

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM YORK COUNTY
Court of Common Pleas
Post Conviction Relief

Roger E. Henderson, Circuit Court Judge

Appellate Case No.: 2019-000655

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SEP 25 2019

S.C. SUPREME COURT

Antonio L. Robbins #300579,..... Petitioner,

vs.

State of South Carolina,Respondent.

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

- I. **Did the PCR Court erred in its finding that trial counsel was not ineffective for his failure to obtain through discovery the recording of the controlled buy between the CI and the Applicant?**

- II. **Did the PCR Court erred in finding that Trial Counsel was not ineffective for failing to object to Lieutenant Ligon's qualifications and testimony as an expert regarding levels of drug dealers?**

STATEMENT OF THE CASE

Petitioner is currently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the York County Clerk of Court. During its February 2016 term, the York County Grand Jury indicted the Petitioner for third-offense trafficking in crack cocaine, ten to twenty-eight grams (2015-GS-46-03147). David C. Cook, Esq., represented Petitioner on this charge. Assistant Solicitors Jennifer Colton and Teasa Weaver, both of the Sixteenth Circuit Solicitor's office, prosecuted the case. On March 16-17, 2016, Petitioner proceeded to a jury trial before the Honorable John C. Hayes, III. Following deliberations, the jury convicted Petitioner as indicted, and Judge Hayes sentenced Petitioner to a term of imprisonment of thirty years.

Petitioner filed a timely notice of Appeal, and Appellate Defendant Robert M. Pachak, of the South Carolina Commission of Indigent Defense, Office of Appellate Defense, represented Petitioner. Appellate counsel filed an Anders brief, in which he raised the following issue: "Whether the trial court erred in giving coercive *Allen* charge after the jury said it was hopelessly deadlocked?" Following a review pursuant to *Anders*, the Court of Appeals dismissed Petitioner's appeal by unpublished opinion on February 15, 2017. *State v. Robbins* Op. No. 2017-UP-081 (S.C. Ct. App. filed February 15, 2017). The remittitur was issued on March 3, 2017.

An evidentiary hearing on Petitioner's PCR Application was convened on April 16, 2018, at the York County Courthouse. The Petitioner was represented by Tommy A. Thomas, Esq. Justin J. Hunter, Esq. represented the Respondent. An Order of Dismissal was signed by The Honorable Roger E. Henderson on March 22, 2019. A timely Notice of Appeal was filed.

ARGUMENT

I. Did the PCR Court erred in its finding that trial counsel was not ineffective for his failure to obtain through discovery the recording of the controlled buy between the CI and the Applicant?

Trial Counsel made a motion Pre-trial to compel the State to produce evidence in an accompanying case regarding the involvement of a confidential informant. Trial Counsel believed that this confidential Informant intended to testify at trial which is subject to this appeal. (App. p. 29, lines 7-11) Trial Counsel was attempting to obtain the discovery of the confidential buy. Trial Counsel argued before the Court (App. p. 31, lines 1-25) that he needed this information to determine the veracity of the Affidavit for the purpose of the search warrant. It appears that there was an audio tape of the alleged confidential informant purchasing drugs from the Petitioner. A copy of this Audio tape was in the office of Michael Brown, an attorney initially retained by the Petitioner. The purpose of obtaining this audio was to show that the transaction, as described by the State, did not take place. Counsel argued that this information was necessary in showing that there was no probable cause for the issuance of the search warrant. (App. p. 36, lines 6-10) That without probable cause to issue the search warrant, there would have been no ability for law enforcement to have searched Petitioner's vehicle and house, leading to the arrest for the charges in which the Petitioner went to trial. (App. p. 36, lines 6-10) A Motion to suppress that evidence based upon a faulty search warrant was made by Counsel. (App. p. 36, lines 13-14 and p. 37, lines 1-5)

The Court indicated to Trial Counsel that it was his obligation to obtain this audio from Mr. Brown. (App. p. 33, lines 21-25) However, it does appear that an individual, Ms. Angie Hester, did meet with Mr. Brown and was able to make an audio recording of this

recorded conversation on her phone. This audio recording was played to the Trial Court in a Jackson v. Denno 378 U.S. 368 (1964) hearing. (App. p. 65, lines 3-20, p. 69, lines 5-7) Mr. Cook points out to the Court that this conversation has nothing to do with the drugs. (App. p. 93, lines 3-13) The Court makes the following ruling:

“From the presentation at this time there’s been nothing that’s indicated to me that there is any reason that the State is required to divulge the name of the confidential informant. He’s not really a tipster in this case, but he’s not a wit – he or she is not a witness to the matter under which Mr. Robbins is presently on trial, and I don’t – and I find that, until there is some basis to – I have to call it set aside – but pierce the affidavit, then, I think the magistrate had the absolute right to rely on the affidavit, unless there is a showing, as I mentioned, of misconduct in the presentation of it. And the burden is on the defendant to do that, that the inquiry stops after the examination of the affidavit.” (Appendix pp. 94, lines 8-20).

At the Post Conviction Relief hearing, trial counsel testifies that this was a case where his client was alleged to have distributed a quantity of crack cocaine. That there was an issue with the search warrant where he was arguing that the search warrant was based off of improper information. That Petitioner was charged with a separate case that did not go to trial and in that case there was a confidential informant. The confidential informant made a statement that was the basis for the search warrant in the current case. (App. p. 398, lines 19-25) Trial Counsel further testified that drugs were found in the Petitioner’s residence and vehicle. (App. p 399, lines 9-11) He also states that the search warrant of the premises and the vehicle was based upon the controlled buy. (App. p. 399, lines 14-15) Counsel further testifies that Petitioner maintained that he never made this controlled buy and that he believed this discovery information went toward the veracity of the search warrant. (App. p. 400, lines 3-7) Trial Counsel testified that his client and his client’s girlfriend told him that Michael Brown had a copy of this recording. It was his client’s position that if you listen to the tape, that there are no drugs

mentioned on the tape and it that it was impossible to establish the sale of drugs, as he had made no such sale. (App. p. 400, lines 18-23) Counsel testified that he was not successful in getting a copy of this audio from Mr. Brown. (App. 401, lines 5-7) Trial Counsel conceded that the Court told him that it was his obligation to get it, being the audio recording, and that he failed to do so. (App. p. 402, lines 1-4)

Trial Counsel then testified that he made a motion before the Court to hear the recording that he got from the Petitioner's girlfriend, Ms. Hester. (App. p. 403, lines 23-25) This was recorded on her phone in the office of Michael Brown. Judge Hayes allowed him to play this to the Court. (App. p. 404, lines 1-8) Counsel testified that the Solicitor said she was willing to make him a copy of the recording as a Court's Exhibit in lieu of Mr. Brown's recording. (App. p. 404, lines 21-25) When asked whether or not he knew if this had actually happened, he indicated that he did not think that that had ever happened. (App. p. 405, lines 1-6) Counsel testified that even though the Court ruled against him on the search warrant issued, he could have still used the recording going to the weight of the evidence if it had been presented to the Jury.

Trial Counsel testified that he did not receive the discovery regarding the case involving the confidential informant. He states that whether I specifically asked for this discovery or not, I don't have a recollection. And you know, to be honest, I don't know, but I do not think that I did. When asked, if this would have been important to have had this information, he stated yes, it would have been. (App. p. 406, lines 13-23)

In the case of Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984) in any ineffectiveness case, the particular decision not to investigate must be directly assessed for reasonableness and all the circumstances implying a heavy measure of

deference to counsel's judgement. In this case, Counsel admits that he did not obtain a copy of this discoverable evidence from either the Solicitor's Office or from the initial attorney. That to his client's detriment, he was unable to produce a complete argument that the search warrant was not supported by any credible evidence. As a result, the Petitioner was prejudiced by the inaction of Defense Counsel. The Court, in its Order denying Post Conviction Relief states that Counsel testified that the Confidential Informant buy was not the subject of Petitioner's trial. After presenting a recording of the original CD made on a witnesses phone, the Trial Court found that there was nothing relevant on the audio recording to the trial. The PCR Court found that because the CI buy was not the subject of Petitioner's trial, that counsel's conduct was reasonable under the circumstances.

The Petitioner would assert that the Post Conviction Relief Court did not follow through with the chain of legal thought. While there were two separate cases and charges, there was a common thread that bound the two together. That but for the confidential informant's statement and alleged purchase, there would have been no search warrant resulting in the charges for which the Petitioner was being tried. That surely, the Court cannot find that because these were separate cases, the trial attorney was not entitled to discovery of this information. Counsel's obligation is to vigorously represent his client. That his failure to obtain this recording severely hampered his ability to convince the trial court that the search warrant was improperly issued. Even if the Court had ruled that the search warrant was proper, he was prevented from being able to introduce this recording into evidence to allow the Jury to determine the weight of the evidence presented.

I. Did the PCR Court erred in finding that Trial Counsel was not ineffective for failing to object to Lieutenant Ligon's qualifications and testimony as an expert regarding levels of drug dealers?

The Petitioner believes that the PCR Court erred in its failure to grant Post Conviction Relief on trial Counsel's failure to object to the qualifications and testimony of Lt. Ligon as an expert witness. Lt. Ligon testified about various levels of drug dealers. Ligon testified that over the course of his career he had debriefed numerous drug dealers. He stated that this was possibly hundreds if not thousands of individuals. He further testified that a street level dealer generally will deal anywhere from a gram up to 15, 20, 30 or 40 grams and that he had also interviewed and debrief mid-level dealers as well as high level trafficking dealers.

Lt. Ligon also testifies that he had been through drug unit commander school in 2002 and he had been to numerous undercover and surveillance schools and had just recently graduated from the FBI national academy. (App. p. 223, lines 1-6) Lt. Ligon was tendered as an expert in narcotics detection and evaluation and this was without objection from trial counsel (App. p. 223, lines 18-21)

When asked if Lt. Ligon was familiar with a typical dose of crack cocaine he testified that a typical dose of crack cocaine would be a tenth of a gram. (App. p. 223, lines 14-17) Lt. Ligon testified that approximately 141 grams were removed from the vehicle in question. (App. p. 232, lines 10-14) He was then asked based upon his training and experience was he familiar of the valuation of drugs as they are commonly sold on the street and he indicates yes. (App. p. 232, lines 19-22) He further testifies that on the street, a tenth of a gram is sold for \$20.00. (App. p. 233, lines 17-19) He then

testifies that one gram could yield approximately 10 dose units and would be worth \$200.00. (App. p. 234, lines 7-8). He then testified that 100 grams would be ten thousand dose units and the equivalent of \$20,000.00. He then states that 140 grams would be roughly \$28000.00 in value. (App. p. 234, lines 7-21) Ligon goes on to testify about the purchase of drugs and receiving a discount for buying drugs in bulk. He states that a typical buyer in Crack Cocaine would not pay \$28000.00 for that drug. That basically in this situation, “you would have what you would consider a mid-level drug dealer dealing with more of the high end drug dealer.” That 5 ounces or just under 5 ounces, you are looking at \$5000.00 if you purchase it in bulk. (App. p. 235, lines 3-22)

It is only when the Solicitor asked about the condition of the crack cocaine evidence that an objection was made by trial counsel, stating that the witness had been qualified as an expert witness in drug dealing and detection and that the questions being asked were more about chemical analysis. (App. p. 237, lines 16-25, p. 238 lines 1-13) At no point did Trial Counsel object to the Lieutenant being qualified as an expert and his ability to make comments about the levels of drug dealing which in essence allowed the Lieutenant to present to the Jury that the Petitioner was a mid to high level drug dealer.

Through the testimony of the expert witness, the Petitioner was able to get before the Jury the information that the Petitioner fit into the category of mid-level to high-level trafficking dealers and that the value of the drugs that were seized was in the amount of \$28,000.00. Clearly this information from law enforcement had an impact upon the Jury and highlighted the fact that law enforcement believed in their expert opinion that he was potentially a high-level dealer.

The PCR Court found in its Order and ruling that a person is competent as an expert when he has acquired knowledge, skill or experience so that he is better able to assist the Jury in understanding the evidence or determining a fact or issue. (Rule 702 SCRE) The Court goes further to quote “An expert is not limited to any class of persons acting professionally” State v. Robinson 396 S.C. 577, 722 SE2d 820 Court Of Appeals (2012).

The problem with Lt. Ligons testimony is that he goes beyond the testimony as an expert who testifies how crack cocaine is packaged, sold, going price, typical intoxication dose, the use and the typical drug dealer. State v. Robinson 396 S.C. 577, 722 SE2d 820 Court Of Appeals (2012). In this case, the Lieutenant was qualified as an expert in narcotics detection and evaluation. His testimony went beyond this qualification. He was allowed to directly tie the Petitioner to the amount of drugs involved as well as to the value of the drugs. In addition, he was able to finalize that connection by establishing that the Petitioner was a high level drug dealer based upon the amount of drugs that were found. Therefore, trial counsel’s failure to object to this information prejudiced the Petitioner.

CONCLUSION

That the Lower Court's decision be reversed and the Appellant be granted a new trial.

A handwritten signature in black ink, appearing to read 'Tommy A. Thomas', written over a horizontal line.

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September 24, 2019

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM YORK COUNTY
Court of Common Pleas
Post Conviction Relief

Roger E. Henderson, Circuit Court Judge

Case No.: 2017-CP-46-01800

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S.C. SUPREME COURT

Antonio L. Robbins #300579,..... Petitioner,

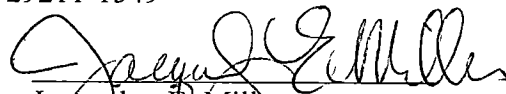
vs.

State of South Carolina,Respondent.

CERTIFICATE OF SERVICE

I, Jacquelyn E. Miller, secretary to Tommy A. Thomas, Attorney for the Applicate hereby certify that I placed in the United States Mail, a copy of a Petition for Writ of Certiorari and Appendix with postage prepaid and the return address clearly shown on said envelope to Brianna Schill, Esq. of the Attorney General's Office, at:

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Irmo, SC
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