

**ORIGINAL
RECEIVED**

DEC 14 2015

S.C. Supreme Court

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Greenville County
Edward W. Miller, Circuit Court Judge

LORENZO R. NICHOLSON

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE # 2015-001231

PETITION FOR WRIT OF CERTIORARI

TIFFANY L. BUTLER
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

ATTORNEY FOR PETITIONER

INDEX

INDEX.....1

ISSUE PRESENTED2

STATEMENT OF FACTS3

ARGUMENT6

CONCLUSION8

ISSUE PRESENTED

Did the PCR judge err by finding counsel provided effective representation where counsel failed to argue that Petitioner's prior simple possession of marijuana charge in municipal court could not be used to enhance Petitioner's trafficking in cocaine conviction to a second offense where the simple possession of marijuana was a bond forfeiture, which did not qualify as a conviction for enhancement purposes under S.C. Code Ann. § 44-53-470 (1985)?

STATEMENT OF FACTS

On April 14, 2009, the Greenville County Grand Jury indicted Petitioner for trafficking in more than ten grams of cocaine and possession of a weapon during commission of a violent crime. App. 216 – 217. Petitioner's case proceeded to a bench trial before the Honorable John C. Few. App. 1. Christopher Scalzo represented Petitioner. Doug Webb represented the State. App. 1.

At the bench trial, Investigator David Weiner with the Greenville County Sheriff's Department testified that on March 5, 2008, he and two other officers drove to 51 Birdsong Lane to serve Petitioner an arrest warrant for armed robbery. App. 7. When Weiner arrived at the residence, he walked to the back of the house while Investigator Hannieg went to the front and knocked on the door. App. 7 – 8. Petitioner opened the door and was told that he was under arrest. Petitioner allegedly began to question the officers' actions and backed up "a few feet inside the house." App. 8, ll. 12 – 25.

According to Weiner, as he placed the handcuff on Petitioner's wrist, Petitioner "kept backing into the house." App. 9, ll. 9 – 12. Officers claimed to "smell the odor of marijuana" and decided to perform a "protective sweep of the residence." App. 10, ll. 10 – 16. Marijuana was found on a dresser in one of the bedrooms.

Investigator Fortner left the home to get a search warrant while Petitioner was transported to the jail. App. 10, ll. 10 – 18. When Fortner returned with the search warrant, officers searched Petitioner's home. With the aid of a narcotics dog, officers located a bag of a white substance which was stored in a box in one of the kitchen cabinets. App. 13, l. 8 – App. The substance was tested positive for cocaine and weighed 15.28 grams. App. 118, ll. 2 – 3. Officers also recovered plastic baggies, razor blades, digital scales, and a machine gun, which was later determined to be inoperable. App. 14, ll. 11 – 15; App. 119, ll. 14 – 17. Judge Few found Petitioner guilty of

trafficking in more than ten grams of cocaine and possession of a weapon during commission of a violent crime. App. 127.

Prior to sentencing, defense counsel cited State v. Spratt, 383 S.C. 212, 678 S.E.2d 266 (Ct. App. 2009), and argued that Petitioner's trafficking in cocaine charge should not be enhanced to a second offense for purposes of sentencing. App. 128 – 131. Counsel explained that Petitioner's prior drug conviction was for 2007 simple possession of marijuana and because client did not have counsel at the hearing and was not informed that he could have counsel present, the prior conviction was uncounseled should not be used for enhancement. App. 131.

Judge Few stated that Spratt was irrelevant to Petitioner's case because the prior marijuana conviction did not involve imprisonment. App. 131, l. 20 – App. 132, l. 16. The judge sentenced Petitioner to thirteen years' imprisonment for second offense trafficking in cocaine and five years for the possession of a weapon charge, to run concurrently. App. 134. That sentence was to run concurrently to the thirteen-year federal sentence that Petitioner was serving at the time of the bench trial.

Petitioner appealed his conviction and sentence. On December 21, 2015, the Court of Appeals affirmed Petitioner's conviction and sentence. See State v. Nicholson, Op. No. 2011-UP-588 (S.C. Ct. App. filed Dec. 21, 2011). Kathrine H. Hudgins represented Petitioner.

On May 7, 2012, Petitioner filed a petition for writ of certiorari in the South Carolina Supreme Court. App. 174. The petition was denied in an order dated July 25, 2013. App. 174. The remittitur was sent on July 31, 2013. App. 174.

On June 17, 2014, Petitioner filed a PCR application. App. 138. On November 22, 2014, Respondent filed a return requesting an evidentiary hearing. App. 173. On April 21, 2015, an

evidentiary hearing was held before the Honorable Edward W. Miller. App. 178. Caroline M. Horlbeck represented Petitioner. Karen C. Ratigan represented the State. App. 178.

At the PCR hearing, Petitioner stated that defense counsel made an improper argument challenging the trial judge's enhancement of his trafficking cocaine charge to a second offense. App. 202. Petitioner explained that counsel cited State v. Spratt, 383 S.C. 212, 678 S.E.2d 266 (Ct. App. 2009), and argued that Petitioner's sentence for trafficking should not be enhanced because the 2007 marijuana conviction that he received in municipal court was the result of an uncounseled guilty plea. App. 203, ll. 2 – 15. Petitioner asserted that counsel should have cited State v. Scott, 334 S.C. 248, 513 S.E.2d 100 (1999), which was "the ruling case on bond forfeiture." App. 203, ll. 14 – 25. Counsel should not have argued that the possession of marijuana conviction was an "uncounseled misdemeanor." App. 203, ll. 2 – 7; App. 203, ll. 14 – 25. Instead, Petitioner's municipal court marijuana charge resulted in a bond forfeiture, which was not a conviction. App. 203, ll. 14 – 25.

Judge Miller issued an order of dismissal on May 12, 2015. App. 207. The judge wrote that Petitioner "was properly sentenced as a second offense and has failed to produce any evidence that the sentence enhancement in his case was improper." App. 213. The judge found that Petitioner had not met his burden of proving that counsel was deficient and that the deficiency prejudiced Petitioner. App. 214.

ARGUMENT

The PCR judge erred by finding counsel provided effective representation where counsel failed to argue that Petitioner's prior simple possession of marijuana charge in municipal court could not be used to enhance Petitioner's trafficking in cocaine conviction to a second offense where the simple possession of marijuana was a bond forfeiture, which did not qualify as a conviction for enhancement purposes under S.C. Code Ann. § 44-53-470 (1985).

Counsel was ineffective for failing to argue that Petitioner's prior simple possession of marijuana charge in municipal court was not a conviction for enhancement purposes. Petitioner's prior marijuana charge resulted in a bond forfeiture which does not qualify as a conviction under S.C. Code Ann. § 44-53-470 (1985).

Prior to June 2010¹, under S.C. Code Ann. § 44-53-470 (1985), an offense was considered a second or subsequent offense if:

“(1) for a possession offense pursuant to the provisions of this article, the offender has been **convicted** within the previous ten years of a violation of a provision of this article or of another state or federal statute relating to narcotic drugs, marijuana, depressants, stimulants, or hallucinogenic drugs; and

(2) for all other offenses pursuant to the provisions of this article, the offender has at any time been **convicted** of a violation of a provision of this article or of another state or federal statute relating to narcotic drugs, marijuana, depressants, stimulants, or hallucinogenic drugs.” (emphasis added).

¹ The offense occurred on March 5, 2008. Petitioner was convicted and sentenced on August 13, 2009.

In Scott v. State, 334 S.C. 248, 255, 513 S.E.2d 100, 104 (1999), the South Carolina Supreme Court held that “the Legislature did not intend for a bond forfeiture to be the equivalent of a conviction under Section 44-53-470.”

A criminal defendant is entitled to effective assistance of counsel under the Sixth Amendment to the United States Constitution. Strickland v. Washington, 466 U.S. 668 (1984). When a defendant challenges a conviction on the ground that counsel was ineffective, the question becomes, “whether counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on 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 686; see Ard v Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007). Pursuant to Strickland v. Washington, a court will conduct a two-prong test when determining whether trial counsel’s assistance was ineffective. Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989) (citing Strickland, 466 U.S. at 688).

First, an applicant must show that counsel’s performance was deficient. Strickland, 466 U.S. at 687. Under this prong, “[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms.” Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (quoting Strickland, 466 U.S. at 688).

Second, the applicant must show that counsel’s “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.’” Cherry v. State, 300 S.C. 115, 117-118, 386 S.E.2d 624, 625 (1989) (quoting Strickland, 466 U.S. at 688).

Here, counsel failed to properly argue that Petitioner’s prior municipal court “conviction” for simple possession of marijuana was a bond forfeiture and not a conviction. See App. 202 – 203.

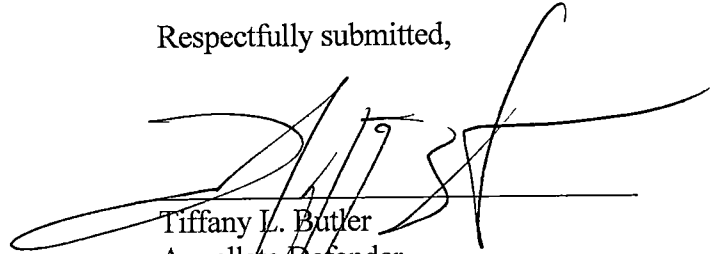
Because the bond forfeiture did not count as a conviction, it could not be used to enhance Petitioner's first offense trafficking in cocaine conviction for a second offense.

Had counsel properly argued the law before the trial judge, the judge would not have incorrectly enhanced Petitioner's trafficking in cocaine charge to a second offense. Petitioner would have been exposed to a minimum term of three years and a maximum term of ten years' imprisonment for a first offense. See S.C. Code Ann. § 44-53-370(e)(2)(a)(1). Instead, Petitioner was exposed to a minimum term of five years and a maximum term of thirty years' imprisonment, and was unfairly sentenced to thirteen years in prison. See S.C. Code Ann. § 44-53-370(e)(2)(a)(2).

CONCLUSION

For the reasons argued above, Petitioner Lorenzo Nicholson respectfully requests this Court to grant his petition for writ of certiorari with the ultimate relief of a new sentencing hearing.

Respectfully submitted,

A large, stylized handwritten signature in black ink, appearing to read 'T. Butler', is written over a horizontal line.

Tiffany L. Butler
Appellate Defender

ATTORNEY FOR PETITIONER

This 14th day of December, 2015.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Greenville County

Edward W. Miller, Circuit Court Judge

LORENZO R. NICHOLSON

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

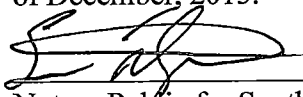
I certify that a true copy of the petition for writ of certiorari and a copy of the appendix in this case have been served on Karen Ratigan, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Mr. Lorenzo R. Nicholson #273996, at Kershaw Correctional Institution, 4848 Gold Mine Highway, Kershaw, SC 29067-8069, this 14th day of December, 2015.



Tiffany L. Butler
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 14th day
of December, 2015.



(L.S.)
Notary Public for South Carolina

My Commission Expires: October 30, 2022.