STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Florence County
Honorable Paul M. Burch, Circuit Court Judge

Appellate Case No. 2017-001412

ONTANEY VENTRELL JACKSON,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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Attorney General

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ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

RESPONDENT'S QUESTION PRESENTED

Is there probative evidence in the record to support the post-conviction relief court's finding Petitioner received effective assistance of counsel where trial counsel notified Petitioner of his trial date and informed him that if he failed to appear, he would be tried in his absence and where trial counsel articulated valid trial strategies for not objecting to the Solicitor's opening statement and the recall of the State's lab witness and for stipulating that the leafy green substance found in one of the bags that Petitioner threw was marijuana?

STATEMENT OF THE CASE

On November 26, 2009, Deputy Jake Chamberlain was on patrol in Timmonsville, a high-crime area of Florence County. App. p. 93. Deputy Chamberlain was checking the area around Club Ponderosa, which was known for drug activity, when he spotted Petitioner standing around near the back of the club. App. p. 94. Chamberlain testified that as soon as Petitioner recognized his car as a patrol car, Petitioner took off running through the club's parking lot. App. p. 43. According to Chamberlain, as he followed Petitioner in his patrol car, he observed Petitioner reach into his right front jacket pocket and throw multiple bags onto the ground while he was running. App. pp. 95-96. Chamberlain then stopped his vehicle and detained Petitioner. App. pp. 96-97.

Chamberlin testified he read Petitioner his Miranda rights, and Petitioner gave Chamberlin permission to search him. App. pp. 97-98. Chamberlain found Petitioner's driver's license and a small plastic bag of cocaine in Petitioner's right front jacket pocket. App. pp. 98-99. Chamberlain testified he asked Petitioner what was in the bags he had thrown on the ground, and Petitioner replied, "You can't charge me with those because they're in the parking lot and not in my pocket." App. p. 99. Chamberlin then placed Petitioner in his patrol car and retrieved the bags Petitioner threw on the ground and placed them into evidence bags. App. pp. 99, 101. During trial, the SLED chemist testified one bag contained 1.32 grams of cocaine base, the second bag contained 2.07 grams of powder cocaine, and the third bag contained .45 grams of cocaine. App. p. 145. Chamberlin testified that marijuana was found with the "rock substance and the powder substance on the ground" App. p. 103.

Petitioner was indicted at the June 2010 term of the Florence County Grand Jury for one count of possession with intent to distribute (PWID) cocaine base, one count of PWID cocaine, and one count of possession of marijuana (2010-GS-21-0673). App. pp. 328-30. He was represented by Carrington Wingard, Esquire, at trial, and Vick Meetz, Esquire, at sentencing. App.

pp. 1, 208. After a trial *in absentia* by jury, he was convicted as indicted on all three charges. App. 202.

The Honorable Michael D. Nettles sentenced Petitioner, and sealed the sentence. App. p. 206. On January 31, 2012, Petitioner appeared for sentencing, and Judge Nettles unsealed Petitioner's sentence. App. p. 208. Judge Nettles sentenced him to concurrent terms of imprisonment for one year for possession of marijuana, and fifteen years each for PWID cocaine and PWID cocaine base. App. pp. 214-17.

Petitioner filed a timely notice of appeal. An appeal was perfected by LaNelle Cantey Durant, Esquire, of the South Carolina Office of Appellate Defense, who submitted an Anders[1] brief. The South Carolina Court of Appeals affirmed Petitioner's conviction on December 11, 2013. State v. Jackson, Op. No. 2013-UP-453 (S.C. Ct. App. filed December 11, 2013). The remittitur was returned to the Circuit Court on January 8, 2014.

Petitioner filed his application for post-conviction relief (PCR) on July 7, 2014. App. pp. 219-53. Respondent filed a Return on October 15, 2016, requesting an evidentiary hearing in the matter. App. pp. 254-60. On March 15, 2017, an evidentiary hearing was convened at the Florence County Courthouse before the Honorable Paul M. Burch. App. p. 261. Jonathan D. Waller, Esquire, represented Petitioner. App. p. 261. Lindsey A. McCallister, Esquire, of the South Carolina Attorney General's Office, represented Respondent. App. p. 261. At the hearing, Petitioner testified on his own behalf and Carrington Wingard, Esquire, testified for Respondent. App. p. 262. An Order of Dismissal was filed June 12, 2017, in which the PCR Court found Petitioner received effective assistance of trial and sentencing counsel, and Petitioner was not prejudiced by either counsel's representation. App. pp. 314-327. Petitioner filed a timely notice of

[1] Anders v. California, 386 U.S. 738 (1967).

appeal, and submitted a Petition for a Writ of Certiorari to this Court on March 2, 2018. This Return to the Petition for a Writ of Certiorari follows.

STANDARD OF REVIEW

The standard of review for post-conviction relief matters depends on the specific issues before the appellate court. Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018). On appellate review, courts defer to a post-conviction relief court's findings of fact and will uphold them if there is any evidence in the record to support them. Smalls, 810 S.E.2d at 839-40 (citing Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016); Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013)). However, pure questions of law will be reviewed *de novo* without deference to the lower court. Id. 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).

The Sixth Amendment to the United States Constitution guarantees a defendant the right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668 (1984); Lomax v. State, 379 S.C. 93, 665 S.E.2d 164 (2008). 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 [it] cannot be relied upon as having produced a just result." Strickland, 466 U.S. at 686 (1984); Butler, 286 S.C. at 442, 334 S.E.2d at 814.

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland. First, a PCR applicant must prove counsel's performance was deficient. Strickland, 466 U.S. at 625; Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625

(quoting Strickland, 466 U.S. at 690). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Butler, 286 S.C. at 442, 334 S.E.2d at 814. "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Id. (citing Strickland, 466 U.S. at 690). A PCR applicant must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625. 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." Id. at 117-18, 386 S.E.2d at 625.

ARGUMENT

There is probative evidence in the record to support the post-conviction relief court's finding Petitioner received effective assistance of counsel where trial counsel notified Petitioner of his trial date and informed him that if he failed to appear, he would be tried in his absence and where trial counsel articulated valid trial strategies for not objecting to the Solicitor's opening statement and the recall of the State's lab witness and for stipulating that the leafy green substance found in one of the bags that Petitioner threw was marijuana.

Petitioner asserts Counsel was deficient in failing to notify him of his trial date in time for him to attend. Petitioner also contends that Counsel was ineffective for failing to object to the solicitor's opening statement, for failing to object to the recall of the State's lab witness, and for stipulating that the marijuana found Petitioner was his. However, the PCR court properly denied these allegations as Petitioner failed to establish counsel's performance was constitutionally ineffective. This Court should deny certiorari.

1. **The PCR court correctly found Counsel was not deficient because she notified Petitioner of his trial date and informed him he would be tried in his absence if he failed to appear.**

It is well established that, although the Sixth Amendment of the United States Constitution guarantees the right of an accused to be present at every stage of his trial, this right may be waived, and a defendant may be tried in his absence. State v. Fairey, 374 S.C. 92, 99, 646 S.E.2d 445, 448 (Ct. App. 2007). A criminal defendant may be tried in his absence only upon a trial court's finding (1) the defendant has received notice of his right to be present, and (2) he was advised the trial would proceed in his absence if he failed to attend. State v. Williams, 292 S.C. 231, 232, 355 S.E.2d 861, 862 (1987). Notice of the term of court in which a defendant will be tried is sufficient notice to enable the defendant to make an effective waiver of his right to be present at his trial. Ellis v. State, 267 S.C. 257, 261, 227 S.E.2d 304, 306 (1976); Fairey, 374 S.C. at 99, 646 S.E.2d at 448. Further, at the time of Petitioner's trial, case law provided that a bond form was sufficient

to give warning that a defendant may be tried in his absence should he fail to appear. Fairey, 374 S.C. at 101, 646 S.E.2d at 449.[2]

The trial transcript reflects Counsel made a motion for a continuance, requested a bench warrant be issued, and objected to Applicant being tried in his absence. App. pp. 27-29. The trial court found Applicant was given adequate notice of the court date and that he would be tried in his absence if he failed to appear. App. pp. 30-31. Further, Petitioner's PCR Counsel stipulated at the evidentiary hearing that the procedural requirements for Petitioner to be tried *in absentia* had met. App. p. 295.

At the evidentiary hearing, Counsel testified that the first week of the court term was July 27, 2010, at which time Petitioner was excused by the solicitor and told his case would likely be called during the third week of the term. App. pp. 287-88. Counsel further testified she telephoned Petitioner on August 9, 2010, when she received notice from the solicitor that he intended to call Petitioner's case, to inform him his case was being called for trial the next day. App. p. 288.

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[2] On August 16, 2017, the Court of Appeals issued an opinion in State v. Wrapp, 421 S.C. 531, 808 S.E.2d 821 (Ct. App. 2017). The issue in Wrapp was whether Wrapp voluntarily waived his right to be present at trial and was sufficiently on notice he would be tried in his absence. Id. at 533, 808 S.E.2d at 822. The Court of Appeals held Wrapp was improperly tried *in absentia* because the trial court failed to make the required findings that Wrapp "(1) received notice of his right to present, and necessarily, of the term of court for which he needed to be present, and (2) was warned he would be tried *in absentia* if he failed to attend." Id. at 536, 808 S.E.2d at 823. The Court of Appeals found the record to be "devoid of any fact indicating Wrapp had actual notice of the term of court in which his trial would occur." Id. at 536, 808 S.E. 2d at 824. The Court stated: "It seems logical that for one to voluntarily fail to attend trial or otherwise waive his trial appearance, one must actually know when the trial is to occur." Id. at 537, 808 S.E.2d at 824. Notably, in Petitioner's case, he had notice of the term of court in which his case would be tried and, by his own admission, he actually appeared during the first week of that term. App. p. 272. Counsel testified Petitioner was told at that time his case would be called during the third week of the term, if at all. App. 287. Additionally, Counsel called Petitioner as soon as she learned his case was being called for trial the next day and informed of the trial date and that he would be tried in his absence if he failed to appear. App. pp. 288-89. Petitioner's case is thus easily distinguishable from Wrapp.

According to Counsel, Petitioner told her he would be present for trial, but he did not appear by 8:30 a.m. the next day, at which time she called him again. App. p. 288. Counsel testified Petitioner did not answer her phone call, so she left him a voice message asking him to come to the fourth floor courtroom as soon as possible and explained he would be tried in his absence if he did not appear. App. p. 289. The PCR court found Counsel's testimony on this issue to be credible, while also finding Petitioner's testimony[3] was not credible. App. p. 321.

Therefore, there is sufficient evidence in both the trial record and the record from the evidentiary hearing to support the PCR court's finding Counsel was not deficient. Petitioner's argument Counsel was deficient is without merit and was properly denied by the post-conviction relief court.

2. **The PCR Court correctly found Counsel was not deficient for choosing not to object to the solicitor's opening statement, for not objecting to the recall of the State's lab witness, and for stipulating that the leafy green substance found in one of the bags was marijuana because Counsel articulated valid trial strategies for each decision.**

Petitioner also argues the PCR court erred in failing to find Counsel was ineffective for failing to object to the solicitor's opening statement, for failing to object to the recall of the State's lab witness, and for stipulating that the leafy green substance found in one of the bags on the

[3] Petitioner testified he was released on bond shortly after his arrest on these charges, and at the time of trial, he was working in Greenwood. App. pp. 267-68. He testified he would take a work van with his coworkers, and they would stay the entire week. App. pp. 267-68. If Petitioner knew he had a court appearance, he would miss that week of work, which happened at least twice. App. pp. 267-68. Petitioner said that he called the court hotline before the second week of the trial term, and his name was not on the list, so he got on the work van and went to Greenwood for the week. App. 272 l. 24- App. 273 l. 14.

Petitioner offered conflicting testimony as to when he was notified of his trial date. Petitioner first admitted Counsel called to tell him his case was being called for trial the following day, but because he was out of town without a car, he had no way to get back to Florence. App. pp. 273-74. Petitioner then testified he was not aware his case was going to trial that day and claimed he did not speak with Counsel either the week leading up to trial or afterward. App. pp. 274-75.

ground was marijuana. "Counsel's performance is accorded a favorable presumption, and a reviewing court proceeds from the rebuttable presumption that counsel 'rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.'" Strickland, 466 U.S. at 690. There is a strong presumption that counsel's decisions are based on tactical strategy rather than neglect. Yarborough v. Gentry, 540 U.S. 1, 8 (2003) (quoting Massaro v. United States, 538 U.S. 500 (2003)). "Accordingly, when counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel." Smith v. State, 386 S.C. 562, 567, 689 S.E.2d 629, 632 (2010) (citing Caprood v. State, 338 S.C. 103, 110, 525 S.E.2d 514, 517 (2000)). See also Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992) (holding where counsel articulates valid reasons for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel); Ingle v. State, 348 S.C. 467, 470, 560 S.E.2d 401, 402 (2002) (holding counsel may avoid a finding of ineffectiveness if he articulates a valid reason for using a certain strategy). "Courts must be wary of second guessing counsel's trial tactics; and where counsel articulates a valid reason for employing such strategy, such conduct is not ineffective assistance of counsel." Whitehead v. State, 308 S.C. 119, 417 S.E.2d 529 (1992) (citing Goodson v. United States, 564 F.2d 1071 (4th Cir. 1977)). Trial counsel's strategy is reviewed under "an objective standard of reasonableness." Magazine v. State, 361 S.C. 610, 617, 606 S.E.2d 761, 764 (2004).

In the present case, Counsel testified that she generally does not object to opening or closing arguments because she gets a chance to respond in her own argument. App. pp. 302-06. She stated her strategy in her opening statement was to be honest with the jury as to Petitioner's absence, but she also made sure to explain the State's burden and to stress that the burden did not change because of Petitioner's absence. App. pp. 88, 303-304. Counsel testified she believes

sometimes it is best to acknowledge bad facts up front. App. 302, 306-308. She testified she stipulated to the green leafy substance being marijuana because she had seen the lab reports and knew what the testimony would be. App. p. 302. In the same vein, Counsel also testified she did not object to the State's lab witness being recalled because she knew the court would allow it, and that "it was fruitless to object." App. 302, 306-308. She instead made a continuing objection to the admission of the drug evidence, which she renewed when the witness was recalled. App. 30, 301-302.

Counsel articulated a general strategy of conceding ownership of the small amount of cocaine found on Petitioner's person, while still contesting the charges arising from the bags of drugs found on the ground. App. pp. 293-94. To this end, Counsel made a motion to suppress the drug evidence found on the ground in a suppression hearing prior to the start of trial, and when the motion was denied, Counsel made a continuing objection to the admission of the drug evidence throughout the trial. App. pp. 98, 146, 158. Counsel explained Petitioner admitted to ownership of the cocaine found in his pocket, and she felt it would help Petitioner to take responsibility for the possession of the bag found on his person. App. p. 302, 307. Counsel further testified Petitioner had admitted to her that the bag recovered from his pocket was his. Counsel also testified the focus of the defense was the two bags of cocaine found on the ground, because the combined weight of those bags added up to a trafficking level offense, rather than mere possession. App. pp. 305-07. The marijuana charge was a possession-level charge which did not carry an increased sentence like the cocaine charge. App. p. 164. See also S.C. Code. Ann. § 44-53-0370(d).

"Our precedents plainly illustrate that counsel's concession of a client's guilt does not automatically constitute deficient performance." Young v. Catoe, 205 F.3d 750, 759 (4th Cir. 2000). Similarly, "there is a distinction which can and must be drawn between . . . a tactical retreat

and . . . a complete surrender." Clozza v. Murray, 913 F.2d 1092, 1099 (4th Cir. 1990). "Some remarks of complete concession may constitute ineffective assistance of counsel, but tactical retreats may be reasonable and necessary within the context of the entire trial, particularly when there is overwhelming evidence of the defendant's guilt." Bell v. Evatt, 72 F.3d 421, 429 (4th Cir. 1995). See also Underwood v. Clark, 939 F.2d 473, 474 (7th Cir. 1991) (explaining that "acknowledgment [of guilt] can be a sound tactic when the evidence is indeed overwhelming (and there is no reason to suppose that any juror doubts this) and when . . . there is an advantage to be gained by winning the confidence of the jury").

In this case, trial counsel testified she stipulated the leafy green substance in one of the bags was marijuana because she didn't want to appear "obstreperous" and she often chooses not to object every time she may have a valid objection as a general trial strategy of "picking your battles." App. 302, 306-308. Here, the identity of the leafy green substance was never a contested issue in the case – Counsel's strategy was to contest ownership only. App. p. 307. Additionally, Petitioner admitted ownership of the bag of cocaine found on his person, and Counsel could reasonably choose to concede that issue as part of an overall trial strategy, in the hopes the jury would find him guilty of possession, but not distribution. The PCR Court therefore correctly found trial counsel was not deficient and articulated a valid trial strategy in support of her performance. App. p. 324.

Accordingly, Counsel's performance was not deficient, nor was Petitioner prejudiced by any alleged deficiency. Therefore, the post-conviction relief court properly denied relief.

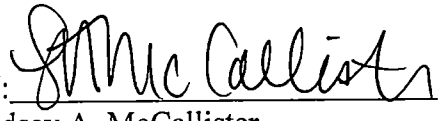
CONCLUSION

For the reasons stated above, this Court should deny the Petition for Writ of Certiorari and affirm the PCR court's finding Counsel was not deficient. Should this Court grant Certiorari, Respondent requests permission under the rules to brief the issues discussed above fully.

Respectfully submitted,

ALAN WILSON
Attorney General

LINDSEY A. MCCALLISTER
Assistant Attorney General

BY: 
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ATTORNEYS FOR RESPONDENT

6/15, 2018

STATE OF SOUTH CAROLINA

In The Supreme Court

CERTIORARI TO FLORENCE COUNTY
Court of Common Pleas

The Honorable Paul M. Burch, Circuit Court Judge

Appellate Case No. 2017-001412

ONTANEY V. JACKSON,

Petitioner,

v.

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 D. Gilliam, Esquire
S.C. Commission on Indigent Defense
Post Office Box 11589
Columbia, South Carolina 29201

This 15th day of June, 2018

KAITLYN S. SLICE
LEGAL ASSISTANT

ALAN WILSON
ATTORNEY GENERAL

RECEIVED
JUN 15 2018
S.C. SUPREME COURT

June 15, 2018

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

Re: **Ontaney V. Jackson, #210570 v. State of South Carolina**
Appellate Case No. 2017-001412
Lower Court Case No. 2014-CP-21-01889

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/ks
Enclosures

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