STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

The Honorable G. Edward Welmaker, Trial Judge
The Honorable Daniel D. Hall, Post-Conviction Relief Judge

Appellate Case No. 2015-001459

Travell Levone Hill, ... Respondent/Petitioner,

v.

State of South Carolina, ... Petitioner/Respondent.

PETITIONER/RESPONDENT'S RETURN TO PETITION FOR WRIT OF CERTIORARI

ALAN WILSON
Attorney General

KAREN C. RATIGAN
Senior Assistant Attorney General
S.C. Bar # 68331

Post Office Box 11549
Columbia, S.C. 29211
(803) 734-3737

ATTORNEYS FOR PETITIONER/
RESPONDENT

TABLE OF CONTENTS

QUESTIONS PRESENTED

1. Did the Post Conviction Relief Judge err in failing to find trial counsel was ineffective when trial counsel did not cross-examine Tyra Rogers, who testified for the State, as to the possible sentence she was facing?

2. Did the Post Conviction Relief Judge err in not granting the petition for Post Conviction Relief when the State failed to inform the trial attorney for [Respondent/Petitioner] that Tyra Rogers had a deal with the State to receive a probationary sentence in exchange for her testimony?

3. Did the Post Conviction Relief Judge err in failing to find that trial counsel was ineffective in his failure to object to the charge by the trial judge "[Respondent/Petitioner]'s knowledge and possession may be inferred when a substance is found on the property under [Respondent/Petitioner]'s control" as the charge is not supported by the case law of the State of South Carolina and is a comment on the facts in violation of Article V, § 21 of the Constitution of the State of South Carolina?

STATEMENT OF THE CASE

The Greenville County Grand Jury indicted Respondent/Petitioner, Travell Levone Hill (hereinafter "Hill"), at the October 2008 term for trafficking cocaine (2008-GS-23-6996). (App.pp.316-18). Christopher T. Posey, Esquire represented Hill.

After the State called the case to trial, Hill was found guilty. On March 31, 2010, the Honorable G. Edward Welmaker sentenced Hill to 27 years imprisonment. (App.p.181; p.315).

A notice of appeal was filed at the South Carolina Court of Appeals. Kathrine H. Hudgins, Esquire of the South Carolina Commission on Indigent Defense, Division of Appellate Defense perfected the appeal. (App.pp.183-97). The Court of Appeals affirmed Hill's conviction and sentence. State v. Hill, Op. No. 2013-UP-198 (S.C. Ct. App. filed May 15, 2013). (App.pp.235-36). The remittitur was sent on June 4, 2013.

Hill filed an application for post-conviction relief (PCR) on January 9, 2014 (2014-CP-23-0129) and later submitted an amended application dated February 13, 2015. (App.pp.237-43; pp.249-56). A hearing was held at the Greenville County Courthouse on February 18, 2015. (App.pp.257-85). Hill was present and represented by C. Rauch Wise, Esquire. Karen C. Ratigan, Esquire of the South Carolina Attorney General's Office represented the State. In an order filed March 19, 2015, the Honorable Daniel D. Hall granted post-conviction relief on a single issue.[1] (App.pp.288-98). After each party filed post-trial motions pursuant to Rule 59(e), SCRCP, Judge Hall filed a supplemental order on June 8, 2015 in which he denied relief on all other issues raised at the PCR hearing. (App.pp.299-301; pp.302-05; pp.306-08; pp.309-14).

[1] Petitioner/Respondent filed a notice of appeal from that order. The petition for writ of certiorari and return to petition for writ of certiorari have been filed.

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); Rule 71.1(e), SCRCP.

ARGUMENT

I. The PCR relief judge did not err in finding Hill failed to meet his burden of proving trial counsel's performance was deficient because he did not adequately cross-examine Tyra Rogers about the potential sentence she faced.

Hill argues trial counsel was ineffective because he did not attempt to impeach Rogers with her knowledge of the potential sentence she could receive. (Cert. Pet., pp.2-4). This allegation is without merit.

At the PCR hearing, Hill argued trial counsel was ineffective because "he failed to bring up the potential sentence that Tyra Rogers was facing and the pending charges that she was facing too." (App.p.266).

Trial counsel testified Rogers was originally going to be tried with Hill but that she instead became a State's witness a few days before trial. (App.pp.274-75). Trial counsel testified he did not ask Rogers about the possible sentence she could receive because he knew the trial judge was not receptive to those types of questions. Trial counsel testified "that was kind of knowing your judge and knowing not what questions he was going to allow you to ask." (App.pp.276-77). Trial counsel testified that, while he was aware he could have questioned

Rogers about her potential sentence, he said "that was the knowing your judge type situation," as he had seen this particular trial judge halt these types of questions before. (App.pp.279-80).

In denying Hill's application for post-conviction relief, the PCR judge found Hill "failed to meet his burden of proving trial counsel did not adequately cross-examine Tyra Rogers." The PCR judge found trial counsel "made a strategic decision not to ask Rogers about the potential sentence she faced." (App.pp.311-12).

For an applicant to be granted PCR as a result of ineffective assistance of trial 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). "[C]ounsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Id. at 690, 104 S. Ct. at 2066. 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) (citing Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984)).

The PCR judge did not err in finding Hill failed to meet his burden of proving trial counsel should have cross-examined Rogers about the possible sentence she could have received. Hill was driving a vehicle and Rogers was in the front passenger seat when police initiated a traffic stop. (App.pp.58-62). Police found more than 1187 grams of cocaine under the floor on the front passenger side of the vehicle. (App.p.73; pp.96-98; p.132). Rogers testified Hill

suggested they drive from Virginia to Georgia in a vehicle that had been rented for her. (App.pp.102-03). Once police found the cocaine in the vehicle, Rogers stated she and Hill were both arrested. (App.p.115). Trial counsel extensively questioned Rogers on cross-examination about the leniency she expected to receive from the State (on her pending trafficking charge) since she was not being jointly tried with Hill. (App.pp.117-20). Trial counsel explained during his PCR testimony that he did not further specifically ask Rogers about the sentence she might receive on her pending charge because his experience with this particular trial judge led him to believe the judge would not allow this line of questions. (App.pp.276-80). The PCR judge found trial counsel articulated a strategic reason that he did not ask Rogers about the sentence he faced. (App.pp.311-12). Where trial counsel articulates a valid reason for employing a certain strategy, such conduct should not be deemed ineffective assistance of counsel. Roseboro v. State, 317 S.C. 292, 294, 454 S.E.2d 312, 313 (1995); Stokes v. State, 308 S.C. 546, 548, 419 S.E.2d 778, 779 (1992). "Counsel's strategy will be reviewed under 'an objective standard of reasonableness.'" Huggler v. State, 360 S.C. 627, 633, 602 S.E.2d 753, 756 (2004) (citing Ingle v. State, 348 S.C. 467, 470, 560 S.E.2d 401, 402 (2002)). "Courts must be wary of second-guessing counsel's trial tactics." Whitehead v. State, 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992). "There is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case." Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 597 (2007). Trial counsel articulated a valid, strategic reason for not questioning Rogers about her potential sentence. Trial counsel testified this was a "know your judge" situation and he did not want to open a line of questioning of which he knew the trial judge would not approve. As such, counsel's decision should not be considered deficient.

Regardless, Hill also failed to meet his burden of proving he was prejudiced as a result of trial counsel's strategic decision. Hill cannot demonstrate he suffered any prejudice in this matter because it is purely speculative to argue the result of his trial would have been different if trial counsel had thoroughly questioned Rogers about the possible sentence she could receive on the charge she was facing. Trial counsel thoroughly cross-examined Rogers about the fact that more than a kilogram of cocaine was found under her feet on her side of the vehicle (a vehicle that had been rented for her use). The jury was well aware of Rogers' involvement in the events in question. The jury was aware Rogers had also been charged with trafficking in excess of 400 grams of cocaine – a situation made clear during trial counsel's cross-examination. (App.pp.118-19). It is speculative to opine the jury would have arrived at a different result in Hill's case merely because – in addition to numerous questions about her role in the events of Hill's case and the leniency she expected she would receive – trial counsel had specifically asked Rogers about the possible sentence she could receive. See Clark v. State, 315 S.C. 385, 434 S.E.2d 266 (1993) (holding pure conjecture as to what a witness's testimony would have been is not sufficient to show a reasonable probability the result at trial would have been different).

Accordingly, Hill failed to prove the first prong of the Strickland test – that trial counsel failed to render reasonably effective assistance under prevailing professional norms. Similarly, Hill also failed to prove the second prong of Strickland – that he was prejudiced by trial counsel's performance.

Hill failed to prove both prongs of the Strickland analysis. As he failed to meet his burden of proving ineffective assistance of trial counsel on this issue, the PCR judge did not err in denying the PCR application. See Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174

(2002) ("The burden of proof is on the applicant to prove his allegations by a preponderance of the evidence.").

II. Hill's allegation that the State failed to inform trial counsel of Rogers' plea agreement is not preserved for appellate review.

Hill argues the PCR judge erred in not granting relief because "the State failed to inform the trial attorney for Mr. Hill that Tyra Rogers had a deal with the State to receive a probationary sentence in exchange for her testimony." (Cert. Pet., p.4). This issue is not preserved for review by this Court.

The issue of whether the State somehow withheld the existence of Rogers' plea agreement was not both raised to the PCR judge and ruled upon in either the original or supplemental order. (App.pp.288-98; pp.309-14). See Staubes v. City of Folly Beach, 339 S.C. 406, 412, 529 S.E.2d 543, 546 (2000) ("It is well-settled that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial court to be preserved for appellate review."); see also Plyler v. State, 309 S.C. 408, 409, 424 S.E.2d 477, 478 (1992) (holding an issue is procedurally barred if it is not both raised to and ruled upon by the PCR judge) (citing Hyman v. State, 278 S.C. 501, 299 S.E.2d 330 (1983)). As this issue was not raised to and ruled upon by the PCR judge, it is not preserved for appellate review.

In the event that Hill believes he raised this issue at the PCR hearing, he should have – in his Rule 59(e), SCRCP – specifically noted this issue was not addressed. See Noisette v. Ismail, 304 S.C. 56, 58, 403 S.E.2d 122, 124 (1991) (holding that where a trial court does not explicitly rule on an argument raised, and appellant makes no Rule 59(e) motion to obtain a ruling, the appellate court may not address the issue). As Hill did not make this argument in his post-trial

motion, this issue is not preserved for review by this Court.

III. The PCR judge did not err in finding Hill failed to meet his burden of proving trial counsel's performance was deficient because he did not object to a jury charge.

Hill argues trial counsel was ineffective because he did not object to the jury charge that "[t]he Defendant's knowledge and possession may be inferred when a substance is found on the property under the Defendant's control." Hill argues this charge is not supported by case law and is a comment on the facts. (Cert. Pet., pp.8-12). This allegation is without merit.

At the PCR hearing, Hill argued trial counsel was ineffective because "he failed to object on the charge of the facts given by the trial judge, the violation of Article 5, Section 21." (App.p.264). Hill argued the trial judge instructed the jury that "[t]hey can draw an inference on other than the facts." (App.p.265).

Trial counsel testified he did not perceive there was a problem with the trial judge's jury charge for constructive possession. (App.p.276). Trial counsel testified "it's the standard charge." (App.p.276).

In denying Hill's application for post-conviction relief, the PCR judge found Hill "failed to meet his burden of proving trial counsel did not object to an alleged charge on the facts." The PCR judge found the jury charges for actual and constructive possession "contain[ed] proper statements of law and, as such, trial counsel was not deficient in not making an objection." (App.p.311).

The PCR judge did not err in finding Hill failed to meet his burden of proving trial counsel should have objected to the jury charge for possession. It was not incumbent upon trial counsel to have objected because it was a proper jury charge. A trial court has a duty to give a

requested instruction that correctly states the law applicable to the issues and is supported by the evidence. State v. Peer, 320 S.C. 546, 553, 466 S.E.2d 375, 380 (Ct. App. 1996). The law to be charged must be determined from the evidence presented at trial. State v. Knoten, 347 S.C. 296, 302, 555 S.E.2d 391, 394 (2001). Generally, a trial court is required to charge only the current and correct law of South Carolina. Sheppard v. State, 357 S.C. 646, 665, 594 S.E.2d 462, 472 (2004).

At Hill's trial, the trial judge gave the following jury instructions for actual and constructive possession:

> Actual possession means that the drug was in the actual physical custody of the Defendant. Constructive possession means the Defendant had dominion and control, or the right to exercise the dominion or control over either the drug itself or the property on which the drug was found. Mere presence at the scene where the drugs were found is not enough to prove possession. Actual knowledge of the presence of the drug is strong evidence of the Defendant's intent to control its disposition or use. The Defendant's knowledge and possession may be inferred when a substance is found on the property under the Defendant's control. However, this inference is simply an evidentiary fact to be taken into consideration by you along with the other evidence in the case and to be given the weight that you decide it should have.

(App.pp.166-67). At the time of Hill's trial, this was a proper recitation of the law concerning possession. This jury charge as a whole was most recently addressed by this Court in State v. Cheeks, 401 S.C. 322, 737 S.E.2d 480 (2013). The possession charge at issue in Cheeks was almost identical to the possession jury charge at Hill's trial. While this Court found the "strong evidence" section of the charge was improper, it did not take issue with the "knowledge and possession may be inferred when a substance is found on the property under the Defendant's control" section of the charge that Hill now complains of. See id. at 328-29, 737 S.E.2d at 484. The possession jury charge – including the language challenged by Hill – is, in fact, the same as

the suggested jury charge listed on the South Carolina Judicial Department website.[2] Further, this Court has long held that the constructive possession jury charge issued at Hill's trial was proper. In State v. Adams, 291 S.C. 132, 352 S.E.2d 483 (1987), for example, this Court held "[t]he proper charge on constructive possession is to instruct the jury that the defendant's knowledge and possession may be inferred if the substance is found on premises under his control." Id. at 135, 352 S.E.2d at 486. This holding has not been overruled and was most recently cited – with approval – by this Court in State v. Heath, 370 S.C. 326, 635 S.E.2d 18 (2006). Hill's argument that trial counsel should have objected to the trial judge's jury charge on possession is without merit.

Hill argues the "knowledge and possession may be inferred when a substance is found on the property under the Defendant's control" section of the possession jury charge in his case was is improper under the South Carolina Constitution. See S.C. Const., art. V, § 21 ("Judges shall not charge juries in respect to matters of fact, but shall declare the law."). The jury charge in Hill's case, however, was not a charge on the facts of the case. The trial judge did not draw any parallels to the facts in Hill's case and did not incorporate any specific facts from Hill's case into the jury charge. Rather, it was the most commonly-used jury charge on the law of actual and constructive possession in a drug trafficking case. As such, trial counsel did not err in not objecting to this jury charge.

Accordingly, Hill failed to prove the first prong of the Strickland test – that trial counsel failed to render reasonably effective assistance under prevailing professional norms. Similarly, Hill also failed to prove the second prong of Strickland – that he was prejudiced by trial

[2] http://www.sccourts.org/juryCharges/GSInstructions.2015.pdf, pp.189-90.

counsel's performance.

Hill failed to prove both prongs of the Strickland analysis. As he failed to meet his burden of proving ineffective assistance of trial counsel on this issue, the PCR judge did not err in denying the PCR application. See Frasier v. State, 351 S.C. at 389, 570 S.E.2d at 174.

CONCLUSION

For the foregoing reasons, Petitioner/Respondent submits this Court should deny Hill's Petition for Writ of Certiorari. However, if this Court grants certiorari, Petitioner/Respondent requests the opportunity to fully brief the issues discussed above.

Respectfully submitted,

ALAN WILSON
Attorney General

KAREN C. RATIGAN
Senior Assistant Attorney General
S.C. Bar # 68331

Post Office Box 11549
Columbia, S.C. 29211
(803) 734-3737

By: _____
ATTORNEYS FOR PETITIONER/RESPONDENT

May 18, 2016

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

The Honorable G. Edward Welmaker, Trial Judge
The Honorable Daniel D. Hall, Post-Conviction Relief Judge

Appellate Case No. 2015-001459

Travell Levone Hill, ... Respondent/Petitioner,

v.

State of South Carolina, ... Petitioner/Respondent.

CERTIFICATE OF SERVICE

I, Karen C. Ratigan, certify that I have today served the within Petitioner/Respondent's Return to Petition for Writ of Certiorari upon Respondent/Petitioner by depositing a copy of the same in the United States mail, postage prepaid, addressed to:

C. Rauch Wise, Esquire
305 Main Street
Greenwood, South Carolina 29646

I further certify that all parties required by Rule to be served have been served. This 18th day of May, 2016.

KAREN C. RATIGAN
S.C. Bar # 68331
Office of Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3737
ATTORNEY FOR PETITIONER/RESPONDENT

ALAN WILSON
ATTORNEY GENERAL

May 18, 2016

The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

Re: **Travell L. Hill v. State of South Carolina**
Appellate Case No: 2015-001459
Lower Court Case No: 2014-CP-23-0129

Dear Mr. Shearouse:

Enclosed for filing please find an original and six (6) copies of the **Petitioner/Respondent's Return to Petition for Writ of Certiorari** in the above-captioned case. If there are any questions or comments, please do not hesitate to contact me at any time.

Sincerely,

Karen C. Ratigan
Senior Assistant Attorney General
SC Bar #68331

KCR/jacc
Enclosures

cc: C. Rauch Wise, Esquire
Trisha Allen, Victim Services (without enclosure)