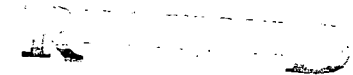


 ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT



MAR 18 2016

SC SUPREME COURT

Certiorari to Spartanburg County

R. Scott Sprouse, Circuit Court Judge

WILBUR SUMMERS,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-001864

PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Did the PCR judge err by finding trial counsel provided effective representation where counsel failed to move for a directed verdict of acquittal and to argue that there was no direct or substantial circumstantial evidence that Petitioner was knowingly in actual or constructive possession of the marijuana seized from inside the pottery in the tractor-trailer?

STATEMENT OF FACTS

Petitioner told agents that he was originally from Mexico. App. 268 – 69. While at the restaurant, Petitioner met an unknown person from Mexico who wanted Petitioner to open a pottery business on his behalf. App. 268 – 69. The unknown individual paid Petitioner \$2,000 to start the business. App. 268 – 69. Petitioner explained to agents that the shipment was the first shipment that he had received for the business. App. 268 – 69. He also stated that he was surprised at how large the shipment was when it arrived. App. 268 – 69.

According to the State, on November 11, 2005, a tractor-trailer truck loaded with “over a thousand” clay pots and ceramic goods traveled across the Mexican and United States borders into Laredo, Texas. App. 108 – 109. During a routine inspection, agents working for Immigration and Customs Enforcement (ICE) discovered marijuana concealed inside several clay pots. App. 109-10. According to the bill of lading, the pottery was to be delivered to Petitioner at an address in Spartanburg County, South Carolina. App. 119.

ICE agents took control of the tractor-trailer truck and accompanied it to Spartanburg as a controlled delivery, with undercover agents as the driver and passenger of the truck. App. 154. After a two-day drive, the undercover agents arrived in Spartanburg to complete the delivery. 156 – 157. The agents drove the truck to Nacho’s restaurant. App. 156 – 57. Petitioner arrived at the restaurant shortly thereafter and signed for the shipment. App. 157. Agents recalled that Petitioner seemed “genuinely excited” about the arrival of his shipment. App. 159.

Petitioner and five or six other individuals unloaded some of the potters from the tractor-trailer onto a Budget rental truck and van, which were used to transport the pottery to a separate storage facility approximately one mile away from the restaurant. App. 218. Petitioner rented the storage facility. App. 202.

After Petitioner and the other individuals placed the pottery into the storage facility, they returned to the restaurant to unload more pots from the tractor trailer. App. 242 – 44. While enroute to the storage facility a second-time, Petitioner and the individuals who were assisting with the delivery were stopped by ICE agents and arrested. App. 244. There was no marijuana found in the pots which had already been put inside of the rented storage facility. App. 244. Marijuana was only seized from the clay pots which were still inside the tractor-trailer. App. 209. Further, the pots which contained the marijuana were on the bottom level and toward the back of the trailer. App. 209. Agents seized 2,267 pounds of marijuana with a value between \$1.3 and \$1.7 million dollars. App. 278.

On February 23, 2006, Petitioner was indicted for trafficking in more than 2000 pounds of marijuana. App. 562. On November 14, 2007, Petitioner's case proceeded to a jury trial before the Honorable Lee S. Alford. App. 1. George Paul Trejo, Jr. and Patricia Anderson represented Petitioner. App. 1. Derrick Bulsa and Sarah Ganss represented the State. App. 1.

After the state rested its case-in-chief, trial counsel Trejo made a motion to dismiss based upon insufficient evidence. App. 305. Specifically, counsel argued:

“So --- so, we're making out motion to dismiss based upon insufficient evidence, the --- the lack of knowledge element in this particular case. And we feel that that has been proven.”

App. 305, ll. 13 – 16. The trial judge denied counsel's motion. App. 306, ll. 20 – 21. Petitioner chose to put the State to its burden and did not offer a defense. App. 310.

The jury found Petitioner guilty as charged. App. 388, l. 22 – App. 389, l. 2. The judge sentenced Petitioner to twenty-five years' imprisonment and a fifty-thousand dollar fine. App. 396. Petitioner appealed his conviction and sentence.

On March 10, 2009, the South Carolina Court of Appeals affirmed Petitioner's conviction and sentence in an unpublished opinion. See State v. Summers, Op. No. 2009-UP-138 (S.C. Ct. App. filed March 10, 2009). Petitioner was represented by appellate defender LaNelle Cantey DuRant. App. 432. No directed verdict argument was made on appeal.¹ App. 398. Trial counsel failed to move for a directed verdict of acquittal at trial. App. 305.

On March 25, 2009, Petitioner filed a petition for rehearing. App. 434. On May 4, 2009, the Court of Appeals issued an order denying the petition for rehearing. App. 438. Petitioner then filed a petition for writ of certiorari in this Court on June 3, 2009. App. 453. This Court issued an order denying the petition on January 22, 2010. App. 472.

Petitioner filed a PCR application on December 9, 2010. App. 473. Respondent filed its return on February 14, 2012 requesting an evidentiary hearing. App. 511. An evidentiary hearing was held on June 12, 2015, before the Honorable R. Scott Sprouse. App. 522. Kenneth Philip Shabel represented Petitioner. Suzanne H. White represented the State. App. 522.

Trial counsel Patricia Anderson testified during the hearing. Counsel Anderson explained that George Trejo represented Petitioner at trial. App. 529. Counsel Trejo was from Washington State and was admitted to practice *pro hac vice* in South Carolina. App. 528. Anderson assisted Trejo with completing the required paperwork to be admitted *pro hac vice* and sat as his second-chair at Petitioner's trial. App. 528.

Anderson explained that Petitioner's first jury trial resulted in a hung jury. App. 529. However, Trejo's performance during the second jury trial was far below that of the first trial. App. 535 – 536. Counsel Trejo was not there to testify at the hearing.

¹ We ask this Court to take judicial notice that appellate counsel argued that the trial court erred by charging the jury on conspiracy to distribute drugs when the evidence did not support the conspiracy charge.

Petitioner explained that he was not satisfied with Trejo's performance during his second trial. App. 541 – 42. Petitioner stated that counsel did not do a good job. App. 543. Petitioner also stated that he was not pleased with the motion counsel made at the end of the State's case. App. 543, ll. 4 – 11.

On July 22, 2015, Judge Sprouse issued an order of dismissal denying Petitioner's application. App. 555. The PCR judge wrote that Petitioner had "wholly failed to prove that Counsel's performance was deficient and that he was prejudiced by the result." App. 559.

Petitioner appealed the order of dismissal. This petition for writ of certiorari follows.

ARGUMENT

The PCR judge erred by finding trial counsel provided effective representation where counsel failed to move for a directed verdict of acquittal and to argue that there was no direct or substantial circumstantial evidence that Petitioner was knowingly in actual or constructive possession of the marijuana seized from inside the pottery in the tractor-trailer.

In State v. Hernandez, 382 S.C. 620, 677 S.E.2d 603 (2009), a case with similar facts, this Court found that the State did not present direct or substantial circumstantial evidence to support the defendants' conviction for trafficking in marijuana. In Hernandez, federal officials in Laredo, Texas stopped and searched a tractor-trailer truck entering the United States from Mexico. Id. at 622, 677 S.E.2d at 604. The officials discovered 900 pounds of marijuana which was concealed inside a shipment of wooden furniture destined for Trenton, South Carolina. Id. The shipment was seized by the officials, the truck driver was replaced with an undercover agent, and the truck was accompanied to South Carolina by agents for a "controlled delivery." Id.

When the tractor-trailer arrived at the furniture store, the owner of the store and two other individuals driving a Ford Thunderbird unloaded several pieces of furniture from the truck. Id. The undercover truck driver was then directed to deliver the rest of the furniture to another store in Trenton. Id. at 623, 677 S.E.2d at 604.

While at the second store, the undercover agents observed the same Ford Thunderbird drive past the store. Id. The Thunderbird reappeared minutes later accompanied by a Ryder moving truck driven by the defendants. Id. The two men inside the Thunderbird directed the undercover drivers to follow their car and the Ryder truck to another location. Id. While the caravan was enroute to the third location, the undercover agents arrested the defendants and charged them with trafficking in marijuana. Id.

At trial, the State presented two receipts which indicated the defendants traveled to Trenton and rented the Ryder truck. Id. at 624, 677 S.E.2d at 605. The State also presented testimony from an undercover agent that the defendants were having a conversation with the driver of the Thunderbird before the three vehicles began traveling to a third location. Id.

This Court held that the evidence presented at trial “does not constitute substantial and circumstantial evidence of knowledge.” Id. at 625, 677 S.E.2d at 605. This Court further held that the State failed to present evidence that the defendants had knowledge of the contents of the tractor-trailer. Id. This Court wrote:

“[W]e find that the conclusion that Petitioners knew the Thunderbird occupants and therefore had knowledge of the drugs in the tractor trailer is mere speculation. Additionally, the State points to the testimony of the federal agents to support the inference that Petitioners had knowledge of the drugs. We find, however, that while these testimonies may support such an inference, this evidence alone does not constitute substantial circumstantial evidence that Petitioners had knowledge.”

Id. at 625, 677 S.E.2d at 605. This Court reversed the Petitioners’ convictions and sentences.

The Charge

To prove that Petitioner is guilty of trafficking in marijuana, the State must show that Petitioner “knowingly sells, manufactures, cultivates, delivers, purchases, or brings into this State, or who provides financial assistance or otherwise aids, abets, attempts, or conspires to sell, manufacture, cultivate, deliver, purchase, or bring into this State, or who is **knowingly in actual or constructive possession** or who knowingly attempts to become in actual or constructive possession of” two thousand pounds or more, but less than ten thousand pounds of marijuana. S.C. Code Ann. § 44-53-370 (e)(1)(c) (1976) (emphasis added).

Actual possession occurs “when the drugs are found to be in the actual physical custody of the person charged with possession.” State v. Ballenger, 322 S.C. 196,199, 470 S.E.2d 851, 854 (1996). Constructive possession occurs “when the person charged with possession has dominion and control over either the drugs or the premises upon which the drugs are found.” State v. Lane, 271 S.C. 68, 73, 245 S.E.2d 114, 116 (1978); State v. Ellis, 263 S.C. 12, 22, 207 S.E.2d 408, 413 (1974). However, the State must show the person charged had intent to control the drug’s disposition and use. Lane, 271 S.C. at 73, 245 S.E.2d at 116-17. Further, knowledge of the presence of the drugs “is such strong evidence of intent to control disposition or use.” Id.

Discussion

Trial counsel was ineffective for failing to properly move for a directed verdict of acquittal in Petitioner’s case. Counsel failed to argue that there was no direct or substantial circumstantial evidence presented by the state that Petitioner was knowingly in possession of the marijuana agents seized from the clay pots inside the tractor-trailer. Because the State did not prove Petitioner had knowledge of the marijuana, which was an essential element of the offense, Petitioner was entitled to a directed verdict of acquittal.

A criminal defendant is entitled to a directed verdict when the State fails to present evidence of the offense charged. State v. McCombs, 368 S.C. 489, 493, 629 S.E.2d 361, 362-63 (2006); State v. Cherry, 361 S.C. 588, 593, 606 S.E.2d 475, 478 (2004); State v. McHoney, 344 S.C. 85, 97, 544 S.E.2d 30, 36 (2001). When reviewing the trial judge’s denial of a directed verdict, an appellate court must review the evidence presented at trial in the light most favorable to the State. State v. Weston, 367 S.C. 279, 292, 625 S.E.2d 641, 648 (2006); State v. Buckmon, 347 S.C. 316, 321, 555 S.E.2d 402, 404 (2001).

Where the State relies “exclusively” on circumstantial evidence, such evidence must be “substantial” before the judge submits the case to a jury. State v. Mitchell, 341 S.C. 406, 409, 535 S.E.2d 126, 127 (2001). When the evidence merely raises a suspicion that the defendant is guilty, the trial judge should grant a directed verdict motion. State v. Lollis, 343 S.C. 580, 584, 541 S.E.2d 254, 256 (2001).

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 Trejo was ineffective for failing to properly move for a directed verdict of acquittal. Trejo made a motion to dismiss the State's case after the state rested. However, Trejo failed to move for a directed verdict of acquittal and state the precise grounds for his motion. Trejo failed to argue on the record that the State failed to present any direct or substantial circumstantial evidence that proved Petitioner had actual or constructive possession of the marijuana.

The only evidence the State presented was the fact that Petitioner's name and address were on the bill of lading as the point of delivery. Although Petitioner did sign the bill of lading when the undercover ICE agents arrived in Spartanburg and loaded a large amount of clay pots into the storage facility that he rented, no marijuana was found in the facility. No marijuana was found in either vehicle Petitioner and his helpers drove to transport the clay pots from the tractor-trailer to the storage unit. No marijuana was found inside the restaurant or at Petitioner's home. See App. 244 – 46.

There was testimony that Petitioner appeared "genuinely excited" to get the pottery. However, there was no evidence of nervousness or any indication that Petitioner was engaged in illegal drug activity. In fact, Petitioner told agents after his arrest that he was expecting a shipment of pottery and someone he met from Mexico paid him to start a pottery business.

The evidence presented against Petitioner merely raised a suspicion of Petitioner's guilt. See Hernandez, 382 S.C. at 625, 677 S.E.2d at 605 ("Although Petitioners' actions may have been suspicious, mere suspicion is insufficient to support the verdict."). While Petitioner did sign for the pottery and began transporting them from the tractor-trailer to his storage unit, there was no evidence presented that Petitioner knew the pots contained marijuana. There was no direct or substantial circumstantial evidence presented which proved Petitioner had the requisite knowledge

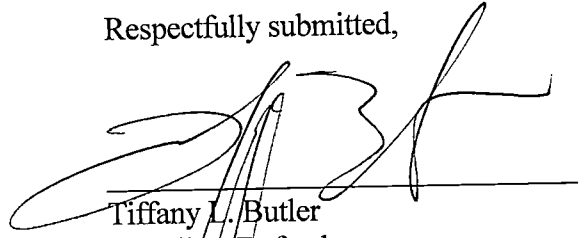
or intent to possess the marijuana. Like Hernandez, the evidence presented by the State was “mere speculation.” Id. at 625, 677 S.E.2d at 605.

Because attorney Trejo failed to properly move for a directed verdict of acquittal, the case was submitted to the jury. Had Trejo moved for a directed verdict of acquittal and made the proper argument in support of the motion, there is a reasonable probability that the trial judge would have granted it. Even if the trial judge had failed to grant counsel’s motion and direct a verdict of acquittal, Petitioner would have won on appeal and would not be serving twenty-five years in prison.

CONCLUSION

For the reasons argued above, Petitioner Wilbur Summers respectfully requests this Court to grant his petition for writ of certiorari with the ultimate relief of a new trial.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Tiffany L. Butler', written over a horizontal line.

Tiffany L. Butler
Appellate Defender

ATTORNEY FOR PETITIONER

This 18th day of March, 2016.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Spartanburg County
R. Scott Sprouse, Circuit Court Judge

WILBUR SUMMERS,

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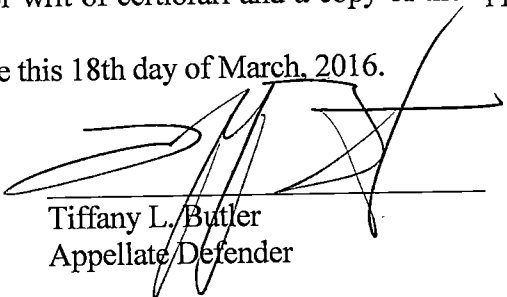
STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-001864

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 Alicia Olive, Esquire this 18th day of March, 2016.



Tiffany L. Butler
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 18th day
of March, 2016.

Christian Ford (L.S.)
Notary Public for South Carolina
My Commission Expires: _.