STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Greenville County
Court of Common Pleas
The Honorable John C. Hayes III, Circuit Court Judge

Appellate Case No. 2016-002382

ERICK HEWINS,

Respondent,

v.

STATE OF SOUTH CAROLINA,

Petitioner.

PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF ISSUE ON CERTIORARI

Did the post-conviction relief court erred as a matter of law by granting Hewins a new trial, where it applied an incorrect standard and erroneously granted relief despite failing to make the requisite finding that Richardson would have prevailed on appeal had the issue been preserved for appellate review and Hewins failed to meet his requisite burden of proof.

STATEMENT OF THE CASE

Procedural History

Hewins is confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Greenville County Clerk of Court. During its July 2011 term, the Greenville County Grand Jury indicted Hewins for trafficking in cocaine base (greater than 10 grams) (2010-GS-23-8295) and possession of a schedule IV controlled substance (clonazepam) second offense (2010-GS-8296). Hunter Chase Harbin, Esquire, represented the Hewins. On January 14-17, 2013, Hewins proceeded to a jury trial before the Honorable L. Edward Welmaker, after which he was convicted as indicted. Judge Welmaker sentenced Hewins to twenty-five years' imprisonment for trafficking in cocaine and one year imprisonment for possession of possession of a schedule IV controlled substance, for an aggregate term of twenty-six years.

A notice of appeal was served January 25, 2013. The Court of Appeals affirmed the conviction and sentence. State v. Hewins, Op. No. 2014-UP-478 Ct. App. (filed Dec. 23, 2014). A petition for rehearing was filed January 6, 2015 and was denied February 24, 2015. Hewins then filed a petition for writ of certiorari. The Supreme Court granted the petition for writ of certiorari on all of Hewins' issues except for one on November 5, 2015. On March 23, 2016 the Supreme Court dismissed the petition as improvidently granted. The Remittitur was sent on March 23, 2016.

Hewins filed a PCR application April 26, 2016 and amended his application on May 26, 2016, alleging numerous allegations. The Hewins made its return on August 29, 2016, requesting an evidentiary hearing. An evidentiary hearing was held on October 25, 2016 at the Greenville County Courthouse before the Honorable John C. Hayes, III. Hewins was present and

represented by Brian P. Johnson, Esquire. Patrick Schmeckpeper, Esquire of the South Carolina Office of the Attorney General represented the State. Testimony was taken from Hewins and his plea counsel, Hunter Chase Harbin, Esquire. Following the evidentiary hearing, Judge Hayes granted Hewins a new trial by written order filed November 4, 2016. In his order Judge Hayes found that

> In this case trial counsel diligently sought to suppress the evidence which constituted the bases for the drug charge. This is what is expected of a reasonable attorney. The question then becomes whether or not a reasonable attorney would have asked the trial judge, who has denied the attorney's motion to suppress, to break down with specificity separate rulings on the Terry frisk and the consent issue as to the second search. Since case law as cited by the Court of Appeals requires such, trial counsel is ineffective for not doing so regardless of what a reasonable attorney would have done under the same or similar circumstances.

Petitioner filed a timely notice of appeal. This petition for writ of certiorari and appendix follows.

Factual History

On August 9, 2010, Detective Scott Gardner ("Gardner") was working a 7:00 pm – 7:00 am shift with Officer Rachel Hall ("Hall"). (App.p.43, line 22-p.44, line 3; p.77, lines 19-22; p.188, lines 6-11.) Gardner and Hall were on patrol as part of an aggressive patrol unit ("APU"); the officers worked in plain clothes and in an unmarked car in order to "get to crimes such as narcotics or prostitution or auto break-ins" more easily. (App.p.44, lines 5-10; p.77, line 23 – p.78, line 20; p.187, line 24 – p.188, line 5; p.232, lines 12-18.) The APU focuses on "the most targeted areas that are plagued with crimes, such as auto break-in, prostitution and drugs." (App.

p.44, lines 19-21; p.189, lines 2-6.) That morning, the patrol included the Clarion Inn just off of Haywood Road, a location where Gardner had personally made multiple drug trafficking and prostitution cases in the past. (App.p.44, lines 21-25; p.63, line 2 - p.64, line 3; p.189, lines 21-24; p.233, lines 3-25.) The Clarion Inn was of particular interest due to its proximity to the highway, making it a prime location for drug and prostitution meetings. (App.p.45, lines 5-11; p.189, lines 8-13.) Gardner also noted its proximity to other hotels and apartment complexes as it was common practice for perpetrators of auto break-ins to park in one parking lot and commit crime in a nearby parking lot. (App.p.45, lines 12-20; p.234, line 23 – p.235, line 11.) According to Hall, there had been several incidents of auto break-ins in parking lots of hotels and apartment complexes in this area of Haywood Road. (App.p.79, lines 17-24; p.233, lines 3-25.)

Upon arriving at the Clarion Inn just after midnight, Gardner and Hall observed a black Lexus occupied by Hewins. (App.p.46, lines 1-2; p.80, lines 21-24; p.91, lines 15-22; p.234, lines 5-6.) A Camry occupied by two teenage females was parked alongside Hewins' car in a dimly-lit portion of the parking lot. (App.p.46, lines 2-6; p.56, lines 11-14; p.190, lines 9-15; p.192, line 23 – p.193, line 1; p.234, lines 7-12.) It did not appear that the parties had luggage or "had really any business being at the hotel," and "they appeared to have a meeting for some reason." (App.p.46, lines 7-10; p.192, lines 2-7.) The cars were positioned such that Hewins' car was backed in with Hewins facing the parking lot and the other car was pulled with the occupants facing the hotel, allowing the driver's side windows to face one another. (App.p.46, lines 11-14; p.69, lines 2-17; p.80, line 21 – p.81, line 1.) Gardner noted that vehicles in this area also often back into parking spaces to prevent law enforcement from seeing the vehicle's license tag. (App.p.46, lines 17-20.) This is often seen in the case of stolen vehicles or a person trying to conceal identity. (App.p.46, lines 19-20; p.192, lines 14-22; p.234, lines 13-22.) Such parking

was also against a city parking law. (App.p.53, lines 20-22; p.199, line 24 – p.200, line 2.) Gardner did not recall any other vehicles in the parking lot at the time. (App.p.46, lines 21-23; p.190, lines 2-6; p.191, lines 20-21.)

In sum, even before speaking to the vehicle occupants, several factors raised reasonable suspicion:

1) High crime area based on law enforcement experience, with specific concerns regarding prostitution, drug traffic, and vehicle theft.

2) Parking so as to conceal tag on vehicle, consistent with stolen vehicles per officer experience. Parking in this manner was also against city ordinance.

3) Lateness of hour.

4) Meeting in darkened area of parking lot. No other cars were nearby.

5) Young females meeting an older male gave rise to suspicion of prostitution.

6) Occupants appeared to have no business at the hotel but appeared to be meeting for a purpose.

After officers approached the vehicles, numerous factors further aroused Gardner's reasonable suspicions. Gardner and Hall were in an unmarked tan Impala and wore t-shirts with visible badges. (App.p.188, lines 20-25.) Gardner and Hall identified themselves as police officers when they approached the vehicles. (App.p.48, line 18 – p.49, line 6.) Gardner noted that "all three individuals appeared to be very nervous almost instantaneously." (App.p.49, lines 7-8.) As the officers approached, conversation among them ceased, and the subjects looked straight ahead. (App.p.49, lines 8-10; p.195, lines 16-18.) The young women provided identification, but Hewins did not have identification. (App.p.49, lines12-13; p.81, lines 23 – p.82, line 4; p.194, lines 23-24; p.238, lines 19-23.) As Hewins provided his name and date of birth to Hall, he appeared "very nervous" and "was stuttering when he was speaking," so much so that he gave

two different social security numbers. (App.p.49, lines 14-15; p.85, lines 9-15; p.88, lines 11-12; p.194, line 25 – p.195, line 2; p.196, lines 22-24; p.239, lines 9-13.)

Gardner noticed that Hewins grew increasingly nervous as they talked even though Gardner asked innocuous questions. (App.p.49, lines 16-17; p.55, lines 12-15.) Officers particularly noticed Hewins sweating profusely after they began speaking with him. (App.p.88, lines 20-21; p.195, lines 20-23; p.240, lines 19-22.) Gardner found this odd because Gardner himself was "a large gentleman" and not sweating at all even though he was wearing body armor beneath his t-shirt. (App.p.49, lines 17-20; p.195, lines 18-23.) Gardner asked general questions, including what Hewins was doing at the Clarion. (App.p.55, lines 12-16.) Hewins replied that he was there to visit his child's mother in room 237. (App.p.55, lines 16-18.) However, when asked the woman's name, he replied that he did not know. (App.p.55, lines 18-19; p.195, line 23 – p.196, line 1; p.227, lines 20-22.)

Hall returned to the patrol vehicle to run the identification information on the subjects. Hall had trouble getting information back on Hewins, a possible indicator that he provided false information which often occurs when subjects have suspended licenses or warrants, and providing false information was itself a criminal offense. (App.p.50, lines 14-24; p.82, lines 13-22; p.84, lines 1-3; p.199, lines 16-23.) Hall returned to Hewins' vehicle to verify Hewins' identification information. (App.p.51, lines 3-7; p.84, lines 3-7; p.240, lines 6-16.) Backup was requested. (Tr. p.51, lines 9-12.)

While Hall continued to verify Hewins' identification, Gardner noticed Hewins continually touching his left pocket, at one point trying to place his hand in the pocket. (App.p.51, lines 12-15; p.84, lines 10-18; p.196, lines 1-10.) Hall also noticed Hewins touching his pocket "continuously" and felt concern that Hewins could have a weapon. (App.p.87, lines

17-24; p.88, lines 6-8; p.88, line 19 – p.89, line 5; p.239, line 13 – p.240, line 2; p.240, lines 22-23; p.241, lines 2-5.) Due to safety concerns, Gardner asked Hewins to refrain from touching the pocket and to leave his hands in sight. (App.p.51, lines 15-17; p.72, lines 3-6.; p.196, lines 10-12) Gardner explained that this behavior is an indicator that the individual has drugs or a weapon in the pocket. (App.p.51, lines 17-24; p.196, lines 2-7.) After being asked not to, Hewins continued to touch the pocket multiple times. (App.p.51, line 25 – p.52, line 2; p.196, lines 11-12.)

Once other officers arrived, Gardner asked Hewins to step out of the car. (App.p.52, lines 7-9; p.197, line 24 – p.198, line 3.) He explained to Hewins that he was going to conduct a Terry frisk for weapons. (App.p.52, lines 9-11; p.198, lines 3-5.) Gardner felt a large lump in Hewins' pocket and requested permission to reach inside. (App.p.52, lines 11-15; p.198, lines 6-11.) With Hewins' consent, Gardner reached in the pocket and retrieved a large wad of cash. (App.p.52, lines 15-17; p.73, lines 3-10; p.198, lines 11-15; p.223, lines 1-4.) Gardner asked why he had such a large wad of cash, approximately $1400.00, and Hewins responded that he did not know.[1] (App.p.52, lines 17-20; p.198, lines 15-17.) When asked what he did for a living, Hewins responded, "this and that." (App.p.52, lines 20-21; p.198, lines 18-19.) Within fifteen to thirty seconds of retrieving the cash, still concerned that a weapon could be beneath the wad of cash because he had been unable to fully clear Hewins' pocket, Gardner reached back into the pocket. At that time, he found four round green pills, later identified as clonazepam, a Schedule IV drug. (App.p.52, line 21 – p.53, line 8; p.73, lines 11-16; p.74, lines 4-15; p.76, lines 5-10; p.198, line 19 – p.199, line 9; p.200, lines 5-8.)

[1] At some point, Hewins also advised Gardner that he had purchased the Lexus for $3500.00 cash three to four days prior to the encounter. (App.p.201, lines 11-14.)

Officer Garner placed Petitioner in custody and arrested him. (App.p.75, lines 16-20.) During an inventory search of Petitioner's vehicle, Officer Gardner found a large rock of crack cocaine, multiple smaller crack cocaine rocks, and a silver scale. (App.p.202, lines 1-25 and p.203, lines 1-13.)

STANDARD OF REVIEW

The post-conviction relief court's findings of fact and conclusions of law receive great deference during appellate review. Caprood v. State, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000). The proper standard of review of a post-conviction relief decision is whether "**any** evidence of probative value" exists to sustain the lower court's findings. Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989) (emphasis added). However, appellate courts will reverse the decision of the post-conviction relief court when it is controlled by an error of law. Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

In a post-conviction relief action, an applicant has the burden of proving the allegations in his or her application. Rule 71.1(e), SCRCP; Caprood v. State, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). When an applicant alleges ineffective assistance of counsel as a ground for relief, he or she 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 (1984); Butler, 286 S.C. 441, 334 S.E.2d 813. The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. "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, 596 (2007). The applicant must overcome this presumption to receive relief. Cherry, 300 S.C. 115, 386 S.E.2d 624. Judicial scrutiny of counsel's performance must be highly deferential, as it is all too tempting for a defendant to second guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or

omission of counsel was unreasonable. Strickland, 466 U.S. at 689. "[E]very effort be made to eliminate the distorting effects of hindsight" and to evaluate counsel's decisions at the time they were made. Strickland, 466 U.S. at 689. Accordingly, courts must be wary of second-guessing counsel's tactics. Whitehead v. State, 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland). Second, counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Strickland, 466 U.S. 668.

ARGUMENT

The PCR Court erred as a matter of law by granting Hewins a new trial, where it applied an incorrect standard and erroneously granted relief despite failing to make the requisite finding that Hewins would have prevailed on appeal had the issue been preserved for appellate review and Hewins failed to meet his requisite burden of proof.

On January 14, 2013, before the start of trial Hewins moved to suppress drugs that were found during his arrest, alleging that the detention and subsequent pat-down were unlawful under the Fourth Amendment of the United States Constitution. (App.p.433). The trial court denied the motion and Hewins was found guilty by a jury. (App.p.433).

Hewins appealed this decision and raised the issue that the police did not have a reasonable belief he was armed and dangerous to justify a pat-down or a second reach into his pockets. (App.p.433). The Court of Appeals found there was evidence to support the trial court's finding that the police officer had a reasonable belief Hewins was armed and dangerous to justify the pat-down.(App.p.436). Additionally, the Court noted that the police officer testified he had received Hewins' consent to reach into his pocket. (App.p.437). Moreover, the Court found the facts raised the question of whether the police's second reach into the Hewins' pocket was justified by continuing consent. (App.p.437). However, the Court found that the issue was not preserved for review as Hewins did not object to the trial court's general ruling on admissibility or seek a specific ruling on the issue of consent for the second reach. (App.p.437).

When the issue is that trial counsel failed to preserve the search issue for an appeal, certiorari is proper where the post-conviction relief court had not concluded Hewins would have prevailed on appeal, but only found "However, the undersigned must live with the Court of Appeals', the ultimate authority, holding that trial counsel did not preserve for appeal the issue of consent for the second search." Given the prejudice prong standard of Strickland v. Washington

of a reasonable probability the **result** of the proceeding would have been different, the post-conviction court committed an error of law by granting Hewins a new trial.

In its order of dismissal, the post-conviction relief court found:

> The Court must find in favor of Applicant on the unpreserved issue argument. This case is hard to fit into the parameters set forth in Strickland, supra, and Cherry, supra. However, looked at it in totality, the test ultimately is: did, trial counsel fail in his representation, and did it prejudice Applicant. This leaves out the reasonableness prong. (App.p.515)

Here the post-conviction relief court never makes a determination about whether Hewins would have been successful on appeal but rather couches its finding in the argument that the issue is simply unpreserved for appeal review.

A. The prejudice prong requirement that the result of the proceeding would likely have been different was not found.

This Court has previously held an issue that was raised on direct appeal but found to be unpreserved may be raised in the context of a post-conviction relief claim alleging ineffective assistance of counsel. McHam v. State, 404 S.C. 465, 475, 746 S.E.2d 41, 47 (2013) (citing McLaughlin v. State, 352 S.C. 476, 575 S.E.2d 841 (2003); Foye v. State, 335 S.C. 586, 518 S.E.2d 265 (1999)). However, to be entitled to relief on such a claim, an applicant must establish the underlying claim is meritorious and would have resulted in a reversal on appeal to a reasonable probability. McHam, 404 S.C. at 475–76, 746 S.E.2d at 47 ("Since the Fourth Amendment issue was not considered on direct appeal because it was unpreserved, an examination of the merits of the issue is appropriate in analyzing the prejudice prong in McHam's PCR claim.") (citing Sikes v. State, 323 S.C. 28, 30, 448 S.E.2d 560, 562 (1994) ("When the defendant claims that counsel's failure to articulate a Fourth Amendment claim was ineffective assistance, [the] defendant must show that such claim is **meritorious** and that the

verdict would have been different absent the evidence that should have been excluded." (emphasis in McHam)). Therefore, before a post-conviction relief court can find an applicant has prevailed on a claim of ineffective assistance of trial counsel for failing to preserve a ground for appellate review, the court must determine the underlying claim was meritorious and a reasonable probability that it would have resulted in reversal and a new trial.

In this case, the post-conviction relief court did not find that Hewins would have prevailed on appeal had trial counsel properly preserved his suppression argument for appellate review. Instead it only found that trial counsel failed in his representation and it prejudiced Hewins even leaving out the reasonableness prong. Therefore, this ultimate grant of relief is based on an error of law requiring reversal.

B. The prejudice prong cannot be satisfied by Hewins as he is unable to meet his burden.

Petitioner also requests that the Court reconsider the PCR court's ruling in light of the fact that the Hewins did not present any evidence that his claim would have been meritorious had it been preserved for review. As previously mentioned, to be entitled to relief on such a claim, an applicant must establish the underlying claim is meritorious and would have resulted in a reversal on appeal to a reasonable probability. McHam, 404 S.C. at 475–76, 746 S.E.2d at 47

The most beneficial conclusion to Hewins that is actually supported by the record is that if counsel had argued the second pocket search exceeded the scope of Hewins' initial consent, it **may** have prompted further testimony that **may** have resulted in suppression of evidence. The Court of Appeals came to that conclusion as well, finding there were not sufficient facts in the records for it to make a determination as to the scope of consent. Where Hewins did not present any additional evidence or testimony to supplement the record or explore the issue of the second search, Hewins submits a finding that he has met his burden is inappropriate.

Evidence in the record further supports the discovery of the clonazepam pills was the result of a consensual search. The police officer testified Hewins consented to his request to reach into his pocket. According to him, he reached into Hewins' pocket the second time to finish searching it within seconds of the initial consent. According to him, Hewins made no protest. "Effective withdrawal of a consent to search requires unequivocal conduct, in the form of either an act, statement or some combination of the two, that is inconsistent with consent previously given." State v. Mattison, 352 S.C. 577, 587, 575 S.E.2d 852, 857 (Ct. App. 2003).

Therefore, even if trial counsel had requested a specific ruling on the issue of consent for the second search, Hewins has not shown that there is a reasonable probability the outcome of the trial would have been different because his underlying claim fails on its merits. Under these circumstances, Hewins has not established the requisite prejudice to support his claim of ineffective assistance of counsel. McHam, 404 S.C. at 481–82, 746 S.E.2d at 50. See generally Foye, 335 S.C. 586, 518 S.E.2d 265 (holding PCR was properly denied where the applicant did not prove he was prejudiced by trial counsel's deficient performance in failing to preserve an issue at trial).

Based on the foregoing, the post-conviction relief court erred in granting Hewins relief and remanding his case to the court of general sessions for a new trial. Therefore, the State asks this Court to grant certiorari and ultimately reverse the lower court's grant of post-conviction relief.

CONCLUSION

For all the foregoing reasons, the State requests that this Court grant this petition for a writ of certiorari and reverse the post-conviction relief court's grant of a new trial.

Respectfully submitted,

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June 26, 2017

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Erick Hewins,.....Respondent,

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CERTIFICATE OF SERVICE

I, DeShawn H. Mitchell, certify that I have today served the within **Petition for Writ of Certiorari** upon Appellant by depositing a copy of the same in the United States mail, postage prepaid, addressed to:

Taylor D. Gilliam, Esquire
SC Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
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I further certify that all parties required by Rule to be served have been served. This 26th day of June, 2017.

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