STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

The Honorable G. Edward Welmaker, Circuit Court Judge

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S.C. Supreme Court

Appellate Case No. 2014-000719

James Melvin Babb, ... 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 not conducting a thorough investigation into Petitioner's case in order to call the two witnesses, Few and Ensley, to testify whose testimony would have rebutted the testimony of the co-defendant, Troy Fallin, that Petitioner was a drug dealer?

STATEMENT OF THE CASE

The Greenville County Grand Jury indicted Petitioner at the September 2007 term of General Sessions for trafficking methamphetamine (2007-GS-23-7963) and at the November 2007 term for possession with intent to distribute (PWID) a controlled substance (2007-GS-23-7964). (App.pp.355-56; pp.358-59). Richard H. Warder, Esquire represented Petitioner.

After the State brought the case to trial, Petitioner was found guilty. On February 2, 2010, the Honorable Edward W. Miller levied concurrent sentences of 15 years for trafficking methamphetamine, second offense and 5 years for PWID a controlled substance, second offense. (App.p.273; p.357; p.360).

A notice of appeal was filed at the South Carolina Court of Appeals. Wanda H. Carter, Esquire of the South Carolina Commission on Indigent Defense, Division of Appellate Defense represented Petitioner on appeal. The Court of Appeals affirmed Petitioner's convictions and sentences. State v. Babb, Op. No. 2012-UP-209 (S.C. Ct. App. filed March 28, 2012). (App.p.354).

Petitioner filed an application for post-conviction relief (PCR) on May 17, 2012 (2012-CP-23-3342). (App.pp.275-88). A hearing was held at the Greenville County Courthouse on December 19, 2013. (App.pp.299-335). Petitioner was present and represented by Susannah C. Ross, Esquire. Karen C. Ratigan, Esquire of the South Carolina Attorney General's Office represented Respondent. The Honorable G. Edward Welmaker denied relief in an order filed February 17, 2014. (App.pp.340-47). Counsel for Petitioner filed a Motion to Alter or Amend the Judgment and Respondent filed a

return. (App.pp.348-49; pp.350-51). Judge Welmaker denied the motion in an order filed March 25, 2014. (App.pp.352-53).

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 because he did not subpoena Few and Ensley to testify at trial.

A.

An anonymous phone call was made to the law enforcement center from someone who stated Petitioner and Troy Fallin "would be bringing a large shipment of methamphetamine and other types of drugs from the Atlanta area into Greenville, and they would be at a Greenville – local Greenville motel with those drugs." (App.p.85). The caller also said they would be driving Fallin's purple Saturn and staying at the Econo Lodge.[1] (App.p.85).

After a detective notified other officers about the tip, they set up an observation post near the Econo Lodge's parking lot. (App.pp.95-96; p.114). The purple Saturn was located there and determined to be registered to Fallin. (App.pp.114-15). An officer kept

[1] The caller also emailed this information. (App.pp.89-90).

the vehicle and motel room door under observation and observed the defendants leave the motel room, with Fallin putting bags into the Saturn. (App.pp.96-97; pp.101-03; pp.116-17). The officer initiated a traffic stop. (App.pp.118-21; pp.155-56). Though Fallin was described as very nervous, he gave consent to search the vehicle. (App.pp.118-21; pp.156-57). A search of the vehicle resulted in officers finding a bag in the trunk containing methamphetamine and a backpack containing two glass pipes with white residue, a butane torch, bottles with clear liquid,[2] methamphetamine, Xanax, scales, and a check. (App.pp.123-24; pp.129-30). The check was made out to Petitioner from Roger Ensley and there was a note that it was for "a charitable donation." (App.pp.138-39).

A criminalist was qualified as an expert in the field of drug analysis and testified the items removed from the vehicle included 56.03 grams of methamphetamine, 45 Xanax tablets, and 222 milliliters of a solvent often used as a substitute for GHB. (App.pp.186-90).

Petitioner's trial began as a joint trial with Fallin. During the trial, however, Fallin pled guilty – in camera – to trafficking methamphetamine and possession with intent to distribute Xanax. (App.pp.164-65). Fallin was advised of the sentencing ranges for the offenses and said he had not been coerced or made promises in exchange for his guilty plea. (App.p.165). Fallin admitted his guilt and stated he had no complaints to make as to how he was treated. (App.p.166). Fallin said Petitioner sold drugs and that they partied together at a motel and used some of these drugs. (App.pp.167-70).

Fallin testified for the State. Fallin testified Petitioner was a drug supplier and

[2] When asked at the scene about the liquid, Fallin stated it was GHB. (App.p.125).

that they used drugs together. (App.pp.193-94; pp.196-97). Fallin testified he dropped Petitioner off at the Econo Lodge and returned to the hotel the next day to smoke methamphetamine, drink GHB, and take Xanax. (App.pp.194-98). Fallin testified Petitioner packed up his drugs and put them in the bag. (App.p.198). Fallin disputed both that the drugs were his and that he carried the bag containing them to his car. (App.p.201). Fallin testified there were no promises made in exchange for his testimony and that he had not been sentenced yet. (App.p.199; p.200). Fallin said he never saw the check before trial. (App.pp.202-03).

Petitioner testified in his own defense. Petitioner testified a friend rented at the Econo Lodge she was not using, so he stayed there. (App.pp.214-16). At the same time, Petitioner stated Fallin was fixing Petitioner's computer at his (Petitioner's) house. (App.p.218). Petitioner stated the bag recovered from Fallin's car was Fallin's and that he had no knowledge of any of the items in that bag. (App.pp.216-17; p.223). Petitioner stated he did not smoke methamphetamine at the motel and did not see Fallin do so either. (App.pp.221-22).

B.

At the PCR hearing, Petitioner stated trial counsel's assistant contacted him before trial to say "that a part of the evidence containing a check that they were going to use at trial to prove that someone had used that check to buy drugs from me." (App.p.305). Petitioner stated Ensley had not given him that check in exchange for drugs. (App.p.305). Petitioner admitted he did not ask trial counsel to contact Ensley and that he was not in touch with Ensley at the time of trial. (App.p.306; pp.312-13).

Petitioner stated the drugs belonged to Fallin, who shared them with him. (App.pp.307-08). Petitioner admitted he did not tell the same story when he testified at trial. (App.p.310). Petitioner stated Fallin subsequently wrote a letter stating he was promised a seven-year sentence and that his testimony had been coached. (App.p.306; p.338).

Michael Few stated he knew Fallin as a drug dealer but not Petitioner. (App.p.314). Few admitted he knew Petitioner was on trial but did not contact trial counsel. (App.p.315). Few stated he spoke to Petitioner, in fact, to say he "would help in anyway that [he] could" and that Petitioner did not ask him to contact trial counsel. (App.p.315).

Roger Ensley stated he wrote the check to Petitioner in exchange for Petitioner allowing him to stay at his house. (App.p.317). Ensley stated the check was not used to buy drugs and that he did not know Petitioner to be a drug dealer. (App.pp.317-18). Ensley admitted, however, that he knew before the trial that Petitioner was a drug user because Petitioner told him why he was wearing an ankle monitor. (App.p.319). Ensley stated he did not know about the check being used at Petitioner's trial and admitted Petitioner did not tell him about this until the summer of 2013. (App.pp.318-19).

Trial counsel testified the trial strategy was that he was not involved in a drug transaction and that the police observed Fallin putting the drugs in the car. (App.pp.322-23). Trial counsel testified he did not specifically recall discussing the check with Petitioner but that he would have reviewed all of the discovery materials with him. (App.p.323). Trial counsel testified there was a letter from Fallin in his file (received two months after the trial) but that he had cross-examined Fallin about whether there were

promises or a deal for his testimony. (App.pp.323-24). Trial counsel testified Petitioner never asked him to contact the person who wrote the check (or any other witnesses) and that no witnesses contacted him wanting to testify on Petitioner's behalf. (App.p.323; pp.324-25). Trial counsel stated there was nothing else he could have done to investigate this case. (App.p.325).

In denying Petitioner's application for post-conviction relief, the PCR judge found Petitioner "failed to meet his burden of proving trial counsel should have subpoenaed witnesses Few and Ensley to testify at trial." (App.p.345). The PCR judge concluded:

> trial counsel had no knowledge of any favorable witnesses because none contacted him and offered to testify – and [Petitioner] did not instruct him to contact any witnesses. In sum, trial counsel committed no unprofessional error in not calling Few and Ensley at trial. Regardless, [Petitioner] failed to demonstrate the testimony of either witness would have changed the ultimate outcome of his trial.

(App.pp.345-46).

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 trial counsel should have subpoenaed Few and Ensley to testify at trial. Petitioner failed to demonstrate either that trial counsel's performance was deficient or that he suffered any prejudice.

Few

Petitioner argues trial counsel should have subpoenaed Few as a witness so he could testify that he did not know Petitioner to be a drug dealer. Petitioner, however, never informed trial counsel to contact Few to be a potential character witness. And while Few told Petitioner at the time that he "would help in anyway that [he] could," Petitioner never told him to contact trial counsel. Trial counsel was not made aware of Few's potential use as a character witness and cannot be expected to have been clairvoyant in this regard. See Strickland v. Washington, 466 U.S. at 690, 104 S. Ct. at 2066 (holding "a court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct").

Regardless, Petitioner failed to demonstrate he was prejudiced by the lack of Few's testimony at trial. Under Petitioner's theory, Few would have been called as a character witness to state he did not know Petitioner to be a drug dealer. Few's utility as

a character witness, however, would have been undermined because he admitted he did not realize Petitioner was a drug user with a prior drug record. Petitioner failed to demonstrate how this purported character witness would have changed the outcome of his trial. See Skeen v. State, 325 S.C. 210, 481 S.E.2d 129 (1997) (holding applicant not entitled to relief where no evidence presented at PCR hearing to show how additional preparation would have had any possible effect on the result at trial). Further, while Petitioner argued Few could have testified to his knowledge of Fallin as a drug dealer, this testimony would not have impacted Petitioner's case as Fallin admitted during his testimony that he pled guilty to these drug charges. See id.

Ensley

Petitioner argues trial counsel should have subpoenaed Ensley as a witness so that he could explain the nature of the check. Petitioner and Ensley both testified Petitioner never asked Ensley to contact trial counsel about the check. Trial counsel confirmed both that Petitioner never asked him to contact any witnesses and that no witnesses ever contacted him about this case. As with Few, trial counsel cannot be expected to be clairvoyant about potential witnesses if Petitioner does not tell him about such. See Strickland v. Washington, 466 U.S. at 690, 104 S. Ct. at 2066.

Regardless, Petitioner cannot show he suffered any prejudice. The check was written to Petitioner by Ensley and was recovered in a bag containing drugs and drug paraphernalia. Fallin testified the bag and its contents belonged to Petitioner and that the two of them had been using these drugs at the motel. Fallin testified he had not seen the check until during the trial. The check ties Petitioner to the bag and its contents, but is

not dispositive in this case. Having Ensley testify as to the issuance of the check would not have changed the facts of the case – that Petitioner was identified by his co-defendant as the person who owned the drugs and paraphernalia. As such, there is no reasonable probably the result of Petitioner's trial would have been different if Ensley had been called as a witness. See Geter v. State, 305 S.C. 365, 367, 409 S.E.2d 344, 346 (1991) (concluding reasonable probability of a different result does not exist when there is overwhelming evidence of guilt).

E.

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 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: _____
ATTORNEYS FOR RESPONDENT

January 9, 2015

STATE OF SOUTH CAROLINA
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APPEAL FROM GREENVILLE COUNTY
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The Honorable G. Edward Welmaker, Circuit Court Judge

Appellate Case No. 2014-000719

James Melvin Babb,.....Petitioner,

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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 9th day of January, 2015.

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ATTORNEY FOR RESPONDENT

ALAN WILSON
ATTORNEY GENERAL

January 9, 2015

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

Re: James Babb v. State of South Carolina
Appellate Case No: 2014-000719
Lower Court Case No: 2012-CP-23-3342

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