

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

ORIGINAL

Certiorari to York County

RECEIVED

Honorable J. Cordell Maddox, Circuit Court Judge

Aug 15 2018

S.C. SUPREME COURT

KENYON JEMEL BROWN,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2018-000713

PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Whether the PCR court erred in finding that plea counsel rendered effective assistance of counsel where she failed to advise Petitioner that he could testify at the pre-trial Denno hearing despite Petitioner's denial that he ever made the statement to police?

STATEMENT OF THE CASE

On July 23, 2015, the York County Grand Jury returned an indictment against Petitioner Kenyon Brown for operating a motor vehicle after having been found to be a habitual traffic offender. App. 135 – 136. On October 22, 2015, the grand jury returned additional indictments against Brown for: two counts of distribution of crack cocaine, one count of possession with intent to distribute crack cocaine, one count of possession with intent to distribute cocaine, one count of possession with intent to distribute Clonazepam, and one count of possession of Oxycodone. App. 137 – 148.

On April 26, 2016, Brown appeared before the Honorable John C. Hayes for trial on four charges.¹ Brown was represented by Melissa Inzerillo, and the State was represented by assistant solicitor Marina Hamilton. App. 1. Following a pre-trial hearing on the admissibility of Brown's alleged statement to police and the drug evidence, Judge Hayes ruled that the statement was voluntary and the evidence was lawfully searched and seized. App. 11 – 57. After a break, Brown entered pleas of guilty to all of the indicted offenses for a negotiated sentence of ten years. Judge Hayes accepted the plea and negotiations. App. 58 – 68; Supp. App. 1 (plea affidavit). Brown is serving concurrent terms of ten-years for the four offenses involving cocaine and crack cocaine (all third offenses), five-years for the habitual traffic offender violation, five-years for possession with intent to distribute Clonazepam (third offense), and five-years for possession of Oxycodone (second offense). App. 68 – 69.

¹ The solicitor indicated that they were going forward at trial on the indictments for possession with intent to distribute crack cocaine and cocaine, the lesser included offense of possession of Clonazepam, and possession of Oxycodone. App. 5, ll. 1-25.

On October 12, 2016, Brown filed an application for post-conviction relief. App. 71. The State filed its return on January 18, 2017. App. 80. On October 26, 2017, Brown, through counsel, filed an amended application. App. 85.

On November 8, 2017, Brown appeared for an evidentiary hearing before the Honorable J. Cordell Maddox. Brown was represented by Nathan Sheldon, and the State was represented by assistant attorney general Justin Hunter. App. 88. The PCR court heard testimony from Brown and plea counsel Inzerillo. App. 89. At the conclusion of the hearing, the court took the matter under advisement. App. 118. On April 4, 2018, Judge Maddox filed an Order of Dismissal, denying Brown's PCR application. App. 121.

A timely notice of appeal was filed. This petition for writ of certiorari follows.

ARGUMENT

The PCR court erred in finding that plea counsel rendered effective assistance of counsel where she failed to advise Petitioner that he could testify at the pre-trial Denno hearing despite Petitioner's denial that he ever made the statement to police.

Introduction

Plea counsel Inzerillo and Petitioner Brown both testified that Brown consistently denied making an incriminating statement to police. App. 94, ll. 7-25; App. 95, ll. 10-16; App. 97, ll. 16-23; App. 109, ll. 5-16; App. 115, ll. 18-22. Nonetheless, the trial judge was never presented with the denial of the statement at the pre-trial Denno² hearing. Instead, he heard only the police officer's dubious averment that when he told Brown that he found a black bag in his property, Brown admitted ownership of the bag and admitted that he had drugs, which he was buying and selling. App. 14, ll. 13-18. Plea counsel's equivocal testimony was insufficient to establish that she provided competent counsel to Brown regarding his right to testify at the Denno hearing. The PCR court utilized the wrong standard in determining that Brown failed to prove prejudice because if Brown's testimony were found credible by the trial court, it would have affected the outcome of the Denno hearing and Brown's decision to plead guilty.

Relevant Facts

Pre-trial Hearing and Guilty Plea

The offenses for which Brown was going to trial on April 26, 2016 stemmed from a search of items purportedly taken from a motel room he was renting at the Econo Lodge in Rock Hill, South Carolina on July 17, 2015. Rock Hill city police officer Leland Harrison, of the York County Multi-Jurisdictional Drug Enforcement Unit, arrested Brown on the evening of July 16,

² Jackson v. Denno, 378 U.S. 368 (1964) (holding that a defendant has a constitutional right to a fair hearing and reliable determination of the voluntariness of a confession, not influenced by its truth or falsity).

2015 for charges related to the sale of drugs to a confidential informant that allegedly occurred on May 28 and June 19, 2015. App. 36, ll. 19-23; App. 40, l. 22 – 41, l. 9; App. 67, ll. 6-12, App. 137; App. 139. Because Brown was incarcerated, he was not present to pay the daily fee due to maintain rental of his motel room the following day. According to the testimony of Marie Sledge, the Econo-Lodge manager, it was the motel's policy that the money for each day was due at 11:00 a.m. If the money was not paid by noon, the motel contacts the police to assist in checking the room. If no one is inside, the hotel employees empty the room and hold the property in a secure area for thirty days. If the items are not picked up within thirty days, they are thrown away in the dumpster. App. 27, l. 6 – 28, l. 10; App. 28, l. 16 – 29, l. 4; App. 29, l. 14 – 30, l. 9; App. 35, ll. 1-7.

Pursuant to that policy, when Brown's room was not paid for by noon on July 17, 2015, Sledge called the Rock Hill police department. The officers confirmed that no one was inside the room rented by Brown, gave permission for the room to be cleared, and then left. App. 28, l. 11-15; App. 31, l. 12 – 32, l. 7. Sledge said that she collected Brown's belongings and put them into two clear 33-gallon garbage bags. The bags and two shoeboxes were placed inside of her locked office at approximately 12:30 p.m. Sledge claimed that one of the items that she found in the room and put inside one of the plastic bags included a black mesh bag. However, there was no log made of the items collected. App. 28, ll. 18 – 30, l. 2; App. 32, l. 8 – 34, l. 21; App. 35, ll. 17-24.

At approximately 3:00 p.m. the same afternoon, Harrison came to the motel office. He claimed that he was there "to do some follow-up investigation on an arrest [he] made on Mr. Brown." Sledge spoke with Harrison and took him to the area where the bags, purportedly from Brown's room, were held. App. 30, ll. 10-25; App. 34, l. 22 – 35, l. 16; App. 37, ll. 2-4; App.

41, ll. 13-24. According to Sledge, Harrison “ask[ed] if it was okay to go through the belongings and I gave them permission to go through the belongings cause [sic] it was abandoned.” App. 31, ll. 1-4. According to Harrison, Sledge told the officers they could “take a look at the bags” and let them inside the locked office where the tied bags were on the floor. Harrison and another officer saw the tied-up bags and “started to look through the property.” App. 37, l. 5 – 38, l. 6.

He further recalled:

When I opened the trash bag that I was looking through I could immediately smell the odor of marijuana. I started taking out all the items and just looking at them. When I did get to the black mesh bag and pulled it out I could tell the odor of marijuana was coming from that bag. I could also see green marijuana inside the bag and also see a white substance which through my training and experience I knew it would either be crack or cocaine.

App. 38, ll. 7-16; see also App. 38, l. 17 – 39, l. 4; App. 40, ll. 11-15. Harrison clarified that he could not see any drugs in the black mesh bag until he “picked it up and looked at it.” App. 42, ll. 16-18. Harrison took the black mesh bag to his office, where he photographed, weighed, and counted the suspected drugs. App. 39, l. 5 – 40, l. 3. No photographs were taken of the plastic garbage bags at the motel and the plastic bags were not retained as evidence. App. 41, l. 25 – 42, l. 15; see also App. 49, l. 21 – 50, l. 8. Defense counsel pointed out on cross-examination that Harrison’s report reflected that the drug evidence was discovered at 3:25 p.m. and that Brown was “booked” just five minutes later, at 3:30 p.m. App. 42, l. 19 – 43, l. 6.

Harrison admitted that he never showed the black mesh bag to Brown. App. 17, ll. 6-11; App. 43, ll. 7-25. Nonetheless, he claimed that when he questioned Brown later in the evening:

I ask[ed] him about a black bag that I located in his property. He told me that it belonged to him. I stated there were drugs in the bag. He stated to me that he did have drugs and that he used -- he was selling drugs for money, girls. And he was also using drugs as well.

App. 14, ll. 13-18; App. 15, ll. 5-8. Harrison further averred: “[Brown] stated he had purchased marijuana, crack cocaine and pills from Lucky. Mr. Brown also stated that he had been buying drugs from Lucky for approximately one year. Mr. Brown also stated that he would re-up from Lucky every day.” App. 14, l. 22 – 15, l. 4. Brown’s alleged statement was not recorded or reduced to writing for Brown’s review. Rather, Harrison “jotted down some notes” that he “transferred over to [his] Case Summary.” App. 16, ll. 2-24.

The trial court found that the statement was voluntarily given, though he partially granted the defense’s redaction request regarding portions of the statement that implied past misconduct. App. 18, l. 4 – 19, l. 11; App. 19, l. 12 – 21, l. 16. The trial court also denied the motion to suppress the drug evidence, finding that the motel had the right to remove the items from the room, regardless of whether Brown’s lack of intent to abandon, and that the manager gave the police lawful consent to search the items. He further determined that upon opening the plastic bag, the smell of marijuana and the marijuana in plain view through the mesh bag, were sufficient to justify the search. App. 55, l. 21 – 56, l. 25.

Following the Court’s ruling admitting the drug evidence, Brown entered a guilty plea and the judge accepted the negotiated ten-year sentence. App. 58 – 69. The prosecution’s recitation of facts it intended to prove at trial included: “The defendant did admit that those drugs within that mesh bag were his and that he did sell drugs, your Honor.” App. 67, ll. 19-21; see App. 68, ll. 1-3.

Post-Conviction Relief Proceedings

At the post-conviction relief hearing, plea counsel Inzerillo admitted that from the time of their first meeting, Brown consistently denied making the statement alleged by police. App. 94, ll. 7-25; App. 95, ll. 10-16; App. 97, ll. 16-23; App. 109, ll. 5-16. Inzerillo said that there was no

evidence that Brown ever made the statement other than the officer's testimony and Brown's eventual admission as part of the plea colloquy. While the State characterized that statement as a confession, she questioned the relevance of the statement in context. App. 95, ll. 1-9; App. 98, ll. 1-21; App. 108, ll. 4-15. She acknowledged that defendants have a right to testify at pre-trial hearings but that Brown did not testify at the Denno hearing in his case. App. 95, l. 17 – 96, l. 20. Regarding whether they discussed Brown's right to testify at the Denno hearing, Inzerillo said: "Yeah, and in my notes it appears we had a discussion not only about the trial but about pre-trial motions, and my recollections [is] **I would've discussed it with him at that time.**" App. 96, l. 21 – 97, l. 2; see also App. 103, l. 16 – 104, l. 7; App. 107, ll. 3-12.

Inzerillo eventually agreed that Brown's testimony was the only means of putting the denial of the statement before the trial court for consideration. App. 97, ll. 3-21; App. 100, ll. 3-15. She further agreed that without Brown's alleged admission, the only thing connecting him to the black mesh bag was the motel manager's testimony that she found it in the room he rented. App. 98, l. 22 – 100, l. 2. On cross-examination, Inzerillo contended that Brown's testimony would not have changed the outcome of the pre-trial hearing, reasoning: "I think he would've taken the stand and denied making the statement, but I'm not sure that that would've changed Judge Hayes' mind. I can't walk around in Judge Hayes' mind, but I've not ever seen just a flat denial by a client cause Judge Hayes to exclude a statement." App. 107, ll. 13-24. Rather, she would have argued to the jury that Brown never made the statement. App. 108, ll. 1-4. It was not clear whether such an argument would have been based upon testimony she planned to elicit from Brown at trial or simply upon the incredulousness of the statement itself.

After the trial court ruled that portions of Brown's statement and the drug evidence were admissible, Brown asked Inzerillo if the State would make a plea offer. After negotiations, the

State offered a ten-year negotiated sentence for all of Brown's pending charges. Inzerillo acknowledged that with a trial there was a risk of a thirty-year sentence and eventually life without parole if convicted of the other pending charges at a separate trial. App. 111, l. 4-25.

Brown said that Inzerillo never discussed his right to testify at the Denno hearing or at trial. App. 115, ll. 6-17. He told Inzerillo that he never made the statement to law enforcement at their first meeting and maintained that throughout the representation. App. 115, ll. 18-22. Brown was never shown the mesh bag to confirm whether it belonged to him and was unaware of anything identifying about the bag that would have connected it to him. App. 116, ll. 6-13.

In the PCR court's Order of Dismissal, the court found that "Counsel's testimony persuasive that she did discuss with Applicant his right to testify at the Denno hearing, and thus she was not deficient." App. 126. The court further found that Brown failed to prove prejudice because "it is unlikely the statement would have been kept out, given the officer's testimony at the hearing, simply because Applicant would have testified that he did not make the statement." App. 126.

Discussion

The Sixth Amendment to the United States Constitution guarantees criminal defendants the right to the effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 684-86 (1984). To establish a claim of ineffective assistance of counsel, the defendant has the burden of proving "(1) counsel failed to render reasonably effective assistance under prevailing professional norms; and (2) counsel's deficient performance prejudiced the applicant's case." McKnight v. State, 378 S.C. 33, 40, 661 S.E.2d 354, 357 (2008). In order to establish prejudice when challenging a guilty plea, a defendant must prove "there is a reasonable probability that, but for counsel's

errors, the defendant would not have pled guilty, but would have gone to trial.” Harden v. State, 360 S.C. 405, 408, 602 S.E.2d 48, 49 (2004) | Hill v. Lockhart, 474 U.S. 52, 59 (1985).

With respect to the deficiency prong, there is no probative evidence to support the PCR court’s finding that Inzerillo informed Brown of the right to testify at the pre-trial Denno hearing, even considering the court’s credibility finding. See App. 126. In Simuel v. State, 390 S.C. 267, 270-71, 701 S.E.2d 738, 739 (2010), this Court found that there was no probative evidence that trial counsel informed Simuel of his right to a direct appeal or that such right was waived where the trial attorney testified that he *normally* discusses an appeal with defendants after trials, but he was not sure whether he did so with Simuel. Here, Inzerillo never stated that she had a specific recollection of discussing Brown’s right to testify at the Denno hearing. Despite the opportunity to do so, she gave no explanation about the reason he did not testify when he so vehemently denied having made the inculpatory statement to police.

When Inzerillo was initially asked about their discussion of the right to testify at the Denno hearing she responded: “Yeah, and in my notes it appears we had a discussion not only about the trial but about pre-trial motions, and my recollections [is] I **would’ve** discussed it with him at that time.” App. 96, l. 21 – 97, l. 2. Later, when asked about the advice she gave to Brown about testifying during the drug suppression hearing, Inzerillo said: “I know we talked about, again, both pre-trial hearings I know suppression was -- I think on the forefront of Mr. Brown’s mind -- that was the motion we talked about the most . . .” App. 103, ll. 16-25. She continued: “[W]e discussed everything entailing with that motion just like all other motions.” App. 104, ll. 6-7.

On cross-examination, the assistant attorney general asked Inzerillo, again about whether she discussed Brown’s right to testify at the hearing. She responded:

Yeah, my notes indicated we went over the pre-trial motions and that would've been, of course, one of them, and that we had discussed, as well, his right to testify in the trial. I think I in one of the motions also mentioned that to Judge Hayes, that he was still considering all that, but, yeah, we did have a discussion about the pre-trial motions.

App. 107, ll. 3-12. The guilty plea transcript reflects that Inzerillo asked the prosecution to reveal whether they intended to elicit information regarding the original charges for which Brown was arrested and information obtained from his cell phone. App. 6, l. 23 – 7, l. 18. She continued:

And, your Honor, with my general motion I would also note for the court as Mr. Brown is considering now whether to exercise his right to remain silent or testify that because all the cases are interlocked and I think time and place not having that information affects my ability to answer any questions he may have about what his testimony would be in terms of opening any doors.

App. 7, ll. 19-25. Inzerillo's statement seems to reference Brown's consideration of whether he would testify at trial, as his testimony at a pre-trial hearing would not "open the door" with respect to the evidence the prosecution could present at trial.

Furthermore, the PCR court had the transcript of the guilty plea hearing to contrast with Inzerillo's testimony at the PCR hearing. Inzerillo's general recitation of the facts, arguments, and rulings at the pre-trial hearing were belied by the record. For example, Inzerillo testified at the PCR hearing that the black mesh bag in which the officer claimed he found the drugs "was gone" and the State had only a photograph of the bag. App. 102, ll. 6-10; App. 103, ll. 1-15. However, at the pre-trial suppression hearing she said that she viewed the mesh bag and it did not appear to her to be "see through." App. 49, l. 24 – 50, l. 8. Additionally, Inzerillo testified at the PCR hearing that the motel manager was alerted that drugs were found by the janitorial staff while cleaning out the room, causing her to contact police. App. 101, l. 18 – 102, l. 5. That "recollection" is not consistent with the testimony at the pre-trial hearing that the police were

called prior to any entry by motel workers into Brown's room and that officer Harrelson did not come by until later in the afternoon of his volition. See App. 28, ll. 18 –35, l. 24; App. 37, l. 2 – 38, l. 6; App. 41, ll. 13-24. Inzerillo also characterized the content of Brown's alleged statement as "irrelevant." App. 98, ll. 9-21; App. 108, ll. 4-15. However, officer Harrison testified at the pre-trial hearing that Brown admitted that the black mesh bag belonged to him. App. 14, ll. 13-18. If that was not also reflected in the case summary report, defense counsel did not use it to impeach or clarify his testimony. These discrepancies in Inzerillo's testimony cast serious doubt as to what she actually recalled from her representation of Brown.

With respect to the prejudice prong, the PCR court erred in ruling that "it is unlikely the statement would have been kept out, given the officer's testimony at the hearing, simply because Applicant would have testified that he did not make the statement." App. 126. The crux of the inquiry is whether counsel's ineffective performance affected the outcome of the plea process, not whether the defendant would have been successful had he gone to trial. Alexander v. State, 303 S.C. 539, 542, 402 S.E.2d 484, 485 (1991). In order to introduce into evidence a confession arising from custodial interrogation, the State must prove by a preponderance of the evidence that the statement was made freely and voluntarily, and taken in compliance with Miranda v. Arizona, 384 U.S. 436 (1966). State v. Goodwin, 384 S.C. 588, 601, 683 S.E.2d 500, 507 (Ct. App. 2009); State v. Miller, 375 S.C. 370, 378, 652 S.E.2d 444, 448 (Ct. App. 2007).

In Kolle v. State, 386 S.C. 578, 591, 690 S.E.2d 73, 79-80 (2010), *abrogated in part* by Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018), this Court upheld the grant of post-conviction relief where plea counsel failed to procure pertinent discovery materials that could have been used to effectively cross-examine the officers at the suppression hearing and point out discrepancies in the reports and testimony. This Court reasoned: "Had plea counsel adequately

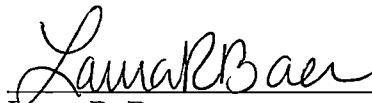
attacked the credibility of the officers, there is a reasonable probability this would have influenced the trial judge's decision regarding the existence of exigent circumstances, *i.e.*, affected the outcome of the suppression motion." 386 S.C. at 591, 690 S.E.2d at 79. Here, due to counsel's deficiency, there was no alternate narrative presented to the trial judge at the suppression hearing. With the limited evidence presented, the trial court's admission of Brown's statement was inevitable. See App: 18, ll. 2-3.

To the extent the PCR court's ruling implies that a police officer's testimony will always be found more credible than the testimony of a defendant, no such rule exists. See, e.g., State v. Bash, 419 S.C. 263, 797 S.E.2d 721 (2017) (affirming trial court's finding that the police officer's purpose was to conduct a search rather than a knock-and-talk). The trial judge at the Denno hearing is tasked with assessing the demeanor and credibility of the witnesses and weigh the evidence accordingly. Notably, the PCR court had only a transcript of the police officer's testimony before it to contrast against Brown's testimony. Even without the seeing the officer in person, Harrison's testimony comes across as incredible. The idea that a defendant who was familiar with the criminal justice system would be told about – not even shown – a bag and admit its ownership and the ownership of drugs is simply unbelievable. The PCR court should have examined prejudice through the lens of whether there was a reasonable likelihood that Brown's testimony, *if believed*, would have affected the outcome of the suppression motion. If the proper question were considered by the PCR court, it would have necessarily been answered in the affirmative.

Thus, the PCR court erred in denying Brown's application for post-conviction relief where he established both deficiency and prejudice.

CONCLUSION

Based on the foregoing, Petitioner Kenyon Jemel Brown respectfully requests that this Court grant the petition for writ of certiorari and order further briefing of the issue raised herein. If this Court dispenses with further briefing, Petitioner requests that the denial of post-conviction relief be reversed and his guilty pleas vacated.



Laura R. Baer
Appellate Defender

ATTORNEY FOR PETITIONER

This 15th day of August, 2018.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to York County

Honorable J. Cordell Maddox, Circuit Court Judge

KENYON JEMEL BROWN,

PETITIONER

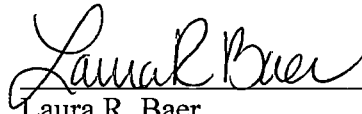
V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Petition for Writ of Certiorari, a copy of the Appendix, and a copy of the Supplemental Appendix, in the above referenced case has been served upon Janell Gregory, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and upon Kenyon Jemel Brown, at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 15th day of August, 2018.



Laura R. Baer
Appellate Defender

ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 15th day of August, 2018.

 (L.S)

Notary Public for South Carolina

My Commission Expires: May 12, 2027 .