STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Greenville County

Honorable John C. Hayes, Circuit Court Judge

ERICK ETON HEWINS,

RESPONDENT

V.

STATE OF SOUTH CAROLINA,

PETITIONER

APPELLATE CASE NO 2016-02382

RETURN TO PETITION FOR WRIT OF CERTIORARI

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INDEX

RESPONDENT'S 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

Mr. Hewins was charged with trafficking cocaine base and possession of a Schedule IV controlled substance following an encounter with police officers in a hotel parking lot on or about August 9, 2010. App. 12 ll. 10 – 21; App. 519 – 525. Two officers, Scott Gardner and Rachel Hall, were dressed in plain clothes while driving a tan unmarked Impala around midnight on August 9, 2010. App. 43 l. 15 – App. 45 l. 23. Combined, Gardner and Hall had approximately four years' experience as police officers. App. 57 ll. 5 – 7; App. 77 ll. 11 – 13.

Gardner and Hall allegedly observed Mr. Hewins sitting in a black Lexus which was backed into a hotel parking spot. App. 46 ll. 1 – 10. Next to the Lexus was a Camry with two occupants. App. 46 ll. 2 – 4. When asked by Hall for his information and Social Security Number, Mr. Hewins provided the "proper information." App. 85 ll. 2 – 6. There were no active arrest warrants for Mr. Hewins. App. 85 ll. 16 – 22. During additional questioning of Mr. Hewins, Gardner supposedly noticed him touch his left pocket. App. 51 ll. 8 – 17. Gardner testified that he told Mr. Hewins to get out of the car while advising him that he was going to conduct a Terry[1] frisk for weapons. App. 52 ll. 6 – 11. Gardner supposedly felt a "hard lump" inside Mr. Hewins' pocket. App. 52 ll. 11 – 13. Although Mr. Hewins and a second witness indicated otherwise, Gardner ostensibly testified that Mr. Hewins consented to a search inside his pocket. App. 52 ll. 14 – 17; App. 198 ll. 9 – 24; App. 114 ll. 17 - 19; App. 123 l. 25 – App. 124 l. 3.

Gardner apparently reached his hand into Mr. Hewins' pocket and supposedly retrieved "a large wad of cash rolled up in rubber bands." App. 52 ll. 15 – 17. Allegedly operating under

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[1] Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).

the same consent, and based on the impression that a weapon could have fit within Mr. Hewins' blue jeans pockets "underneath the wad of cash" which was "very large," Gardner again reached into Mr. Hewins' pocket and claimed to have located "four green round green pills, which were confirmed to be clonazepam, which is a Schedule IV drug." App. 52 l. 21 – App. 53 l. 4; App. 73 ll. 8 - 25. Mr. Hewins was subsequently arrested. App. 54 ll. 5 – 6. The pills which were found as a result of the second search served as the basis for the arrest. App. 75 ll. 7 – 21.

As a result of the arrest, Gardner claimed that it was department policy to tow the vehicle; therefore, a search was conducted.[2] App. 54 ll. 7 – 16. Gardner testified that he found a piece of crack "on the back floorboard" of Mr. Hewins' Lexus. App. 54 ll. 17 – 20. Gardner also claimed to have found a medicine bottle containing multiple small crack rocks. App. 54 ll. 21 – 25.

Mr. Hewins proceeded to trial before the Honorable G. Edward Welmaker and a jury on January 14, 2013. App. 1. Joyce Montis represented the State, and Chase Harbin represented Mr. Hewins. This was Mr. Hewins' second trial on these charges, with the first trial having taken place before Judge Hyman in September 2012. App. 42 ll. 2 – 7.

Trial counsel sought to suppress any evidence which was obtained as a result of the encounter. App. 40 ll. 11 – 22. Following a pre-trial suppression hearing, the trial court indicated that it was going to "allow the evidence in." App. 160 ll. 14 – 15.

The jury deliberated for "quite some time" before delivering a guilty verdict. App. 419 ll. 8 – 15; App. 424 ll. 24 – 25. Judge Welmaker sentenced Mr. Hewins to one year imprisonment

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[2] Gardner suggested that the police department instituted this policy because it "can't allow the tow truck drivers to be trafficking crack themselves" even though S.C. Code Ann. § 44-53-370 and § 44-53-375 require knowledge in order to prove guilt for a trafficking charge.

on the possession charge and twenty-five years' imprisonment on the trafficking charge, with the sentences to run consecutively. App. 428 ll. 13 – 18.

In an opinion which affirmed Mr. Hewins' sentences and convictions, the South Carolina Court of Appeals found the issue of the second search unpreserved:

> While we believe the facts raise the question of whether Gardner's second reach was justified by consent, we find the issue is not preserved. When Gardner was cross-examined during the suppression hearing, he reiterated his assertion that he had Hewins' consent to reach into the pocket the first time to retrieve the 'hard lump.' Hewins made no inquiry as to Gardner's testimony that he had Hewins' continuing consent to conduct the second reach. Hewins did not object to the State's argument that Gardner's first reach was justified under Terry and by Hewins' consent and that the second reach was justified by continuing consent. Finally, while Hewins supported his suppression argument by asserting a reasonable person with drugs in their pocket and car would not give consent, he 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 search. Therefore, we find the issue is not preserved for review on appeal.

State. v. Hewins, Op. No. 2014-UP-478 (filed Dec. 23, 2014); App. 438.

The Court of Appeals denied Mr. Hewins' petition for rehearing. App. 440. Mr. Hewins filed a PCR application on or about April 26, 2016. App. 443 - 453. Mr. Hewins raised multiple claims of ineffective assistance of counsel, including failure to object to the two reaches into his pocket. App. 452. The State filed its Return on or about August 29, 2016. App. 455 – 463.

On October 25, 2016, a hearing was held before the Honorable John C. Hayes, III. Brian Johnson represented Mr. Hewins, and Patrick Schmeckpeper represented the State. App. 464. Mr. Hewins and trial counsel testified during the hearing.

Following the hearing, Judge Hayes issued an Order granting Mr. Hewins' application for post-conviction relief. App. 512 – 518. The State filed its Notice of Appeal on November 23, 2016. The Petition for Writ of Certiorari was filed on June 26, 2017.

This Return follows.

ARGUMENT

I. There is probative evidence in the record to support the PCR court's finding that trial counsel rendered ineffective assistance by failing to request a more specific ruling, and the PCR court applied the correct standard throughout its Order.

Background

"[I]t borders on insulting to think that anybody would think that [Mr. Hewins] would really give consent to" allow an officer to search his pocket. App. 155 ll. 22 – 23. In fact, Mr. Hewins *did not give consent* for Gardner to reach into his pocket. App. 114 ll. 17 – 19; App. 116 ll. 17 – 20; App. 489 l. 2. As Mr. Hewins put it, "[Gardner] came over to me and just stuck his hand in my pocket without consent." App. 473 ll. 18 – 19. Not only did Mr. Hewins refuse to give consent, he questioned Gardner when the reach was occurring:

> Q: And you just said don't go in my pocket[?]
>
> A: No, I said, Why the hell are you goin' in my pocket[?]
>
> Q: Correct, yeah.
>
> A: Do we need to go to the, uh, transcript?

App. 487 ll. 1 – 9.

Furthermore, Mr. Hewins refuted Gardner's assertion that any conversation took place regarding Mr. Hewins touching his pocket:

> I don't recall him asking me ... [to] stop touching my pocket. All that's fabricated. I never was touching my pocket. I was sitting in my car complying with his questions."

App. 111 ll. 1 – 4.

Megan Newman, one of the individuals in the car who was speaking with Mr. Hewins before Gardner and Hall arrived, likewise repudiated Gardner's claim that he received consent to reach into Mr. Hewins' pocket:

> I know [Gardner] was asking [Mr. Hewins] some questions, but the only thing that I really heard out loud because they were in front of my car by then, was why the H-E-L-L are you going in my pocket.

App. 123 l. 25 – App. 124 l. 3.

The Court of Appeals opinion affirming Mr. Hewins' convictions and sentence repeatedly cast doubt on Gardner's actions:

> "Apparently without any further inquiry or notice, Gardner then reached into Hewins' pocket a second time." App. 434.
>
> "Gardner did not testify if Hewins' consent was verbal or non-verbal." App. 434 n. 3.
>
> **"In addition, we are troubled by Gardner's bare assertion that he received consent for the second reach to justify his actions."** App. 437 (emphasis added).
>
> If Gardner had Hewins' consent to conduct the first reach into the pocket, the scope of the consent granted could have been limited to determining what the lump in Hewins' pocket was. Thus, the second reach into Hewins' pocket might have exceeded the scope of consent. The trial court did not make any findings as to whether the scope of consent included the second reach into Hewins' pocket. App. 437.

Respondent sought to parse language from the Court of Appeals opinion at the PCR Hearing:

> I would just like to highlight the ... language. It's not that this issue is unpreserved as meritorious, it's this issue is unpreserved and we don't have the facts before us to make the determination.

App. 507 ll. 12 – 16.

This may not be accurate. The exact language of the Court of Appeals opinion was "we believe the facts raise the question of whether Gardner's second reach was justified by consent."

App. 438. The facts gave rise to the question, but the question was unanswered. This issue was not afforded judicial scrutiny due to the failure of trial counsel to preserve it for review.

Discussion

A two-prong test for determining effective assistance of counsel has been set forth by the U.S. Supreme Court in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). First, a defendant must show that counsel's performance was deficient. Under this prong, "[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms." 466 U.S. at 688, 104 S.Ct. at 2065. The second prong of the Strickland test requires a showing that the deficient performance prejudiced the defendant to the extent that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." The defendant is required to overcome the presumption that counsel was effective in order to receive relief. Cherry v. State, 300 S.C. 115, 117–18, 386 S.E.2d 624, 625 (1989).

"In order to show that he was prejudiced by appellate counsel's performance, a PCR applicant must show that 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.' " Bennett v. State, 383 S.C. 303, 309–10, 680 S.E.2d 273, 276 (2009) (citing Cherry v. State, 300 S.C. 115, 117–18, 386 S.E.2d 624, 625 (1989).

"This Court gives great deference to the post-conviction relief (PCR) court's findings of fact and conclusions of law." Dempsey v. State, 363 S.C. 365, 368, 610 S.E.2d 812, 814 (2005). This Court will uphold factual findings of the PCR court if there is any evidence of probative value to support them. Webb v. State, 281 S.C. 237, 314 S.E.2d 839 (1984). The Court will reverse the PCR court's decision when it is controlled by an error of law. Pierce v. State, 338

S.C. 139, 145, 526 S.E.2d 222, 225 (2000). Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007).

However, " 'even an isolated error' can support an ineffective-assistance claim if it is 'sufficiently egregious and prejudicial.' " Harrington v. Richter, 562 U.S. 86, 131 S.Ct. 770, 791, 178 L.Ed.2d 624 (2011) (quoting Murray v. Carrier, 477 U.S. 478, 496, 106 S.Ct. 2639, 91 L.Ed.2d 397 (1986) (internal citations omitted)). Such is the case here.

A contemporaneous objection requirement enables trial judges to make reasoned decisions by appropriately developing issues by way of argument, both for or against any particular legal proposition. This, in turn, allows potential errors to be prevented or cured. The United States Supreme Court set forth in Wainwright v. Sykes, 433 U.S. 72, 90, 97 S.Ct. 2497, 2508, 53 L.Ed.2d 594 (1977) the virtues of a contemporaneous objection requirement thusly:

> A defendant has been accused of a serious crime, and this is the time and place set for him to be tried by a jury of his peers and found either guilty or not guilty by that jury. To the greatest extent possible all issues which bear on this charge should be determined in this proceeding: the accused is in the courtroom, the jury is in the box, the judge is on the bench, and the witnesses, having been subpoenaed and duly sworn, await their turn to testify. Society's resources have been concentrated at that time and place in order to decide, within the limits of human fallibility, the question of guilt or innocence of one of its citizens. Any procedural rule which encourages the result that those proceedings be as free of error as possible is thoroughly desirable, and the contemporaneous objection rule surely falls within that classification.

As stated by the Court in Wainwright, the contemporaneous objection maintains the framework of our time-proven adversarial process and allows the various actors in each trial (solicitor, defense counsel, and trial judge) to adhere to their traditional roles. State v. Torrence, 305 S.C. 45, 66–67, 406 S.E.2d 315, 327 (1991).

Petitioner posits that the failure of the PCR judge to include a finding that Mr. Hewins would have prevailed on appeal constituted an error as a matter of law. "Trial judges are

presumed to know the law." State v. Ray, 310 S.C. 431, 437, 427 S.E.2d 171, 174 (1993) (see Walton v. Arizona, 497 U.S. 639, 110 S.Ct. 3047, 111 L.E.2d 511 (1990). On the second page of Judge Hayes' order, he cited the two-prong Cherry standard:

> The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of ... counsel. First, the Applicant must prove that the 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 117-118, 386 S.E.2d at 625. Second, counsel's deficient performance must have prejudiced Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Id.

App. 513

By granting Mr. Hewins' application for post-conviction relief after citing the applicable law, Judge Hayes recognized that both prongs of the Cherry test were satisfied. Although Judge Hayes seemed reluctant to grant Mr. Hewins a new trial, we "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." App. 515.

There was not a shortage of testimony from the PCR hearing regarding prejudice and success on appeal. Mr. Hewins knew he was prejudiced by the failure to object and he could have succeeded on appeal if given the opportunity:

> [H]ad trial counsel objected it wore the greater possibility that it would have been sustained or at least it would have been preserved for direct review and this failure [prejudiced] the outcome of the case in that my conviction was obtained in violation of the Sixth Amendment.

App. 479 ll. 13 – 18.

> [H]ad trial counsel objected, it's a great possibility the drugs would have been suppressed, even if the Court wished to believe I gave consent, the officer exceeded the scope of consent, there was evidence that Gardner never had consent and this was an illegal search and seizure not justified under Terry.

App. 481 ll. 5 – 11.

Just like he knew that he had been prejudiced, Mr. Hewins knew his rights leading up to the encounter:

> I knew... that I had a right ... to ... not consent to his ... request to search so I woulda never gave consent to search ... once he stuck his hand in my pocket I stepped back and I asked him, Why the hell is you goin' in my pocket, I said it loud enough where... Megan Newman who... testified at trial she even heard herself.

App. 473 l. 24 – App. 474 l. 6.

There is a compelling amount of testimony indicating a lack of consent from Mr. Hewins. In reviewing a PCR judge's decision, this Court is concerned only with whether there is any evidence of probative value to support that decision). Trial counsel's testimony from the PCR hearing revealed no strategic discretion was employed by counsel on this matter at all. See Foye v. State, 335 S.C. 586, 518 S.E.2d 265 (1999) (counsel's performance did not constitute valid strategy where counsel did not even consider the question and thus failed to use discretion in employing an appropriate strategy). Castro v. State, 417 S.C. 77, 84, 789 S.E.2d 44, 47–48 (2016).

In contrast to Petitioner's position at the PCR hearing, trial counsel believed the consent issue was worthy of jury consideration. App. 503 ll. 1 – 5. When asked whether he would make a double objection when presented with a situation similar to Mr. Hewins', trial counsel answered in the affirmative. App. 502 ll. 14 – 16. Upon information and belief, there has been no drastic change in the law which would have altered the objection standard during the time period spanning Mr. Hewins' trial and the post-conviction relief hearing. As such, counsel should have been aware of the law, most notably State v. McLaughlin, 307 S.C. 19, 23, 413 S.E.2d 819, 821 (1992) (holding the appellant's failure to request a more explicit ruling constituted a waiver to any objection to the trial court's general ruling) and State v. Passmore,

363 S.C. 568, 584, 611 S.E.2d 273, 282 (Ct. App. 2005) ("Without an initial ruling by the trial court, a reviewing court simply would not be able to evaluate whether the trial court committed error.").

Citing Gardner's testimony and State v. Mattison, Petitioner submits that Mr. Hewins "made no protest" and never effectively withdrew consent "in the form of either an act, statement or some combination of the two, that is inconsistent with consent previously given." 352 S.C. 577 587, 575 S.E.2d 852, 857 (Ct. App. 2003). In fact, the opposite is true—Mr. Hewins in no uncertain terms asked Gardner why he was reaching into his pocket. According to Mr. Hewins and an additional witness, this is what occurred. However, due to trial counsel's failure to request a more explicit ruling, this issue was unpreserved and could not be considered on direct appeal.

Similar to the defendant in Tice v. Johnson, Mr. Hewins was found guilty due to the testimony of a witness with suspect credibility. 647 F.3d 87, 106 (4th Cir. 2011). In Tice, the Defendant was convicted through the testimony of an alleged eyewitness, Dick, whose credibility was called into question just like Gardner's.

"The facts and inferences that might cause one to lend credence to his sworn utterances seem rather less in number and substance than those supporting disbelief." Id. at 109. The Fourth Circuit concluded that "in light of ' the ... accounts Dick had provided and the **lack of significant corroboration of his testimony** ..., a reasonable jury would have grave doubts as to Dick's veracity regarding Tice's participation in the crime.'" Id. at 109 (emphasis added).

Gardner's testimony, like Dick's, is problematic. As set forth in Mr. Hewins' Final Brief of Appellant:

> During Defendant's motion to suppress, the trial court determined that Officer Gardner had reasonable suspicion to conduct a Terry frisk based upon the following (1) the high crime area; (2) the lateness of the hour; (3) "nervous behavior" by the Defendant; (4) that the Defendant allegedly touched his pocket, and (5) the experience of the Officers (R. P. 111, lines 1 – 15). None of these factors articulates that criminal activity the Officers believed Defendant to be engage in at the time of their initial detention. These factors also fail to articulate the reason Officer Gardner believed Defendant was armed and dangerous. Finally, all Officer Gardner felt upon an over the clothes pat of Defendant's pocket was what turned out to be a wad of cash. Officer Gardner failed to identify a single reason be believed Defendant was still armed after the cash was removed. In short, Officer Gardner engaged in a fishing expedition based upon a hunch and persisted until he discovered contraband. Sikes v. State, 323 S.C. 28, 448 S.E.2d 560 (1994), see United States v. Foster, 634 F.3d 242 (C.A.4 2011).
>
> Given the totality of the circumstances, Officer Gardner's second frisk of Defendant was not supported by reasonable suspicion that Defendant was armed and dangerous. Officer Gardner testified that Defendant provided consent to perform the second search. However, "consent" must be (1) knowing and voluntary and (2) given by one with authority to consent. U.S. v. Digiovanni, 650 F.3d 498 (C.A.4 2011). Whether consent was voluntarily given is a question of fact, but ultimately rests on whether the person giving consent reasonably believed the Officer's request was voluntary. Digiovanni at 514. The facts in this case do not support an argument that Officer Gardner's request was voluntary, nor does Defendant concede that he voluntarily consented to search.
>
> Supp. App. pp. 26 - 27.

As mentioned, the Court of Appeals took issue with multiple instances of Gardner's testimony. Trial counsel failed to articulate any valid strategic reason for not inquiring into the continued consent conclusion or requesting a more detailed ruling from the trial court. The result, an unpreserved issue which could not be considered by the Court of Appeals, stems from trial counsel's failure to meet an objective standard of reasonableness.

Mr. Hewins was not afforded judicial review on this issue. He was not allowed the opportunity for a panel of judges to review the facts surrounding the trial court's ruling regarding the second search. Had counsel objected, there was a likelihood that Mr. Hewins would have prevailed on appeal due to the credibility problems surrounding Gardner's testimony.

II. Petitioner's issue is not preserved due to the failure to file a Motion to Alter or Amend under Rule 59(e), SCRCP.

It seems fair to presume that the crux of Petitioner's angst rests with alleged deficiencies in Judge Hayes' Order.[3] However, it does not appear that Petitioner filed a Motion to Alter or Amend a Judgment under Rule 59(e), SCRCP.

Pursuant to S.C. Code Ann. § 17-27-80, the PCR judge must make specific findings of fact and state expressly the conclusions of law relating to each issue presented. The failure to rule on the issues precludes appellate review of the issues. Pruitt v. State, 310 S.C. 254, 423 S.E.2d 127 (1992). As a result, this issue is not preserved for appellate review because it was not addressed in the PCR order and no Rule 59(e) motion was filed. Humbert v. State, 345 S.C. 332, 548 S.E.2d 862 (2001).

In order to "properly preserve an issue for appellate review, it is incumbent upon a party in a PCR action to file a Rule 59(e) motion in the event the PCR court fails to make specific findings of fact and conclusions of law regarding an issue. Marlar v. State, 375 S.C. 407, 653 S.E.2d 266 (2007) see also Burgess v. State, 402 S.C. 92, 738 S.E.2d 264 (Ct. App. 2013) (holding the State's argument was not preserved for appellate review because the State failed to file a Rule 59(e), SCRCP, motion asking the PCR court to make a specific determination).

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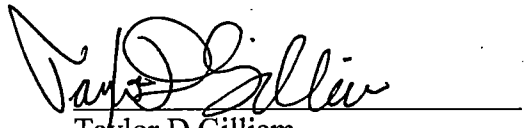
[3] From the Statement of Issue on Certiorari": "Did the post-conviction relief court erred [sic] as a matter of law by granting Hewins a new trial, where it applied an incorrect standard and erroneously granted relief despite failing to make the requisite finding that Richardson [sic] would have prevailed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

CONCLUSION

For the reasons set forth above, Respondent respectfully submits that the Petition for Writ of Certiorari should be denied. However, if this Court grants certiorari, Respondent requests the opportunity to brief fully the issues discussed above.



Taylor D Gilliam
Appellate Defender

ATTORNEY FOR PETITIONER

This 26th day of October, 2017.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Greenville County

Honorable John C. Hayes, Circuit Court Judge

ERICK ETON HEWINS,

RESPONDENT

V.

STATE OF SOUTH CAROLINA,

PETITIONER

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Return to Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon Justin J. Hunter, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Erick Eton Hewins, #297728, at McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29899, this 26th day of October, 2017.

Taylor D Gilliam
Appellate Defender

SUBSCRIBED AND SWORN TO before me this 26th day of October, 2017.

ATTORNEY FOR RESPONDENT

_____ (L.S)
Notary Public for South Carolina
My Commission Expires: