STATE OF SOUTH CAROLINA
In the Supreme Court

CERTIORARI TO DILLON COUNTY
Court of Common Pleas
Thomas A. Russo, Circuit Court Judge

Appellate Case No. 2017-000849

Johnny Jones,

Petitioner,

v.

State of South Carolina,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI PURSUANT TO AUSTIN V. STATE

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RESPONDENT'S ISSUES PRESENTED

Did the PCR Court properly deny post-conviction relief where, near the outset of the State's closing argument, Counsel broadly objected to the prosecution's "law and order" argument, where the State's argument did not attack any of Petitioner's rights, and where the strength of the case against Petitioner was substantial?

STATEMENT OF THE CASE

Summary of Procedural History

Petitioner is confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Dillon County Clerk of Court. Petitioner was indicted at the May 2006 term of the Dillon County Grand Jury for trafficking cocaine, more than 100 grams but less than 200 grams (2006-GS-17-00441). Lois McMillon, Esq. represented Petitioner. Mary Johnson-Lee, Esq., and Kernard Redmond, Esq., of the Fourth Circuit Solicitor's Office, prosecuted the case. On October 17, 2006, Petitioner proceeded to trial before the Honorable John L. Breeden, Jr. and a jury. The jury found Petitioner guilty as indicted on October 20, 2006. Judge Breeden sentenced Petitioner to imprisonment for a term of 25 years.

Petitioner filed a timely notice of appeal and a direct appeal was perfected by Robert M. Pachak, Esq., who raised the following issue:

> Whether the trial court erred in refusing to grant a directed verdict to the charge of trafficking in cocaine when the State failed to present any substantial evidence beyond a reasonable doubt that appellant, as a passenger in the vehicle, was in constructive possession of the cocaine?

By opinion decided December 18, 2008, the South Carolina Court of Appeals affirmed Petitioner's convictions in an unpublished opinion. State v. Jones, Op. No. 2008-UP-715 (S.C. Ct. App. filed Dec. 18, 2008). The Remittitur was issued on January 5, 2009.

Petitioner filed his application for post-conviction relief on May 6, 2011 (2011-CP-17-00153). He alleged the following grounds for relief in his application:

1. "Ineffective assistance of counsel"
2. "Ineffective appellate counsel"

Respondent made its return on or about October 19, 2011. Petitioner amended his application by filing on July 15, 2013, to allege the following grounds for relief:

1. "Ineffective assistance of appellate counsel for failure to argue that the drugs should have been suppressed based on the termination of the stop."
2. "Ineffective assistance of trial counsel for failure to argue that 'suspicious' behavior and presence alone are insufficient to prove constructive possession."
3. "[I]neffective assistance of appellate counsel for failure to adequately argued that that 'suspicious' behavior and presence alone are insufficient to prove constructive possession."
4. "Ineffective assistance of trial counsel for failure to object to the solicitor's closing arguments concerning the war on drugs."
5. "Ineffective assistance of counsel for failure to object to the 'strong evidence' language in the constructive possession charge."

An evidentiary hearing into the matter was convened on July 21, 2014, before the Honorable Thomas A. Russo. Petitioner was present at the hearing and represented by Tristan M. Shaffer, Esq. Joshua L. Thomas, Esq., of the South Carolina Attorney General's Office, represented Respondent. Petitioner testified on his own behalf; Lois E. McMillan, Esq., and Kernard E. Redmond, Esq., also testified. By written order dated November 24, 2014, and filed December 17, 2014, Judge Russo denied and dismissed the application.

Subject to the same common pleas docket number, the Honorable Roger E. Henderson issued an Order dated December 20, 2016, and filed February 13, 2017, finding Petitioner did not knowingly, intelligently, and voluntarily waive his right to an appeal, and thus was entitled to relief pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991). This appeal follows.

Summary of Facts Adduced at Trial

At 9:18 AM on February 28, 2006, Sgt. David Lane ("Lane") of the Dillon Police Department, Interstate Criminal Enforcement Team, stopped a northbound car on I-95 for weaving from lane to lane a few miles from the North Carolina border. (Appx. 168-74). Lane went to the passenger side window and requested a driver's license and registration from the driver, co-defendant Artie Burns ("Burns"). Petitioner was located in the front passenger seat. (Appx. 186-87). Lane testified Burns had difficulty retrieving the documents because his hands

were shaking. Burns handed Lane a rental agreement out of Florida for Enterprise Rental. (Appx. 187-88). The rental agreement was under the name of "Miko Williams," but Burns was listed as an additional driver. (Appx. 191-92).

Lane then requested Burns to exit the car and accompany him to the rear of the vehicle. Burns was frisked for weapons. Lane questioned Burns about who rented the car, because the car was only allowed to travel in Florida. (Appx. 192). Burns told Lane that Jones' uncle rented the car, but he was unable to tell Lane his name. Lane said he placed Burns' license "over the name which is at the top of the rental agreement," and Burns "pushed the license down so he could read the name of who rented the vehicle off the top of the rental agreement." Lane testified this heightened his suspicions about the occupants. (Appx. 192-94).

Lane told Burns the reason for the stop. He testified Burns said he was doing something with his cell phone which caused him to swerve. (Appx. 194). When asked where they were heading, Burns said they were going to the University of Virginia where his cousin was having an MRI done on his knee. (Appx. 195). Lane asked Burns the name of his passenger. Lane recalled, "he said 'Jay.' Then I asked what his last name was and then he started saying, Jay, John, John, Jay, and he kept saying it over and over as if he was trying to remember what the person's name was." Lane testified Burns at one point referred to Jones as "Johnny," but he gave no last name. (Appx. 195-96).

Lane left Burns and went over to talk to Petitioner, who was seated in the car. He asked Petitioner where they were going. Petitioner said they were going to Virginia from Miami and then to Atlanta, but he did not give a clear answer about the length of their stay in Virginia. Petitioner finally told Lane that they were going to Virginia to see some girls. (Appx. 196-98). Burns never mentioned either Atlanta or the girls to Lane. (Appx. 198). Lane then asked

Petitioner who rented the car, and Petitioner said his uncle rented it. Petitioner, however, was unable to state his uncle's name. Petitioner then admitted to Lane it really was not his uncle who rented the car. Petitioner told Lane that Burns' first name was "Audie," when it was really "Artie." Petitioner also did not know Burns' last name. (Appx. 198-99).

Lane suspected both occupants in the car were involved in criminal activity, although he was not sure what kind. He went back to his patrol car and began to write a warning and wanted to know if he could ask him a few questions. Burns said yes. Lane asked Burns if there were any drugs or large sums of money in the car, to which Burns said no. Lane then asked Burns if he could search the car. Lane testified that Burns consented without hesitation. (Appx. 199-201; p. 233). Lane testified he asked for consent to search the car because of the inconsistent answers to his questions given by Petitioner and Burns. (Appx. 233).

Lane began to search the car, starting from the front and working toward the back, but found no luggage of any type despite the purported purposes of the trip. (Appx. 201-03). Lane found his way to the trunk and, just as he was about to lift the storage compartment for the spare tire, either Petitioner or Burns called to him and asked for their jacket. (Appx. 202-03). Lane testified that when he opened the compartment, he discovered a bag of white powder which he identified immediately as cocaine. (Appx. 203). Lane drew his weapon and detained Burns and Petitioner until backup arrived. (Appx. 203-04).

Once help arrived, Lane resumed his search of the vehicle. (Appx. 204-05). Lane found another, much larger bag of white powder under the spare tire, which he also identified as cocaine. (Appx. 205-06). Lane ultimately found a total of 138.68 grams of cocaine. (Appx. 233; p. 256-57).

STANDARD OF REVIEW

The post-conviction relief court's findings of fact receive great deference during appellate review and will be upheld if "any evidence of probative value" exists in the record to support the lower court's findings. Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016). Questions of law are reviewed *de novo*, and appellate courts will reverse the decision of the post-conviction relief court when it is controlled by an error of law. Id.; Smalls v. State, 422 S.C. 174, 180-81, 810 S.E.2d 836, 839 (2018).

In a post-conviction relief action, an applicant has the burden of proving the allegations in his or her application. Rule 71.1(e), SCRCP; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). When an applicant alleges ineffective assistance of counsel as a ground for relief, he or she must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 686 (1984); Butler, 286 S.C. at 442, 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. Strickland at 687. "There is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case." Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007). The applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

Judicial scrutiny of counsel's performance must be highly deferential, as it is all too tempting for a defendant to second guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable.

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

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland). Second, counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. Strickland at 696. A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. Id. at 697. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Id.

ARGUMENT

THE PCR COURT PROPERLY DENIED RELIEF BECAUSE COUNSEL OBJECTED TO THE STATE'S CLOSING ARGUMENT, AND BECAUSE ANY POTENTIAL ERROR IN THE STATE'S CLOSING WAS NOT PREJUDICIAL BOTH IN ITS ISOLATED CONTEXT AS COMPARED TO LIBERTE AND IN THE PROPER CONTEXT OF THE ENTIRE RECORD.

The PCR Court properly denied post-conviction relief upon Petitioner's allegations that Counsel should have objected to the State's closing arguments. "A solicitor's closing argument must not appeal to the personal biases of the jurors. In addition, the argument may not be calculated to arouse the jurors' passions or prejudices." State v. Copeland, 321 S.C. 318, 324, 468 S.E.2d 620, 624 (1996). "So long as the prosecutor stays within the record and its reasonable inferences, he may legitimately appeal to the jury to do their full duty." State v. Caldwell, 300 S.C. 494, 504, 388 S.E.2d 816, 822 (1990) (overruled on other grounds by State v. Evans, 371 S.C. 27, 30, 637 S.E.2d 313, 315 (2006)) (citing State v. Durden, 264 S.C. 86, 212 S.E.2d 587 (1975)). The prosecution thus may tell the jury "that a failure to enforce the law begets lawlessness[,]" that "the people look to them for protection against crime[,]" and "illustrate the effect of their verdict on the community or society generally with respect to obedience to, and enforcement of, the law[.]" Durden, 264 S.C. at 92, 212 S.E.2d at 590 (quoting 23A C.J.S. Criminal Law § 1107).

Any alleged impropriety in closing argument is considered in the context of the entire record on appeal. Copeland, 321 S.C. at 324, 468 S.E.2d at 624-25. "A review of the closing argument is based upon the standard of 'whether the prosecutor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" Caldwell, 300 S.C. at 504, 388 S.E.2d at 822 (quoting State v. Hawkins, 292 S.C. 418, 421, 357 S.E.2d 10, 12 (1987)).

In opening statements, counsel for the co-defendant, David Watson, Esq., offered to the jury a theory of the case that the facts of the investigation into Burns and Petitioner "somehow got tampered with" and cited to a discrepancy between the number of bags cocaine reported by Lane in his investigative report and as tested by SLED. (Appx. 160-61). Attorney Watson criticized law enforcement's failure to investigate the individual who rented the vehicle used by Burns and Petitioner and the change in the containers of the drugs discovered. (Appx. 163). Nonetheless, Attorney Watson represented Lane as "an honorable man." (Appx. 160, ll. 14-15). Counsel similarly argued in her own opening statement that the evidence had been subject to tampering, arguing:

> I believe after you hear the testimony in this case, you're going to see what I see and how my eyes are being opened almost daily with what goes on in police investigations in this county. We have to depend on you ten to do what is right. Somebody has got to stop tampering with evidence, somebody has got to stop it. And only jurors can do this, you're the only ones who can.

(Appx. 167, ll. 13-20).

Solicitor Redmond attacked the allegations of tampering head-on at the very outset of the State's closing argument, rejected the "innuendos and implications that they are engaged in some wrongdoing and some high level conspiracy against these two defendants," and instead called for gratitude instead of "bashing." (Appx. 324-25). Counsel objected broadly:

> MRS. MCMILLAN: Your Honor, I'm going to object at this time to his continuous harping on this because *it is not the jury's role to maintain law and order*. And he is trying to tell them something other than what their duty is. We all know law enforcement's duties are very difficult and life-threatening.
>
> MR. REDMOND: Your Honor, if I may, they are the ones that made those comments in opening. And actually I was going to address the tape as it relates to that.
>
> THE COURT: You may continue.

(Appx. 325, ll. 8-19) (emphasis added). The prosecution thereafter moved through a review of the facts in the record and the law to be applied to the facts. (Appx. 325-36). The solicitor did not return to the nobility of law enforcement and the duty of the jury until the end of his argument:

> Ladies and gentlemen, we've talked about wars, I talked about that earlier in my closing, but there's another war that's been going on for a long time, that being the war on drugs. Let me just say this; David Lane was the first line of defense in that war, the war to help ensure that individuals such as these defendants do not have the opportunity to traffic and transport their poison and infect the bloodstream of this country.
>
> But guess who the last front, the final front in that particular war is, ladies and gentlemen? That would be you. This is where the battle lines are drawn, but yet this is where the battle itself culminates, with you, ladies and gentlemen. Because here today with your verdict we have the opportunity to send a message loud and clear up and down the east coast of this nation; we will not tolerate the highways in our county to be utilized to transport this poison.

(Appx. 336, ll. 4-21). The State very shortly thereafter finished its closing. (Appx. 336-37).

The PCR Court rightly observed in its Order of Dismissal that Counsel properly objected early in the State's closing argument on the very grounds complained of to the PCR Court and now on appeal. There is nothing in the record to show that the outcome of a second, identical objection would have resulted in any different ruling at the end of the State's closing argument, let alone an entirely different outcome at trial. Counsel properly, promptly, and professionally objected and as such evidence exists in the record to show no deficiency on the part of counsel, but rather that she performed well within the scope of representation expected by attorneys in this state. Petitioner's fleeting suggestion that the objection pertained to a different issue is plainly incorrect—the objection explicitly identifies the duty of the jury as the issue of concern, which is the same in both instances identified by Petitioner.

Petitioner strains to compare the argument here to that in State v. Liberte, 336 S.C. 648, 521 S.E.2d 744 (Ct. App. 1999). As noted in the Order in Dismissal, the prejudicial argument in Liberte was not a mere impassioned call to order and the enforcement of the law, but was an open and brazen attack on the burden of "reasonable doubt" enshrined in the very foundations of our criminal justice system, describing it "as a sword to attack law and order, to attack law enforcement, to attack people who are trying to keep drugs off our streets[.]" Liberte, 336 S.C. at 652, 521 S.E.2d at 746. No such explicit attack on reasonable doubt, nor any other fundamental right is found in the closing here. To the contrary, the argument remains within the boundaries set by Durden and the record in light of invitation provided by Counsel's own opening statement.

To the extent the State's closing argument goes beyond the boundaries of Durden, in light of the concerns expressed in Liberte,[1] it hardly infected the trial with so much unfairness as to require reversal in light of the entire record. The PCR Court properly observed the considerable strength of the total circumstantial case against Petitioner: Petitioner was travelling across multiple states with no luggage in a rental car carrying in excess of a hundred grams of cocaine, driven by a man he could not identify with whom he had an inconsistent story about the purpose of their travel. Once Counsel's passionate argument to suppress the drugs failed, Petitioner had very little chance of prevailing at trial absent some affirmative evidence of misconduct or jury nullification.

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[1] Specifically insofar as Liberte quoted and cited at length to numerous federal cases on the subject. Liberte, 336 S.C. at 654, 521 S.E.2d at 747.

CONCLUSION

For the foregoing reasons, this Court should deny this Petition for Writ of Certiorari. Should this Court grant the petition, the State seeks permission to more fully brief the issues herein.

Respectfully submitted,

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13 July, 2018

STATE OF SOUTH CAROLINA
In the Supreme Court

CERTIORARI TO DILLON COUNTY
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Thomas A. Russo, Circuit Court Judge

Appellate Case No. 2017-000849

JOHNNY JONES,

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v.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of **Return to Petition for Writ of Certiorari Pursuant to Austin v. State** has been served upon opposing counsel by mailing two (2) copies in the United States mail, postage prepaid:

LaNelle C. Durant, Esquire
1330 Lady Street, Ste. 401
Columbia, SC 29201

This 13th day of July, 2018.

MALLORY MORRIS
Legal Assistant for Respondent

ALAN WILSON
ATTORNEY GENERAL

July 13, 2018

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

RE: **Johnny Jones v. State of South Carolina**
Appellate Case No. 2017-000849
Lower Court Case No. 2011-CP-17-0153

Dear Mr. Shearouse:

Enclosed for filing are the original and six (6) copies of the **Return to Petition for Writ of Certiorari Pursuant to Austin v. State** in the above-referenced case. By copy of this letter we are serving opposing counsel today.

Sincerely,

Johnny F. James Jr.
Assistant Attorney General
S.C. Bar No. 101260

JEJ/mm
Enclosures

cc: LaNelle C. DuRant, Esquire