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STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

SC SUPREME COURT

Certiorari to Spartanburg County

The Honorable James R. Barber, III, Circuit Court Judge

Appellate Case No.: 2015-002310

DERRICK LAMAR CHEEKS,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

ALAN WILSON
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PETITIONER'S ISSUE PRESENTED

- I. Trial counsel erred in failing to object to the prejudicial prior bad acts evidence and negative character testimony from drug users and dealers who aligned themselves with petitioner because the result was the denial of petitioner's right to a fair trial in the case.

STATEMENT OF THE CASE

Petitioner is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Spartanburg County Clerk of Court. He was indicted at the November 2009 term and the indictment was amended at the October 2010 term of the Spartanburg County Grand Jury for trafficking in crack, over 400 grams (2009-GS-42-6453) and possession with intent to distribute within ½ mile of a school zone (2009-GS-42-6452). Petitioner was represented by J. Falkner Wilkes, Esquire (hereinafter "Counsel"). On October 6, 2010, Petitioner proceeded to trial and was found guilty by a jury of the charges as indicted. The Honorable Roger L. Couch sentenced Petitioner to concurrent sentences of imprisonment for twenty-five years with a \$200,000 fine for trafficking in crack and ten years with a \$100,000 fine for possession with intent to distribute within ½ of a school zone.

A timely Notice of Appeal was filed on Petitioner's behalf by Counsel, Esquire. The South Carolina Supreme Court affirmed the Petitioner's conviction. State v. Cheeks, Op. No. 27211 (Sup. Ct. filed January 16, 2013). The Remittitur was issued on February 1, 2014.

On June 21, 2013, Petitioner filed an application for post-conviction relief. Respondent made its Return on or about July 11, 2014, requesting that an evidentiary hearing be held. An evidentiary hearing was convened on September 3, 2015, in Spartanburg County before the Honorable James R. Barber, III. Christopher Brough, Esquire, represented Petitioner at the hearing. Justin J. Hunter, Esquire, of the South Carolina Office of the Attorney General, represented Respondent. Petitioner and Counsel testified at the hearing. By an Order of Dismissal signed November 2, 2015 and filed November 6, 2015, the PCR Court denied and dismissed Petitioner's application with prejudice.

STANDARD OF REVIEW

The proper standard of review of a post-conviction relief 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, 386 S.E.2d 624 (1989). In a post-conviction relief proceeding, the Petitioner bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

ARGUMENT

Petitioner argues that the PCR Court erred in failing to find Counsel ineffective where Counsel did not object to prejudicial prior bad act evidence and negative character evidence. For the following reasons, Respondent contends that this arguments are without merit.

Relevant Law

In a PCR action, the petitioner bears 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 petitioner must prove that "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." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064 (1984); Butler, *supra*.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, *supra*. Petitioner must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of counsel. Id. at 117, 386 S.E.2d at 625. First, Petitioner must prove counsel's performance was deficient. Id. Under this prong, the Court measures counsel's performance by its "reasonableness under prevailing professional norms." Id. (citing Strickland, 466 U.S. at 688). Second, counsel's deficient performance must have prejudiced Petitioner such 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.

I. The PCR Court correctly ruled that Petitioner's trial counsel was not ineffective for failing to object to character or prior bad act evidence.

How the Issue Was Raised

The PCR Court addressed the following allegations of prior bad act testimony. The first instance concerned the direct examination of Eric Elder, the driver of the vehicle that was stopped by police resulting in Ricky Cheeks' arrest for trafficking. Petitioner first took issue with a portion of the testimony where the solicitor asked Elder:

Q. Have you ever been present during the manufacturing or cooking of crack cocaine?

A. Yes, sir.

App. 256, ll. 15-17.

Petitioner next took issue with the following exchange from the solicitor and Elder:

Q. Okay, why were you driving Mr. Derrick Cheeks and Mr. Ricky Cheeks?

A. Cause a lot of times I'd get free dope, free crack.

App. 257, ll. 10-12.

Petitioner also took issue with the following exchange from the solicitor and Elder:

Q. Who did you leave the residence with?

A. With Ricky Cheeks.

Q. And what were y'all going to do?

A. Derrick had told him that he needed to go somewhere to, to get rid of something.

Q. Okay. And you were — I couldn't hear you. What did you say?

A. Ricky — Derrick told his Uncle Ricky that, that he needed to get rid of something, somebody was calling. So, he needed to get rid of something.

App. 258, ll. 8-17.

Petitioner also believed improper prior bad act evidence came out during the solicitor's direct examination of Tracy Markley, where the following exchange took place:

Q. And how did you meet Derrick Cheeks?

A. It was a long process, we knew each other at work, we weren't friends. We didn't hang out. It was a, probably a six month period before me and him actually started hanging out, and that was because of my friend, James Cranfield. He was, he was going to Derrick to buy crack, and, like I said, he got me started smoking, and we would go to his, you know, where he lived at the time to buy some. But that, you know, I didn't, I didn't even go inside and buy it or anything cause at that time I still didn't know—

App. 300, l. 23 – 301 l. 7.

When questioned at the PCR hearing about these alleged prior bad acts or character evidence, Counsel testified that the testimony at issue was "leading up and giving an explanation of what their contact was or how they knew something or why they were doing something." App. 557, ll. 11-13. Counsel also believed that the testimony at issue was very short. App. 557, l. 14. He further continued to testify that the statements were "not huge, and in the grand scheme at the time, it would of been something that, that did not strike me as being extensive enough or large enough to jump and make an objection and draw more attention to it." App. 557, ll. 17-20. Counsel testified that he did not jump up and object to the statements because they were said "in context to an explanation." App. 557, ll. 21-22. Counsel further testified that he did not believe that objecting to the testimony at issue would have caused a different outcome in Petitioner's trial and agreed with the Supreme Court's opinion that there was overwhelming evidence of Petitioner's guilt in this case. App. 558, ll. 22-24; 559, ll. 7-15.

Regarding Elder's statement that he had been present during the cooking of crack cocaine, the PCR Court found that Counsel was not ineffective for failing to object to this statement because this statement did not refer to Petitioner nor did it illustrate a prior bad act by Petitioner. App. 592. Regarding Elder's statement that he was driving Petitioner and his uncle to so that he would get free crack, the PCR Court found that Counsel was not ineffective for failing to object to because it was not an example of a prior bad act and was part of the *res gestae* of the case.

App. 592. The PCR Court found that when reading the statement in context, the solicitor was asking Elder about what occurred during the day in question and why he was driving the car that was later pulled over by police. App. 592. Regarding Elder's statement that he left the residence with Petitioner's uncle because Petitioner told him to get rid of something, the PCR Court found that Counsel was not ineffective for failing to object because the statement described the res gestae of the case and explained why Elder left the house before being pulled over by police. App. 592. The PCR Court found that Counsel articulated a valid strategy to not object to the statements at issue because he did not want to draw more attention to the statements. App. 593.

Analysis

Petitioner's argument is without merit. First, the PCR Court found that Counsel's strategy of not objecting to the short statements at issue was a valid trial strategy as Counsel did not want to draw unnecessary attention to Elder and Markley's statements. Where counsel articulates a valid strategic reason for his action or inaction, counsel's performance should not be found ineffective. Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312 (1996); Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992); Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992). Courts must be wary of second guessing counsel's trial tactics; and where counsel articulates a valid reason for employing such strategy, such conduct is not ineffective assistance of counsel. Whitehead v. State, 308 S.C. 119, 417 S.E.2d 529 (1992).

The PCR Court correctly found that Counsel was not ineffective because these statements at issue do not illustrate any objectionable prior bad acts. It is clear that the fact that Elder was present during the cooking of crack cocaine in no way references Petitioner. Further, the fact that Elder would often drive Petitioner and his uncle because he would sometimes get free crack was simply his response to the State asking him why he was driving on the day in question. This

response describes Elder's mindset during the res gestae of the Petitioner's case and does not rise to an objectionable level. Elder did not state that he received crack that day from Petitioner nor did he describe specific instances of Petitioner giving him crack. Further, the PCR Court was correct in agreeing with Counsel that an objection to such a short statement would bring more unnecessary attention to the jury.

The PCR Court was also correct in finding that Counsel was not ineffective for failing to object to Elder's statement that he drove Petitioner's uncle on the day in question because Petitioner told him to get rid of something. This statement in no way references a prior bad act by Petitioner or improper character evidence. The statement was in response to the State questioning Elder about his version of what transpired on the day of the crime.

Although the PCR Court did not explain its ruling in regard to Markley's statement that he met Petitioner through a friend who was looking for crack, Counsel was not ineffective for failing to object. Markley is asked how he met Petitioner and explains that the two worked together but he did not hang out with him until a friend went to Petitioner to buy crack. The PCR Court correctly found that Counsel was not ineffective because objecting would further draw the jury's attention to a short passing statement.

Accordingly, Petitioner has failed to prove the deficiency prong of the Strickland test – that Counsel failed to render reasonably effective assistance under prevailing professional norms. As Petitioner failed to meet his burden of proving ineffective assistance of 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.").

Furthermore, it is important to note that Petitioner cannot demonstrate he suffered prejudice as the result of Counsel's representation because the State presented overwhelming evidence of guilt at trial. The South Carolina Supreme Court found that there was overwhelming evidence of Petitioner's guilt in this case as Petitioner "was actively cooking crack cocaine when the warrant was served, and ... possessed the 650 grams of crack found on the kitchen counter." App. 482. The PCR Court agreed, finding that Petitioner could not prove that he was prejudiced by any alleged deficiencies because there was overwhelming evidence of Petitioner's guilt. App. 589. See Franklin v. Catoe, 346 S.C. 563, 570 n. 3, 552 S.E.2d 718, 722 n. 3 (2001), cert. denied, 535 U.S. 1114, 122 S.Ct. 2332, 153 L.Ed.2d 162 (2002) (finding overwhelming evidence of guilt negated any claim that counsel's deficient performance could have reasonably affected the result of defendant's trial); Geter v. State, 305 S.C. 365, 367, 409 S.E.2d 344, 346 (1991) (concluding reasonable probability of a different result does not exist when there is overwhelming evidence of guilt). Accordingly, the PCR Court was correct in dismissing Petitioner's application as he cannot show that he was prejudiced by Counsel's actions.

CONCLUSION

For the reasons stated above, this Court should deny the Petition for Writ of Certiorari and affirm the PCR Court's ruling. Should this Court grant Certiorari, the Respondent requests permission under the rules to brief the issue discussed above fully.

Respectfully submitted,

ALAN WILSON
Attorney General

JUSTIN J. HUNTER
Assistant Attorney General
S.C. Bar # 101254

By:


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RESPONDENT.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the 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:

Wanda H. Carter, Esquire
S.C. Commission on Indigent Defense
Appellate Defense
PO Box 11589
Columbia, SC 29211-1589

This 17th day of June, 2016.



JOCELYN BAKER
LEGAL ASSISTANT



ALAN WILSON
ATTORNEY GENERAL

June 17, 2016

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SC SUPREME COURT

The Honorable Daniel E. Shearouse
Clerk of Court, Supreme Court of South Carolina
PO Box 11330
Columbia, SC 29211

Re: Derrick Lamar Cheeks v. State of South Carolina
Appellate Case No. 2015-002310
Lower Court Case No. 2013-CP-42-2654

Dear Mr. Shearouse:

Enclosed for filing are the original and six (6) copies of the **Return to Petition for Writ of Certiorari** in the above-referenced case. By copy of this letter we are serving opposing counsel today.

Sincerely,

Justin J. Hunter
Assistant Attorney General
SC Bar No. 101254

JJH/jyb

Enclosures

cc: Wanda H. Carter, Esquire
Trisha Allen, Victim Services (w/o enclosures)