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S.C. Supreme Court

STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO SPARTANBURG COUNTY
Court of Common Pleas

The Honorable J. Mark Hayes II, Circuit Court Judge

Appellate Case No. 2013-001696

Travis Montre Smith, ... Petitioner,

v.

State of South Carolina, ... Respondent.

BRIEF OF RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

1. Did the PCR Court properly hold that Petitioner was not prejudiced by Counsel's failure to object to the additional crack presented to the jury in the BEST bag where the evidence of guilt was overwhelming?

STATEMENT OF THE CASE

Petitioner is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Spartanburg County Clerk of Court. Petitioner was indicted at the July 2007 term of the Spartanburg County Grand Jury for trafficking in cocaine (2008-GS-42-3530). (App.pp.173-74). Petitioner was represented by William H. McPherson, Esquire. On February 27, 2009, Petitioner proceeded to trial where he was convicted as indicted. Petitioner was sentenced by the Honorable J. Derham Cole to confinement for a period of twenty-five (25) years. (App.p.169).

A timely notice of appeal was filed on behalf of Petitioner and an appeal was perfected. The South Carolina Court of Appeals affirmed Petitioner's conviction and sentence. State v. Smith, Op. No. 2011-UP-201 (S.C. Ct. App. filed May 3, 2011). The Remittitur was issued on May 19, 2011.

Petitioner subsequently filed a PCR application on December 14, 2011 (2011-CP-42-5555). (App.pp.176-87). An evidentiary hearing into the matter was convened on April 5, 2013 at the Spartanburg County Courthouse. (App.pp.193-214). Petitioner was present and represented by Kenneth P. Shabel, Esquire. Suzanne H. White, Esquire, of the South Carolina Attorney General's Office, represented Respondent. Following the hearing and submission of memoranda by both parties, The Honorable J. Mark Hayes, II denied the PCR application by Order filed July 26, 2013. (App.pp.232-38).

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 Court properly held that Petitioner was not prejudiced by Counsel's failure to object to the additional crack presented to the jury in the BEST bag where the evidence of guilt was overwhelming.

At the hearing, Petitioner argued Counsel was ineffective for failing to object to the entry into evidence of the BEST bag, which contained both the cocaine for which Petitioner was being tried, but also a bag of crack cocaine, for which he was arrested but not tried.

The proper measure of performance is whether counsel provided representation within the range of competence required in criminal cases. The courts presume counsel "rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Strickland v. Washington, 466 U.S. 668, 690, 104 S. Ct. 2052, 2066 (1984). The PCR applicant must overcome this presumption in order to receive relief. See Cherry v. State, 300 S.C. at 118, 386 S.E.2d at 625.

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) (citation omitted).

The PCR court properly found that Petitioner was not prejudiced by Counsel's failure to object to the entry of the BEST bag as evidence because of overwhelming evidence of Petitioner's guilt. (App.p.236). As the PCR court noted, there was sufficient evidence in the record to support the conviction, including the testimony of two very credible officers, the chemist who tested the drugs, and a dash cam video. (App.p.236).

The facts as presented at trial included testimony from both Officers Satterfield and Wilde. Officer Satterfield testified that he observed Petitioner running from Officer Wilde and throwing a clear plastic bag back towards the vehicle. (App.pp.69-70). Satterfield also testified that the driver never went near the bag or moved from his location. (App.p.70). Satterfield also testified that he completed a field test on the subject in the package and determined that it was positive for cocaine. (App.p.71). Testimony continued with Satterfield identifying the BEST bag (State's Ex. #4), and indicating that it was the same cocaine that he retrieved after Petitioner threw the bag. (App.p.72). The jury was then shown the dash cam video of the stop. (App.p.74). Based upon assertions that the driver of the vehicle was found to have had both cocaine and

crack cocaine in his possession, on cross-examination, Counsel did ask Satterfield if the bag that was picked up contained both cocaine and crack, to which Satterfield acknowledged that it did. (App.p.90). However, Satterfield testified that he "saw [Petitioner] pull them out, pull the drugs out and thrown them." (App.p.94).

Officer Wilde then testified that when he asked Petitioner to step out of the vehicle for a quick pat down, Petitioner took off running. Wilde then testified that he was able to grab Petitioner's jacket, but Petitioner continued to run. (App.p.100). Wilde testified that during the chase, Petitioner threw something the size of a baseball. (App.p.101). Wilde further testified that following Petitioner's arrest, over $6,000 was found in Petitioner's coat, bundled together in rubber bands. (App.p.103). Wilde also testified that he never saw the driver get near the coat or the item thrown by Petitioner. (App.p.103). On cross-examination, Wilde further testified that he saw Petitioner "throw the dope," and that the bag which was recovered contained crack and cocaine, while acknowledging that the driver was found with cocaine and a crack pipe. (App.p.119).

Also, at Petitioner's trial, the Chemist with the Spartanburg Sheriff's office, Beth Stuart, testified that State's Exhibit #4, the BEST bag was the one from which she tested evidence. (App.p.125). Stuart also testified that her analysis report indicated which substances and weights were in the bag, which she testified was a white powdery substance corresponding to cocaine of 11.10 grams. (App.pp.125-26). Counsel's objection to entry of the analysis report was sustained as cumulative, but the BEST bag was entered into evidence as State's Exhibit #4.[1]

[1] The trial transcript reflects that "Cocaine marked State's Exhibit No. 4." (App.p.127).

Finally, the trial court instructed the jury that Petitioner had been charged with **trafficking in cocaine** and reviewed the specific statute regarding cocaine, in particular charging the jury with the charge regarding actual possession. (App.p.151;pp.156-59). Additionally, the court instructed the jury that "the state has to prove that [Petitioner] did, in fact, have **possession of ten grams or more of cocaine or any mixture of a substance containing cocaine.**" (App.p.159). There was never any reference in the jury charge to crack cocaine, an indictment for crack cocaine, the required weight of crack cocaine, or that it was even evidence.

In addressing the PCR Court's order of dismissal, Petitioner takes aim at its reference to Brown v. State, 383 S.C. 506, 680 S.E.2d 909 (2009). In Brown, a PCR Court found trial counsel ineffective for failing to object to a "Golden Rule" closing argument during which the solicitor asked the jury to "speak up for [child victim]," because Petitioner suffered prejudice as a result of that failure. Id. However, this Court reversed the PCR Court's decision, in part, and ruled that although trial counsel was deficient in failing to object to the "Golden Rule" argument, Petitioner failed to meet his burden under Strickland by showing prejudice. Id. Petitioner states that the reason the Petitioner in Brown could not show prejudice was "because the solicitor's remark was limited in duration **and** there was overwhelming evidence of guilt."[2] (PWC, p.7). Such a reading misconstrues the presence of both factors in Brown with the *requirement* that they both be present, and suggests that overwhelming evidence *alone* is not sufficient to

[2] The first reason given by the Court was that the comments "did not so infect the trial with unfairness as to make the resulting conviction a denial of due process." Brown v. State, 383 S.C. at 517, 680 S.E.2d at 915 (citing Smith v. State, 375 S.C. 507, 654 S.E.2d 523 (2007)).

destroy prejudice. Nothing could be further from the truth. No prejudice occurs, *despite trial counsel's deficient performance*, where there is overwhelming evidence of guilt. Geter v. State, 305 S.C. 365, 367, 409 S.E.2d 344, 346 (1991).

Further, Petitioner's assertion that the State's introduction of the additional crack cocaine for the jury to view in the current case is "far more prejudicial than the limited and brief improper 'Golden Rule' comment," even if true,[3] is not relevant to the question of prejudice when dealing with overwhelming evidence.

The lack of prejudice does not, however, *depend* on the evidence being overwhelming. When an ineffectiveness claim is presented the defendant must show that counsel's representation was deficient. Deficient representation amounts to conduct that is not objectively reasonable under the circumstances. Strickland v. Washington, 466 U.S. 668, 688, 104 S. Ct. 2052, 2064 (1984). In addition, Petitioner must show prejudice by establishing that the outcome would have been different but for counsel's deficient performance. Id. at 694, 104 S. Ct. at 2068. Petitioner has failed to lay out a credible claim that would suggest a reasonable probability that, but for Counsel's alleged errors, the outcome of his trial would have been different. Nowhere in Petitioner's brief is there any indication as to how the absence of the additional crack cocaine in the BEST bag would have changed the outcome of the trial. Petitioner's defense turned on whether the jury believed the drugs were his or not. The crucial issue concerned credibility of the

[3] It is not entirely clear from the facts that trial counsel's alleged ineffectiveness in the present case was "far more prejudicial" than in Brown, where it was "indisputable that the case was 'emotionally charged' given it involved sexual conduct with a three-year-old child," and the Court found that "the solicitor's remarks imploring the jurors to 'speak for' the victim undeniably asked the jurors to set aside their impartiality and, instead, consider the evidence from the subjective position of the child victim." Brown at 527, 680 S.E.2d at 915.

police officers. This case does not involve, nor does any contested issue turn on, the specific type or quantity of drugs in the BEST bag.

Petitioner failed to establish that the outcome of his trial would have been different had the BEST bag been objected to. As a result, Petitioner has failed to carry his burden with respect to the prejudice prong.

CONCLUSION

For the reasons stated above, this Court should affirm the lower court's ruling and deny the requested relief.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT

July 1, 2015

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CERTIFICATE OF SERVICE

I, Karen C. Ratigan, certify that I have today served the within Brief of Respondent upon Petitioner by depositing a copy of the same in inter-agency mail, addressed to:

Kathrine H. Hudgins, 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 1st day of July, 2015.

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