

STATE OF SOUTH CAROLINA
In The Supreme Court

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CERTIORARI TO UNION COUNTY
Court of Common Pleas

S.C. SUPREME COURT

The Honorable Paul M. Burch, Circuit Court Judge

Appellate Case No. 2016-001775

CLARENCE J. PUCKETT,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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RESPONDENT'S ISSUE PRESENTED

The PCR court correctly found Counsel was not ineffective for failing to make a contemporaneous motion for a mistrial when a police officer gave prior bad act testimony regarding a prior drug sale involving Petitioner because no prejudice exists where the trial judge indicated how he would have ruled on the mistrial motion had it been timely made and the grounds for the mistrial would not have been successful on appellate review.

STATEMENT OF THE CASE

Procedural History

Petitioner was true-bill indicted during the October 2009 term of the Union County Grand Jury for trafficking in cocaine (2009-GS-44-1210) and possession of crack cocaine with intent to distribute (2010-GS-44-774). Petitioner was represented at trial by Eric Delaney, Esquire of the Sixteenth Circuit Public Defender's Office. Deputy Solicitor John C. Anthony, Esquire prosecuted the case. On November 13, 2012, Petitioner proceeded to a jury trial before the Honorable John C. Hayes, III. Petitioner was found guilty of trafficking in cocaine and not guilty of possession of crack cocaine with intent to distribute. On November 15, 2012, Petitioner was sentenced to imprisonment for ten years for trafficking in cocaine.

Petitioner filed a timely notice of appeal and the appeal was perfected by Appellate Defender Carmen V. Ganjehsani, Esquire. The South Carolina Court of Appeals affirmed Petitioner's conviction by Order filed October 1, 2014. State v. Puckett, Op. No. 2014-UP-347 (S.C. Ct. App.). The Remittitur was returned October 17, 2014.

Petitioner filed a PCR Application on March 23, 2015, alleging Counsel was ineffective for failing to object to introduction of illegally seized drugs, failing to ask for mistrial at appropriate time, and failing to ask for a change of venue. Respondent made its Return on or about December 30, 2015. An evidentiary hearing was convened on January 20, 2016, at the Moss Justice Center in York, South Carolina. Petitioner was present at the hearing and represented by Leah Moody, Esquire. Assistant Attorney General Justin Hunter, Esquire represented Respondent. At the hearing, Petitioner testified on his own behalf. Petitioner's trial counsel, Erik Delaney, Esquire also testified. Petitioner's application was dismissed with prejudice by Order signed July 25, 2016.

Petitioner filed a notice of appeal. The Petition for Writ of Certiorari was submitted, dated April 10, 2017. This Return follows.

Factual History

Lieutenant John Sherfield of the Union County Sheriff's Office set up surveillance of Petitioner's trailer to investigate possible drug activity. App. 73, ll. 7-10. Lieutenant Sherfield observed Travis Anderson arrive at the trailer at this time. App. 73, ll. 11-15. Meanwhile, Sergeant Jimmy Johnson obtained a search warrant. App. 74, ll. 1-3.

Four officers executed the search warrant on Petitioner's trailer. Lieutenant Sherfield testified he could hear someone running inside while they attempted to open the door. App. 75, ll. 17-18. The door finally came open and Travis Anderson was found inside the living room. App. 75, ll. 24-25. Lieutenant Sherfield heard the toilet flushing and the bathroom door was locked, so Lieutenant Sherfield knocked a hole through the wall of the bathroom. App. 76, ll. 10-16. Lieutenant Sherfield observed Petitioner through the hole; Petitioner was leaning over the toilet. App. 75, l. 21 – 76, l. 14. Sergeant Johnson was able to open the bathroom door and led Petitioner out of the bathroom. Sergeant Johnson recovered an open bag of powder cocaine from the bathroom. App. 77, ll. 11-25. Fourteen grams of marijuana were recovered from the basket next to the commode. App. 78, ll. 7-9. Both Petitioner and Anderson were arrested. App. 78, ll. 22-23. Anderson's case was still pending at the time of trial. App. 83, ll. 13-15.

Law enforcement found \$1,177 in cash in Petitioner's pocket. App. 79, ll. 24-25. Petitioner admitted at the scene that he flushed some of the drugs, although he could not say how much. App. 80, ll. 7-9. He also told officers there were scales in the kitchen cabinet. App. 80, ll. 10-20. Law enforcement recovered black digital scales with white powder residue, which Sherfield believed was cocaine, on the lid. App. 80, ll. 11-25. Petitioner admitted to selling drugs

because he fell on hard times and lost his job. App. 81, ll. 17-20. Two more small bags, later determined to contain crack cocaine, were found on the couch and floor in the living room.¹ App. 81, l. 125 – 82, l. 9.

Petitioner was interviewed the next day at the Union County jail. App. 83, ll. 19-24. He again admitted selling drugs because he lost his job. App. 84, ll. 5-6. He indicated he knew three other people who were selling drugs and said he might want to help, but he wanted to think it over. App. 84, ll. 6-17. Puckett indicated he could attain up to a quarter kilogram (9 oz.) of cocaine. App. 84, ll. 21-23.

Sergeant Jimmy Johnson testified he heard movement inside the trailer when he knocked on the door to execute the search warrant. App. 150, ll. 7-10. Sergeant Johnson kicked and pulled on the door until it suddenly opened. App. 150, ll. 18-21. When Sergeant Johnson heard flushing, he attempted to open the bathroom door but it was locked. App. 151, ll. 7-19. After he forced the door open, Sergeant Johnson found Petitioner crouched down at the toilet and also found a bag of cocaine in the toilet and marijuana in the bathroom trash can. App. 152, l. 3 – 153, l. 7. Sergeant Johnson heard Petitioner tell Lieutenant Sherfield that all the drugs in the trailer were his and not Anderson's. App. 154, ll. 3-8.

Deputy Dee Haney confirmed that Petitioner told law enforcement that the drugs were his and Anderson knew nothing about them. App. 177, ll. 12-13.

Petitioner admitted at trial the marijuana was his but denied the crack cocaine or cocaine were his. He explained he does not do cocaine, but did use marijuana in the past. App. 255, ll. 10-16. He denied the scales were his. App. 256, ll. 17-18. He claimed he received a \$20 pack of marijuana from Anderson. App. 257, ll. 11-14. Petitioner claimed he did not attempt to flush the

¹ The two small bags found in the living room constituted the contraband for the charge of possession with intent to distribute crack cocaine, for which Petitioner was acquitted.

toilet and he did not bring any cocaine into the bathroom. App. 266, ll. 15-24. He denied ever telling law enforcement at the trailer or the jail that the cocaine was his. App. 271, l. 24 – 272, l. 5. Petitioner also denied ever telling law enforcement he could buy cocaine from anyone. App. 272, ll. 16-18.

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) (emphasis added). 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)).

In a post-conviction relief action, an applicant bears the burden of proving the allegations in his or her 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 prove “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, at 441, 334 S.E.2d at 814.

The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. Courts presume counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, at 689. An applicant must overcome this presumption in order to receive relief. Cherry, at 118, 386 S.E.2d at 625.

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of counsel, and both prongs must be established by an applicant to receive relief. Strickland, at 687. First, an applicant must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (citing Strickland, at 688). 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.

ARGUMENT

The PCR court correctly found Counsel was not ineffective for failing to make a contemporaneous motion for a mistrial when a police officer gave prior bad act testimony regarding a prior drug sale involving Petitioner because no prejudice exists where the trial judge indicated how he would have ruled on the mistrial motion had it been timely made and the grounds for the mistrial would not have been successful on appellate review.

Petitioner argues that Counsel was ineffective for failing to make a contemporaneous motion for a mistrial to Sergeant Johnson's prior bad act testimony. This Court has held "to prove prejudice resulting from counsel's failure to move for a mistrial, an applicant must demonstrate that, had counsel moved for a mistrial, the trial court's denial of the motion would have amounted to an abuse of discretion:" Earley v. State, 418 S.C. 255, 266, 792 S.E.2d 226, 232 (2016). In Petitioner's case, the trial court gave a detailed ruling on Counsel's motion for a mistrial in trial and had it been preserved for appellate review, there is not a reasonable probability that the mistrial motion would have been meritorious.

At trial, Counsel cross-examined Sergeant Johnson as to how the search warrant was obtained:

Counsel: And I want to go to the point where you, before you get to the residence you received a call, say that it was information and you were going to use that information to go get a search warrant, is that right?

Sergeant Johnson: Yes. Lieutenant Sherfield gave me a call, advised me that one of our confidential informants - - -

Counsel: Right.

Sergeant Johnson: --- that we had used had been to Mr. Puckett's location ---

Counsel: Right.

Sergeant Johnson: ---and witnessed him sell---

Counsel: Your Honor.

Court: Just – Go on to your next question.

App. 158, ll. 5-18.

Counsel did not move to strike the testimony or move for a mistrial at that time, but continued to ask Sergeant Johnson about his role in obtaining the search warrant:

Counsel: Again, my question to you is, and if you – just wait.

Sergeant Johnson: Okay.

Counsel: Listen to what my question is. You received information; is that right?

Sergeant Johnson: Right.

Counsel: From Officer Sherfield?

Sergeant Johnson: Correct.

Counsel: Okay. And your job at that point was to take that information to somebody to get a warrant; is that right, search warrant?

Sergeant Johnson: Correct.

App. 159, l. 20 – 160, l. 11.

Counsel waited until after several more State's witnesses testified before making his motion for mistrial. App. 208, ll. 5-20. The trial court asked the court reporter to replay the testimony and made the following detailed ruling:

That was not necessary and it was not responsive to – it was not necessary to respond to the question. It was gratuitous information and it of course was hearsay and hearsay on hearsay basically. I'm not going to grant a mistrial. I do not find that there is any manifest necessity to grant a mistrial although [these] kind of interjections disturb me particularly Officer Johnson having been around for a long time and we shouldn't have to get into these situations. I will give a curative instruction if requested by the defense. Well I'm not going to give a curative instruction, I think that would highlight it and I'm not going to put the burden on the defense to have to ask for a curative instruction so I deny the motion for a mistrial and I'm not going to give any kind of curative instruction. But I am going to request the solicitor to have some similar or some sort of training with the officers who appear as the solicitor's witnesses and try to make sure they understand where they can go with their testimony and where they can't go with their testimony. We've already tried this case one time, don't want to

have to try it a third time based on some extraneous interjection by a State's witness.

App. 210, ll. 5-25.

After Counsel renewed his motion for a mistrial at the close of the State's case, the trial court again made a ruling:

Well as to a mistrial I of course have ruled and continue to rule there is no manifest necessity and again, I'm not going to put you to the burden of requesting a charge, corrective charge, but I'm not going to give one because. I think that would just be highlighting something that may have just gone over the jury's head and may not have, but since I do not find that this rises to the level of manifest necessity to grant a mistrial I'm not going to give a charge. All right.

App. 226, l. 25 – 227, l. 8.

While Petitioner asserts that Counsel testified at the hearing that he erred in failing to contemporaneously move for a mistrial, the PCR court did not find his actions deficient and it is clear that Counsel nonetheless did not act unreasonably. Counsel testified at the PCR hearing he did not expect his line of questioning to elicit the inadmissible testimony about a prior bad act. App. 417, ll. 11-13. When Sergeant Johnson began to testify about the prior bad act, Counsel acted quickly to mitigate the effect of Sergeant Johnson statement by immediately interrupting with, "Your honor." App. 158, ll. 5-18; 417, ll. 15-17. After Counsel's motion, the trial court noted that the interjection was merely gratuitous information which was not responsive to Counsel's question. App. 210, ll. 5-26. Counsel testified at the PCR hearing that he was not sure what the jury heard from the inadmissible statement, given his interruption, and therefore did not contemporaneously object. App. 418, ll. 1-3.

The PCR court correctly found, even if Counsel was deficient for failing to contemporaneously move for a mistrial, Petitioner could not show that he was prejudiced by Counsel's failure to timely move for a mistrial because the trial court gave a detailed ruling on the motion despite the fact that it was not made contemporaneously. App. 438. Despite the late

motion for a mistrial, it is abundantly clear how the trial court would have ruled on the motion because the trial court did in fact rule on the motion. App. 210; 227. The trial court twice denied Counsel's motion, first ruling that there was no manifest necessity to grant a mistrial based on the gratuitous extraneous statement. App. 210, ll. 5-26. After Counsel renewed his motion for a mistrial, the trial court stated, "I of course have ruled and continue to rule that there is no manifest necessity..." App. 226, l. 26 – 227, l. 8.

Furthermore, Petitioner cannot show Counsel was ineffective for failing to preserve the issue for appellate review because he has failed to prove the issue would have been successful on appeal. 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.

“A mistrial should only be granted when ‘absolutely necessary,’ and a defendant must show both error and resulting prejudice in order to be entitled to a mistrial.” State v. Stanley, 365 S.C. 24, 34, 615 S.E.2d 455, 460 (Ct. App. 2005) (citations omitted). “The less than lucid test is therefore declared to be whether the mistrial was dictated by manifest necessity or the ends of public justice, the latter being defined as the public’s interest in a fair trial designated to end in just judgment.” State v. Prince, 279 S.C. 30, 33, 301 S.E.2d 471, 472 (1983). The decision to grant or deny a mistrial is within the sound discretion of the trial judge and will not be overturned on appeal absent an abuse of discretion amounting to an error of law. State v. Crim, 327 S.C. 254, 257, 489 S.E.2d 478, 479 (1997). Our courts favor the exercise of wide discretion of the trial judge in determining the merits of such motion in each individual case. State v. Howard, 296 S.C. 481, 483, 374 S.E.2d 284, 285 (1988). “It is only in cases of abuse of discretion which result in prejudice that this court will intervene and grant a new trial.” Id.

The trial court did not abuse its discretion, as the oblique reference to a prior bad act was not sufficiently prejudicial as to require a curative instruction, much less a mistrial. It is clear from the record the short gratuitous statement Sergeant Johnson began to make before Counsel interrupted was unlikely to be interpreted by the jury. Sergeant Johnson was only able to say, “and witnessed him sell,” before being interrupted by Counsel. App. 158, l. 16. Counsel testified at the PCR hearing that he did not contemporaneously object because he was not sure the jury had even heard what Sergeant Johnson began to say. App. 417, l. 23. The statement at issue is merely a short fragment of a sentence that was unlikely to be heard or contextualized by the jury given Counsel’s swift interruption. Petitioner was not prejudiced by Counsel’s actions because

there is not a reasonable probability that his grounds for a mistrial would have been meritorious had he preserved it for appellate review. Therefore, the PCR court correctly held Petitioner failed to meet his burden of proving Counsel was ineffective and the Order of Dismissal should be affirmed.


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,

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By: 
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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
SC Commission of Indigent Defense
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This 8th day of September, 2015



CAROLINE COLLINS
LEGAL ASSISTANT