STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM PICKENS COUNTY
Court of Common Pleas

The Honorable Robin B. Stilwell, Circuit Court Judge

Appellate Case No. 2014-000054

Israel Colecio, ... 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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QUESTION PRESENTED

1. Did the PCR court err in failing to find trial counsel ineffective for conceding in his closing argument that Petitioner was guilty of trafficking methamphetamine (10-28 grams) without Petitioner's consent?

STATEMENT OF THE CASE

The Pickens County Grand Jury indicted Petitioner at the November 2009 term of General Sessions for 2 counts of trafficking methamphetamine (2009-GS-39-1750, -1751) and possession of a weapon during the commission of a violent crime (2009-GS-39-1752). (App.pp.309-23). E.P. "Bill" Godfrey, Esquire represented Petitioner.

After the State brought the case to trial, Petitioner was found guilty. On April 27, 2010, the Honorable G. Edward Welmaker sentenced Petitioner to concurrent terms of 10 years for trafficking methamphetamine (10-28 grams) (2009-GS-39-1750), 19 years for trafficking methamphetamine (28-100 grams) (2009-GS-39-1751), and 5 years for possession of a weapon during the commission of a violent crime (2009-GS-39-1752). (App.p.262).

A notice of appeal was filed at the South Carolina Court of Appeals. LaNelle C. DuRant, Esquire of the South Carolina Commission on Indigent Defense, Division of Appellate Defense perfected the appeal in the form of an Anders[1] brief. The Court of Appeals dismissed the appeal. State v. Colecio, Op. No. 2012-UP-101 (S.C. Ct. App. filed Feb. 22, 2010).

Petitioner filed an application for post-conviction relief (PCR) on February 9, 2011 (2012-CP-39-0186). (App.pp.264-70). A hearing was held at the Pickens County Courthouse on August 26, 2013. (App.pp.276-300). 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 Robin B.

[1] Anders v. California, 386 U.S. 738, 87 S. Ct. 1396 (1967).

Stilwell denied relief in an order filed November 5, 2013. (App.pp.302-08).

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

The PCR judge did not err in finding Petitioner failed to meet his burden of proving trial counsel was ineffective.

Petitioner argues trial counsel erred in conceding in closing argument that he was guilty of one of the trafficking charges. Petitioner argues he did not consent to this concession and that it prejudiced his case. This argument is without merit.

A.

At trial, Agent Henry Campbell of the Pickens County Sheriff's Office testified he used a confidential informant with a recording device to purchase narcotics and that Petitioner was the target of the investigation.[2] (App.pp.49-51; pp.57-58). Agent Campbell testified the Powells leased the residence and Petitioner did not live there. (App.p.54; p.68; pp.74-75; p.80). Agent Campbell testified the confidential informant was to purchase one-half of an ounce of methamphetamine, and that officers entered the residence after the informant completed the transaction and left the area. (App.pp.51-52).

[2] Petitioner was known as "Willie" at the time. (App.p.67).

Agent Campbell testified methamphetamines were found in the front bedroom and living room and that scales and a gun were found in the back bathroom. (App.pp.60-63).

Agent Tommy Blankenship of the Pickens County Sheriff's Office testified he assisted in the search of the front bedroom and found a bag of methamphetamine behind the dresser. (App.pp.100-03; p.107).

Lieutenant Chad Brooks of the Pickens County Sheriff's Office testified the confidential informant contacted the Sheriff's Office and stated "he could purchase a quantity of methamphetamine from a Hispanic male that he knew as Willie." (App.p.131). Lieutenant Brooks testified he set up a controlled buy, used documented funds, and wired the confidential informant for audio and video recording. (App.pp.132-35). Lieutenant Brooks testified he had constant audio surveillance of the confidential informant the entire time he was inside the residence. (App.p.139). Lieutenant Brooks testified he followed the confidential informant when he left the residence and then retrieved the material the informant purchased and removed the surveillance equipment. (App.pp.141-43).

Special Agent Constance Sonnefeld of the South Carolina Law Enforcement Division (SLED) testified she provided documented funds, took surveillance notes, and took custody of the drug evidence in this case. (App.pp.160-62; pp.165-66). Agent Sonnefeld testified she turned over the drug evidence to the SLED lab for testing. (App.p.162; p.167). Agent Sonnefeld testified on cross-examination that she prepared a report about the search and where various items were found and confirmed methamphetamines and currency were found in the front bedroom, methamphetamine

was found in the living room and second bedroom, and that a gun and scales were found in the bathroom. (App.pp.169-70).

Kathy Powell testified she lived at the residence in question. (App.pp.82-83; p.90). Powell testified Petitioner woke her up, handed her money and two cell phones, and said "police, police." (App.p.85; pp.92-93). Powell testified she consented to the search of the residence and gave officers the money and phones. (App.p.86; p.93). Powell testified the marijuana found in her pocket was not hers and did not know how it was in there. (App.pp.86-87).

Leon Davis was the confidential informant in this case. Davis confirmed the Sheriff's Department provided him with money and instructions on the information they wanted him to collect. (App.pp.180-81). Davis testified they also gave him a hidden recording device. (App.p.181). Davis testified he entered the residence and went into the bedroom, where he made the purchase. (App.pp.183-84). Davis identified "Willie" to the jury and confirmed this was the person he gave the money to that day. (App.p.184). Davis testified "Willie" showed him a handgun. (App.pp.185-86). Davis testified "Willie" gave him a half-ounce of methamphetamine that he took out of a larger bag of methamphetamine. (App.p.187). Davis testified he met with officers right after the transaction, gave them the drugs, and had the recording equipment removed. (App.p.190). After the video recording was played for the jury, Davis confirmed it accurately depicted what happened on the night in question. (App.p.197).

Angil Landrum, a forensic chemist at SLED, testified State's Exhibit 1 (the drugs sold directly to Petitioner) was 13.16 grams of methamphetamine and State's Exhibit 2

(the large amount of drugs found in the bedroom) was 94.50 grams of methamphetamine. (App.pp.209-10; p.212). Landrum also testified she tested and weighed an additional 3.26 grams of methamphetamine and 0.23 grams of marijuana. (App.p.212).

In closing argument, trial counsel told the jury he wanted to bring clarity to the charges that were brought to trial. Trial counsel stated

> Here is the almost fourteen grams that was sold to the informant, Leon Davis. You've watched the video. This indictment, ten to twenty-eight grams, it's real clear what happened. I don't think there's any doubt. Okay. When it comes to the other two indictments, the indictment regarding the gun, it's more of a problem. Now, when you get to the indictment for the drugs more than twenty-eight grams, it's an even greater problem. This is the point of the trial.

(App.p.226, line 21 – p.227, line 4). The balance of trial counsel's closing argument concerned his perceived issues with the strength of the evidence against Petitioner for the other two charges. (App.pp.227-34). Trial counsel stated four more times that the indictment for trafficking methamphetamines (10-28 grams) was clear but also asserted "[s]ometimes people are guilty of one charge and not another." (App.p.231, lines 22-24; p.232, line 7 and lines 20-21; p.233, lines 23-24; p.234, line 6).

B.

At the PCR hearing, trial counsel testified he watched the video of the transaction with the confidential informant. Trial counsel testified a man was

> scooping up drugs out of a big bag of drugs onto the scale. And then you see him package it, and he hands it to the C.I.
>
> . . .
>
> And [Petitioner] got up and walked out of the bathroom and walked straight towards the C.I. And so you had a full facial front. Absolutely no question that it was [Petitioner].

(App.p.292). Trial counsel testified "the state's evidence was quite good." (App.p.295). Trial counsel testified his trial strategy was to accept the methamphetamine Petitioner sold to the C.I. (App.pp.297-98). Trial counsel testified he also attempted to draw a distinction between the drugs in that transaction and the gun and other drugs found in various parts of the Powells' trailer. (App.pp.298-99).

In denying Petitioner's application for post-conviction relief, the PCR judge found Petitioner failed to meet his burden of proof on this issue. The PCR judge specifically found "that, given the videotape evidence against [Petitioner] for the trafficking methamphetamine (10-28 grams) charge – and that the remaining drugs and gun were found scattered throughout a home not belonging to [Petitioner] – this was a valid trial strategy." (App.p.307).

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 proving both that trial counsel's performance was deficient and that it prejudiced his case.

Petitioner failed to demonstrate trial counsel's decision to accept guilt during closing argument for the trafficking methamphetamine (10-28 grams) charge was deficient. Trial counsel articulated a valid trial strategy in explaining this course of action. Where trial counsel articulates a valid reason for employing a certain strategy, such conduct should not be deemed ineffective assistance of counsel. Roseboro v. State, 317 S.C. 292, 294, 454 S.E.2d 312, 313 (1995); Stokes v. State, 308 S.C. 546, 548, 419 S.E.2d 778, 779 (1992). "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) (citing Ingle v. State, 348 S.C. 467, 470, 560 S.E.2d 401, 402 (2002)). "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). Trial counsel testified the video evidence of Petitioner's drug transaction with the confidential informant was clear and that "the state's evidence was quite good." As such, trial counsel explained his strategy was to accept guilt for this charge and then argue the other drugs and gun were not Petitioner's as they were scattered throughout a residence that was not his. Based upon the evidence against Petitioner, this was a valid trial strategy. Trial counsel advanced this strategy both through his cross-examination of the State's witnesses and in his closing argument when

he noted to the jury that "[s]ometimes people are guilty of one charge and not another." As trial counsel articulated a valid, reasonable trial strategy, his execution of that strategy cannot be deemed deficient or ineffective.

While Petitioner argues trial counsel made this strategic decision without his consent, it was not incumbent upon trial counsel to have received approval before embarking upon this defense strategy. A defense attorney has a duty to consult with the defendant regarding "important decisions" in the overall defense strategy. Strickland, 466 U.S., at 688, 104 S. Ct. at 2065. A defendant, for example, has "the ultimate authority" to determine "whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal." Jones v. Barnes, 463 U.S. 745, 751, 103 S. Ct. 3308 (1983); see also Florida v. Nixon, 543 U.S. 175, 187, 125 S. Ct. 551, 560 (2004) (holding counsel's strategy of conceding guilt did not automatically render his performance deficient). However, "[t]he adversary process could not function effectively if every tactical decision required client approval." Taylor v. Illinois, 484 U.S. 400, 418, 108 S. Ct. 646, 657 (1988). Trial counsel clearly relied upon his evaluation of the State's evidence in determining the most effective trial strategy in this case. This decision was not comparable to those contemplated in Jones. Petitioner has failed to demonstrate the decision to accept guilt for the trafficking methamphetamine (10-28 grams) charge was such an important trial decision that he should have been consulted prior to trial counsel making this concession in closing argument.

Petitioner also failed to demonstrate trial counsel's strategy prejudiced his case. It is clear trial counsel employed a tactical retreat as a result of the overwhelming evidence

that Petitioner was guilty of the charge of trafficking methamphetamine (10-28 grams). "[T]actical retreats may be reasonable and necessary within the context of the entire trial, particularly when there is overwhelming evidence of the defendant's guilt." Bell v. Evatt, 72 F.3d 421, 429 (4th Cir. 1995). Petitioner was the target of the controlled buy in this case. Davis, the confidential informant, was fitted with a video and audio recording device to document his transaction with Petitioner. Petitioner was clearly seen on the video selling a half-ounce of methamphetamines to Davis. Petitioner's ties to the other drugs and gun found in the residence were less obvious. As such, it was eminently reasonable for trial counsel to have accepted guilt for the lesser trafficking charge and then attacked the strength of the State's case against the remaining charges. See id.

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.

E.

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 the PCR application. 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.").

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 issue discussed above.

Respectfully submitted,

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By: _____
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November 10, 2014

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM PICKENS COUNTY
Court of Common Pleas

The Honorable Robin B. Stilwell, Circuit Court Judge

Appellate Case No. 2014-000054

Israel Colecio, ... 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 the United States mail, postage prepaid, 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 10th day of November, 2014.

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ATTORNEY FOR RESPONDENT

ALAN WILSON
ATTORNEY GENERAL

November 10, 2014

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

Re: Israel Colecio v. State of South Carolina
Appellate Case No: 2014-000054
Lower Court Case No: 2012-CP-39-0186

Dear Mr. Shearouse:

Enclosed for filing please find an original and six (6) 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
SC Bar #68331

KCR/jacc
Enclosures

cc: LaNelle C. DuRant, Esquire
Trisha Allen, Victim Services Counselor