

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Anderson County

Honorable Brooks P. Goldsmith, Circuit Court Judge

LORETTA GALLOWAY BRANYON,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2016-001143

PETITION FOR WRIT OF CERTIORARI

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ISSUES PRESENTED

- 1.) Trial counsel erred in failing to object to the trial judge's comment on the facts at trial.
- 2.) Trial counsel erred in failing to object to the solicitor's repeated references to mandatory presumptions related to the evidence during opening and closing arguments because such presumptions have long been condemned as relieving the state of its burden of proof.

STATEMENT

Petitioner Loretta Galloway Branyon was found guilty of possession with intent to distribute methamphetamine (third offense) during a jury trial held at the August 2012 term of the Anderson County General Sessions Court before Judge R. Lawton McIntosh. Petitioner was sentenced to imprisonment for a period of ten years. App. 1-249. Charles W. Whiten, Jr. represented petitioner at trial, and Assistant Solicitor Lauren S. Hogan appeared on behalf of the state. Petitioner appealed, but her conviction and sentence were affirmed on direct appeal. See State v. Branyon, Op. No. 2014-UP-310 (S.C. Ct. App. filed August 6, 2014). Charles Whiten represented petitioner on direct appeal also.

On August 12, 2013, petitioner filed a PCR application with the Anderson County Office of the Clerk of Court. App. 251- 257. On July 30, 2015, the respondent filed a return requesting that a hearing be held in response to petitioner's PCR action. App. 258-261. An amended PCR application was filed on February 5, 2016. App. 263-268.

A PCR hearing was convened on February 8, 2016, at the Anderson County Courthouse before Judge Brooks P. Goldsmith. App. 269-317. Petitioner was present at the hearing and represented by Donald Lewis Allen, Jr., and Assistant Attorney General Patrick Lovell Schmeckpeper appeared on behalf of the state.

On May 10, 2016, Judge Goldsmith signed on Order of Dismissal denying and dismissing petitioner's allegations of ineffective assistance of counsel in the case. App. 319-327.

Petitioner appealed Judge Goldsmith's Order of Dismissal. This petition follows.

QUESTION I

Trial counsel erred in failing to object to the trial judge's comment on the facts at trial.

The state's case consisted of the testimony of only three witnesses: 1.) Police Officer Marty Robinson, who executed the search warrant upon petitioner's residence; 2.) Brenda Lee, who was the property custodian who handled the drug evidence taken from the scene; and 3.) Meredith Lanford, who was the SLED chemist that analyzed the drug evidence from the case. Petitioner did not testify at trial and presented no defense witnesses at trial. The defense's theory was that petitioner was a user rather than a distributor, and guilty at best, if at all, of possession of methamphetamine only.

At trial, police officer Marty Robinson testified that he executed a search warrant on petitioner's residence in Anderson on January 13, 2011, and found petitioner (and another unknown male) sitting on a couch inside. While inside the residence, Officer Robinson confiscated digital scales, a smoking pipe, money, and baggies containing what appeared to be methamphetamine (off white colored substance) in a pocketbook, and some drug residue on the table that also appeared to be methamphetamine, and approximately \$4,000.00 in cash. Tr. 65, l. 3 – p. 82, l. 25. SLED Chemist Meredith Lanford testified that the drug collected at the crime scene was methamphetamine totaling 6.18 grams. Tr. 140, l. 19 – p.142, l. 3.

During the PCR hearing, trial counsel admitted that he erred in failing to object to the trial judge's comment on the facts in the case. After the jury charge was given, the trial judge referred to the handling of the exhibits (drugs) in the case as follows:

When you [get] back in deliberations, we are going to send these exhibits back with you, which will include the baggies of drugs...just remember that's methamphetamine and you don't need to have it on your fingers....it's accounted for coming back

out. So just don't handle it that way. App. 235, l. 23 – p. 236, l. 11.

Trial counsel stated during the PCR hearing that the judge's remark in question was indeed a comment on the facts and that he should have objected to the judge's comment at trial, and further that the failure to do so constituted an admitted error. Counsel added that the judge's statement on the facts in petitioner's case prejudiced the jury. App. 292, l. 11 – p. 295, l. 2; App. 296, l. 6-20. Counsel explained that he raised this issue on direct appeal, but that the appellate court ruled that the issue was not preserved for appellate review. App. 294, l. 6 – p. 296, l. 10 and App. 293, l. 20 – p. 295, l. 18; App. 295, l. 6 – p. 296, l. 10; App. 291, l. 20 – p. 293, l. 18.

Note that petitioner did not testify during the PCR hearing.

The right to a jury trial is considered "inviolable." See South Carolina State Constitution Art. 1, §14. Note that South Carolina State Constitution Article V, § 21 prevents judges from commenting on the facts and in effect is designed "to preserve inviolable the jury's fact finding function" ...[as] all questions of fact are to be decided exclusively by the jury." State v. Norris, 270 S.C. 552, 243 S.E.2d 440 (1978). It is well settled that all questions of fact are for the jury to decide. State v. Smith, 227 S.C. 400, 88 S.E.2d 345 (1955).

In the case at bar, the trial judge erred in commenting on the facts because the question of whether the baggies found at petitioner's home contained methamphetamine was a factual question for the jury to decide. Counsel erred in failing to object to the judge's error in this regard because the judge invaded the province of the jury on this factual issue. Counsel's omission in failing to object to this and move for a mistrial violated the Sixth Amendment provision guaranteeing competent counsel in criminal cases. See Strickland v. Washington, 466 U.S. 668 (1984). This prejudiced petitioner's case at trial because he was deprived of a jury deliberation on this factual issue and but for counsel's omission, the outcome of the case would

have been different. Moreover, petitioner was prejudiced further by counsel's error in this regard because the omission deprived petitioner of appellate review of this issue, particularly where a reversal on appeal with respect to this issue would have been likely in the case. Counsel's deficient representation in the negligent handling of the trial judge's erroneous comments on the facts in the case constituted ineffective legal representation at trial and on appeal,¹ which in turn prejudiced petitioner's case.

QUESTION II

Trial counsel erred in failing to object to the solicitor's repeated references to mandatory presumptions related to the evidence during opening and closing arguments because such presumptions have long been condemned as relieving the state of its burden of proof.

The solicitor made several improper comments regarding presumptions in effect with respect how to interpret the weight of the drugs in question that were connected to petitioner's case. For example, during opening arguments, the solicitor made the following remarks:

[Petitioner] was charged with possession with intent to distribute methamphetamine....based on the weight....what that means if that because she was found in possession of more than one gram of methamphetamine, the law requires the assumption that she intended to sell it. Tr. 58, lines 13-21.

Then at closing, the solicitor made the following comments:

Because she had six grams of meth on her that she intended to sell them...that's real important, so I will say it again. You are allowed to assume that simply based on the weight of the drugs based on the fact that she had 6.18 grams of meth, you are allowed to assume that he intended to sell those drugs. App. 215, l. 22 – p. 216, l. 5.

¹ Counsel's raised this issue on appeal, but the substantive merit of the issue was procedurally barred as not having been preserved through objection at trial.

You're allow[ed] to presume that solely based on the weight she was intending [to] sell the drugs, the methamphetamine. App. 223, lines 3-7.

Trial counsel admitted that he erred in failing to object to these comments regarding mandatory presumptions about the weight of the drugs associated with petitioner's case because these comments violated due process and prejudiced petitioner's defense. App. 287, l. 4 – p.291, l. 19.

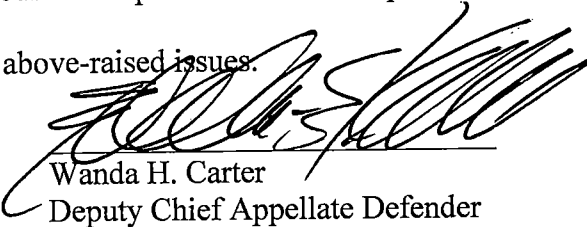
Burden shifting presumptions that regard a person as intending the consequences of his actions violate due process because it is the burden of the state to prove every element of the offense charged beyond a reasonable doubt in criminal cases; and therefore, mandatory presumptions have been prohibited. Sandstrom v. Montana, 442 U.S. 510 (1979); Gibson v. State, 355 S.C. 429, 586 S.E.2d 119 (2004); See State v. Andrews, 324 S.C. 526, 479 S.E.2d 808 (1997); State v. Sumner, 269 S.C. 175, 236 S.E.2d 815 (1977). In Sandstrom v. Montana, *supra*, the Court made it clear that the Due Process Clause of the Fourteenth Amendment prohibits any jury instructions that have the effect of relieving the state of its burden of proof at trial.

Although this case involved mandatory presumptions with respect to a solicitor's comments rather than a jury charge; nonetheless, trial counsel erred in failing to object to the solicitor's comments because the effect was still burden shifting regarding the state's burden of proof and the comments were not cured by the trial judge's overall charge. Moreover, counsel erred in failing to object to the mandatory presumption comments in order to preserve the issue for appellate review. Petitioner was prejudiced by counsel's error here because a reasonable likelihood exists that the outcome of petitioner's trial or his appeal would have been different but for counsel's omission with respect to the solicitor's impermissible remarks. The error in this instance violated petitioner's right

to competent counsel in a criminal case in violation of the Sixth Amendment. See Strickland v. Washington, 466 U.S. 668 (1984).

CONCLUSION

Based on the foregoing arguments, counsel for petitioner would request that this Court grant the petition and allow full briefing on the above-raised issues.



Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER

This 8th day of March, 2017.

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LORETTA GALLOWAY BRANYON,

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CERTIFICATE OF SERVICE

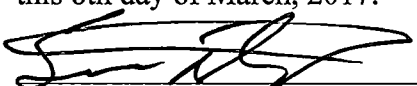
The undersigned hereby certifies that a true copy of the Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon Lindsey McCallister, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Petition for Writ of Certiorari and a copy of the Appendix have been served on Loretta Galloway Branyon, at 905 Shirley Store Rd , Anderson, SC 29626, this 8th day of March, 2017.



Wanda H. Carter

Deputy Chief Appellate Defender

SUBSCRIBED AND SWORN TO before me ATTORNEY FOR PETITIONER
this 8th day of March, 2017.



(L.S)
Notary Public for South Carolina
My Commission Expires: 10/30/2022