STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. Supreme Court

APPEAL FROM PICKENS COUNTY
Court of Common Pleas

The Honorable Edward W. Miller, Circuit Court Judge

Appellate Case No. 2014-000151

Jason Turmon,.....Petitioner,

v.

State of South Carolina,.....Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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ATTORNEYS FOR RESPONDENT

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QUESTIONS PRESENTED

1. Did the PCR court correctly find that trial counsel's overall performance fell below a reasonable standard when counsel did not seek a plea offer; did not review the video with Petitioner before trial; and elicited testimony from the co-defendant that co-defendant and Petitioner had previously dealt drugs together; but did the PCR court err in finding that Petitioner was not prejudiced by trial counsel's deficient performance?

2. Did the PCR court err in failing to find trial counsel ineffective for requesting the jury charge on possession of cocaine which the judge gave to the jury when the officers testified that Petitioner never touched the drugs in this "reverse buy" where the police provided the drugs?

STATEMENT OF THE CASE

The Pickens County Grand Jury indicted Petitioner at the May 2009 term of General Sessions for trafficking cocaine, 400 or more grams (2009-GS-39-0595). (App.pp.440-41). Scott D. Robinson, Esquire represented Petitioner.

After the State took the case to trial, Petitioner was found guilty. On March 17, 2010, the Honorable G. Edward Welmaker sentenced Petitioner to twenty-five years imprisonment. (App.p.331; p.442).

A notice of appeal was filed at the South Carolina Court of Appeals. Tristan M. Shaffer, Esquire of the South Carolina Office of Appellate Defense perfected the appeal in the form of an Anders[1] brief. (App.pp.445-55). The Court of Appeals dismissed the appeal. State v. Turmon, Op. No. 2012-UP-188 (S.C. Ct. App. filed March 14, 2012). (App.pp.456-57).

Petitioner filed an application for post-conviction relief (PCR) on August 13, 2012 (2012-CP-39-1159) and an amendment on March 5, 2013. (App.pp.333-66; pp.367-75). A hearing was held at the Pickens County Courthouse on October 24, 2013. (App.pp.382-428). Petitioner was present and represented by R. Mills Ariail, Jr., Esquire. Karen C. Ratigan, Esquire of the South Carolina Attorney General's Office represented Respondent. The Honorable Edward W. Miller denied relief in an order filed December 11, 2013. (App.pp.430-39).

[1] Anders v. California, 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967).

STANDARD OF REVIEW

The proper standard for review of a PCR evidentiary hearing is whether "any evidence of probative value" exists to sustain the post-conviction relief judge's findings. Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989). In a post-conviction relief proceeding, the applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985).

ARGUMENT

I. The PCR judge did not err in finding Petitioner failed to meet his burden of proving he was prejudiced by trial counsel's preparation of the case and execution of his strategy at trial.

Petitioner alleges the PCR judge erred in denying relief as trial counsel rendered deficient performance that prejudiced his case. Certiorari is not warranted because Petitioner cannot demonstrate trial counsel's representation prejudiced his case.

A.

At trial, the State presented the following evidence and testimony regarding the "reverse buy" or "reversal" that was planned and executed in Petitioner's case.

Lieutenant Kenneth Washington testified he was the supervisor over the narcotics and vice section of the Oconee County Sheriff's Office. (App.p.111). Lieutenant Washington testified he was contacted by Lieutenant Chad Brooks of the Pickens County Sheriff's Office in July 2008 because Brooks wanted to use some drugs to do "a reversal." (App.pp.112-13). Lieutenant Washington explained a reversal "is when someone is wanting to purchase drugs. What we will do is we will actually go out in an undercover capacity, or some type of operation, and actually sell either drugs or

something that is imitated as drugs." (App.p.112). Lieutenant Washington testified he gave a quantity of drugs – referred to as Item 6[2] – to Lieutenant Brooks. (App.p.114). Lieutenant Washington testified he also assisted with the operation and observed – via the live video recording – that Petitioner was "actively involved" in the drug transaction. (App.p.117-20).

Lieutenant Brooks testified Travis Cherry worked for him as a confidential informant. (App.pp.131-32). Lieutenant Brooks testified Cherry had pending charges and approached him with information that he "knew of an individual who wanted to possibly purchase a large quantity of cocaine." (App.pp.133-34). Lieutenant Brooks testified he recorded several telephone calls between Cherry and Petitioner. (App.pp.134-39). Lieutenant Brooks testified Petitioner asked Cherry in one of these calls if Cherry had a Pyrex dish "because he wanted to test the quality of the cocaine once he got there." (App.pp.140-41). Lieutenant Brooks testified he obtained the cocaine from Lieutenant Washington, searched the apartment that was used as the transaction location, set up a covert video recording system in that apartment, and assigned both indoor and outdoor surveillance teams. (App.pp.141-43; pp.151-52). Lieutenant Brooks testified he placed the drugs under the couch in the apartment and then he, Lieutenant Washington, and other agents watched the incident from a monitor in another room. (App.p.152; p.160). Lieutenant Brooks testified Petitioner arrived alone (Cherry was already there) and had a conversation about the transaction with the undercover agent (Pruitt). (App.pp.153-55).

[2] Agent Michael Miller was the director of the Anderson-Oconee Regional Forensics Laboratory. (App.p.93). Agent Miller testified he analyzed the drugs used in this case when they were originally in his lab in January 2006 and determined Item 6 was 2571 grams of cocaine. (App.p.102; p.104).

Lieutenant Brooks testified Petitioner made a telephone call, said he was going to meet Lewis, and left the location. (App.pp.157-58). Lieutenant Brooks testified he had the outside surveillance team follow Petitioner. (App.p.158). Lieutenant Brooks testified Petitioner returned with Lewis. (App.p.159). Lieutenant Brooks testified Petitioner left once again and returned with a bag containing a Pyrex dish and $24,480 in cash. (App.p.159-60). Lieutenant Brooks testified he handed the money to Lewis, who handed it to Pruitt. (App.p.161). Lieutenant Brooks testified the takedown occurred after Pruitt handed the drugs to Lewis. (App.pp.161-62).

Travis Cherry – the confidential informant – testified he approached Lieutenant Brooks about setting up an undercover deal. (App.pp.190-91). Cherry testified he offered to call Petitioner to ask him to get in touch with one of his friends in order to purchase cocaine – and that these telephone calls were recorded. (App.pp.192-94). Cherry testified Petitioner requested scales at least once during these recordings. (App.p.195). Cherry testified the drug transaction could not have taken place without Petitioner. (App.p.196).

Darrell Lewis testified Petitioner called him approximately three weeks before the incident in question to say he "had a friend that was coming to town with some [drugs] and, you know, asked me did I want to make a move, you know, make a buy." (App.p.215). Lewis testified Petitioner called him about this several times. (App.pp.215-16). Lewis testified he and Petitioner agreed upon a price of $24,500 a couple of days before the incident in question.[3] (App.pp.216-19). Lewis testified on the day of the drug

[3] Lewis stated $24,000 was for a kilogram of cocaine and $500 was for Petitioner. (App.p.222).

transaction, he met Petitioner at a gas station and followed him to an apartment. (App.p.221). Lewis testified a "white guy" in the apartment had the drugs and that Lewis gave Petitioner his keys and told him to retrieve the money from his car. (App.pp.221-22). Lewis stated the takedown occurred after he handed the money to the white guy. (App.p.222).

Ricky Pruitt testified he was a retired SLED agent and – upon Lieutenant Brooks' request – assisted in this reversal. (App.pp.239-40). Pruitt testified his role during the operation was that he was named Bill and was the "supplier of cocaine." (App.p.241). Pruitt testified Petitioner arrived before Lewis and that the two of them "discussed my selling him one kilogram of cocaine and the possibility of selling more kilograms later that day." (App.pp.241-42).

Agent Henry Campbell testified he was part of the narcotics division of the Pickens County Sheriff's Office and was involved in outdoor surveillance in this case. (App.pp.228-29). Agent Campbell testified he observed Petitioner arrive alone at the location. (App.p.230). Agent Campbell testified Petitioner exited the residence shortly thereafter and that he followed Petitioner to a gas station. (App.pp.231-32). Agent Campbell testified Petitioner's vehicle met up with Lewis's vehicle, that both vehicles returned to the location, and that Petitioner and Lewis went inside. (App.pp.233-34).

B.

In denying Petitioner's application for post-conviction relief, the PCR judge found "that – with regard to trial counsel's preparation of the case and execution of the strategy at trial – [Petitioner] has met his burden of proving counsel was deficient under the first

prong of the [sic] Strickland.[4]" The PCR judge also found, however that Petitioner "failed to prove the second prong of Strickland – that he was prejudiced by trial counsel's performance." The PCR judge concluded this after finding the State "presented overwhelming evidence of [Petitioner]'s guilt" and noting Petitioner told the trial judge at sentencing that "I knew what I was doing was wrong." (App.pp.436-37).

C.

For an applicant to be granted PCR as a result of ineffective assistance of counsel, he must show both: (1) that his counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that he was prejudiced by his counsel's ineffective performance. See Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984); Porter v. State, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006). In order to prove prejudice, an applicant must show "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry v. State, 300 S.C. at 117-18, 386 S.E.2d at 625. "A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984)).

D.

The PCR judge did not err in finding Petitioner failed to meet his burden of proof. Petitioner cannot sustain a claim that he was prejudiced by trial counsel's preparation and trial strategy when the State presented overwhelming evidence of his guilt. See Cherry v.

[4] Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984).

State, 300 S.C. at 117-18, 386 S.E.2d at 625. In this case – as detailed supra – the State presented testimony from two law enforcement officers (Washington and Brooks), a confidential informant (Cherry), an uncharged co-defendant (Lewis), and an undercover agent (Pruitt) in which Petitioner's involvement in setting up this drug transaction was detailed. The State introduced audio recordings[5] of telephone calls between Cherry and Petitioner in which they set up the transaction. (App.p.137). The State also introduced the DVD[6] in which Petitioner's words and actions regarding his involvement in the drug transaction were clear and unambiguous. (App.p.155). As the State presented overwhelming evidence of his guilt, Petitioner cannot prevail on his allegation that counsel's deficient performance prejudiced his case. See Smith v. State, 386 S.C. 562, 566, 689 S.E.2d 629, 631 (2010) (holding "no prejudice occurs, despite trial counsel's deficient performance, where there is otherwise overwhelming evidence of the defendant's guilt") (citation omitted).

E.

Accordingly, Petitioner failed to meet his burden of proving both prongs of the Strickland test – that trial counsel failed to render reasonably effective assistance and that he was prejudiced by counsel's performance. As Petitioner failed to meet his burden of proof on this issue, the PCR judge did not err in denying relief. See Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) ("The burden of proof is on the applicant to prove his allegations by a preponderance of the evidence.").

[5] These were published to the jury during Cherry's testimony. (App.p.194).
[6] This was published to the jury during Pruitt's testimony. (App.p.243).

II. The PCR judge did not err in finding Petitioner failed to meet his burden of proving trial counsel was ineffective for requesting a jury charge on possession of cocaine.

Petitioner alleges the PCR judge erred in finding he failed to meet his burden of proving trial counsel was deficient in requesting a jury charge of actual and constructive possession. Certiorari is not warranted because the PCR judge correctly found this was a matter of trial strategy.

A.

In denying Petitioner's application for post-conviction relief, the PCR judge found Petitioner "failed to meet his burden of proving trial counsel should not have requested the jury charge for possession." The PCR judge found "this request was clearly part of trial counsel's strategy. One of the key points argued by the defense at trial was that [Petitioner] never touched either the drugs or money in this case. Clearly trial counsel was hoping the jury would find that, as such, he was never in possession of the drugs." (App.p.435).

B.

The PCR judge did not err in finding Petitioner failed to meet his burden of proof. First, Petitioner failed to demonstrate trial counsel's request for a jury charge on actual and constructive possession constituted deficient performance. Such a request was clearly in line with counsel's trial strategy.

"A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time.

Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Strickland v. Washington, 466 U.S. at 689, 104 S. Ct. at 2065. "Counsel's strategy will be reviewed under an objective standard of reasonableness." Huggler v. State, 360 S.C. 627, 633, 602 S.E.2d 753, 756 (2004) (citation omitted). "Courts must be wary of second-guessing counsel's trial tactics." Whitehead v. State, 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992).

It is clear trial counsel's strategy was to demonstrate Petitioner was never in either actual or constructive possession of the cocaine. Trial counsel elicited testimony from Lieutenant Washington, Lieutenant Brooks, and Cherry[7] that Petitioner never touched the drugs used by the State in this reverse buy. (App.pp.127-28; pp.171-72; p.208). Trial counsel elicited testimony from retired SLED agent Pruitt that the drugs were in the custody of law enforcement when they were placed in the room. (App.pp.245-46). In arguing the motion for a directed verdict, trial counsel argued "there has to be some sort of possession, or some sort of either constructive or actual in this case. There's been no testimony that the state put forward that [Petitioner] ever had actual possession of these drugs" and that "there could be no constructive possession shown on this case as the apartment did not belong to the defendant in this case." (App.p.247). In his closing argument to the jury, trial counsel argued "law enforcement actually has the drug[s]" and that Petitioner could not be involved when the police set up the operation using their own

[7] Cherry further testified it was Lewis – not Petitioner – who was the target in this case. (App.p.201).

drugs and that "[t]he captain of the ship was law enforcement." (App.p.290; p.294; p.297). Trial counsel's request for the possession jury charge cannot be considered to be deficient, as it complemented his trial strategy of arguing Petitioner could not be found guilty of trafficking cocaine because he never actively or constructively possessed it. As such, trial counsel's charge request was eminently reasonable. See Strickland v. Washington, 466 U.S. at 689, 104 S. Ct. at 2065; Huggler v. State, 360 S.C. at 633, 602 S.E.2d at 756.

C.

Second, Petitioner failed to demonstrate there was any resulting prejudice from the jury charge for actual or constructive possession because this information was already before the jury due to the verbiage of the statute for trafficking cocaine. The indictment uses the phrase "actual or constructive possession" and this indictment was read to the jury panel prior to voir dire and jury selection. (App.p.5; p.441). In addition, the trial judge's jury charge for trafficking cocaine contained the following language:

> The state must prove beyond a reasonable doubt that the defendant knowingly sold, or manufactured, cultivated, delivered, purchased, or brought into the state, or provided financial assistance, or otherwise aided, abetted, attempted, or conspired to sell, manufactures, cultivate, deliver, purchase, or bring into the state, or was knowingly in actual or constructive possession, or knowingly attempted to become in actual or constructive possession of the cocaine.

(emphasis added) (App.p.308). As such, Petitioner cannot demonstrate he was prejudiced by the separate jury charge for actual or constructive possession. Further, the jury charge was accurate and supported by the facts of the "reverse buy" in this case. See State v. Knoten, 347 S.C. 296, 302, 555 S.E.2d 391, 394 (2001) (holding the law to be charged

must be determined from the evidence presented at trial); see also Sheppard v. State, 357 S.C. 646, 665, 594 S.E.2d 462, 472 (2004) (noting a trial court is required to charge only the current and correct law of South Carolina).

D.

Accordingly, Petitioner failed to prove the first prong of the Strickland test – that trial counsel failed to render reasonably effective assistance under prevailing professional norms. Similarly, Petitioner also failed to prove the second prong of Strickland – that he was prejudiced by trial counsel's performance. As Petitioner failed to meet his burden of proving ineffective assistance of trial counsel on this issue, the PCR judge did not err in denying relief. See Frasier v. State, 351 S.C. at 389, 570 S.E.2d at 174.

CONCLUSION

For the foregoing reasons, Respondent submits this Court should deny the Petition for Writ of Certiorari. However, if this Court grants certiorari, Respondent requests the opportunity to fully brief the issues discussed above.

Respectfully submitted,

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By: _____
ATTORNEYS FOR RESPONDENT

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STATE OF SOUTH CAROLINA
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APPEAL FROM PICKENS COUNTY
Court of Common Pleas

The Honorable Edward W. Miller, Circuit Court Judge

Appellate Case No. 2014-000151

Jason Turmon, ... Petitioner,

v.

State of South Carolina, ... Respondent.

CERTIFICATE OF SERVICE

I, Karen C. Ratigan, certify that I have today served the within Return to Petition for Writ of Certiorari upon Petitioner by depositing a copy of the same in Inter-Agency Mail, addressed to:

LaNelle C. DuRant, Esquire
South Carolina Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, South Carolina 29211-1589

I further certify that all parties required by Rule to be served have been served. This 27th day of October, 2014.

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ATTORNEY GENERAL

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OCT 27 2014
S.C. Supreme Court

October 27, 2014

Honorable Daniel E. Shearouse
Clerk of Court
South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

Re: Jason Turmon v. State
Appellate Case No. 2014-000151

Dear Mr. Shearouse:

Enclosed for filing, please find an original and six copies of the Return to Petition for Writ of Certiorari in the above-captioned case. If there are any questions or comments, please do not hesitate to contact me at any time.

Sincerely,

Karen C. Ratigan
Senior Assistant Deputy Attorney General

cc: LaNelle C. DuRant, Esquire

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