

STATE OF SOUTH CAROLINA
In The Supreme Court

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CERTIORARI TO SPARTANBURG COUNTY
Court of Common Pleas

AUG 08 2016

The Honorable R. Scott Sprouse, Circuit Court Judge

S.C. SUPREME COURT

Appellate Case No. 2015-001864

Wilbur Summers, #318793, Petitioner,

v.

State of South Carolina, Respondent.

**RETURN TO PETITION FOR
WRIT OF CERTIORARI**

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QUESTION PRESENTED

Should this Court should deny the petition because Petitioner's argument that counsel was ineffective for failing to properly move for a directed verdict is not preserved for review, and the record supports the PCR judge's finding that Petitioner failed to prove ineffective assistance of counsel?

STATEMENT OF THE CASE

Petitioner is incarcerated with the South Carolina Department of Corrections pursuant to the Spartanburg County Clerk of Court's orders of commitment. Petitioner was indicted at the February 2006 term of the Spartanburg County Grand Jury for trafficking in marijuana, more than 2000 pounds (2006-GS-42-0740). George P. Trejo, Jr., Esquire, admitted *pro hac vice* to practice in South Carolina, and J. Patricia Anderson, Esquire, local counsel, represented Petitioner at trial. On November 16, 2006, Petitioner was convicted of this charge by a jury. The Honorable Lee S. Alford sentenced him to confinement for a period of twenty-five years.

A timely Notice of Appeal was filed on Petitioner's behalf and an appeal was perfected by Appellate Defender LaNelle C. Durant. The South Carolina Court of Appeals affirmed Applicant's conviction and sentence. State v. Summers, Op. No. 2009-UP-138 (filed March 10, 2009). A Petition for Rehearing was filed by the Petitioner and denied by the Court on May 4, 2009. Petitioner then filed a Petition for Writ of Certiorari with the South Carolina Supreme Court, which was denied on January 22, 2010. The Remittitur was returned on January 29, 2010.

Petitioner filed an application for post-conviction relief ("PCR") on December 9, 2010. An evidentiary hearing into the matter was convened on June 12, 2015, at the Spartanburg County Courthouse. Petitioner was present and represented by Ken Shabel, Esquire. Suzanne H. White, Esquire, of the South Carolina Attorney General's Office, represented Respondent. At the hearing, Petitioner testified through a Spanish interpreter and J. Pat Anderson, Esquire, also testified. Trejo, a Washington resident, did not testify. On July 27, 2015, the Honorable R. Scott Sprouse issued a written order denying and dismissing Petitioner's PCR application.

STANDARD OF REVIEW

This Court must affirm the post-conviction relief ("PCR") court's factual findings if there is any evidence of probative value in the record to support them. Dempsey v. State, 363 S.C. 365, 368, 610 S.E.2d 812, 814 (2005) (citing Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989)). This Court should reverse the PCR court only where there is no probative evidence to support the decision or the decision was controlled by an error of law. Kolle v. State, 386 S.C. 578, 589, 690 S.E.2d 73, 79 (2010). Furthermore, this Court "gives great deference to the [PCR] court's findings of fact and conclusions of law." Id. (quoting Dempsey v. State, 363 S.C. 365, 368, 610 S.E.2d 812, 814 (2005)).

ARGUMENT

This Court should deny the petition because Petitioner's argument that counsel was ineffective for failing to properly move for a directed verdict is not preserved for review, and the record supports the PCR judge's finding that Petitioner failed to prove ineffective assistance of counsel.

Petitioner argues that the PCR judge erred in finding Counsel provided effective representation where Counsel failed to move for a directed verdict 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. However, Respondent first submits that to the extent Petitioner now argues that Counsel did not make a certain argument in support of his directed verdict motion, this issue is not preserved for this Court's review because no evidence or argument was presented in that regard.

At a minimum, issue preservation requires that an issue be raised to and ruled upon by the trial judge. Herron v. Century BMW, 395 S.C. 461, 465, 719 S.E.2d 640, 642 (2011) (citing Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998)).

Here, the PCR judge found that Petitioner wholly failed to prove that Counsel was ineffective for failing to move for a directed verdict for two reasons: (1) the record reflected that trial counsel *did* make the motion, and (2) Petitioner stated at the PCR hearing that he had no problem with Counsel making the motion. (App. p. 559). He made no finding as to the effectiveness of trial counsel's motion for a directed verdict, but found only that he did make the motion. Furthermore, there was very limited testimony related to the directed verdict motion presented at the PCR hearing. PCR counsel asked Petitioner if he was "happy with the directed verdict motion [trial counsel] made" and Petitioner said "no" because trial counsel "didn't do a good job with that jury trial." (App. p. 543, lines 4-6). PCR counsel then asked "but when he made a motion to dismiss after the State finished its evidence, did you have a problem with the

motion he made?" and Petitioner responded "no." (App. p. 543, lines 12-15). The only other testimony elicited regarding trial counsel's motion was Anderson's testimony elicited by the State:

Q: And [trial counsel] also, . . . at the end of the State's case, moved to dismiss for insufficient evidence, didn't he?

...

I'm looking at page 305 of the transcript. . . . The middle of page 305, did he not make a motion to dismiss for insufficient evidence?

A: Yes.

Q: Lack of knowledge being the element that was required that he felt that had not been proven?

A: Yes.

(App. p. 536, line 20-p. 537, line 7). Therefore, as an initial matter, Respondent submits that Petitioner's argument that trial counsel did not *properly* move for a directed verdict is not preserved, because there was no argument to that effect presented at the PCR hearing. Therefore, the Court should deny review on this issue.

Nevertheless, should the Court find the issue properly preserved, Respondent submits that given the limited way in which the issue of trial counsel's direct verdict motion was raised at the PCR hearing, the record contains evidence supporting the PCR judge's finding that Petitioner failed to prove that trial counsel's performance was deficient for failing to move for a directed verdict, or that he was prejudiced as a result.

In a PCR action, the applicant has the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the applicant must show 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." Id. at 442, 334 S.E.2d at 814 (citing Strickland v. Washington, 466 U.S. 668 (1984)).

The Court uses a two-pronged test in evaluating allegations of ineffective assistance of counsel. Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). The applicant must prove both that counsel's performance was deficient and that such deficient performance prejudiced him. Strickland, 466 U.S. at 688. The Court measures counsel's performance by its "reasonableness under prevailing professional norms." Cherry, 300 S.C. at 117-18, 326 S.E.2d at 625 (quoting Strickland, 466 U.S. at 688). In other words, the question is whether counsel "provided representation within the range of competence required" in criminal cases. Butler, 286 S.C. at 442, 334 S.E.2d at 814 (citing Strickland, 466 U.S. at 687). The Court presumes counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Id. An applicant must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625.

In making a fair assessment of attorney performance, a court must make every effort to "eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." Strickland v. Washington, 466 U.S. 668, 689, 104 S. Ct. 2052, 2065, 80 L. Ed. 2d 674 (1984). There is a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance and the "defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." Id.

To show prejudice, the applicant must affirmatively prove that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 117-18, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 690). "A

reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial." Patrick v. State, 349 S.C. 203, 207, 562 S.E.2d 609, 611 (2002). "It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding." Strickland, 466 U.S. at 693.

The offense of trafficking marijuana contains a knowledge element. Specifically, the evidence must show that the defendant

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 marijuana].

S.C. Code Ann. § 44-53-370 (e)(1)(c) (1976). A person is in constructive possession of when he "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).

Here, Petitioner received and signed for the delivery of the pottery and directed it to be loaded into a truck he was renting. (App. pp. 157-58). Therefore, there was evidence that he was in constructive possession of the drugs. As discussed above, trial counsel made a "motion to dismiss for insufficient evidence" after the State rested, *arguing the State failed to produce evidence showing the existence of the knowledge element*. (App. p. 305, lines 5-16). In denying the motion, the trial judge stated that the jury could infer from the evidence the following: (1) the shipment was shipped to Petitioner at his address, (2) that address was in the bill of lading, (3) he signed for the shipment, (4) the drugs were delivered and found there, and (5) he received them and took them. (App. p. 305, line 21-p. 306, line 5). The trial judge further stated that the jury could infer that he was, in fact, taking possession of the entire amount when he signed the bill of lading and agreed to take them. (App. p. 306, lines 13-17). Ultimately the judge stated "it [was] a

jury issue as to whether [Petitioner] actually knew the drugs were there or was involved in it in any way." (App. p. 306, lines 18-21). Accordingly, the record shows that trial counsel did move for a directed verdict, even though he called it a motion to dismiss. The judge treated the motion as a motion for a directed verdict because he found that there was evidence presented from which the jury could infer that Petitioner had knowledge.

Accordingly, the record reflects that trial counsel did make the motion and did argue that the State failed to produce evidence that Petitioner had knowledge that he was in actual or constructive possession of the drugs. Therefore, there is evidence of probative value in the record to support the PCR judge's finding that Petitioner failed to prove any deficiency in counsel's performance as to this claim.

Moreover, the record supports the PCR judge's finding that Petitioner failed to prove that but for the alleged error of counsel, the result of the trial would have been different. When ruling on a motion for a directed verdict, the trial court is concerned with the existence or nonexistence of evidence, not its weight. State v. Weston, 367 S.C. 279, 292, 625 S.E.2d 641, 648 (2006). The trial judge clearly and thoroughly addressed the argument that the State had failed to prove the knowledge element, pointing to several parts in the record in support of his finding that there was evidence produced at trial from which the jury could reasonably infer knowledge. Accordingly, there is no reasonable probability that had Counsel made a more convincing argument, the result of the proceeding would have been different. Accordingly, the PCR judge correctly found that Petitioner failed to prove prejudice.

Therefore, this Court should deny review because there is ample evidence in the record to support the PCR court's finding that Petitioner failed to satisfy his burden of showing Counsel's performance was deficient or that he was prejudiced as a result.

CONCLUSION

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

Respectfully submitted,

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By: 
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August 4, 2016.

STATE OF SOUTH CAROLINA
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Appeal from Spartanburg
The Honorable R. Scott Sprouse, Circuit Court Judge

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S.C. SUPREME COURT

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WILBUR SUMMERS,

PETITIONER,

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STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of 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:

Tiffany L. Butler, Esquire
SC Commission of Indigent Defense
Appellate Defense
Post Office Box 11589
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This 4th day of August, 2016



ASHLEY HAWORTH
LEGAL ASSISTANT