ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Charleston County

Honorable Maite Murphy, Circuit Court Judge

RECEIVED
DEC 10 2018
S.C. SUPREME COURT

JAMES L. MOORE,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2018-001051

PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Whether the PCR court erred as a matter of law by ruling defense counsel provided effective representation by objecting and moving for a mistrial where the state's confidential informant gave highly prejudicial testimony that he knew petitioner was guilty and implied petitioner's defense counsel knew that petitioner was guilty too, since the Court of Appeals procedurally barred the mistrial issue because defense counsel failed to timely move for a mistrial when he asked for a curative instruction instead?

STATEMENT

A Charleston County Grand Jury indicted petitioner for distribution of cocaine base on November 9, 2009.[1] App. 434 – 435. Petitioner was tried in absentia from October 17 – 18, 2012, before the Honorable Kristi L. Harrington and a jury. App. 1; App. 58, l. 22 – 59, l. 7. Jason King and Michael Cooper represented petitioner. App. 1. Stephanie Linder and Randall Stoney represented the state. App. 1.

The state alleged that petitioner sold crack cocaine to a paid confidential informant, Joseph Ancrum (Ancrum), after Ancrum was "wired" and dropped off near a liquor store by police officers. App. 115, ll. 12-18; App. 181, ll. 18-20. According to police officers, Ancrum had been a "paid informant for a long, long time." App. 112, ll. 7-8. In 2009 alone, Detective Grill said Ancrum did between one hundred and two hundred drug buys, for which he was paid between twenty dollars and one hundred fifty dollars a buy. App. 123, ll. 8-17.

At trial, Ancrum admitted his only source of income other than being a paid informant was a seven hundred dollar monthly disability check for his glaucoma. App. 134, ll. 8-25; App. 140, ll. 15-16. Ancrum admitted at trial that he could "barely see." App. 145, ll. 12-13. Ancrum said, "I got tubes, holes and all in my eye." App. 138, ll. 7-8. According to Ancrum, on the date of the alleged drug buy, "On a scale from one to a hundred I had about a 60 vision . . ." App. 145, ll. 14-16.

There were a number of people "hanging out" by the liquor store. App. 117, ll. 18-23. Ancrum came back from the liquor store with crack cocaine and claimed he bought the drugs from a man wearing a blue cast. App. 116, ll. 18-23; App. 118, ll. 1-6. Officer Burke was then asked to drive by the area and identify the seller, who was described as wearing a white tank top

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[1] This was petitioner's third or subsequent drug offense. App. 225, l. 20 – 226, l. 15.

and blue arm cast. App. 154, ll. 8-14. According to Burke, he drove by and saw a man wearing a blue cast, and he recognized the man as petitioner. App. 154, l. 21 – 155, l. 6. Burke said, "I knew who he was." App. 155, l. 4.

It was undisputed that Ancrum did not capture any exchange of money or drugs on the "button camera" he wore. App. 190, ll. 9-14; App. 121, ll. 1-2. However, according to Detective Grill, Ancrum knew he was supposed to capture the transaction on video if possible. App. 123, l. 22 – 124, l. 2.

Officers did not attempt to arrest the seller or recover the prerecorded currency that day, instead letting "a lot of time pass" in an attempt to keep the informant's identity secret. App. 157, ll. 1-11; App. 110, ll. 12-18. An arrest warrant was obtained for petitioner a month later. App. 190, l. 21 – 191, l.1.

In addition to a prior conviction for receiving stolen goods and his severely impaired vision, Ancrum had a checkered history with truth and the courts. App. 141, ll. 11-15. Defense counsel impeached Ancrum with an affidavit he signed, in which he recanted his testimony in a prior drug case involving another defendant. App. 142, ll. 1-22. Ancrum signed an affidavit that said, "I feel bad that I lied on the stand about who sold the drugs but I didn't feel like I had a choice if I wanted to keep getting money from the detectives to buy drugs." App. 143, ll. 12-20.

In that prior case, petitioner's counsel, Jason King, represented that defendant and petitioner's solicitor, Stephanie Linder, prosecuted that defendant. App. 146, ll. 5-12. Ancrum claimed he only "lied" in the prior case because he was threatened. App. 149, l. 18 – 150, l. 6. Ancrum claimed the other defendant, who was serving life in prison, had family members and other criminals follow him and threaten to kill him until he finally recanted. App. 147, l. 8 – 150, l. 6. Ancrum told defense counsel that his former client "ain't stupid. Just like your guy who's

supposed to be to court now. See you believe in him. He ain't here right now because he's lying." App. 144, ll. 19-22.

Ancrum said of the perjured affidavit, "Yeah, I did the wrong thing when I signed that paper **but I know he guilty, and his lawyer know he guilty. Just like the guy who supposed to be on trial here, he guilty**—" App. 150, ll. 7-10 (emphasis added). "That's all I got to say." App. 150, l. 12.

Defense counsel objected and asked for a curative instruction. App. 150, ll. 13-14. The court ordered the testimony stricken and instructed the jury not to consider the testimony. App. 150, ll. 15-20. Later in the trial, defense counsel moved for a mistrial based on Ancrum's statement and urged: "I know I requested a curative instruction but I don't believe that this is enough to cure any prejudice caused to [petitioner] and would ask you to grant a mistrial." App. 161, ll. 16-21. The court denied the motion. App. 162, ll. 4-5.

Defense counsel would later say Ancrum was very: "Good for the State. Of any informant I've ever cross-examined, he was the best I've seen as far as testifying." App. 383, ll. 4-6. Petitioner was found guilty as indicted. App. 224, ll. 4-9.

On direct appeal, petitioner's appellate counsel argued, *inter alia*, that the trial court erred in failing to grant defense counsel's motion for a mistrial and that the curative instruction was not sufficient to cure the prejudice to petitioner. App. 255. However, the Court of Appeals denied petitioner relief. App. 324 – 326. In addressing the failure to grant a mistrial, the Court of Appeals wrote

> As to whether the trial court erred in denying Moore's motion for a mistrial: *State v. George*, 323 S.C. 496, 510, 476 S.E.2d 903, 911-12 (1996) ("If the trial judge sustains a timely objection to testimony and gives the jury a curative instruction to disregard the testimony, the error is deemed to be cured."); *id.* ("No issue is preserved for appellate review if the objecting party accepts the

> judge's ruling and does not contemporaneously make an additional objection to the sufficiency of the curative charge or move for a mistrial."); *State v. Heller*, 399 S.C. 157, 174, 731 S.E.2d 312, 321 (Ct. App. 2012) (concluding a **motion for a mistrial was not preserved for appellate review when the court sustained an objection and gave a curative instruction and Heller did not contemporaneously move for a mistrial but waited until after the State completed examination of the witness and the court took a fifteen minute recess**).

App. 325 (emphasis added).

After exhausting his direct appeal remedies, petitioner filed an application for post-conviction relief (PCR) on December 29, 2018. App. 348 – 356. The state made its return May 9, 2018. App. 357 – 362. An amended application filed December 12, 2017, alleged: "Trial Counsel was ineffective for failing to move for a mistrial after the State's witness testified that applicant was guilty and that his lawyer knows he is guilty." App. 363 – 364. "Additionally trial counsel should have objected to the Court's curative instruction." App. 363. A hearing was held on the matter February 1, 2018, before the Honorable Maite Murphy. App. 365. James Falk represented petitioner and Megan Jameson represented the state. App. 365.

The PCR court heard testimony from petitioner and from his trial counsel, but ultimately denied petitioner relief. App. 366; App. 433. Petitioner's PCR counsel argued that defense counsel was ineffective because he did not ask for a mistrial at the time "when Mr. Ancrum [ ] makes this statement," leaving the issue of whether a mistrial should have been granted unpreserved. App. 410, ll. 5-8.

Prior to issuing its order of dismissal, the PCR court reviewed petitioner's brief of appellant and the unpublished opinion by the Court of Appeals. App. 415 – 416; App. 426. However, the PCR court found the allegation that defense counsel was ineffective for failing to

move for a mistrial following a comment by the confidential informant (CI) was "wholly without merit." App. 432.

The order of dismissal states: "The record establishes counsel immediately objected to this testimony, his objection was sustained, the court struck the testimony and instructed the jurors not to consider it during deliberations, and counsel moved for a mistrial." App. 432. The order of dismissal continues: "Counsel did all of the things that [petitioner] is now alleging he should have done." App. 432 – 433.

Petitioner's sentence was unsealed and imposed on November 16, 2012. App. 436. Petitioner was sentenced to seventeen years imprisonment. App. 436.

ARGUMENT

The PCR court erred as a matter of law by ruling defense counsel provided effective representation by objecting and moving for a mistrial where the state's confidential informant gave highly prejudicial testimony that he knew petitioner was guilty and implied petitioner's defense counsel knew that petitioner was guilty too, since the Court of Appeals procedurally barred the mistrial issue because defense counsel failed to timely move for a mistrial when he asked for a curative instruction instead.

Counsel was deficient when Ancrum said that both he and defense counsel knew petitioner was guilty and counsel requested and accepted a curative instruction but moved for a mistrial based on Ancrum's statements minutes later during a break, since his mistrial motion was untimely.

"The assessment of witness credibility is within the exclusive province of the jury." *State v. McKerley*, 397 S.C. 461, 464, 725 S.E.2d 139, 141 (Ct. App. 2012) (citing *State v. Wright*, 269 S.C. 414, 417, 237 S.E.2d 764, 766 (1977)). A jury must make its own assessment on the credibility of witnesses. *Gilchrist v. State*, 350 S.C. 221, 227, 565 S.E.2d 281, 285 (2002). *See Briggs v. State*, 421 S.C. 316, 328, 806 S.E.2d 713, 719 (2017) (recognizing "longstanding rule of law that no one may invade the province of the jury"). Ancrum's statement that petitioner, "he guilty," improperly invaded the province of the jury.

"Because a trial court's curative instruction is considered to cure any error regarding improper testimony, a party must contemporaneously object to a curative instruction as insufficient *or* move for a mistrial to preserve an issue for review." *State v. Walker*, 366 S.C. 643, 658, 623 S.E.2d 122, 130 (Ct. App. 2005) (emphasis in original).

Counsel's failure to move for a mistrial was raised in the amended application and argued at the PCR hearing. The PCR court erred as a matter of law when it found that: "Counsel did all of the things that [petitioner] is now alleging he should have done," in regard to moving for a mistrial, since the Court of Appeals found that counsel's mistrial motion was untimely. App. 432 – 433; App. 325.

The Sixth Amendment to the United States Constitution guarantees an accused the right to effective assistance of counsel. U.S. CONST. amend. VI; *Strickland v. Washington*, 466 U.S. 668 (1984). The United States Supreme Court has established a two-pronged test to evaluate allegations of ineffective assistance of counsel. Petitioner must prove "that counsel's performance was deficient" and fell below reasonable professional norms, and the deficient performance prejudiced petitioner. *Id.* at 687.

"To show prejudice, the applicant must show that, but for counsel's errors, there is a reasonable probability the result of the trial would have been different." *Patrick v. State*, 349 S.C. 203, 207, 562 S.E.2d 609, 611 (2002). "A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial." *Johnson v. State*, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997).

"[A]n instruction to disregard objectionable evidence *usually* is deemed to have cured the error in its admission unless on the facts of the particular case it is probable that notwithstanding such instruction the accused was prejudiced." *State v. Hale*, 284 S.C. 348, 354, 326 S.E.2d 418, 422 (Ct. App. 1985) (emphasis added). "Generally, the consideration of whether there was any prejudice requires that a motion for mistrial be made after the trial judge attempts to cure the error." *State v. Craig*, 267 S.C. 262, 268, 227 S.E.2d 306, 309 (1976).

Ancrum said of the prior case involving his perjured testimony, "Yeah, I did the wrong thing when I signed that paper **but I know he guilty, and his lawyer know he guilty. Just like the guy who supposed to be on trial here, he guilty**—" App. 150, ll. 7-10 (emphasis added). The jury knew that petitioner's counsel had been the prior defendant's counsel, and through this testimony Ancrum implied that petitioner's counsel knew that petitioner was just as guilty as counsel's prior client. App. 141, l. 24 – 142, l. 1.

Ancrum had cooperated with law enforcement "[a]bout over 20 years or longer." App. 126, ll. 22-24. Detective Grill said he had used Ancrum as a CI "a good bit," and that Ancrum "knows what he's doing." App. 122, l. 21 – 123, l. 5. When Ancrum, who had been trusted by police officers for years, stated that petitioner was just as "guilty" as defense counsel's prior client who threatened to kill Ancrum, petitioner was prejudiced.

Here, defense counsel realized belatedly that petitioner was prejudiced and the curative instruction was insufficient, and made the untimely mistrial motion. Defense counsel later said that: "Of any informant I've ever cross-examined, [**Ancrum**] **was the best I've seen as far as testifying**." App. 383, ll. 4-6 (emphasis added). Given Ancrum's efficacy as a witness, it is impossible to say that his improper testimony did not contribute to the jury's verdict.

The evidence against petitioner was not overwhelming—Ancrum's credibility was key in determining petitioner's guilt or innocence. Although it was not disputed that petitioner was around the liquor store or that Ancrum returned to the police with cocaine, the video did not show any drugs or money being exchanged between petitioner and Ancrum. Only Ancrum could say who passed him the drugs. The premarked currency was never recovered. Ancrum was partially blind, relied heavily on his payment as a CI for income, and had a prior conviction for a

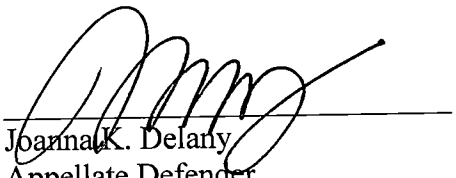
crime of dishonesty. Petitioner was an easy target for Ancrum to falsely claim was the seller, since he had prior drug convictions and was recognized by police officers.

Ancrum had lied in a prior drug case, either when he testified or when he signed a sworn affidavit that said: "I feel bad that I lied on the stand about who sold the drugs but I didn't feel like I had a choice if I wanted to keep getting money from the detectives to buy drugs." App. 143, ll. 12.20.

The PCR court erred in finding defense counsel properly moved for a mistrial, since the Court of Appeals found the mistrial motion was untimely. Petitioner was prejudiced by counsel's deficiency, as Ancrum's credibility was key in determining guilt or innocence.

CONCLUSION

Based on the foregoing argument, petitioner respectfully asks that a writ of certiorari be granted to allow full briefing on this issue.



Joanna K. Delany
Appellate Defender

ATTORNEY FOR PETITIONER

This 10th day of December, 2018.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of her ability this Petition for Writ of Certiorari complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

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ATTORNEY FOR PETITIONER

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon Benjamin Limbaugh, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Petition for Writ of Certiorari and a copy of the Appendix have been served on James L. Moore, #299043, at MacDougall Correctional Institution, 1516 Old Gilliard Road, Ridgeville, SC 29472, this 10th day of December, 2018.

Joanna K. Delany
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 10th day of December, 2018.

(L.S)
Notary Public for South Carolina
My Commission Expires: July 26, 2028