

STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. SUPREME COURT

CERTIORARI TO BEAUFORT COUNTY
Carmen T. Mullen, Plea Judge
R. Lawton McIntosh, Post-Conviction Relief Judge

Appellate Case No. 2018-001202

DWAYNE CHISOLM,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

ALAN WILSON
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RESPONDENT'S STATEMENT OF ISSUES

I.

Did the post-conviction relief court properly determine Petitioner failed to establish that counsel was ineffective when he did not object to a jury instruction on constructive possession when the instruction stated the correct law and ultimately did not prejudice Petitioner because Petitioner admitted to owning the drugs for which he was on trial for possessing?

STATEMENT OF THE CASE

Petitioner Dwayne Chisolm is presently confined in the South Carolina Department of Corrections following his conviction at trial in Beaufort County. On May 19, 2010, the Beaufort County Sheriff's Department executed a search warrant at Petitioner's residence. Prior to executing the search warrant law enforcement observed Petitioner leaving the residence. There were two bedrooms inside the residence. One belonged to Petitioner and the other belonged to David Greene. Law enforcement found Greene inside the first bedroom upon arrival. In the second bedroom, law enforcement found 125 grams of cocaine inside a shoe. Also found in the bedroom were Petitioner's passport, car title, and a credit card. In the kitchen, officers found a scale, a police radio, plastic baggies, a cutting agent, and five rolls of cash. Officers also found a handgun with an obliterated serial number. After Petitioner was placed under arrest, he made a number of incriminating statements. Petitioner stated: "This is my residence; I live here. Bedroom to the left. That's all my property." (App. 27, lines 3-5). Petitioner also stated "That's my residence; that's my stuff; I'm going to do the time for the drugs because they're mine." (App. 27, lines 12-14).

During its July 2010 term, the Beaufort County Grand Jury indicted Petitioner for possession of a weapon during the commission of a violent crime (2010-GS-07-1253), trafficking in cocaine of greater than 100 grams but less than 200 grams (2010-GS-07-1251), possession of a firearm with an obliterated serial number (2010-GS-07-1254), and possession with intent to distribute cocaine base (2010-GS-07-1252). He was represented on these charges by Assistant Public Defenders Jessica Saxon, Esquire and Arie Bax, Esquire. Assistant Solicitors Mary Concannon Julie Kate Keeney and of the Fourteenth Circuit Solicitor's Office prosecuted the case.

On October 23, 2014, Petitioner was convicted by a jury in the Beaufort County Court of General Sessions before the Honorable Carmen T. Mullen. The trial judge sentenced Petitioner to a term of 25 years' imprisonment for trafficking cocaine of more than 100 grams but less than 200 grams first offense, 15 years' imprisonment for possession with intent to distribute cocaine base, 5 years' imprisonment for possession of a pistol with an obliterated serial number, 5 years' imprisonment for possession of a firearm during the commission of a violent crime. All sentences ran concurrently resulting in an aggregate term of 25 years' imprisonment.

Petitioner filed a notice of appeal challenging his guilty plea and sentence on October 29, 2014. Petitioner was represented in his appeal by Wanda Carter, Esquire. Appellate counsel filed an Anders brief and a motion to be relieved as counsel with the Court of Appeals. The Court of Appeals dismissed Petitioner's appeal and granted appellate counsel's motion to be relieved on June 29, 2016. The Remittitur was returned to the circuit court on July 15, 2016.

On October 20, 2016, Petitioner filed a *pro se* application for post-conviction relief (2016-CP-07-2267). Petitioner subsequently retained private counsel and filed an amended application for post-conviction relief on December 30, 2016. Petitioner asserted that he was entitled to relief under four grounds. Petitioner claimed that counsel was ineffective for: (1) failing to adequately challenge the admission of incriminating statements made by Petitioner to law enforcement, (2) the State withholding exculpatory information pursuant to Brady v. Maryland, (3) failing to adequately challenge the search warrant executed on Petitioner's residence, and (4) failing to object to the trial judge's jury instruction on constructive possession. On April 17, 2017, Respondent served its return to the application and requested an evidentiary hearing on the application. An evidentiary hearing was convened January 31, 2018, before the Honorable R. Lawton McIntosh, circuit court judge. Petitioner was present alongside counsel

James A. Brown, Esquire. Respondent was represented by Assistant Attorney General Christian Saville of the South Carolina Attorney General's Office. Petitioner did not present any testimony and waived the first three claims to relief that he raised in his amended application. Petitioner argued that trial counsel was ineffective for failing to object to the trial judge's jury instruction on constructive possession. At the conclusion of the evidentiary hearing, Judge McIntosh denied Petitioner's application.

On March 6, 2018, Judge McIntosh issued a written order denying the application in full. This order was filed with the Beaufort County Clerk of Court on March 9, 2018. On March 16, 2017, Petitioner filed a motion to reconsider the order of dismissal. On April 18, 2018 judge McIntosh denied Petitioner's motion to reconsider and the order was filed on April 25, 2018. Petitioner filed his notice of appeal to this Court on June 26, 2018.

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, 839 (2018). When reviewing factual findings, the appellate courts defer to the post-conviction relief court's factual findings and will uphold them if there is probative evidence in the record to support them. Buckson v. State, 423 S.C. 313, 320, 815 S.E.2d 436, 440 (2018); Smalls, 422 S.C. at 180-81, 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. Smalls, 422 S.C. at 180-81, 810 S.E.2d at 839-40. 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).

ARGUMENT

I.

The post-conviction relief court properly denied relief for the allegation that trial counsel was ineffective for not objecting to a jury instruction on constructive possession when the instruction stated the correct law and ultimately did not prejudice Petitioner because Petitioner admitted to owning the drugs for which he was on trial

Petitioner claims the post-conviction relief court erred in denying him relief because trial counsel was ineffective for failing to object to the trial judge's constructive possession jury instruction. Petitioner's argument is without merit. The trial court instructed the jury on the correct law of constructive possession and therefore trial counsel had no good faith basis to object to the instruction. However, even if trial counsel was deficient in failing to object to the jury instruction, Petitioner was not prejudiced by the instruction because he admitted that the drugs and firearm belonged to him. This Court should deny certiorari.

Petitioner, like all other defendants, has a right to the assistance of effective counsel as provided by the Sixth Amendment to the United States Constitution. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668 (1984); Lomax v. State, 379 S.C. 93, 665 S.E.2d 164 (2008). Petitioner has the burden of proving the allegations in his post-conviction relief action, and when alleging that trial counsel was constitutionally ineffective, he must prove that "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

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland, 466 U.S. 668. First, Petitioner must prove that counsel's performance was deficient. Id.; 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 v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). “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). Petitioner 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 Petitioner 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. 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. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Strickland, 466 U.S. 668.

Moreover, Strickland does not require a finding of ineffectiveness merely for deviation from some rigid rule of representation. Rather, Strickland requires the post-conviction relief applicant to prove “counsel made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment.” Id. at 697. Therefore, the function of the post-conviction relief court is to determine if “in light of all the circumstances, the identified acts or omissions were outside the wide range of professional competent assistance” required of a criminal defense attorney.” Id. at 690.

“A jury charge is correct if, when the charge is read as a whole, it contains the correct definition and adequately covers the law.” State v. Adkins, 353 S.C. 312, 318, 577 S.E.2d 460, 464 (2003) (internal citations omitted). A jury charge which is substantially correct and covers the law does not require reversal. State v. Foust, 325 S.C. 12, 479 S.E.2d 50 (1996).

“Constructive possession can be established by circumstantial as well as direct evidence, and possession may be shared.” State v. Hudson, 277 S.C. 200, 202, 284 S.E.2d 773, 775 (1981). Constructive possession is proven by showing the accused has dominion and control, *or the right to exercise dominion and control*, over the contraband. Hudson at 277 S.C. at 202, 284 S.E.2d at 774-75 (emphasis added). “The proper charge on constructive possession is to instruct the jury that the defendant’s knowledge and possession may be inferred if the substance was found on premises under his control.” State v. Adams, 291 S.C. 132, 135, 352 S.E.2d 483, 486 (1987). “Where contraband materials are found on premises under the control of the accused, this fact in and of itself gives rise to an inference of knowledge and possession which may be sufficient to carry the case to the jury.” State v. Muhammed, 338 S.C. 22, 26-27, 524 S.E.2d 637, 639 (Ct. App. 1999) (citing Hudson, 277 S.C. at 203, 284 S.E.2d at 775).

Petitioner asserts that trial counsel was deficient for not objecting to the trial judge’s instruction on constructive possession. Petitioner initially argues that the trial judge’s instruction was an impermissible comment on the facts in violation of Article V, Section 21 of the South Carolina Constitution. Additionally Petitioner argues that trial counsel should have objected based on this Court’s holding in State v. Stukes, 787 S.E.2d 480 (2016). Petitioner’s argument is without merit. As an initial matter, the instruction on constructive possession given by the trial judge was not an impermissible comment on the facts. The trial judge’s instruction mirrored the correct definition adopted by this Court in State v. Adams. Furthermore, the instruction did not

reference any of the facts that were presented at Petitioner's trial, but rather merely stated the correct law. Secondly, even if we assume for the sake of argument that State v. Stukes is applicable to a drug case, the Stukes opinion was not published until 2016. Petitioner's trial occurred in 2014. Thus, the post-conviction relief judge correctly recognized that trial counsel cannot be held to a standard of clairvoyance. See Teamer v. State, 416 S.C. 171, 183 786 S.E.2d 109, 115 ("We have never required an attorney to be clairvoyant or anticipate changes in the law.") Trial counsel was not deficient by failing to object to the jury instruction because it contained the correct law at the time of trial and therefore there was no basis to object.

Trial counsel was not deficient for failing to object to the trial judge's constructive possession instruction. Petitioner also fails to satisfy the second prong of the Strickland test because he was not prejudiced by the instruction. The evidence presented against Petitioner at trial was overwhelming. Not only was cocaine found in a shoe inside Petitioner's bedroom closet along with drug paraphernalia in his kitchen, Petitioner told law enforcement that he would take responsibility for everything in the house. Petitioner stated: "This is my residence; I live here. Bedroom to the left. That's all my property." (App. 27, lines 3-5). Petitioner also stated "That's my residence; that's my stuff; I'm going to do the time for the drugs because they're mine." (App. 27, lines 12-14). Even if trial counsel had objected to the constructive possession instruction or if the instruction had not been given at all, the jury likely still would have convicted Petitioner based on his admitted ownership of the drugs. Therefore, Petitioner cannot show there is any probability or likelihood that the result of his trial would have been different if trial counsel had objected to the jury instruction. This Court should deny certiorari.

CONCLUSION

Because the post-conviction relief court properly determined Petitioner failed to establish any constitutional deprivations, this Court should deny certiorari. Should this Court grant certiorari, Respondent requests the opportunity to fully brief the issues raised.

Respectfully submitted,

ALAN WILSON
Attorney General

SCOTT MATTHEWS
Assistant Attorney General
S.C. Bar No. 101464

By: 
ATTORNEYS FOR RESPONDENT

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January 17, 2019

STATE OF SOUTH CAROLINA
In the Supreme Court

CERTIORARI TO BEAUFORT COUNTY
Carmen T. Mullen, Plea Judge
R. Lawton McIntosh, Post-Conviction Relief Judge

Appellate Case No. 2018-001202

DWAYNE CHISOLM,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

PROOF OF SERVICE

I, Tamiaka Russell-Brown, certify that I have served the within **Return to Petition for Writ of Certiorari** on Petitioner by depositing two copies of the same in the mail to be delivered to Petitioner at the address below:

James A. Brown, Jr.
Law Offices of Jim Brown, P.A.
1600 Burnside St., Suite 100
P.O. Box 592
Beaufort, SC 29901

I further certify that all parties required by Rule to be served have been served.

This 17 day of January, 2019.



TAMIEKA RUSSELL-BROWN
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STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari from Dorchester County
The Honorable R. Lawton McIntosh, Circuit Court Judge

Appellate Case No. 2018-001202

DWAYNE CHISOLM, #325820,

PETITIONER,

v.

THE STATE OF SOUTH CAROLINA,

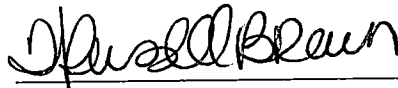
RESPONDENT,

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:

**James A. Brown, Jr., Esquire
Law Offices of Jim Brown, P.A.
Post Office Box 592
Beaufort, South Carolina 29901**

This 17th day of January, 2019



Tamiaka Russell-Brown
LEGAL ASSISTANT



RECEIVED

JAN 17 2019

S.C. SUPREME COURT

ALAN WILSON
ATTORNEY GENERAL

January 17, 2019

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

Re: Dwayne Chisolm, #325820v. State of South Carolina
Appellate Case No. 2018-001202
Lower Court Case No. 2015-CP-18-1665

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,

Scott Matthews
Assistant Attorney General
SC Bar No. 101464

SM/trb
Enclosures

cc: James A. Brown, Jr., Esquire (2 copies)