STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. Supreme Court

CERTIORARI TO FAIRFIELD COUNTY
Court of Common Pleas

William Jeffrey Young, Circuit Court Judge

Appellate Case No. 2014-002165

Willie J. Adams..Petitioner,

v.

State of South Carolina,...Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Is certiorari warranted to review where there is *any* probative evidence to support the PCR Court's finding that Counsel was not ineffective in failing to timely object to testimony regarding drugs and specific drug amounts found at the scene of the shooting, where Counsel's conduct was reasonable under professional norms and such evidence was admissible?

STATEMENT OF THE CASE

Petitioner is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Fairfield County Clerk of Court. Petitioner was indicted at the June 2008 term of the Fairfield County Grand Jury for murder (2008-GS-20-0245). He was represented by William P. Frick, Esquire. From December 7-10, 2009, Petitioner proceeded to trial before a jury, where he was convicted of murder. The Honorable Howard P. King sentenced him to confinement for a period of forty (40) years.

A timely Notice of Appeal was filed on Petitioner's behalf. The South Carolina Court of Appeals affirmed Petitioner's conviction and sentence in a written opinion. State v. Adams, Op. No. 2012-UP-006 (Ct. App. January 4, 2012). The remittitur was issued on January 24, 2012.

Petitioner filed an application for PCR on October 15, 2012 (2012-CP-20-0413). The State made its Return on or about December 11, 2013, and the matter was scheduled for an evidentiary hearing before the Honorable W. Jeffrey Young, on July 29, 2014. Petitioner was present and represented by Ernest M. Spong, III, Esquire. The State was represented by Assistant Attorney General J. Croom Hunter of the South Carolina Attorney General's Office. In a written order signed August 28, 2014, Judge Young denied and dismissed Petitioner's application with prejudice. Petitioner appealed Judge Young's order of dismissal.

This Return to the Petition of Writ of Certiorari follows.

STANDARD OF REVIEW

The proper standard of review of a post-conviction relief evidentiary hearing is whether "any evidence of probative value" exists to sustain the post-conviction relief court's findings. Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989). Appellate courts give great deference to the PCR Court's findings of fact and conclusions of law. Caprood v. State, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000).

ARGUMENT

The PCR Court's finding that Counsel was not ineffective in failing to object timely object to testimony regarding drugs and specific drug amounts found at the scene of the shooting is supported by probative evidence, where Counsel's conduct was reasonable under professional norms and such evidence was admissible.

Petitioner alleges that the PCR judge erred in refusing to find trial counsel ineffective for failing to timely object to testimony regarding drugs and specific drug amounts found at the scene of the fatal shooting. Specifically, Petitioner argues that because Petitioner was not charged with drug offenses, the testimony about the drugs did not meet an exception to Rule 404(b) as the State failed to connect the drugs to Petitioner and the probative value of the drug amount testimony was substantially outweighed by the prejudicial effect.

The State respectfully submits that Petitioner's argument is without merit. There is substantial evidence of probative value to support the PCR Court's finding that Petitioner's right to effective assistance of counsel was not violated.

In a post-conviction relief action, the petitioner bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where an application alleges ineffective assistance of counsel as a ground for relief, the petitioner 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." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064 (1984); Butler, 286 S.C. 441, 334 S.E.2d 813.

The proper measure of performance is whether the petitioner's attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of

reasonable professional judgment. Strickland, 466 U.S. 668, 104 S.Ct. 2052, 2064. The Petitioner must overcome this presumption in order to receive relief. Cherry, 300 S.C. 115, 386 S.E.2d 624.

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the Petitioner must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625, *citing* Strickland. Second, counsel's deficient performance must have prejudiced the Petitioner such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. With respect to guilty plea counsel, the Applicant must show that there is a reasonable probability that, but for counsel's alleged errors, he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52 (1985).

1. Deficient Performance:

Petitioner's argument – that Counsel exhibited deficient performance in his failure to object to testimony concerning the existence and weight of drugs found at the scene of the murder – equates constitutionally adequate performance with perfect representation. The standard imposed by Strickland and the Sixth Amendment is one of *reasonableness under professional norms*. 466 U.S. at 688, 104 S.Ct. at 2065; Cherry at 117, 386 S.E.2d at 625. The State submits that there is probative evidence in the record supporting the PCR judge's finding that Counsel's efforts were reasonable.

The PCR judge made detailed findings in support of its ruling that Counsel's performance was not deficient. Specifically, it found that Counsel "strenuously objected,

throughout the course of the trial, to the admission of the contested drug evidence," that Counsel "attempted to stop the admission of the drug evidence through a pretrial hearing and through contemporaneous objections to the evidence throughout the trial," and even moved for a mistrial as a result of that evidence reaching the jury. App. p. 557. The PCR judge further found that Counsel's belief that the issue was properly preserved for appellate review was reasonable, especially considering the trial court's comment to counsel, "[o]kay. All right. I think both of you got your positions on the record." App. p. 235, l. 7-9.

Because there is evidence of probative value in the record to support the PCR judge's ruling on the issue, certiorari should be denied.

2. Prejudice prong:

Petitioner has also failed to meet the second prong of the Strickland test and failed to show prejudice from Counsel's alleged errors. 466 U.S. at 694, 104 S.Ct. at 2068; Cherry at 118, 386 S.E.2d at 625.

The South Carolina Supreme Court has held that even where trial counsel was deficient in failing to properly preserve an issue for review, a PCR applicant must show that he would have succeeded on the merits had the issue been properly preserved in order to be entitled to relief. See McHam v. State, 404 S.C. 465,482, 746 S.E.2d 41, 50 (2013).

In the present case, Petitioner would not have succeeded on the merits because the testimony concerning the existence of drugs at the scene of the murder was relevant; adhered to Rule 404(b), SCRE; provided crucial context under the *res gestae* doctrine; and any resulting prejudice did not substantially outweigh its probative value. Concerning the specific quantity of the drugs, any prejudice resulting from Angil Landrum's expert testimony was cured by the trial

judge's curative instruction to the jury;[1] and the testimony of Investigator Petersen was not so prejudicial that it calls into question the outcome of the proceeding.

a. Admissibility pursuant to Rule 401, SCRE

The State submits that the evidence of drugs presented at trial was clearly relevant. The process of analyzing bad act evidence begins with Rule 401, SCRE. State v. Wallace, 384 S.C. 433, 683 S.E.2d 275, 277 (2009). "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Rule 401, SCRE. "All relevant evidence is admissible," subject to various exceptions, and "[e]vidence which is not relevant is not admissible." Rule 402, SCRE. Relevancy of evidence is an issue within the trial court's sound discretion. State v. Gillian, 373 S.C. 601, 612, 646 S.E.2d 872, 878 (2007); see also State v. Sweat, 362 S.C. 117, 127, 606 S.E.2d 508, 513 (Ct. App. 2004) ("The trial judge must have wide discretion on innumerable questions of relevancy before her, and her decision should be reversed only for abuse of that discretion").

The location of the drugs and the testimony concerning the location of the drugs lent credibility to the State's theory of the case that the victim was murdered for taking and possibly using Petitioner's drugs. In other words, the drugs could be construed as making the State's theory of the case "more probable." As a result, at a minimum, evidence of the drugs was relevant as required by Rule 402, SCRE. In addition, the trial court *repeatedly* held that evidence of the drugs was relevant. App. p. 107-08; p. 288; p. 569. Specifically, according to the trial judge, they showed the location of the crime as well as the relationship between the parties, including the victim and Petitioner. App. p. 569, l. 3-7.

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[1] INFRA, Section 2(d)(ii), *Landrum's Expert Testimony.*

b. Admissibility Pursuant to Rule 404(b)

Even relevant evidence may be excluded where provided by various Rules and other laws. See Rule 402, SCRE. Under Rule 404(b), SCRE, "[e]vidence of crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent." Id.

Petitioner's contention that he was prejudiced by Counsel's failure to object to drug testimony on the ground that it violated Rule 404(b) is entirely without merit. The trial court properly admitted evidence of the drugs under Rule 404(b), SCRE, explaining that they showed motive and intent. App. p. 569, l. 16-21. The State's theory of the case was that Petitioner murdered the victim after the victim stole a large amount of cocaine from him. This theory is supported by drugs found on the property and the testimony presented at trial.

First, it is clear from the testimony that there was substantial drug dealing and drug use on the property where the murder occurred. Several witnesses testified that they personally bought cocaine or crack there. App. p. 620-22; 692-93. There was also testimony to the effect that people used drugs at the house. App. p. 767, l. 11-13.

In addition, the testimony and evidence support the fact that drugs were stashed behind the barn. One witness, who had previously bought drugs at the house, testified that after she placed an order she would see people walk over towards the barn. App. p. 695, l. 19-23. The large amount of cocaine in question was found at or near the spot in question – "approximately 100 yards behind the barn." App. p. 423, l. 11-15. This testimony and evidence set the scene for the theft and subsequent murder.

Reginald Gibson, who had been driving the victim around, testified that the day before the murder, the victim hid behind the barn when a deputy came by the house. App. p. 626, l. 10-22. Later that night the victim got a flashlight from Gibson, and then returned from behind the barn with a container "similar in size of a soda can." App p. 627-28. It does not take a great leap in logic to infer that the victim discovered drugs behind the barn while hiding there, and then decided to rob Petitioner.

Other witnesses testified that Petitioner returned to the house later that night and went to the bushes behind the barn. App. p. 771-72. Petitioner then came back and said "it's gone." App. p. 733; p. 773, l. 8. Petitioner further said that the victim had taken his "package." App. p. 775, l. 13.

When the victim returned the next morning, he went back to an area near the barn, and then into the woods. App. p. 670, l. 2-10. Petitioner and his codefendants went to the barn. App. p. 671, l. 15-17. The victim returned to the barn with a gun. App. p. 672, l. 1-2. He then handed it to Petitioner. App. p. 672, l. 3-6. Petitioner asked the victim the entire time where something of his was. App. p. 672, l. 7-14. According to witnesses, Petitioner's exact phrasing was closer to "[w]here the shit at?" or "where my shit at?" App. p. 683, l. 11-12; p. 830, l. 24-25. Petitioner also, at some point, shot off the gun into the ground while asking "where the shit at?" App. p. 673, l. 10-11.

The context the drugs provide here is crucial. They corroborate the State's theory – that Petitioner killed the victim because the victim stole his drugs – by explaining to the jury what was in the "package" and what Petitioner's "shit" was. Petitioner was linked to the drugs by both his words and behavior: he was asking, by some accounts, where *his* "shit" was, all the while firing off rounds near the victim. Whether or not the missing drugs actually belonged to

him, at the very least Petitioner exhibited a strong interest in finding out where they were. Accordingly, the trial court correctly found the additional drugs contained within the thermos or thermoses were admissible pursuant to the Rule 404(b), SCRE exceptions for motive and intent.

c. Admissibility Pursuant to the *Res Gestae* Doctrine

The trial court also properly found that the evidence at issue was admissible under a *res gestae* theory. App. p. 570, l. 12-15.

Evidence of other crimes which supplies the context of the crime, or is intimately connected with and explanatory of the crime charged, is admissible as *res gestae* evidence. State v. Wiles, 383 S.C. 151, 158, 679 S.E.2d 172, 176 (2009) (*citing* State v. Adams, 322 S.C. 114, 122, 470 S.E.2d 366, 370-71 (1996) (*overruled on other grounds*)). Evidence or testimony may be admissible pursuant to both Rule 404(b), SCRE, *and* the doctrine of *res gestae*. See Id. at 158-59, 679 S.E.2d at 177. That being said, *res gestae* and Rule 404(b) involve different lines of analysis. See State v. Gilmore, 393 S.C. 72, 83 n. 9, 719 S.E.2d 688, 694 n. 9 (Ct. App. 2011) ("Under the [South Carolina] rules of Evidence . . . arguing an event is part of the *res gestae* is equivalent to arguing the evidence is not an 'other' act under Rule 404(b), but rather is integral to the crime or event. Our courts have continued to use the term to describe details of a crime or event which are not to be excluded as 'other crimes, wrongs, or acts' under Rule 404(b).").

The facts here are similar to those of Wiles. In that case, the South Carolina Supreme Court found that evidence of the defendant's escape from prison a week prior to the factual genesis of his Assault and Battery with Intent to Kill charge, was admissible under a *res gestae* theory as it constituted "the first link in a chain of circumstances" which led to the criminal charges then before the Court. Wiles at 158-59, 679 S.E.2d at 176.

The State submits the *res gestae* in the current case is closer in time and provides as much, if not more, context to the case than the evidence of the defendant's prior escape in Wiles. In Wiles, the prior act occurred "approximately one week" prior to the crime charged. 383 S.C. 151, 155, 679 S.E.2d 172, 174. In the present case, the drugs were found at the scene the morning after the murder. App. p. 423.

Also in this case, the large quantities of the drugs and the victim's discovery of their hiding place provided the entire background for the case. The amount, as well as the proximity of the drugs to the series of events which unfolded preceding the murder, lent credibility to the State's case and provided further insight into Petitioner's state of mind at the time the murder occurred. As a result the drugs, their connection to Petitioner and the connection between the victim and Petitioner's hiding place, clearly demonstrates a "chain of circumstances" which led to the criminal charges currently at issue, and the trial court correctly concluded they were admissible under a *res gestae* theory.

Because the testimony at issue was properly admitted pursuant to the doctrine of *res gestae*, Petitioner is unable to show prejudice.

d. Admissibility Pursuant to Rule 403, SCRE

Finally, Petitioner argues that the testimony concerning the existence and weight of cocaine at the scene of the murder should be excluded under Rule 403, SCRE. This argument is also without merit, as prejudice resulting from the introduction of testimony on the existence of drugs at the scene was highly probative and minimally prejudicial; expert testimony regarding the exact quantity of the drugs was adequately cured by the trial judge; and non-expert testimony concerning the quantity of drugs was not so prejudicial as to bring the outcome of the proceeding into question.

Under Rule 403, even evidence that is relevant and otherwise admissible under the rules of evidence may still be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. In addition, the admission or exclusion of testimonial evidence falls within the sound discretion of the trial court, whose decision will not be disturbed on appeal absent abuse resulting in prejudice. State v. Holder, 382 S.C. 278, 288, 676 S.E.2d 690, 696 (2009).

i. Evidence of Drugs at the Scene

The trial court commented extensively on the probative value of the drugs, stating that they show "the relationship of the parties, . . . the setting or atmosphere in which [the] homicide took place, and . . . the chain of circumstances leading up to the victim's murder." App. p. 570, l. 5-11. As a result, the State submits Petitioner cannot show prejudice for Counsel's failure to object to testimony regarding the *existence* of the drugs at the scene of the murder on the grounds that their prejudicial impact substantially outweighed their probative value.

ii. Evidence Concerning the *Quantity* of Drugs at the Scene

Petitioner then argues that Counsel should have objected to testimony from Landrum and Officer Peterson regarding the exact quantity of drugs. The State's position is that any prejudice Petitioner *could have* suffered from expert testimony by Landrum was effectively cured by the trial judge's curative instruction, and that non-expert testimony by Petersen did not rise to the level of a violation of Rule 403, SCRE.

Landrum's Expert Testimony

Petitioner argues that Counsel should have objected to Landrum's expert testimony because it referred to the quantity of drugs found at the scene of the murder. The State submits that even *if* the prejudicial impact of Landrum's testimony substantially outweighed probative value, that failure did not affect the outcome of the proceeding once the trial judge issued its

curative instruction to the jury. It is well-established "[a] curative instruction to disregard incompetent evidence and not to consider it during deliberation is deemed to have cured any alleged error in its admission." State v. Wiley, 387 S.C. 490, 497-98, 692 S.E.2d 560, 564 (2010). The trial judge in the present case issued an adequate curative instruction, instructing the jury to disregard Landrum's testimony as to drugs found on the premises. App. p. 576, l. 10-18. The trial judge further instructed the jury that evidence of the illegal drugs was not admissible to prove the character of Petitioner in order to show that he "acted in conformity therewith with respect to the charge of murder," and forbade them from considering it "for that purpose during [their] deliberations." App. p. 576, l. 19 – p. 577, l. 3. Because the trial judge's curative instruction cured any harm that would have resulted from Landrum's testimony, Petitioner cannot show prejudice.

Peterson's Testimony

Petitioner then argues that because Landrum's testimony was excluded, Petersen's testimony, which also referred to the exact quantity of drugs found, should have been excluded, as well. This argument is also without merit. The State submits that Petersen's testimony, in and of itself, did not rise to the level of prejudicial to the extent that it would have been sufficient to call into question the outcome of the proceeding. Petersen's testimony is categorically distinguishable from Landrum's testimony because Landrum was an expert and Petersen was not. "[A]lthough an expert's testimony theoretically is to be given no more weight by a jury than any other witness, it is an inescapable fact that jurors can have a tendency to attach more significant to the testimony of experts." State v. Kromah, 401 S.C. 340, 357, 737 S.E.2d 490, 499 (2013). The label of expert should be jealously guarded by the court and never loosely bandied about. Id.

Contrary to Petitioner's argument, it simply does not follow that equal prejudice flows from the testimony of an expert witness and a lay witness – even if their testimony can be characterized as roughly similar. This seems consistent with the trial judge's ruling on the matter, which does not specifically address Petersen's testimony. See App. p. 558, l. 9-12 (noting that "the depth of the testimony with regard to the volume of [the drugs] came from Landrum.").

Petersen was not an expert testifying as to the exact, scientifically-verified amount of cocaine recovered from the scene. Instead, he testified as to his field observations. Even if the fact that Petersen mentioned the weight can be said to have caused *some* prejudice to Petitioner, it certainly did not rise to the level of *substantially outweighing* its probative value. See Rule 403, SCRE. Nor is it reasonably likely that his testimony, taken alone, affected the outcome of the proceeding.

Because Petitioner has failed to show that he would have been meritorious on appeal had Counsel properly preserved the above issue, this petition should be dismissed.

CONCLUSION

For the foregoing reasons, the State submits that the Petition should be denied. Should this Court grant the Petition for Writ of Certiorari, Respondent requests permission to more fully brief the issues herein.

Respectfully submitted,

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THE STATE OF SOUTH CAROLINA,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the **Return to Petition for Writ of Certiorari** has been served upon opposing counsel by mailing two (2) copies in the United States mail, postage prepaid:

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This 20th day of July, 2015

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