ALAN WILSON
ATTORNEY GENERAL

July 28, 2017

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

Re: **James Tinsley v. State of South Carolina**
Appellate Case No. 2016-001435
Lower Court Case No. 2013-CP-37-0272

Dear Mr. Shearouse:

Enclosed please find the original and six (6) copies of the Return to Petition for Writ of Certiorari. By copy of this letter we are serving opposing counsel today.

Sincerely,

Lindsey A. McCallister
Assistant Attorney General
SC Bar No. 79054

LAM/dgr
Enclosures

cc: Taylor D. Gilliam, Esquire (2 copies)
Victim Advocacy Division

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

RECEIVED

JUL 28 2017

S.C. SUPREME COURT

Certiorari from Anderson County
Honorable Brooks P. Goldsmith, Circuit Court Judge

Appellate Case No. 2016-001435

JAMES TINSLEY,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

ALAN WILSON
Attorney General

LINDSEY A. MCCALLISTER
Assistant Attorney General
Bar No. 79054

Post Office Box 11549
Columbia, SC 29211
(803) 734-3737
#79054

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

RESPONDENT'S QUESTION PRESENTED

Did the PCR court correctly find appellate counsel rendered effective assistance where appellate counsel briefed one issue on the merits, but did not raise a second issue as requested by Petitioner, where Petitioner waived his objection to the issue, and, in any event, was not reasonably likely to succeed on the merits?

STATEMENT OF THE CASE

Petitioner is presently confined in the Department of Corrections pursuant to orders from the Oconee County Clerk of Court. Petitioner was indicted at the May 2008 term of the Oconee County Grand Jury for Receiving, Possessing, Concealing, Selling, or Disposing of a Stolen Vehicle over $5,000 pursuant to S.C. Code §16-21-80(3) (2008-GS39-881), and four counts of Receiving Stolen Goods over $5,000 (2008-GS-39-882 through -885). Supp. App., p. 353-58. Judge Nicholson ultimately consolidated indictments -882 through -884 into a single charge, and struck one count from indictment -885. App. 266, 330-32. Petitioner was tried before a jury, representing himself *pro se*, and found guilty as indicted on all remaining counts. App. p. 372-73. Judge Nicholson sentenced Petitioner to ten years' imprisonment suspended on service of seven years and five years' probation on both the consolidated indictment (-882 through -884) and the stolen vehicle indictment (-881), to be served consecutively. App. pp. 386-87. Judge Nicholson also sentenced Petitioner to five years' imprisonment suspended to five years' probation on the remaining stolen goods indictment (-885). App. p. 387. Judge Nicholson also made restitution to various victims a condition of probation. App. p. 387.

A timely notice of appeal was filed and perfected by Tristan Shaffer,[1] Esquire, of the Office of Appellate Defense. Supp. App. p. 1. The South Carolina Court of Appeals affirmed Applicant's convictions and sentences in an unpublished opinion. State v. James Douglas Tinsley, (2012-UP-321, filed May 30, 2012). A *pro se* petition for writ of certiorari was filed at the South Carolina Supreme Court on October 2, 2012. While the writ was pending, Petitioner

[1] Petitioner was initially represented by Celia Robinson, Esquire, of the Office of Appellate Defense, who filed the Initial Brief of Respondent. She then left the office, and Tristan Shaffer took over Petitioner's case. Mr. Shaffer filed the Final Brief of Respondent. Supp. App. II, p. 1.

filed a premature post-conviction relief (PCR) application (2013-CP-37-0272) on April 4, 2013.[2] App. p. 670. The South Carolina Supreme Court denied cert on February 6, 2014. App. p. 670. The Remittitur was issued on February 18, 2014. App. p. 670. Petitioner then filed a timely application for PCR on December 3, 2014. App. pp. 420-37. Respondent made its Return on March 13, 2015. App. pp. 439-45. An evidentiary hearing into the matter was convened on February 9, 2016, at the Anderson County Courthouse in front of the Honorable Brooks P. Goldsmith. App. p. 486. Petitioner was present at the hearing and represented himself *pro se*.[3] App. p. 486. Respondent was represented by Patrick Schmeckpeper, Esquire, of the South Carolina Attorney General's Office. App. p. 486. By Order filed May 17, 2016, Judge Goldsmith denied and dismissed Petitioner's application for PCR. App. pp. 669-90. Petitioner appealed the order of dismissal and filed a Petition for Writ of Certiorari on January 11, 2017. PWC p. 16.

[2] The State filed responsive pleadings and requested the application be dismissed without prejudice. App. pp. 408-10. A conditional order was issued on the matter. App. pp. 411-15. However, while the first application was still pending, Petitioner's petition on his direct appeal was denied, and the Remittitur was issued. Supp. App. pp. 903-05. Applicant then filed a timely second application, and the two applications were merged. App. p. 479.

[3] Petitioner was appointed an attorney, Hugh Welborn, Esquire. However, at the beginning of the evidentiary hearing, Petitioner made a motion to relieve Mr. Welborn and proceed *pro se*, which Judge Goldsmith granted. App. p. 488-95.

STATEMENT OF THE FACTS

This case began when Wesley Crawford contacted Detective Errin Jenkins of the Iredale County Sheriff's in North Carolina with concerns that two brand new ATVs he had recently purchased might be stolen. App. pp. 107-08. Crawford purchased one ATV from Petitioner at a storage facility in Oconee County, and then met him in North Carolina to purchase the second. App. p. 186. Detective Jenkins testified Petitioner sold the ATVs for $5000 when the retail value was between $7900 to $12,700, and in his experience, when someone sells goods for a price that far below the actual value, the seller likely knows the goods are stolen. App. pp. 112-13. When Detective Jenkins checked the VIN numbers of the ATVs, one was reported as stolen from Waynesville, North Carolina, and the other was reported stolen from a state park in North Carolina. App. pp. 108-09. Based on information provided by Crawford, Detective Jenkins and the Oconee County Sheriff's Office were able to locate two storage units rented in Petitioner's name. App. pp. 109-10.

David Smith, with Oconee County Sheriff's Office, obtained a search warrant for the storage facility, and eventually discovered additional stolen goods Petitioner kept there, including two Polaris ATVs stolen from Waynesville, North Carolina, stored inside a trailer stolen from another North Carolina ATV dealer. App. pp. 168-69, 187-89. Detective Smith seized those items, and a few days later, Petitioner showed up at the storage facility asking who had taken the ATVs. App. pp. 189-90. The owner of the facility told Petitioner he did not know, and called Detective Smith when Petitioner left to give a description of the vehicle Petitioner was driving. App. pp. 190. Detective Smith located Petitioner's vehicle, and pulled it over. App. pp. 190-91. Petitioner was inside with two other men – his codefendant, Hugh Justice, and another man, Clyde Boles. App. p. 191. Boles told officers about a campsite where he was staying with

Petitioner.[4] App. p. 191. When officers pulled up to the campsite, they discovered in plain view a camper, an olive green Carry-On trailer with an ATV trailer attached to it, and another small trailer. App. pp. 191-93. The olive green trailer had an additional ATV stored inside of it. App. pp. 193. Both ATVs and the small trailer had been stolen from the Polaris dealership in Waynesville, and the olive green trailer had been reported stolen from the factory in Lavonia, Georgia. App. pp. 159-60, 149-53, 193-94. The camper on site had been reported stolen from an RV dealership in Spartanburg. App. pp. 14-45, 147, 194.

At trial, representatives from each of the victim businesses testified and identified the recovered items as their property. On cross-examination, Petitioner asked the owner of the RV dealership if he had any evidence Petitioner was involved in the theft of the camper, and the witness answered, "no." App. p. 147. Petitioner also asked the manager of the Carry-On trailer plant in Georgia if he had any evidence such as "fingerprints, bootprints, or anything of that nature" linking Petitioner to the theft, and the manager answered he did not. App. p. 153. The owner of the Polaris dealership in Waynesville testified he recalled talking with two men who were driving a truck with South Carolina plates. App. pp. 157-58. Shortly thereafter, he realized the keys to his forklift were missing, and the ATVs and trailer went missing later that night or the next day. App. pp. 158-59. Petitioner elicited on cross examination that the Polaris dealership owner had been shown photos of Petitioner and Justice, and the manager was unable to identify them. App. pp. 162-63. Petitioner further elicited testimony from the detective who investigated the thefts in Waynesville that he recovered prints at the Polaris dealership matching the boots Justice was wearing at the time of his arrest, but none of the prints matched Petitioner's

[4] Testimony at trial established Petitioner was a member of a mining association and brought the camper out to the association's property, leaving a note for the caretaker indicating it was Petitioner's. App. pp. 137-38.

shoes. App. pp. 180-81. The detective also testified the Polaris dealer was shown photos of Petitioner and Justice, but was unable to identify them. App. p. 170. Finally, upon arrest, Petitioner told law enforcement, "If anything is stolen Hugh [Justice] stole it. I don't have anything to do with that." App. p. 309.

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 in a post-conviction relief action is whether "any evidence of probative value" exists to sustain the post-conviction relief court's findings. Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989). The reviewing court will affirm if there is any evidence to support the post-conviction relief court's ruling. Moore v. State, 399 S.C. 641, 646, 732 S.E.2d 871, 873 (2012). This Court will reverse the post-conviction relief court's decision when it is controlled by an error of law. Suber v. State, 371 S.C. 554, 558-59, 640 S.E.2d 884, 886 (2007) (citing Sheppard v. State, 357 S.C. 646, 651, 594 S.E.2d 462, 465 (2004)).

ARGUMENT

I. There is probative evidence in the record to support the PCR court's finding appellate counsel rendered effective assistance because Petitioner abandoned his request and waived any objection to the jury charge, so appellate counsel's failure to raise the issue on direct appeal was not deficient performance.

Respondent concedes the PCR court incorrectly found Petitioner did not properly preserve the issue of his request for a jury instruction on the "thief defense" for direct appeal; however, Petitioner later abandoned the request and waived his objection to the jury charge. App. pp. 333-338, 370; Supp. App. p. 865. Therefore, the PCR court was still correct appellate counsel's conduct was not deficient because he could not have raised that issue on direct appeal.

Petitioner submitted a written request for five jury instructions on the following issues: (1) abandonment of involvement in any plan or scheme regarding the goods; (2) mere presence around the stolen goods; (3) the "thief defense"- that if he stole the items, he could not be convicted of receiving them; (4) involuntary and superficial possession; (5) knowledge of goods' stolen character. App. p. 333; Supp. App. p. 865. The "thief defense" instruction at issue reads: "That if the jury believes I committed the thefts of the goods, they must find me not guilty of receiving stolen goods and possessing a stolen vehicle. State v. Hamilton, 172 S.C. 453, 174 S.E.2d 396 (1934) (sic)." Supp. App. p. 865.

After the court reviewed Petitioner's five proposed instructions, the following exchange took place:

> **Court**: [A]s far as mere presence, abandonment, talking about guilt, stolen knowledge character, I'm not going to charge that. Glad to hear you on involuntary and superficial possession. I'm not sure what you're asking me on that. . . .
>
> **Petitioner**: I'm not really worried about that one Your Honor. It was the others because of my testimony I abandoned any involvement in it. And the mere presence the law is that the possession of stolen property (sic), you cannot be convicted based on mere presence alone.

Court: That's a legal question I have already made (sic) at the directed verdict stage. That's not a jury question. So I'm not going to charge on that. . . . You're not even charged with stealing so there's no way I can charge that. . . .

Petitioner: No, the mere presence has to do with possession.

. . .

Court: I think my charge on receiving stolen goods, possession of stolen vehicle will cover what you're saying. . . . So the possession, whether you want to call it constructive or whatever, mere presence is I think encompassed in that. What do you want me to say about mere presence? And as far as the abandonment, I heard no testimony that would indicate any abandonment. As to a defense, the first thing you have to do is admit you had knowledge. You deny knowledge. Okay. So I don't think abandonment is appropriate.

Petitioner: Okay, Your Honor.

Court: So I'm not going to charge abandonment. I'll listen to you on mere presence. What do you actually want?

Petitioner: Just what I said. To clarify for the jury that my mere presence around the property in and of itself would be insufficient to convict on.

App. 333-36. The trial court ultimately declined to give any of Petitioner's requested instructions, either finding them inappropriate or already encompassed in the standard charge. App. 334-35. Because Petitioner requested an instruction on the thief defense, and the trial court denied it on the record, after allowing Petitioner to make arguments as to his requested charges, Petitioner properly preserved the issue at that point in the trial. See Rule 20, SCRCrimP (outlining the requirements for requesting jury instructions and objecting to a jury charge). However, Petitioner later abandoned the request and waived his objection to the jury charge as given. App. 370.

Even if a party properly raises an objection during trial, his right to argue error in regard to that objection on appeal may still be waived under certain circumstances. See State v. O'Neal, 210 S.C. 305, 312, 42 S.E.2d 523, 526 (1947) (recognizing a previously raised objection can be

waived). This occurs when the party raising the objection indicates to the trial judge the party no longer has an objection to the issue previously raised. See State v. Brown, 402 S.C. 119, 125, 740 S.E.2d 493, 496 (2013) (holding Brown's issue with a jury instruction was not preserved for appellate review where Brown explicitly stated to the trial judge he had no objection to the instruction); State v. Rios, 388 S.C. 335, 342, 696 S.E.2d 608, 612 (Ct. App. 2010) (holding Rios waived his right to allege error with a jury charge on appeal where the trial court specifically asked if there were any objections to the instructions given and Rios responded there were none); cf. Commonwealth v. Moury, 992 A.2d 162, 178 (Pa. Super. Ct. 2010) ("Generally, a defendant waives subsequent challenges to the propriety of the jury charge on appeal if he responds in the negative when the court asks whether additions or corrections to a jury charge are necessary."). The charge given did not include Petitioner's requested instruction on the thief defense, and the trial judge specifically questioned Petitioner as to whether he had any objection to the charge as given, and Petitioner answered in the negative. App. 370. When Petitioner failed to note his exception to the omission of the thief defense instruction, he waived the request and effectively agreed with the trial judge's decision not to give the requested instruction. See Rios, 388 S.C. at 342, 696 S.E.2d at 612 ("Even after the trial court specifically asked if there were any objections to the charges given, Rios responded, 'None.' By failing to contemporaneously object to the jury charges, Rios has waived his right to allege error on appeal."); see also Burke v. AnMed Health, 393 S.C. 48, 55, 710 S.E.2d 84, 88 (Ct. App. 2011) ("When a party states to the trial court that it has no objection to the introduction of evidence, even though the party previously made a motion to exclude the evidence, the issue raised in the previous motion is not preserved for appellate review.").

Petitioner cites State v. Johnson, 333 S.C. 62, 64 n. 1, 508 S.E.2d 29, 30 n. 1 (1998), for the proposition that further objection was not required after the charge was given where Petitioner requested a specific charge and the court denied the motion on the record, after a chance for discussion. Petitioner's case is distinguishable from Johnson, however, because of the trial judge's specific inquiry as to whether Petitioner had *any exceptions* to the charge as given. Notably, the trial judge did not ask if Petitioner had any *new* or *additional* exceptions to the charge; he asked if Petitioner had *any* exceptions to the charge as given. App. 369-70. Petitioner stated he did not, which constituted a waiver of any issue regarding the jury instructions. App. 370. Petitioner thereby abandoned his request for an instruction on the thief defense. Therefore, Petitioner waived the jury-instruction issue, and it could not have been raised for appellate review. Accordingly, the PCR court correctly found appellate counsel was not deficient in failing to raise the issue on direct appeal. See Legge v. State, 349 S.C. 222, 225, 562 S.E.2d 618, 620 (2002) ("Because the issue would not have been preserved for appeal, appellate counsel cannot be ineffective for failing to raise the issue.").

II. Even if this Court finds the jury-instruction issue was preserved and could have been raised on direct appeal, Petitioner failed to prove deficient conduct because appellate counsel raised other issues he felt had a better chance of success on the merits, and appellate counsel is not required to raise every non-frivolous issue.

A defendant is entitled to effective assistance of appellate counsel. Southerland v. State, 337 S.C. 610, 615, 524 S.E.2d 833, 836 (1999). Generally, in analyzing a claim of ineffective assistance of appellate counsel, the PCR court applies the Strickland test just as it would when analyzing a claim of ineffective assistance of trial counsel. Bennett v. State, 383 S.C. 303, 309, 680 S.E.2d 273, 276 (2009). Thus, the PCR court must first determine whether appellate counsel's performance was deficient, and, if so, whether Petitioner was prejudiced by appellate counsel's deficient performance. Id.

"Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (citing Strickland, 466 U.S. at 690). While "it is still possible to bring a Strickland claim based on counsel's failure to raise a particular claim. . . it is difficult to demonstrate that counsel was incompetent." Smith v. Robbins, 528 U.S. 259, 288 (2000). This is because "'[g]enerally, only when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome.'" Id. (quoting Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1986)).

The PCR court correctly found Petitioner has failed to establish appellate counsel's conduct was deficient. Petitioner insists that if an argument is not frivolous, appellate counsel is required to raise it. PWC p. 13. This, however, is not the rule. To be effective, appellate counsel must give assistance of such quality as to make appellate proceedings fair. Southerland, 337 S.C. at 615-16, 524 S.E.2d at 836 (citing Evitts v. Lucey, 469 U.S. 387 (1985)). This Court has repeatedly held that although appellate counsel is required to provide effective assistance of counsel, "appellate counsel is *not* required to raise every non-frivolous issue that is presented by the record." Thrift v. State, 302 S.C. 535, 539, 397 S.E.2d 523, 526 (1990) (citing Jones v. Barnes, 463 U.S. 745 (1983)) (emphasis in original). "For judges to second-guess reasonable professional judgments and impose on . . . counsel a duty to raise every 'colorable' claim suggested by a client would disserve the very goal of vigorous and effective advocacy. . . ." Jones, 463 U.S. at 754. Jones makes crystal clear there is no "constitutional right to compel appointed counsel to press non-frivolous points requested by the client, if counsel, as a matter of professional judgment, decides not to present those points." Id. at 751. In fact, Jones notes that in order to render effective assistance to the client, appellate counsel must necessarily "winnow[]

out weaker arguments on appeal and focus[] on one central issue if possible. . . " because "a brief that raises every colorable issue runs the risk of burying good arguments. . . ." Id. at 751-753.

Petitioner argues appellate counsel's exclusion of the jury-instruction issue was not a "tactical decision" based on his professional judgment, but rather was the result of a "mistaken belief that the requested charge was improper or that the requested charge was not preserved." PWC pp. 14-15. Petitioner, however, cites no evidence in the record to support this contention, as Petitioner did not call appellate counsel as a witness at the evidentiary hearing or otherwise introduce any evidence to overcome the Strickland presumption that appellate counsel's decision was "made. . . in the exercise of reasonable of reasonable professional judgment." Butler, 286 S.C. at 442, 334 S.E.2d at 814 (citing Strickland, 466 U.S. at 690). Furthermore, appellate counsel could have reasonably concluded the issue actually briefed – i.e. the denial of Petitioner's direct verdict motion – was a stronger issue because it was clearly preserved, both the State and Petitioner made extensive arguments in support of their positions, and the trial judge gave a thorough explanation of his ruling on the record. See App. pp. 257-65. In fact, documentation submitted in Petitioner's "Appendix to Applicant's Motion for Summary Judgment" indicates Petitioner and appellate counsel specifically discussed whether Petitioner's brief would be amended to include the jury-instruction issue. Supp. App. II, pp. 2-3. Appellate counsel explained his reasoning for not doing so, writing, "[Former appellate counsel] raised the issue she thought, in her professional judgment . . . gave you the best chance of winning. . . . Although I feel the 'thief defense' may have enough merit to brief, I think the State has a very strong statutory interpretation argument. After all, the cases you cite are primarily concerning the statute prior to 1993." Supp. App. 11, p. 3.

In this case, appellate counsel reviewed the record, researched the law, and "consciously decided not to brief the issue," which "clearly supports the PCR judge's finding that appellate counsel was not ineffective." Thrift, 302 S.C. 535 at 539-40, 397 S.E.2d at 526. "[A]ppellate counsel who files a merits brief need not (and should not) raise every non-frivolous claim, but rather may select from among them in order to maximize the likelihood of success on appeal." Robbins, 528 U.S. 259 at 288. Petitioner has failed to satisfy his burden of proving appellate counsel's performance was deficient because appellate counsel consciously decided not to brief the issue, submitted a merits brief on another issue, and obtained a ruling on the merits.

III. Even if this Court finds appellate counsel was deficient in failing to raise the jury-instruction issue, Petitioner was not prejudiced because he has not met his burden of establishing he was reasonably likely to succeed on the merits.

Petitioner contends that because there was some evidence at trial tending to show he was involved in the theft of the goods, he was entitled to a jury instruction to the effect that if the jury believed he was the thief, then he could be convicted of receiving the stolen goods or possessing the stolen vehicle.[5] PWC p. 13-14. Even if this Court finds appellate counsel should have raised the jury-instruction issue, Petitioner's PCR claim still must fail because he cannot prove he was prejudiced by the deficiency. To prove prejudice in this instance, Petitioner must show that, but for appellate counsel's errors, there is a reasonable probability he would have prevailed on direct appeal. Anderson v. State, 354 S.C. 431, 434, 581 S.E.2d 834, 835 (2003). "It is not enough for [Petitioner] to show that the errors had some conceivable effect on the outcome of the proceeding. Virtually every act or omission of counsel would meet that test." Strickland, 466 U.S. at 693.

[5] Petitioner made the same argument as part of his directed verdict motion at the end of the State's case. App. 257-58. The issue of whether the trial court erroneously denied that motion was briefed on the merits in Petitioner's direct appeal, and the Court of Appeals affirmed the decision of the trial court. Supp. App. 903-05.

Petitioner's argument on this issue fails for two distinct, but interrelated, reasons. First, Petitioner relies on cases distinguishable from his own because he was never charged with the larceny of the goods, and therefore, there was no possibility the jury would convict him of both the theft and the receipt. Second, the line of cases on which Petitioner relies is no longer directly applicable to the current "receiving stolen goods" statute, under which Petitioner was charged, because those cases were decided based on a previous version of the statute, which criminalized only the buying or receipt of stolen goods, not possession *on its own*. Compare S.C. Code Ann. § 16-13-180 (1991) ("It is unlawful for any person knowingly to buy or receive stolen goods, chattels or other property.") with S.C. Code Ann. § 16-13-180 (1993) ("It is unlawful for a person to buy, receive, or possess stolen goods, chattels, or other property if the person knows or has reason to believe the goods, chattels, or property is stolen.").

Beginning with State v. Hamilton, this Court has long held a defendant may not be *convicted* of both the larceny and the receipt of the same stolen goods. 172 S.C. 453, 453, 174 S.E. 396, 396 ("While one may be *charged* in an indictment with both of these crimes, he cannot be *convicted* of both.") (emphasis added). In Hamilton, the defendant was not only charged with both offenses, the jury was specifically instructed it could convict him of both, which it did. Id. Petitioner, however, was charged only with possession of stolen goods, so there was never any possibility he would be convicted of both offenses.[6]

[6] Petitioner seems to suggest the State improperly charged him with possession or receipt of the stolen goods because there was some evidence he was also guilty of the larceny. PWC, pp. 11-12. However, the charging decision is firmly within the realm of prosecutorial discretion. See Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978) ("[S]o long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, *and what charge to file or bring before a grand jury*, generally rests entirely in [the prosecutor's] discretion." (emphasis added)); State v. Burdette, 335 S.C. 34, 40, 515 S.E.2d 525, 528-529 (1999) ("Choosing which crime to charge a defendant with is the essence of prosecutorial discretion[.]"). See also United States v. Washington, 109 F.3d 335, 338 (7th Cir.

In State v. McNeil, the defendant waived presentment of his indictment for grand larceny of a vehicle and then pleaded guilty to possession of stolen vehicle. 314 S.C. 473, 476, 445 S.E.2d 461, 463 (Ct. App. 1994). On appeal, his conviction was overturned because the Court of Appeals held possession of a stolen vehicle is not a lesser-included offense of larceny, so his waiver did not apply to the possession charge. Id., 314 S.C. at 475, 445 S.E.2d at 462. Thus, the Court of Appeals found he was not properly indicted so as to confer subject-matter jurisdiction on the circuit court. Id. The Court of Appeals applied Hamilton and concluded, "grand larceny and possession of a stolen vehicle are separate and distinct offenses because the possession of a stolen vehicle statute requires the defendant receive the goods from someone who actually stole them, and he cannot receive from himself." Id., 314 S.C. at 476, 445 S.E.2d at 463. This was a misapplication of the rule in Hamilton because the "receiving stolen goods statute" analyzed in Hamilton only criminalized the conduct of "buy[ing] or receiv[ing] stolen goods," not possession. The statute prohibiting possession of a stolen vehicle at issue in McNeil, and in Petitioner's case, however, criminalizes mere possession alone. See S.C. Code Ann. § 16-21-80 (1991); S.C. Code Ann. 16-21-80 (2008) ("A person not entitled to the possession of a vehicle who receives, possesses, conceals, sells or disposes of it, knowing it to be stolen or converted under circumstances constituting a crime, is guilty. . . ."). For this same reason, the Hamilton rule is also not applicable to the amended "stolen goods" statute under which Petitioner was charged. See S.C. Code Ann. § 16-13-180 (2008) ("It is unlawful for a person to buy, receive, or possess stolen goods, chattels, or other property if the person knows or has reason to believe the goods, chattels, or property is stolen.").

1997) ("If one person shoots and kills another, a prosecutor may charge anything between careless handling of a weapon and capital murder.").

None of the cases cited by Petitioner account for the addition of the word "possession" in both the stolen vehicle and stolen goods statutes on the continued viability of Hamilton. Possession of stolen goods alone would not have been enough to convict Mr. Hamilton, regardless of whether or not he had also committed the larceny. Under the law in effect at the time of the Hamilton decision, the State was required to prove the stolen goods came from a third party, and the defendant knew or had reason to know of the stolen character. 172 S.C. at 453, 174 S.E. at 396-97. In Hamilton, the court reached the decision that one who commits the larceny cannot also be guilty of receiving the stolen goods specifically "for the reason that he cannot *receive* from himself." 172 S.C. at 453, 174 S.E. at 397 (emphasis added).

The same is not true with respect to Petitioner's case because he was charged under the post-1993 amendment. The "receipt" of stolen goods statute now makes it unlawful for a person to "buy, receive, *or possess* stolen goods. . . if the person knows or has reason to believe" the goods are stolen. S.C. Code Ann. § 16-13-180 (2008). Similarly, the "possession of a stolen vehicle" statute prohibits receipt, *possession*, concealment, sale, *or* disposal of a stolen vehicle. S.C. Code Ann. § 16-21-80 (2008) (emphasis added). "Possession," by its plain and ordinary meaning, does not require action or involvement on the part of another party, unlike "buy" or "receive." See POSSESSION, Black's Law Dictionary (10th ed. 2014) ("The fact of having or holding property in one's power; the exercise of dominion over property"); PURCHASE, Black's Law Dictionary (10th ed. 2014) ("The acquisition of an interest in real or personal property by sale, discount, negotiation, mortgage, pledge, lien, issue, reissue, gift, or any other voluntary transaction"); RECEIVE, Black's Law Dictionary (10th ed. 2014) ("To take (something offered, given, sent, etc.); to come into possession of or get from some outside source").

As the trial judge noted in denying Petitioner's directed verdict motion, "The statute itself refers to possession, and the Court [is] of the opinion if you steal it, you can still possess the stolen property. However, the Court also agrees with Hamilton and McNeil, if you stole it, you cannot receive it. . . ." App. 264. The two are not mutually exclusive, and the distinction is important because it is the lynchpin of the entire Hamilton line of cases. "It is presumed the Legislature, in adopting an amendment to a statute, intended to make some change in the existing law." Cannon v. S.C. Dept. of Prob., Pardon, & Parole Servs., 371 S.C. 581, 584, 641 S.E.2d 429, 430 (2007). Subsequent amendments adding material terms to a statute "signal that a 'departure from the original law was intended.'" Kerr v. State, 345 S.C. 183, 189, 547 S.E.2d 494, 497 (2001) (quoting North River Ins. Co. v. Gibson, 244 S.C. 393, 398, 137 S.E.2d 264, 266 (1964)). Therefore, the Hamilton rule is not applicable to Petitioner's case because under the amended statute, the State was merely required to prove possession of stolen goods or vehicles by a person who knew or had reason to believe the items were stolen.[7] Petitioner cannot meet his burden of proving the issue would likely have been successful on appeal, and appellate counsel was not ineffective in failing to raise it.

[7] For this same reason, Petitioner's reliance on State v. Wiles, 383 S.C. 151, 679 S.E.2d 172 (2009), is also misplaced. Petitioner contends Wiles stands for the proposition that even the post-1993 statute requires receipt of the stolen goods from another person. PWC p. 5. Petitioner cites dicta in a footnote stating "the possession of a stolen vehicle statute requires the defendant receive the goods from someone who actually stole them; he cannot receive the vehicle from himself." Id., 383 S.C. at 159, n. 1, 679 S.E.2d at 176, n. 1. This language is a direct quote from McNeil, recited without any consideration of the effect of the statutory amendment, as that charge was not at issue in the Wiles appeal.

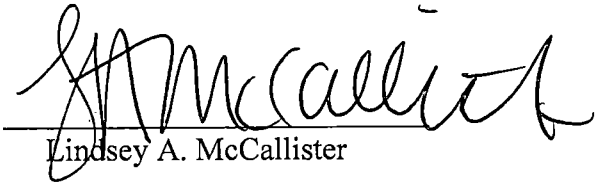
CONCLUSION

Petitioner has failed to meet his burden of proving appellate counsel was deficient because appellate counsel is not required to raise unpreserved issues on appeal, and even if the jury-instruction issue was preserved, appellate counsel is not required to raise every non-frivolous issue on appeal. Additionally, Petitioner has failed to meet his burden of proving he was prejudiced by any alleged deficiency because Petitioner relies on outdated case law and cannot show there was a reasonable probability he would have prevailed on appeal. Therefore, Respondent respectfully submits that the Petition for a Writ of Certiorari should be denied. However, if this Court grants certiorari, Respondent requests the opportunity to fully brief the issues discussed above.

Respectfully submitted,

ALAN WILSON
Attorney General

LINDSEY A. MCCALLISTER
Assistant Attorney General

BY: 
Lindsey A. McCallister

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3737

ATTORNEYS FOR RESPONDENT

July 28, 2017

RECEIVED
JUL 28 2017
S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari from Anderson County
Honorable Brooks P. Goldsmith, Circuit Court Judge

Appellate Case No. 2016-001435

JAMES TINSLEY, PETITIONER,

v.

THE STATE OF SOUTH CAROLINA, 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:

Taylor Davis Gilliam, Esquire
SC Commission of Indigent Defense
Post Office Box 11589
Columbia, SC 29201

This 28th day of July, 2017

DEONNA ROGERS
LEGAL ASSISTANT