ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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SC SUPREME COURT

Certiorari to Fairfield County

William Jeffrey Young, Circuit Court Judge

WILLIE J. ADAMS,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-002165

BRIEF OF PETITIONER

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ISSUE PRESENTED

In this murder case, did the PCR judge err in refusing to find trial counsel ineffective for failing to timely object to testimony in regard to drugs and specific drug amounts found at the scene of the fatal shooting when 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?

STATEMENT

In June of 2008, the Fairfield County Grand Jury indicted Adams for murder, indictment #2008-GS-20-245. On December 7, 2009, Adams proceeded to jury trial before the Honorable Howard P. King. William P. Frick represented Adams at trial. Douglas A. Barfield and Riley Maxwell prosecuted the case. The jury returned a verdict of guilty and Judge King sentenced Adams to 40 years. The direct appeal was perfected and on January 4, 2012, the South Carolina Court of Appeals affirmed the sentence and conviction. State v. Adams, Op. No. 2012-UP-006 (S.C. Ct.App. January 4, 2012).

On October 15, 2012, Adams filed an application for post conviction relief. The State filed a return on December 11, 2013. On July 29, 2014, an evidentiary hearing was held before the Honorable W. Jeffrey Young. Ernest M. Spong, III, represented Adams at the PCR hearing. Croom Hunter of the South Carolina Attorney General's Office represented the State. In a written order signed August 28, 2014, Judge Young denied relief and dismissed the application. A timely notice of intent to appeal was served on October 10, 2014. The petition for writ of certiorari was filed on March 2, 2015. The return was filed on July 20, 2015. On November 19, 2015, this Court granted the petition for writ of certiorari. This brief of petitioner follows.

ARGUMENT

In this murder case, the PCR judge erred in refusing to find trial counsel ineffective for failing to timely object to testimony in regard to drugs and specific drug amounts found at the scene of the fatal shooting when 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 PCR judge, contrary to the finding by the South Carolina Court of Appeals on direct appeal, found that trial counsel properly objected to testimony in regard to drugs and specific drug amounts. (App. pp. 1006-1007). The trial judge initially ruled that the drug testimony was admissible as a common scheme or plan. (App. p. 110, lines 10-19). Trial counsel objected. (App. p. 11-, lines 2-5). Trial counsel, however, failed to object when Investigator Jeff Talbert and Officer Brad Douglas with the Fairfiled County Sheriff's Department and Michael Greene with SLED testified about the drugs found at the scene of the shooting. When trial counsel later renewed his objection to the drug testimony, the judge changed his ruling and found that that the drug testimony was admissible to show motive. (App. pp. 225-235). Trial counsel objected. (App. p. 233, lines 9-11). Trial counsel, however, failed to object when Officer Travis Peterson, Investigator Jeremy Ashford and Angil Landrum the SLED chemist testified about the drugs found at the scene of the shooting. Both Officer Peterson and the chemist testified about specific drug weights. The PCR judge erred in finding that trial counsel properly objected to the drug testimony. Trial counsel was deficient for not contemporaneously objecting to the drug testimony. Petitioner was prejudiced by the deficient performance.

Prior to trial the State sought a ruling on the admissibility of evidence of drugs found at the scene of the fatal shooting. (App. pp. 98-100). The State told the judge, "Adams [appellant],

Jackson and Lawhorn are defendants[1] charged with murder in the case. This happened in Lawhorn's house. The State is going to offer some evidence or intend to offer some evidence from witnesses that the night before this the victim stole some dope and the gun that was used to kill the victim from the premises where the incident occurred the next day." (App. p. 98, lines 10-17). After the shooting the police found quantities of crack and powder cocaine in the woods around Lawhorn's house. The State argued, "Necessarily I think from my perspective and the presentation of my case I've got to have evidence of this whole drug scenario before the jury. That's part of the res gestae of this whole event. That's what it is all about. It provides a motive and it is also part of the ongoing events that led to Mr. Miller's death." (App. p. 99, lines 17-23).

Counsel for Adams objected, arguing that the drug evidence was more prejudicial than probative because the State was unable to prove that the drugs belonged to Adams. (App. pp. 100 – 103). The judge ruled, "I'm not going to rule on the motive issue because the State doesn't have to prove motive. But I do think that it is relevant from the standpoint of identity and also is relevant from the standpoint of the existence of a common scheme or plan. And I think it's also relevant from the standpoint of the absence of mistake or accident. The Court is not making a finding with regard to the identity issue or the intent issue." (App. p. 109, lines 14-23). The judge made his ruling without the benefit of testimony. Adams objected to the evidence arguing that the drug evidence was not a common scheme or plan in regard to the murder. (App. p. 110, lines 2-5). The judge found that there was a common scheme or plan because there was more than one defendant. (App. p. 110, lines 10-19).

[1] Appellant was not tried with his co-defendants. Jackson pled guilty to voluntary manslaughter in exchange for a twenty year sentence. The disposition of Lawhorn's charge is unknown.

Jeff Talbert, an investigator with the Fairfield County Sheriff's Department and Brad Douglas, a narcotics officer with the Fairfield County Sheriff's Department, testified generally about drugs being found at the scene of the shooting. (App. p. 194, lines 4-8; p. 199, lines 9-14). Michael Greene with SLED testified about finding what appeared to be a large quantity of cocaine at the scene of the shooting. (App. pp. 210-217). Trial counsel failed to object when these officers testified about the drugs found at the scene. In order to preserve the motion to exclude this evidence, counsel should have objected at the time the testimony was offered. Trial counsel was deficient for failing to object to the drug testimony from these officers.

On the second day of trial, Adams renewed his objection to the drug evidence arguing that it did not constitute a common scheme or plan. (App. p. 225, lines 13-24). The trial judge noted, "Well, Mr. Frick, it's kind of hard for me to go back and undo something that's already been done and the testimony has already been done on it. And that wasn't pointed out to me yesterday in arguments when I asked the court about it at that time, when I asked you about it at that time. I mean - -" (App. p. 225, line 25 – p. 226, lines 1-6). Trial counsel responded, "Your Honor, in all due respect, I didn't have my case law with me, but I did ask what common scheme or plan." (App. p. 226, lines 7-9). The judge stated, "Well, that's true. You did. But, I mean, what can I do about it now?" (App. p. 226, lines 10-11). Trial counsel responded, "You could strike it and give the jury a curative instruction." (App. p. 226, lines 12-13). After hearing arguments from both sides, the judge found the evidence was admissible to show motive and the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice. (App. pp 225 -235; p. 232, lines 9-14). Adams objected to the admission of the evidence to show motive. (App. p. 233, lines 9-11). The judge stated, "Okay. All right. I think both of you got your positions on the record. All

right. Bring the jury in, please." (App. p. 235, lines 7-9). The State then called the next witness, Barkley Ramsey, a Fairfield County Coroner. (App. p. 236, lines 13-24).

Later in the trial the State called as a witness Travis Petersen who, at the time of the shooting, worked with the Fairfield County Sheriff's Department in the narcotics unit. Petersen testified at trial that he assisted in the execution of a search warrant at Lawhorn's house after the shooting. (App. pp. 420-421). Petersen testified that they found 43 grams of cocaine base and 394 grams of cocaine powder at the location. (App. p. 425, lines 11-14). Trial counsel failed to object to Peterson's testimony. Trial counsel was deficient in failing to object to Petersen's testimony.

Investigator Jeremy Ashford testified as to the chain of custody for the drugs found at the scene. (App. pp. 435-441). Angil Landrum, a SLED chemist, testified that she tested items submitted to her by the Fairfield County Sheriff's Department. The results of her tests revealed 41.81 grams of cocaine base, 106.48 grams of cocaine in one bag and an additional 269 grams of cocaine in another bag. (App. p. 450, lines 4-13). The analysis and the drugs were marked for identification as State's exhibits #73 and #74 but were not admitted in evidence. (App. p 450, lines 14-21). Trial counsel failed to object to both the testimony of the chain witness and the testimony of the chemist. Trial counsel was deficient for failing to object to the drug testimony from these officers.

At the conclusion of Landrum's testimony, the judge sent the jury home for the night. The judge then, outside of the presence of the jury, stated that he had concerns about admission of the drug evidence. The judge said:

> With regard to this evidence of the drugs, I earlier ruled that it would go to prove motive. My concern is that in the weighing process of the 403, probative value versus prejudicial effect, I came down on the side of probative value.

> We've gotten awful close, if not crossed the line of where it exceeds the probative value where you are trying to introduce a quantity of drugs and the drug reports, that is more than just saying that drugs were involved in this case. That's what I thought the testimony was going to be or that's what the State's purpose of getting into the matter regarding drugs.
>
> We're almost getting into the point now where a drug case to show the amount of drugs, the weight of the drugs, introduce the drugs themselves. And I'm having some second thoughts about the prejudicial effect in view of that.
>
> The defense could have very easily been lured into not objecting to that, to the testimony regarding that by my previous ruling to the effect that I would allow testimony with regard to drugs.
>
> But very likely, Mr. Maxwell, and Mr. Barfield, I think it's overkill as to what you're trying to show for under 404(b). I'll be glad to hear from you.

(App. p. 454, lines 9 – p. 455, lines 1-10). The judge also said, "And the other thing of course that really troubles me at this point, too, is the fact there has been no link of these drugs whatsoever to the defendant." (App. p. 455, lines 15-18). The State argued that the judge needed to hear additional testimony. (App. p. 455, lines 22-25). After hearing arguments, the judge withheld ruling. (App. pp. 456 – 458).

The next morning the judge decided to hear testimony outside the presence of the jury in order to determine if the drug evidence was admissible to show motive. (App. pp. 460 – 553). At the close of the in camera testimony, the State elected not to move to admit the drugs and the analysis marked as State's exhibits for identification #73 and #74. (App. p. 555, lines 10- p. 556, lines 1-10). Counsel for Adams argued that the drug evidence testimony already heard by the jury was irrelevant and moved for a mistrial. (App. p. 557, lines 1-21). Counsel also argued that the testimony about the large quantity of drugs was more prejudicial than probative. (App. p. 559, lines 8 – p. 560, lines 1-20). The argument, however, was made too late because trial counsel failed to

contemporaneously object to the testimony of Peterson, Ashford and Landrum in regard to the drug evidence and specifically the weights of the drugs.

The judge found that the testimony in regard to the drugs was relevant "because it does go as to the location of where this crime took place and the relationship of the parties, including the victim and the defendant." (App. p. 569, lines 4-7). The judge also found that the evidence of drugs found at the scene was admissible to show motive and intent. (App. p. 569, lines 8-25). The judge found that the probative value of the evidence was not substantially outweighed by the prejudicial effect. (App. p. 570, lines 1-11). Lastly, the judge found that the evidence was admissible as *res gestae*. (App. p. 570, lines 12-15).

The judge, however, found that the chemist's testimony in regard to the drug weight was more prejudicial than probative. (App. p. 571, lines 23 – p. 572, lines 1-7). The judge stated, "However, we've got to go that step further with regard to the testimony of Angil Landrum, specifically her testimony with regard to exhibits 73 and 74 which are not being admitted, but she testified as to the weight of those drugs. And it is my view that that testimony, the probative value is outweighed by the danger of unfair prejudice, ask that testimony is going to be stricken and the jury would be so instructed and told to disregard that testimony." (App. p. 571, lines 23 – p. 572, lines 1-7). The judge denied the motion for a mistrial. (App. p. 572, lines 8-13). Trial counsel noted his objection. (App. p. 572, lines 24-25).

On direct appeal Adams challenged the trial judge's ruling in allowing the State to introduce evidence of additional drug quantities found at the scene of the shooting as exceptions under Rule 404(b) showing motive and intent when the State failed to connect those additional drug quantities to the defendant and the probative value of that drug evidence was substantially outweighed by the

prejudicial effect. The South Carolina Court of Appeals affirmed finding the issue was not preserved and writing:

> Willie James Adams, Jr. appeals his conviction for murder, arguing the trial court erred in admitting testimony regarding quantities of cocaine and cocaine base found at the murder scene. We affirm pursuant to Rule 220(b)(1), SCACR, and the following authorities: State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 693 (2003) (stating for an issue to be properly preserved for appellate review, the issue must have been raised to and ruled upon by the trial court); State v. Simpson, 325 S.C. 37, 42, 479 S.E.2d 57, 60 (1996) ("Unless an objection is made at the time the evidence is offered and a final ruling made, the issue is not preserved for review."); State v. Moultrie, 316 S.C. 547, 555-56, 451 S.E.2d 34, 39 (Ct. App. 1994) ("[A] 'failure to contemporaneously object' to the introduction of evidence claimed to be prejudicial 'cannot be later bootstrapped by a motion for a mistrial.'" (quoting State v. Lynn, 277 S.C. 222, 226, 284 S.E.2d 786, 789 (1981))).

State v. Adams, Op. No. 2012-UP-006 (S.C. Ct.App. January 4, 2012).

The issue raised at post conviction relief was ineffective assistance of trial counsel for failure to properly preserve objections for appellate review. In the order of dismissal the PCR judge wrote:

> This Court finds further that Counsel strenuously objected, throughout the course of the trial, to admission of the contested drug evidence. This Court finds Counsel attempted to stop the admission of the drug evidence through a pretrial hearing and through contemporaneous objections to the evidence throughout the trial. This Court notes Counsel moved for a mistrial. This Court finds Counsel's belief that the issue was properly preserved for appellate review was reasonable, especially considering the trial court's comment to counsel, " Okay. All right. I think both of you got your positions on the record." (Trial Transcript p. 235, lines 7-8). This Court further notes that Counsel objected to the admission of the drugs multiple times throughout the course of the trial, even after the trial judge commented that he believed Counsel's objection was protected on the record. This Court notes that the trial court finally decided to admit the drugs[2] only after an extended proffer by the State and further arguments from both sides on the issue. (Trial Transcript pp. 464-576).

(App. pp. 1006-1007). The PCR judge erred.

[2] The drugs were not admitted in evidence.

Trial counsel was ineffective in failing to object when Landrum and Petersen testified about specific drug quantities found at the scene of the shooting. The motion for a mistrial and objection for failure to grant the mistrial came too late as there was no objection when Landrum or Petersen testified about drug weights. While the trial judge instructed the jury to disregard Landrum's testimony in regard to the drugs found at the location (App. p. 576, lines 10-18), the judge failed to instruct the jury to disregard the testimony of Travis Petersen who testified that officers found 43 grams of cocaine base and 394 grams of cocaine powder at the location of the shooting. (App. p. 425, lines 11-14). If trial counsel had timely objected to the testimony of Landrum and Petersen, based upon the judge's ruling that the probative value of Landrum's testimony was outweighed by the danger of unfair prejudice, there is a reasonable probability that the judge would have excluded the testimony from both Petersen and Landrum in regard to specific drug amounts. If the judge had not excluded the testimony but the objection had been made timely, the issue would have been preserved for appellate review.

When the trial judge told both sides that their positions were on the record (App. p. 235, lines 7-9), the judge was simply noting that trial counsel's objection to the ruling that the drug evidence was admissible to show motive. (App. p. 233, lines 9-11). Trial counsel was still required to contemporaneously object when drug testimony was offered. Later in the trial when the testimony went beyond general drug testimony and went into specific amounts, counsel was again required to contemporaneously object to the testimony in regard to specific drug amounts. Specific drug amounts do not show motive and any probative value of that testimony is outweighed by the prejudicial impact.

A criminal defendant is guaranteed the right to effective assistance of counsel under the Sixth Amendment to the United States Constitution. U.S. Const. amend. VI; Strickland v.

Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). To establish a claim of ineffective assistance of trial counsel, a PCR applicant must show that: (1) counsel's representation fell below an objective standard of reasonableness and, (2) but for counsel's errors, there is a reasonable probability the result at trial would have been different. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997). 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.

Counsel was ineffective in failing to contemporaneously object when witnesses testified about drugs found at the scene of the crime. The testimony was irrelevant. The drugs found on Lawhorn's property, with no connection to Petitioner, do not make the State's theory that Miller was shot for taking Petitioner's drugs more probable. If counsel had timely objected to the drug evidence, Petitioner could have challenged on direct appeal the trial judge's ruling that the drug evidence was admissible to show motive pursuant to Rule 404(b), SCRE. This is especially important given the fact that the State failed to link Petitioner to the drugs found on co-defendant

Lawhorn's property after the shooting. The judge noted that there had been no link of these drugs whatsoever to the defendant. (App. p. 455, lines 15-18). The State failed to present evidence that Lawhorn and Petitioner were partners in the drug trade. In fact, the State argued that the evidence and testimony indicated that the large quantities of drugs found on Lawhorn's property belonged to Lawhorn and not Adams. (App. p. 562, lines 6-25). The drug evidence did not meet an exception under Rule 404(b) because the evidence failed to prove motive on the part of Petitioner.

Additionally, counsel was ineffective in failing to object when two witnesses, Petersen and Landrum, testified as to specific amounts of drugs found at the scene. Testimony about specific drug amounts does not show motive, as the judge correctly ruled when he struck the chemist, Landrum's testimony. Neither the drug location testimony nor the specific drug amount testimony was part of the *res gestae* of the shooting. While testimony that Petitioner believed that Miller may have stolen his drugs may have been admissible, testimony about additional quantities of drugs found after the shooting were not an integral part of the shooting.

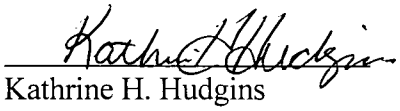
Petitioner was prejudiced by the deficient performance. The State failed to present overwhelming evidence of guilt against Petitioner. The prosecutor admitted in opening statement that he was unable to say who fired the fatal shot. (App. p. 126, lines 3-16). Lawhorn testified that after Miller was confronted, Petitioner put the gun on the ground and Jackson "Boo" picked it up and put the gun in his back pocket. (App. p. 832, lines 1- p. 833, lines 1-9). Lawhorn testified that Boo and Miller argued, Miller ran away, Petitioner threw a four by four at Miller and then Boo ran behind Miller. (App. p. 834, lines 4-25). Lawhorn did not see "Boo" shoot Miller but stated that he could see Petitioner and when he heard the shots he assumed "Boo" shot Miller because "Boo" was the last one with the gun. (App. p. 834, line 7 – p. 835, lines 1-8). Petitioner and "Boo" Jackson were the only witnesses to the fatal shooting. In his

statement to police, Petitioner said that "Boo" Jackson, shot and killed Alpha Lee Miller, "Amp." (App. pp. 608 – 610). "Boo" Jackson testified that Petitioner shot Miller. (App. p. 786, lines 10 – p. 787, lines 1-7). Trial counsel was ineffective in failing to timely object to testimony in regard to drugs and specific drug amounts found at the scene after the fatal shooting when the testimony was irrelevant, Petitioner was not charged with drug offenses, the State failed to connect the drugs to Petitioner, the testimony about the drugs and specific drug amounts did not show motive and was not part of the *res gestae* of the shooting and the probative value of the extensive drug and specific drug amount testimony was substantially outweighed by the prejudicial effect.

CONCLUSION

Based on the above argument, Petitioner's conviction and sentence should be reversed and the case remanded for a new trial.

Respectfully submitted,



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER.

This 22nd day of February, 2016

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Fairfield County

William Jeffrey Young, Circuit Court Judge

WILLIE J. ADAMS,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-002165

CERTIFICATE OF SERVICE

I certify that a true copy of the brief of petitioner, in this case has been served on J. Croom Hunter, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 this 22nd day of February, 2016.

Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 22nd day
of February, 2016.

_____(L.S.)
Notary Public for South Carolina
My Commission Expires: July 3, 2023.