

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Spartanburg County
J. Mark Hayes, II, Circuit Court Judge

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MAR - 4 2015

S.C. Supreme Court

TRAVIS MONTRE SMITH,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2013-001696

BRIEF OF PETITIONER

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ISSUE PRESENTED

In a trial where the State proceeded only on the charge of trafficking in powder cocaine, did the PCR judge err in refusing to find prejudice resulting from trial counsel's deficient performance in failing to object when the bag containing 11.10 grams of powder cocaine and introduced as evidence against Petitioner also contained an additional 94.17 grams of crack cocaine?

STATEMENT

In July of 2008, the Spartanburg County Grand Jury indicted Smith for trafficking in cocaine, indictment #2008-GS-42-3530. On February 26, 2009, Smith proceeded to jury trial before the Honorable J. Derham Cole. William H. McPherson represented Smith at trial. Ryan F. McCarty prosecuted the case on behalf of the State. The jury returned a verdict of guilty and Judge Cole sentenced Smith to 25 years in prison. A timely notice of intent to appeal was filed and the direct appeal perfected. The South Carolina Court of Appeals affirmed the conviction and sentence. State v. Smith, Op. No. 2011-UP-201 (S.C.Ct.App. filed May 3, 2011).

On December 14, 2011, Smith filed an application for post conviction relief. The State filed a return on September 11, 2012. On April 5, 2013, an evidentiary hearing was held before the Honorable J. Mark Hayes, II. Kenneth P. Shabel represented Smith at the PCR hearing. Suzanne H. White represented the State. In a written order filed July 26, 2013, Judge Hayes denied relief and dismissed the application. A timely notice of intent to appeal was served on August 5, 2013. A petition for writ of certiorari was filed with this Court on April 1, 2014. The State filed a return on July 21, 2014. On December 3, 2014, this Court granted the petition for writ of certiorari. This brief of petitioner follows.

ARGUMENT

In a trial where the State proceeded only on the charge of trafficking in powder cocaine, the PCR judge erred in refusing to find prejudice resulting from trial counsel's deficient performance in failing to object when the bag containing 11.10 grams of powder cocaine and introduced as evidence against Petitioner also contained an additional 94.17 grams of crack cocaine.

On February 12, 2008, close to midnight, Officers Satterfield and Wilde with the Spartanburg County Sheriff's Department stopped the car in which Smith was a passenger. Satterfield was with the regional support unit of the department and had recently been certified in street drug recognition. (App. p. 15, lines 12-25). Wilde was an investigator assigned to the regional support unit and was riding with Satterfield on the day of the stop. (App. p. 37, lines 10-25). Satterfield testified that he stopped the vehicle because, "The vehicle actually failed-to-yield and actually stopped in the middle of the road, actually had to slow down to avoid hitting the white Ford Escort." (App. p. 16, lines 24- p. 17, lines 1). Satterfield testified that he initially stopped the car because he thought the driver might be intoxicated. (App. p. 17, lines 13-17).

Satterfield approached the driver, Joy Wood, and asked for his license, registration and proof of insurance. (App. p. 20, lines 4 – 15). Wilde approached the passenger side and asked Smith for his identification. (App. p. 38, lines 1-14). Wilde testified that Smith handed him a hotel key which he thought was "kind of weird." (App. p. 38, lines 8-11). Wilde testified that Smith was wearing baggy pants and a baggy coat and was fumbling in his pockets for something. (App. p. 38, lines 15-22). Wilde testified, "I could see money, amounts of money, coming out of pocket of his coat, out of his left pocket of his coat. And I just felt, I felt like he was trying to conceal something because he was laying his body over like this where I couldn't see whatever he

had in his pocket or whatever he was trying to do. I felt like he might have a gun. I mean, so I was concerned about it. So I asked him to step out of the car.” (App. p. 38, lines 23 – p. 39, lines 1-5).

Wilde next testified, “Yeah, he, he stepped out of the car. And I asked him to place his hands on top of the car so I could pat him down just to make sure he didn’t have guns or anything on him.” (App. p. 39, lines 14-16). According to Wilde, Smith ran away as Wilde started to pat him down. (App. p. 39, lines 24 – p. 40, lines 1-16). Wilde testified that he observed Smith throw something down as he was running away. (App. p. 40, lines 24 – p. 41, lines 1-10). After reviewing the videotape of the incident, Wilde admitted that the driver, Joy Wood, is seen in the area where Satterfield found drugs. (App. p. 118, lines 1-19).

Satterfield testified that he asked the driver, Wood to step out of the car. (App. p. 67, lines 12-25). As Satterfield was talking with the driver, he realized Smith had run away and Wilde was chasing him. (App. p. 84, lines 8-14). Satterfield immediately took off, joining Wilde in the chase of Smith and leaving the driver unattended. (App. p. 84, lines 15-18). According to Satterfield, during the chase, Smith threw a clear plastic bag. (App. p. 69, lines 22-25). Satterfield testified that he retrieved a package containing an off white powder substance testing positive for cocaine. (App. p. 70, lines 4 – p. 71, lines 1-13). After reviewing a video of the incident, Satterfield admitted that, during the chase of Smith the driver, Wood, is seen going through his pockets and walking away from the area where the package was found. (App. p. 85, line 3 – p. 86, 87, lines 1-16). Beth Stuart, a forensic chemist with the Spartanburg County Sheriff’s Department, testified that the substance found was 11.10 grams of powder cocaine. (App. p. 126, lines 1-4).

At the beginning of the PCR hearing, the clerk of court retrieved State’s Exhibit #4, a BEST bag that was introduced at trial, and showed the exhibit to the PCR judge. (App. p. 195, line 20 – p. 196, lines 1-20). The PCR judge stated, “And the I did, uh, view what was marked as State’s

Exhibit 4 that was used that that was my understanding used at trial of the case that was – that did contain, uh, the two substances, one was described to me as being the crack cocaine which was the larger item in the bag, the smaller item in the bag was described to me as being just cocaine, - - - ” (App. p. 196, lines 21 – p. 197, lines 1-2).

During the PCR hearing Smith testified that he was originally charged with both trafficking in cocaine and trafficking in crack but the State elected to proceed to trial only on the trafficking in cocaine charge. (App. pp. 199-204). Smith testified that the discovery material indicated that law enforcement collected 11.01 grams of powder cocaine and 94.17 grams of crack cocaine at the scene of the traffic stop. (App. p. 200, line 18 – p. 201, lines 1-14). Smith testified that the BEST bag, State’s Exhibit #4, admitted without objection in evidence by the State during his trafficking in powder cocaine trial contained both powder cocaine and crack cocaine. (App. p. 204, line 23 – p. 205, lines 1-25; App. p. 127, lines 4-15). Trial counsel did not remember if the BEST bag introduced at trial contained both powder and crack cocaine. (App. p. 227, lines 2-25). In the order of dismissal the PCR judge wrote, “However, following the chemist’s testimony, Counsel failed to object to the entry of the BEST bag into evidence, in particular since it appeared to contain both the cocaine and the crack cocaine.” (App. p. 235).

The PCR judge found that counsel was deficient for failing to object to the jury viewing the BEST bag which contained both packages of drugs. The PCR judge, however, found that Smith was not prejudiced by the deficient performance because there was overwhelming evidence of guilt. (App. p. 236). In the order of dismissal the PCR judge wrote, “This Court remains shocked by Counsel’s failure to stop the crack from going back to the jury and believes that Counsel was clearly deficient for failing to object to the jury viewing the BEST bag which contained both packages of drugs.” (App. p. 236). The PCR judge, however, went on to write, “This Court finds that the

Applicant was not prejudiced by any alleged deficient representation because there was overwhelming evidence of the Applicant's guilt." (App. p. 236). The PCR judge's finding as to overwhelming evidence is not supported by the record. The evidence in the present case was not overwhelming.

The PCR judge correctly found that trial counsel was deficient in failing to object when the State introduced in evidence 94.17 grams of crack cocaine for the jury to view while trying to determine if Smith was guilty of trafficking 11.01 grams of powder cocaine. The PCR judge erred, however, in finding no prejudice as a result of trial counsel's deficient performance because there was overwhelming evidence of guilt. While both officers testified to seeing Petitioner throw **something**, the credibility of Officer Satterfield was called into question when, contrary to his testimony on direct examination that the co-defendant Wood never moved (App .p. 70, lines 7-10), after viewing a videotape of the incident Satterfield admitted that, during the chase of Petitioner, the driver, Wood, is seen going through his pockets and walking away from the area where the package was found. (App. p. 85, line 3 – p. 86, 87, lines 1-16). Officer Wilde also admitted, after reviewing a videotape of the incident, that the driver, Joy Wood, is seen in the area where Satterfield found drugs. (App. p. 118, lines 1-19).

The evidence presented against Petitioner was not overwhelming. Petitioner Smith was prejudiced by counsel's failure to object to the improper admission of 94.17 grams of crack cocaine when the jury was only asked to determine if Petitioner was guilty of trafficking 11.01 grams of powder cocaine. Courts evaluate allegations of ineffective assistance of counsel using a two-pronged test. Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989) (citing Strickland, 466 U.S. at 668, 104 S.Ct. 2052). First, the applicant must demonstrate counsel's representation was deficient, which is measured by an objective standard of reasonableness. Strickland, 466

U.S. at 687–88, 104 S.Ct. 2052. “Under this prong, ‘[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms.’” Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 688, 104 S.Ct. 2052). Second, the applicant must demonstrate he was prejudiced by counsel's performance in such a manner that, but for counsel's error, there is a reasonable probability the result of the proceedings would have been different. Strickland, 466 U.S. at 694, 104 S.Ct. 2052. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” Id. The improper admission of this large quantity of crack cocaine sufficiently undermines confidence in the outcome of Petitioner’s trial.

The State presented less evidence in the present case than the State presented in State v. Garner, 304 S.C. 220, 403 S.E.2d 631 (1991), cited by the PCR judge in the order of dismissal. In Garner the State presented three eyewitnesses to the drug transaction who all positively identified Garner as the seller. In the present case the officers testified to seeing Petitioner throwing **something** during their chase. The officers later find drugs but admit that, while they were chasing Petitioner, the driver is seen on the video in the area where the drugs were found. The jury could have found reasonable doubt from the actions and location of the driver compounded by the officer’s original testimony that the driver never moved. (App. p. 70, lines 7-10).

The State presented far less evidence in the present case than the State presented in Brown v. State, 383 S.C. 506, 680 S.E.2d 909 (2009), cited by the PCR judge in the order of dismissal. In Brown the Court held that trial counsel's failure to object when the solicitor impermissibly asked the jury to “speak up” for three-year-old child victim during its closing arguments did not prejudice defendant because the solicitor’s remark was limited in duration **and** there was overwhelming evidence of defendant's guilt, including testimony from four

eyewitnesses, defendant's admission of "accidental" penetration of victim, and evidence that child had exhibited symptoms indicative of sexual abuse and had been diagnosed with gonorrhea.

In the present case the State's improper introduction of 94.17 grams of crack cocaine for the jury to view while trying to determine if Smith was guilty of trafficking 11.01 grams of powder cocaine is far more prejudicial than the limited and brief improper "Golden Rule" comment in the Brown case. While the Court in Brown found no prejudice based on the limited improper comment by the solicitor **and** the overwhelming evidence of guilt, the evidence of guilt in the present case can not be characterized as overwhelming, especially in light of the fact that the driver is seen on video in the area where the officers found the drugs.

"An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." Strickland v. Washington, 466 U.S. 668, 691, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). To establish prejudice, the defendant is required "to show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694, 104 S.Ct. 2052.

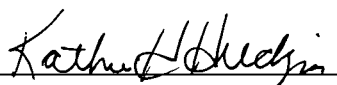
The improper admission of this large quantity of crack cocaine sufficiently undermines confidence in the outcome of Petitioner's trial. The State did not present overwhelming evidence of guilt in the present case. There is a reasonable probability that the jury viewing an additional amount of 94.17 grams of crack cocaine while trying to determine if Smith was guilty of trafficking 11.01 grams of powder cocaine had an effect on the outcome of the trial. Stated differently, there is a reasonable probability that the result of the proceeding would have been

different if the jury had not seen the additional 94.17 grams of crack attributed to the Petitioner. The error was substantial **and** there was not overwhelming evidence of guilty. The PCR judge erred in refusing to find that Smith was not prejudiced by trial counsel's deficient performance.

CONCLUSION

Based on the above argument, the finding of the PCR judge should be reversed, the conviction and sentence reversed and the case remanded for a new trial.

Respectfully submitted,


Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER.

This 4th day of March, 2015

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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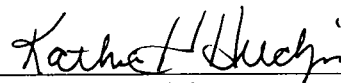
STATE OF SOUTH CAROLINA,

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CERTIFICATE OF SERVICE

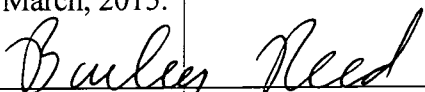
I certify that a true copy of the brief of petitioner, in this case has been served on Suzanne H. White, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 this 4th day of March, 2015.



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 4th day
of March, 2015.

 (L.S.)

Notary Public for South Carolina
My Commission Expires: October 24, 2021