STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Charleston County

Honorable Maite Murphy, Circuit Court Judge

DALE GOULD,

RESPONDENT

V.

STATE OF SOUTH CAROLINA,

PETITIONER

APPELLATE CASE NO. 2018-000876

RETURN TO PETITION FOR WRIT OF CERTIORARI

LANELLE CANTEY DURANT
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR RESPONDENT

INDEX

QUESTION PRESENTED

Did the PCR court correctly find that trial counsel was ineffective for failing to object to the trial court's jury instruction that actual knowledge of the presence of the cocaine is "strong evidence" of the defendant's intent to control its disposition or use which was prejudicial to Petitioner Gould because the words "strong evidence" were a comment on the weight of the evidence and no witnesses saw Petitioner place the drugs on the floor; and the South Carolina Supreme Court had instructed trial judges to no longer use the "strong evidence" charge?

STATEMENT OF THE CASE

Taylor Boyd was a student at the College of Charleston who was arrested for being a minor in possession of alcohol. App. 78, l. 8 – 80, l. 4. In order to have her charges dismissed, she told police that she knew someone who was selling illegal narcotics out of Joe Pasta restaurant and was willing to cooperate with law enforcement. She was also paid one hundred dollars. App. 103, l. 13 – 104, l. 17. Detective Patrick Gill, the case agent, confirmed that the charges were dismissed in exchange for her cooperation in this case. App. 86, l. 16 – 87, l. 1.

Boyd, along with an undercover officer, Melanie Fredrick, conducted an undercover "buy operation" for the Charleston City Police Department on October 10, 2013. The two of them went to Joe Pasta restaurant where Gould worked as a manager. Frederick was wearing an audio wire and a front facing camera. They sat at the bar and eventually made contact with Gould. App. 60, l. 4 – 63, l. 17; App. 64, l. 12 – 65, l. 24; App. 71, l. 24 – 73, l. 5; App. 80, l. 17 – 82, l. 14.

The three all went outside the restaurant. Boyd and Frederick indicated they wanted something to take to a friend's birthday party. App. 82 ll.1- App. 83, ll.3. They then returned inside the restaurant and went into an office in the back. Frederick shut the door. Gould pointed out that there was something on the ground, which Frederick picked up. Gould suggested that they see what it was and split it three ways. Frederick and Boyd refused to try the substance, but eventually Gould tried it. He told Boyd and Frederick that he was going to throw the rest away. App. 73, l. 8 – 75, ll. 22; App. 82, l. 15 – 84, l. 11. Neither Boyd nor Frederick left the office with the item picked up from the floor. App. 84, l. 12-16; App. 87, ll. 2-17.

Boyd and Frederick returned to the bar. Gould eventually came out and allegedly pointed out something on the ground near the bar. Frederick picked up a bag which she testified

at trial that she believed was "another small plastic bag of white powder" containing "possibly cocaine." She and Boyd then left and returned to the undercover team. App. 74, l. 20 – 75, l. 3; App. 84, l. 17 – 85, l. 13. The bag contained 0.23 grams of cocaine. App. 293; App. 134, l. 18 – 138, l. 25.

On January 13, 2014, the Charleston County Grand jury indicted Petitioner Gould on the charge of distribution of cocaine. App. 295. On November 19- 20, 2014, Gould proceeded to trial before the Honorable Deadra Jefferson and a jury. Gould was represented by Melissa Gay, and the state was represented by J. Whit Sowards and Stephanie Linder. App. 1.

At trial, the CI Boyd and Officer Frederick both testified concerning the incident. App. 70, ll. 23 – App. 87, ll. 22. Neither one of them saw Gould place the cocaine on the floor in his office nor on the floor near the bar. App. 73, ll. 7 – App. 74, ll. 25; App. 83, ll. 24 – App. 84, ll. 24. Gould did not testify. App. ii.

During the judge's charge to the jury, she said to the jury:

> Mere presence at the scene where the drugs were found is not enough to prove possession. Actual knowledge of the presence of the cocaine is **strong evidence** {emphasis added} of the defendant's intent to control its disposition or use.

App. 214, ll. 1 – 5. There was no objection by defense counsel. App. 214, ll. 6 – 25.

The jury found Petitioner Gould guilty as indicted. App. 256, ll. 20 – App. 257, ll. 10. The judge sentenced Petitioner Gould to ten years' incarceration and a fine of $50,000 as this was his third drug offense. App. 280, ll. 6 – App. 281, ll. 16; 270, ll. 1 – 24.

Trial counsel filed a notice of appeal. The appeal was perfected with the filing of a brief pursuant to Anders v. California, 378 U.S. 738 (1967) by the Division of Appellate Defense within the Commission of Indigent Defense. Petitioner Gould filed an affidavit asking that his appeal be dismissed. The Court of Appeals issued an order dismissing Gould's appeal. App. 399.

On April 1, 2016, Petitioner Gould filed a post-conviction relief (PCR) application. On June 23, 2016, the state filed a return. App. 398. PCR counsel filed an amended PCR application on November 27, 2017. App. 357. An evidentiary hearing was held on January 30, 2018 before the Honorable Maite D. Murphy. Petitioner Gould was represented by Rodney Davis, and the state was represented by Rasheeda Cleveland. App. 359.

Petitioner Gould testified at the PCR hearing that his trial counsel was ineffective for not objecting to the trial judge's "strong evidence" jury charge. App. 376, ll. 1 – 12.

Trial counsel testified at the PCR hearing that she "botched" the jury charge issue. Counsel admitted that she should have objected. She said that she had read the case law that PCR counsel had. She said that she did not object to the charge. App. 388, ll. 3 – 13.

PCR counsel argued after the evidence that the PCR court grant relief to Gould and vacate his sentence and allow him to "begin anew." App. 395, ll. 2 – 4.

The PCR judge issued an order on March 29, 2018 granting Petitioner Gould's PCR application that would give him a new trial. App. 398- App. 406. The judge found that trial counsel was ineffective for not objecting to the "strong evidence" jury charge. The judge cited the case of State v. Cheeks, 401 S.C. 322, 727 S.E.2d 480 (2013) where the Supreme Court instructed trial judges to no longer use the "strong evidence" charge because it was a statement on the sufficiency of the evidence. App. 405 – App. 406.

The state filed a petition for a writ of certiorari to the Supreme Court on September 28, 2018. This return to that petition follows.

ARGUMENT

The PCR court correctly found that trial counsel was ineffective for failing to object to the trial court's jury instruction that actual knowledge of the presence of the cocaine is "strong evidence" of the defendant's intent to control its disposition or use which was prejudicial to Petitioner Gould because the words "strong evidence" were a comment on the weight of the evidence and no witnesses saw Petitioner place the drugs on the floor; and the South Carolina Supreme Court had instructed trial judges to no longer use the "strong evidence" charge.

In State v. Cheeks, 401 S.C. 322, 737 S.E.2d 480 (2013), the Supreme Court held that instructing a jury in a drug case that actual knowledge of the presence of a drug was "strong evidence" of the intent to control its disposition or use unduly emphasized that evidence and deprived the jury of its prerogative both to draw inferences and to weigh evidence. This Court also held that the jury instruction in a drug case that actual knowledge of the presence of a drug was strong evidence of the intent to control its disposition or use was improper as an expression of the judge's view of the weight of certain evidence and the bench was to no longer use the instruction.

The Court then held that the "strong evidence" jury instruction converted all persons merely present who have actual knowledge of the drugs on the premises into possessors of that drug, and it largely negated the instruction on mere presence and erroneously conveyed that a mere permissible evidentiary inference was instead a proposition of law.

Cheeks had argued that the jury charge was a comment on the facts and it nullified or at least conflicted with the mere presence charge. This Court agreed with Cheeks that this jury charge largely negated the mere presence charge. This Court then held that even if they did not agree that the "strong evidence" charge undermined the mere presence charge, the "strong

evidence" charge was improper as an expression of the judge's view of the weight of certain evidence.

The state argues that Petitioner Gould's case is similar to Cheeks' case as neither could show prejudice. However, Petitioner Gould's case is distinguished from Cheeks in that Cheeks was in the process of cooking crack cocaine when the police executed a search warrant on the witness Markley's house. Cheeks was seen fleeing from the kitchen where water was actually boiling items used in the manufacture of crack. Cheeks was not merely present.

No one testified that they saw Gould drop the bag of cocaine found at the bar. The testimony was that he only pointed to the bag. That was evidence of his mere presence. He was seen allegedly using cocaine in the office but said he was going to throw the remainder away. Boyd and Frederick did not take that bag from the office. In addition, the bag of alleged cocaine in the office was not seized and not tested. App. 159, ll. 14 – 22.

The PCR judge found that Gould was prejudiced by the "strong evidence" jury charge because the Supreme Court had instructed the bench to no longer use that charge. The PCR judge found that there was a reasonable probability that the result of the trial would have been different. App. 405. Using the words "strong evidence" in any jury charge is giving the jury the judge's opinion that certain evidence is strong which is a statement on the facts. That is prejudicial to the defendant.

Where ineffective assistance of counsel is alleged as a ground for relief, the applicant 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, 104 S. Ct. 2052 (1984); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). The proper

measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Strickland v. Washington, *supra*; Butler v. State, *supra.*

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. The applicant must prove that counsel's performance was deficient and fell below reasonable professional norms; and there is a reasonable probability that, but for counsel's unprofessional errors, the result would have been different. Cherry v. State, 300 S.C. 117-118, 386 S.E.2d 624 (1989).

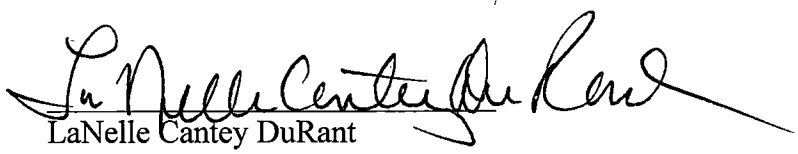
A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007); Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997).

In Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018), the Supreme Court held that in determining whether the applicant alleging ineffective assistance of counsel has proven prejudice, the PCR court should consider the specific impact counsel's error had on the outcome of the trial. In addition, the PCR court should consider the strength of the state's case in light of all the evidence presented to the jury.

The PCR court was correct in finding that Gould was prejudiced by the trial court's use of the "strong evidence" charge because that was the judge giving his opinion of the facts to the jury. It was the judge emphasizing certain evidence. This was prejudicial to Gould. Trial counsel was ineffective for not objecting to this charge. The state emphasizes that Gould was guilty of more than mere presence. However, the emphasis of the PCR court and of the Supreme Court in Cheeks is on the words "strong evidence" as the Supreme Court held in Cheeks that the words "strong evidence" were improper regardless of the impact on the mere presence charge because the words were an expression of the judge's view of the weight of certain evidence.

CONCLUSION

Based on the above, Petitioner Gould's conviction and sentence should be vacated, and his case remanded for a new trial as ordered by the PCR court.



LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR PETITIONER

This 13th day of February, 2019.

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V.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Return to Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon Megan Harrigan Jameson, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Dale Gould, #335171, at Manning Correctional Institution, 502 Beckman Drive, Columbia, SC 29203, this 4th day of February, 2019.

LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR RESPONDENT

SUBSCRIBED AND SWORN TO before me
this 13th day of February, 2019.

_____ (L.S)
Notary Public for South Carolina
My Commission Expires: September 27, 2028.