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STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Greenville County

G. Edward Welmaker, Circuit Court Judge

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DEC 5 2014

S.C. Supreme Court

ERIK MORROW,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-000809

JOHNSON PETITION FOR WRIT OF CERTIORARI

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INDEX

INDEX 1

ISSUE PRESENTED 2

STATEMENT 3

ARGUMENT 5

CONCLUSION 13

PETITION TO BE RELIEVED AS COUNSEL 14

ISSUE PRESENTED

Whether Petitioner's Sixth Amendment rights were violated when counsel failed to conduct a reasonable investigation in preparation for Petitioner's trial by not independently testing the contents and weight of narcotics found during search of Petitioner and by not interviewing witnesses able to impeach the State's confidential informant?

STATEMENT

On October 18, 2005, Petitioner was indicted by the Greenville County Grand Jury for: (1) distribution of cocaine; (2) possession with intent to distribute (PWID) cocaine; (3) trafficking crack cocaine greater than ten grams; (4) escape and, (5) habitual traffic offender. App. 360 – 379.

On March 3, 2008, Petitioner proceeded to trial before the Honorable Larry R. Patterson. App. 13 – 220. Petitioner was represented by Elizabeth Wiygul (hereinafter “counsel”) and the State was represented by Assistant Solicitor Joyce Monts. App. 13. The jury found Petitioner guilty of distribution of cocaine, possession with intent to distribute cocaine, trafficking crack cocaine, and habitual traffic offender. App. 267, ll. 22 – App, 268, ll. 9. The escape charge was dismissed on Petitioner’s directed verdict motion. App. 220, ll. 3-4.

The trial court sentenced Petitioner to concurrent terms of twenty five years for trafficking cocaine, third offense, PWID cocaine, third offense, distribution of cocaine, third offense, and five years for habitual traffic offender. App. 278, ll. 1-11.

On appeal Petitioner was represented by Elizabeth Franklin-Best. The Court of Appeals affirmed Petitioner’s convictions and sentences. *State v. Morrow*, Op. No. 2011-UP-117 (S.C. Ct. App. filed March 23, 2011).

On June 7, 2012, Petitioner filed his application requesting post-conviction relief (PCR). App. 281 – 289. The Respondent filed its return and a motion to dismiss on September 11, 2012. App. 290 – 294. Respondent filed an amended return on February 13, 2013. *Id.* An evidentiary hearing was held before the Honorable G. Edward Welmaker on February 19, 2014. App. 295 - 350. Petitioner was represented by R. Mills Ariail, Jr., and the Respondent by Assistant Attorney General Karen C. Ratigan. *Id.*

On April 8, 2014, Judge Welmaker issued an Order of Dismissal denying Petitioner's PCR application. App. 351 – 359. This petition for writ of certiorari follows.

ARGUMENT

Petitioner's Sixth Amendment rights were violated when counsel failed to conduct a reasonable investigation in preparation for Petitioner's trial by not independently testing the contents and weight of narcotics found during search of Petitioner and by not interviewing witnesses able to impeach the State's confidential informant.

Relevant Facts

On March 14, 2005, Petitioner was stopped on a traffic violation by troopers of the South Carolina Highway Patrol. App. 150, ll. 4-17. Petitioner was arrested for driving under suspension and as a habitual traffic offender. App. 121, ll. 8-11. During his arrest, Petitioner was found to be in possession of quantities of cocaine and crack cocaine. While in the back of the police car, the arresting officers believed Petitioner attempted to escape and gain control over the police car. App. 138, ll. 8 – App. 139, ll. 17.

Unknown to Petitioner the traffic stop was the conclusion of an undercover drug sting. Earlier in the day, Randall West, a confidential informant facing serious drug charges, called Petitioner and allegedly arranged to purchase cocaine from Petitioner. App. 70, ll. 1-22; App. 75, ll. 2-12. Under the observation of law enforcement, Petitioner met West. App. 71, ll. 1-23. West was wearing a recording device at the time of the alleged drug buy, but its audio quality was unintelligible. App. 72, ll. 12-13; App. 75, ll. 17-23. After meeting with West, Petitioner left Spartanburg County, entering Greenville County where he was stopped by the highway patrol. App. 149, ll. 2 – App. 150, ll. 25.

While Petitioner did not testify at trial, the defense's theory was that West met Petitioner to give him clothes and money belonging to a mutual friend and used the opportunity to set Petitioner up in order to get a better offer from the State. App. 247, ll. 17-24. West conceded on cross examination to having the friend's clothes in his possession at the time of the buy. App. 82, ll. 1-16.

Pre-Trial Representation

Counsel was Petitioner's third appointed attorney. Petitioner's first attorney, Steve Henry, was relieved in October of 2007 to prepare for a death penalty case. App. 3, ll. 5-14. Petitioner's second attorney was John Abdalla. App. 1. On January 23, 2008, Petitioner's case was called to trial by the Solicitor. App. 3, ll. 5-9. Abdalla informed the court that he was not adequately prepared for trial. App. 3, ll. 13-21. Abdalla explained that he had been on the docket ten times in the previous three weeks; he had not had time to locate Petitioner's witnesses; he had not had time to speak with Petitioner who was incarcerated in Spartanburg; and Petitioner had not had the chance to review the evidence with Abdalla. *Id.* – App. 4, ll. 21. Abdalla also stated that he had recently moved offices and had only received Henry's file on this case the day before. App. 7, ll. 23. Petitioner also informed the Court Abdalla had actually prosecuted Petitioner in a prior case and Petitioner would like to try to find other representation. App. 5, ll. 13-20.

Judge Miller granted the continuance, but ordered no additional continuances. App. 10, ll. 15-19. Despite solicitor control of the docket, Judge Miller seemed to attribute the delay to Petitioner:

Based on what I've been told today, I do not want to do it-- the case should not sit out there like this for no good reason. And I really hate to do this. I'm going to grant the continuance until the week of March 3'd.... And while I don't control the docket, I urge that his case be set first up Monday morning. And to you, Mr. Morrow, this case is three years old. And you're not entitled to the greatest lawyer on the planet. You're entitled to a competent attorney. And I'll tell you this, if you're going to hire an attorney, that's fine. You're entitled to an attorney of your choice. But you tell whoever you hire that this case is going Monday, March 4. Do you understand?

Id. at ll. 15 – App. 11, ll. 8. Judge Miller concluded, “March 3'd. There will be no change. I don't care what the complaints are. You've got all the evidence. There will be no more excuses. And if your lawyer comes in here and says he's not prepared, then you can try it yourself.” *Id.* at 10-14.

Counsel began representing Petitioner two weeks before trial. App. 340, ll. 19-22. Counsel had previously represented him in federal court. App. 342, ll. 4-6. Petitioner asked counsel to represent him, on the condition that she would get a continuance in order to prepare adequately for the case. App. 331, ll. 4 – App. 332, ll. 2. Prior to the trial, counsel motioned for a continuance and was denied. App. 32, ll. 15-21; App. 346, ll. 20 – App. 347, ll. 1. Counsel was aware of Judge Miller’s Order and had attached it to her motion for a continuance. *Id.*

Trial

On March 3, 2008, the day of trial, Petitioner attempted to bring the problems with his case to the judge’s attention. App. 26, ll. 5 – App. 30, ll. 17. Petitioner claimed that, after getting a continuance, Abdalla never met with him over the ensuing three months; that Abdalla had not used the extra time to contact witnesses identified by Petitioner; and that counsel had not received information on the confidential informant until minutes before trial. *Id.* The trial judge denied Petitioner’s motion for a continuance:

You can’t put this case off and continue to put it off I don't know how many witnesses, who, who was, who was present on March 14 of 2005. We're gonna hear all that. But apparently you were there, and you can convey to your lawyer everything that happened on that day. So, I don't know if there's any substance to what you have to say or not. But you're gonna have a trial. I'm denying your motions. You're going to have a trial at two 9 o'clock today. You're going to get a fair trial.

App. 30, ll. 18 – App. 31, ll. 13.

At trial, the State called James Armstrong, a drug chemist with the Greenville County Sherriff’s department, who analyzed evidence found in the search of Petitioner’s person and vehicle. App. 209, ll. 21 – App. 210, ll. 1. Armstrong analyzed two packages, claiming “Item A, which is a bag containing powder substance, which I found it to be cocaine with a weight of 8.66 grams. My item B of the bag containing rock substance, found it to be crack cocaine with a

weight of 10.27 grams.” App. 212, ll. 23 – App. 213, ll. 3. The drug weights reported by Armstrong were significantly less than the amount initially reported by the arresting officers. App. 300, ll. 5-18. Corporal JD Owens, a member of the drug team that arrested Petitioner, reported that the bags of narcotics seized from Petitioner contained thirteen of cocaine and twelve grams of crack cocaine respectively. *Id.*

On cross-examination, counsel asked Armstrong about how he tested the items for any foreign substances. App. 214, ll. 5 – App. 215, ll. 18. After explaining a series of tests that he runs to determine the composition of the items, Armstrong stated that, in the present case, he did not test for any foreign substances, but instead was “checking for the presence or absence of a controlled substance and not going any further.” App. 215, ll. 23-24. Armstrong’s testimony on cross-examination concluded with a summary of his evidence handling procedures. App. 216, ll. 15 – App. 217, ll. 3.

PCR and Evidentiary Hearing

At the evidentiary hearing, Petitioner testified that counsel was ineffective for failing to conduct an independent investigation of the facts surrounding Petitioner’s case. App. 306, ll. 2-17. Specifically, Petitioner believed that counsel should have had the alleged drug samples independently tested, “the evidence was in discretion [verbatim] of [two tenths of a gram] of the substance. And [two tenths of a gram] is so minuscule.” App. 306, ll. 22-25. Petitioner also claimed that counsel did not have sufficient time to contact the witnesses he had provided her. App. 314, ll. 24 – App. 316, ll. 11. These witnesses were with West on the day of Petitioner’s arrest and could have testified as to the informant’s ulterior motives and to Petitioner’s non-criminal reason for agreeing to meet with the informant. App. 315, ll. 6 – App. 316, ll. 11. Petitioner stated that instead of interviewing witnesses, counsel was limited by the length of her

representation to simply trying to impeach the informant by asking him about the witnesses. App. 316, ll. 17-25.

Counsel testified, in agreement with Petitioner, that the State had not provided her the identity of the confidential informant until minutes before trial. App. 336, ll. 5-7. Counsel did not recall attempting to double check the weight of the crack cocaine for the purposes of dismissing the trafficking charge. App. 344, ll. 3-6. With respect to Petitioner's witness list, Counsel believed that two weeks would have been enough time to contact them, but did not specifically recall contacting them. App. 341, ll. 1-12. When asked about promising a continuance, counsel claimed that she would never make a guarantee on how a judge would rule. App. 346, ll. 30-21.

Order of Dismissal

In denying Petitioner's relief, Judge Welmaker held that counsel "conducted a proper investigation, and was thoroughly competent in her representation." App. 355. Specifically, Judge Welmaker noted that counsel, "did not have any recollection of either the Applicant wanting the drugs to be tested or there being an issue regarding the weight of the drugs." App. 354. The PCR court concluded Petitioner failed to meet his burden of proving that counsel should have obtained an independent analysis of the drug evidence because of discrepancies in drug weight and that any investigation into the issue would have been unproductive. App. 356.

Discussion

Counsel was deficient in failing to conduct a reasonable investigation into Petitioner's case by not independently testing the contents and weight of narcotics found during arrest of Petitioner and by not interviewing witnesses able to impeach the State's confidential informant

To establish ineffective assistance of counsel, the Petitioner must satisfy the two-prong test set forth in *Strickland*, 466 U.S. 668. "First, a defendant must show that counsel's

performance was deficient. Under this prong, [t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms.” *Cherry v. State*, 300 S.C. 115, 386 S.E.2d 624 (1989) (internal citations omitted). “The second prong of the *Strickland* test requires a showing that the deficient performance prejudiced the defendant to the extent that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. The defendant is required to overcome the presumption that counsel was effective in order to receive relief.” *Id.* at 118, 386 S.E.2d at 625 (internal citations omitted). Therefore, where ineffective assistance of counsel is alleged as a ground for PCR relief, the applicant must prove that “counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result.” *Butler v. State*, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (quoting *Strickland*, 466 U.S. at 692).

The United States Supreme Court has held that “counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.” *Strickland*, 466 U.S. at 691; *See Wiggins v. Smith*, 539 U.S. 510, 527 (2003) (noting “[i]n assessing the reasonableness of an attorney’s investigation, . . . a court must not only consider the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further”). This Court has also held that counsel has a duty “to discover all reasonably available mitigation evidence and reasonable available evidence tending to rebut any aggravating evidence introduced by the State.” *McKnight v. State*, 378 S.C. 33, 46, 661 S.E.2d 354, 360 (2008); *See Ard v. Catoe*, 372 S.C. 318, 642 S.E.2d 590 (2007) (finding “[w]ithout a doubt, [a] criminal defense attorney has a duty to investigate, but this duty is limited to reasonable investigation”) (internal quotation omitted).

Deficient Performance

In this case, counsel's performance was deficient, as it fell below an objective standard of reasonableness. *See Strickland*, 466 U.S. at 687-88. Specifically, counsel has a duty to interview witnesses and test the sufficiency of the State's evidence. *See Lounds*, 380 S.C. 454, 460, 670 S.C. 646, 649 (finding "while the scope of a reasonable investigation depends on a number of issues, at a minimum, counsel has the duty to interview potential witnesses and to make an independent investigation of the facts and circumstances of the case") (internal quotations omitted). Counsel also failed to confirm with Petitioner's previous counsel whether the State had already disclosed the identification of the confidential informant.

In addition, counsel was also deficient in failing to secure an independent analysis of the evidence tested by Armstrong. Armstrong admitted that he only conducted one test on the substances to determine their composition. App. 212, ll. 23 – App. 213, ll. 3. Moreover the substance labeled Item 2 was only .27 grams over the minimum amount necessary for the trafficking charge and the police initially believed the substance weighed thirteen grams. *Id.*; App. 308, ll. 15 – App. 309, ll. 18; *McKnight*, 378 S.C. at 45, 661 S.E.2d at 360 (counsel ineffective for failing to conduct a reasonable investigation to discover evidence contradicting State's expert). When counsel began representation she knew that Petitioner's case had two prior attorneys including one who had formerly prosecuted Petitioner. She also knew that additional continuances were unlikely and that the Petitioner believed Abdalla had not done an investigation. In these circumstances, an expeditious independent investigation was essential to ensure the adversarial process properly functioned in Petitioner's case. *Strickland* 466 U.S. at 690, 104 S.Ct. 2052.

Accordingly, the PCR court erred in finding that counsel conducted a reasonable investigation in preparation for Petitioner's trial because counsel's performance was not reasonable

“under prevailing professional norms.” App. 716 – 717; *Id.* at 687-88; *see also Cherry*, 300 S.C. 115, 386 S.E.2d 624.

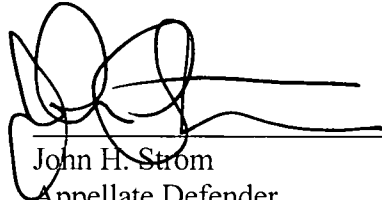
Prejudice

Petitioner was prejudiced because counsel’s deficient performance “so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result.” *Butler*, 286 S.C. at 442, 334 S.E.2d at 814 (quoting *Strickland*, 466 U.S. at 692). Counsel’s deficient performance adversely affected Petitioner’s right to a fair trial because counsel’s failure to investigate limited the scope of cross-examination and prevented Petitioner from presenting a full and complete defense. App. 315, ll. 6 – App. 316, ll. 11. In addition, counsel’s deficient performance precluded a challenge to the trafficking charge, which could have had a mitigating effect on the number and length of Petitioner’s sentences. App. 278, ll. 1-11; *McKnight*, 378 S.C. at 45, 661 S.E.2d at 360 (counsel’s failure to discover all reasonably available mitigation evidence and all reasonably available evidence tending to rebut any aggravating evidence introduced by the State prejudiced defendant). Therefore, the PCR court erred in finding counsel provided effective assistance of counsel because “there is a reasonable probability that, but for [trial] counsel’s unprofessional errors, the result of the proceeding would have been different.” App. 716 – 717; *Cherry*, 300 S.C. at 118, 386 S.E.2d at 625 (internal citations omitted); *See Strickland*, 466 U.S. 668.

CONCLUSION

Based on the foregoing reasons, Petitioner Erik Morrow's petition for writ of certiorari should be granted to allow full briefing on the issue.

Respectfully submitted,



John H. Strom
Appellate Defender

ATTORNEY FOR PETITIONER

This 5th day of December, 2014.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO GREENVILLE COUNTY
G. EDWARD WELMAKER, CIRCUIT COURT JUDGE

ERIK MORROW,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

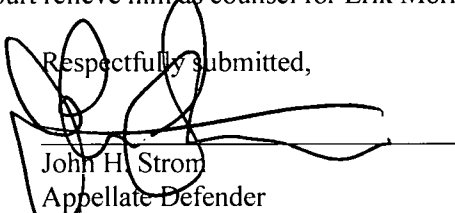
APPELLATE CASE NO. 2014-000809

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Erik Morrow states:

1. He is an Appellate Defender for the South Carolina Office of Appellate Defense and was appointed to represent petitioner.
2. He has reviewed the records and transcript of petitioner's post-conviction relief hearing which was held on February 19, 2014. In his opinion seeking certiorari from the order of dismissal is without merit.
3. He has, pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), briefed the one arguable legal issue which arose during the post-conviction relief process.

Therefore, counsel requests that the Court relieve him as counsel for Erik Morrow.

Respectfully submitted,

John H. Strom
Appellate Defender
ATTORNEY FOR PETITIONER

This 5th day of December, 2014

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Greenville County
G. Edward Welmaker, Circuit Court Judge

ERIK MORROW,

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STATE OF SOUTH CAROLINA,

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APPELLATE CASE NO. 2014-000809

CERTIFICATE OF SERVICE

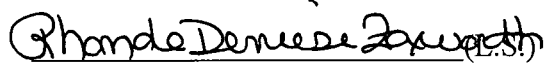
I certify that a true copy of the Johnson petition for writ of certiorari and a copy of the appendix in this case have been served on Karen Ratigan, Esquire at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Erik Morrow, #266037, at McCormick Correctional Institution this 5th day of December, 2014.



John H. Strom
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 5th day
of December, 2014.


(L.S.)

Notary Public for South Carolina

My Commission Expires: October 17, 2021.