

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to York County

Honorable Roger E. Henderson, Circuit Court Judge

JOMAR ROBINSON,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2018-002126

PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Did the PCR court err in not finding trial counsel ineffective for introducing the marijuana into the trial during his cross examination of Lieutenant Ligon before the state introduced the drugs including the marijuana and the gun into evidence which was prejudicial to Petitioner Robinson because that made it appear that it then was likely he possessed the other drugs as well?

STATEMENT

On March 20, 2006, an officer with the York County Multi-jurisdictional Task Force, Sergeant Rayford Ervin, Jr., was hiding out in the woods with binoculars, surveilling a public housing project. It was a Thursday night, and officers testified that they had received “anonymous complaints” about drug dealing and “people carrying guns” in the area. App. 203, ll. 3-5. An officer testified that they received a complaint on that particular night, although he could not offer any specific information about it. App. 73, ll. 10-24.

During this particular night of surveillance, Ervin testified that he observed five cars approach the parking lot and which were met by one of five young men standing on a porch. Ervin believed this conduct was consistent with drug dealing, and he called for back up. App. 204, l. 9-206, l.4. Law enforcement did not take any notes documenting this significant traffic which led them to believe that drug dealing was afoot on that particular night. App. 211, ll. 8-14. The lack of documentary evidence in this case was consistent with these officers’ view of the need: “Well, you have got three officers that came up here and testified. I’m sure that’s just as good as a picture.” App. 244, ll. 18-19.

It was part of this police set-up that officers would follow cars leaving the public housing project, and then pull them for minor traffic violations so they could search the cars. On this night, a car was pulled and searched, and no drugs were found. App. 215, ll.6-8. A stolen pistol, however, was found, and the individual arrested. App. 207, l. 16- p. 208, l. 8; App. 76, ll. 14-21. Despite the absence of drugs found in the searched vehicle, the officers approached the porch area to engage in a “consensual encounter” with the five young men. Critically, the officers stepped onto the porch area and then asked the men for their identifications. On this porch were 5

young men, and two chairs. Appellant, and others, gave law enforcement their IDs. App. 150, ll. 1 – App. 152, ll.

Lieutenant Mike Ligon testified that “as soon as coming up on the porch and encountering these five individuals” they could smell a “strong odor of green marijuana.” App. 150, ll. 1 -App. 151, ll. 24. He also testified that, “[a]s we actually got to them” is when they could smell the 3.2 grams of marijuana, sealed in a plastic bag, and located in appellant’s jacket pocket. App. 85, ll. 19-21; App. 86, l. 21- 87, l. 8 (emphasis added). Of the five people located on the porch, Ligon testified that he could tell that either appellant, or another male, had the marijuana. App. 88, ll.2-11.

As the officers were standing on the porch, and while checking the young men’s identifications, Ligon testified that he observed the butt of a pistol hanging out of appellant’s right jacket pocket. App. 152, ll. 4-9. At that point, Ligon testified that he informed the men that he was going to conduct a Terry¹ frisk. App. 153, ll. 4-5.

According to Ligon, at that point, appellant began to back away from him, which scared him, and so he then grabbed for appellant’s weapon. App. 153, ll. 4-16. A tussle ensued, and Ligon managed to remove appellant’s jacket. Appellant then took off running. Shortly thereafter, he was caught, and handcuffed. The drugs were found in appellant’s jacket pocket and he was subsequently charged with these crimes. App. 70, l. 7- p. 71, l. 7.

In June 2008, the York County Grand jury indicted Petitioner Robinson on the charges of possession of cocaine base (crack) with intent to distribute (PWID); PWID within the proximity of a public park or playground; resisting arrest; carrying a pistol unlawfully; possession of marijuana. App. 540 – App. 549.

¹ Terry v. Ohio, 392 U.S. 1 (1968).

On February 9, 2009, Petitioner Robinson proceeded to trial before the Honorable Lee S. Alford and a jury. Petitioner Robinson was represented by J. Christopher Mills and James Morton. The state was represented by E.B. Springs. App. 1. The trial was held in Petitioner Robinson's absence. App. 8, ll. 4 – 18.

Lieutenant Mike Ligon testified at the trial. He told of the surveillance and of smelling the green marijuana in the area of Petitioner Robinson and his co-defendant Laquaris Patton when the officer stepped onto the porch. App. 150, ll. 1 – 151, ll. 25.

Lieutenant Ligon then testified about seeing the butt of a pistol hanging out of Petitioner Robinson's jacket pocket. Ligon described how Petitioner then ran and of the scuffle they had before Lieutenant Ligon overcame petitioner and arrested him. App. 152, ll. 1 – App. 159, ll. 19. Trial counsel then cross-examined Lieutenant Ligon. The first question defense counsel asked the lieutenant was: "You smelled green marijuana?" Lieutenant Ligon responded: "Yes, sir." App. 165, ll. 2 – 6. Defense counsel then entered the marijuana into evidence as Defense Exhibit No. 1. App. 165, ll. 13 – App. 166, ll. 12.

Lieutenant Ligon continued to respond that he found a pistol—not the marijuana—in Petitioner Robinson's jacket pocket. However, the lieutenant stated that he could smell the strong odor of marijuana because he said it likely sat in Petitioner Robinson's pocket for a while. Because it sat, Lieutenant Ligon said that was the reason the odor was so strong. App. 166, ll. 1 – App. 172, ll. 23.

Later in the trial during the testimony of the chemist, Dee Anne Johnson, the other drugs (cocaine base) were admitted into evidence. App. 256, ll. 1 – App. 262, ll. 24.

The jury returned a verdict of guilty on all charges as indicted including the possession of marijuana except the jurors found him guilty of the lesser charge of resisting arrest under

Subsection A. App. 379, ll. 8 – App. 380, ll. 22. The judge sentenced Petitioner Robinson in absentia to life without parole based on three charges of distributing drugs within the proximity of a school or park. Two proximity charges were prior convictions. App. 392, ll. 3 – App. 394, ll. 17; App. 402, ll. 1 – 21.

On March 12, 2009, Petitioner Robinson appeared before the Honorable Lee S. Alford for sentencing. Robinson was again represented by J. Christopher Mills, and the state was represented by E.B. Springs, IV. App. 404. The judge opened the sealed sentence and sentenced Petitioner Robinson to LWOP on the proximity charge; to a concurrent 23 years on the PWID crack cocaine; to a concurrent one year on the resisting arrest; to a concurrent one year on the unlawful carrying of a pistol; and to a concurrent one year on the possession of marijuana charge. App. 408, ll. 14 – App. 409, ll. 24.

Trial counsel filed a notice of appeal which was perfected by the Division of Appellate Defense. The Court of Appeals affirmed Petitioner Robinson's convictions and sentences on February 15, 2012. State v. Robinson, 396 S.C. 577, 722 S.E.2d 820 (Ct. filed March February 15, 2012). Appellant counsel filed a petition for rehearing which was denied on March 29, 2012. On June 8, 2012, appellant counsel filed a petition for a writ of certiorari to the Court of Appeals with the Supreme Court which the Supreme Court granted on August 7, 2013. The Supreme Court issued an opinion on November 12, 2014 affirming Petitioner Robinson's convictions and sentences. State v. Robinson, 410 S.C. 519, 765 S.E.2d 564 (2014). App. 526.

On March 27, 2015, Petitioner Robinson filed an application for post-conviction relief (PCR). The state filed a return on March 8, 2017. An evidentiary hearing was held on April 17, 2018 before the Honorable Roger E. Henderson. Petitioner Robinson was represented by Leah Moody, and the state was represented by Justin Hunter. App. 431.

Petitioner Robinson testified at the PCR hearing that his trial counsel was ineffective for introducing the marijuana into evidence during his cross-examination of Lieutenant Ligon. App. 450, ll. 14 – 18. Petitioner Robinson explained:

Because man, you just admit this in evidence like you are just giving it to me. Well, okay, that's his then. So I admit that. You know what I am saying? And if you admit the marijuana, it's like you just ---I felt like he was giving it all to me. If the man said he found the marijuana with the crack cocaine if you admit to the marijuana it's like you okaying everything else.

App. 450, ll. 19 – 25.

PCR counsel then clarified by asking Petitioner if he felt that his trial counsel allowing the marijuana into evidence made Petitioner look guilty. Petitioner Robinson responded: “Absolutely!” App. 451, ll. 1 – 3.

Petitioner Robinson continued to testify that his trial counsel was more interested in the officer being able to smell the marijuana for probable cause when his counsel should have objected to the marijuana coming in. App. 451, ll. 4 – 23.

Petitioner Robinson testified that he had a plea offer for fifteen years. However, if he could not get an offer lower than fifteen, then he wanted to go to trial. App. 455, ll. 13 – 23. Petitioner Robinson stated that his trial attorney was going into trial “half-heartedly.” That scared Robinson. App. 468, ll. 22 – App. 469, ll. 5. Petitioner Robinson told the court that he wanted another trial or a reasonable plea. App. 470, ll. 2 – 24. Trial counsel testified at the PCR hearing that another attorney, Jim Morton, volunteered to assist trial counsel with this LWOP trial because they were friends, and this was a serious trial. App. 475, ll. 2 – 19.

Trial counsel testified that he did not see a problem for him to introduce the marijuana into evidence because “we were never claiming it was ours. We never said it came off of us. Introducing it we did not admit that it was Jomar's pot.” App. 492, ll. 7 – 10. However, counsel

admitted that they realized there was a risk. Counsel knew the drugs were coming in because the judge had denied the suppression motion. Counsel admitted the marijuana to demonstrate that Lieutenant Ligon could not smell the green marijuana because it did not smell. App. 492, ll. 1 – 6.

Counsel described their defense at trial as focusing on the suppression of the drugs. App. 486, ll. 11 – 20. The argument was that Robinson was at the scene of the incident visiting friends as a girlfriend lived in the area. Trial counsel explained that Robinson's story was that he was just standing on the porch and the police came up and tried to grab him and he ran. App. 487, ll. 10 – 25. Counsel stated that the defense was that the police officers "just got confused." Witnesses would say that Robinson was not wearing a jacket. App. 488, ll. 1 – 18.

The PCR judge issued an order on November 8, 2018 denying Petitioner Robinson's PCR and dismissing it with prejudice. App. 525 – App. 539. The PCR judge found that Petitioner failed to prove that trial counsel was ineffective for introducing the marijuana into evidence. App. 536. The order provided that trial counsel made a strategic decision to use the marijuana evidence to his advantage to show the jury that the officer likely could not have smelled the marijuana. It was not prejudicial to Petitioner because the drugs would have been admitted anyway. The PCR judge found that trial counsel's actions were reasonable under his valid trial strategy. App. 537.

PCR counsel filed a notice of appeal. This petition follows.

ARGUMENT

The PCR court erred in not finding trial counsel ineffective for introducing the marijuana into the trial during his cross examination of Lieutenant Ligon before the state introduced the drugs including the marijuana and the gun into evidence, which was prejudicial to Petitioner Robinson because that made it appear that it then was likely he possessed the other drugs as well.

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).

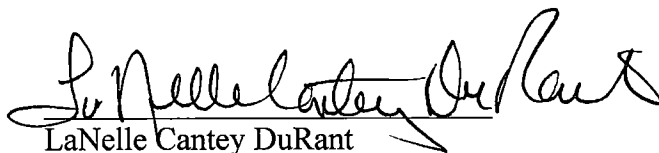
A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007); Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997).

Trial counsel was ineffective for introducing the marijuana into evidence which was prejudicial to Petitioner Robinson because it made him look very guilty of having all of the drugs. By counsel’s implication that Petitioner Robinson possessed the marijuana, then as Petitioner said during his testimony, that told the jury that Robinson possessed the cocaine also, as both drugs were

found in the pocket of the jacket that Petitioner was allegedly wearing. The PCR court erred in finding counsel's action were trial strategy.

CONCLUSION

Based on the above, certiorari should be granted, and Petitioner's convictions and sentences vacated, and the case remanded for a new trial.



LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR PETITIONER

This 11th day of June, 2019.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to York County

Honorable Roger E. Henderson, Circuit Court Judge

JOMAR ROBINSON,

PETITIONER

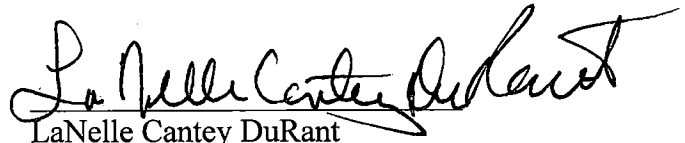
V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Petition for Writ of Certiorari and a copy of the 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 a copy of the Petition for Writ of Certiorari and a copy of the Appendix have been served on Jomar Antavis Robinson, #281722, at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 11th day of June, 2019.


LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 11th day of June, 2019.

 (L.S)
Notary Public for South Carolina

My Commission Expires: September 27, 2028.