STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. SUPREME COURT

CERTIORARI TO YORK COUNTY
Honorable Roger. E. Henderson, Post-Conviction Relief Judge

Appellate Case No. 2018-002126

JOMAR ROBINSON, PETITIONER,

v.

STATE OF SOUTH CAROLINA, RESPONDENT.

RETURN TO PETITION FOR A WRIT OF CERTIORARI

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RESPONDENT'S STATEMENT OF ISSUE ON APPEAL

The PCR Court correctly found Trial Counsel was not ineffective for introducing the marijuana evidence during the cross-examination of Lieutenant Ligon before the State introduced the marijuana because Trial Counsel was implementing a legitimate trial strategy and because Petitioner was not prejudiced by the introduction of the evidence.

STATEMENT OF THE CASE

Petitioner was indicted at the June 2008 term of the York County Grand Jury for possession of cocaine base with intent to distribute in proximity of a park (2008-GS-46-3141), possession with intent to distribute crack cocaine (2008-GS-46-3142), resisting arrest (2008-GS-46-3143), carrying a pistol unlawfully (2008-GS-46-3144), and possession of marijuana (2008-GS-46-3145). (App. 425). Christopher Mills and Jim Morton, Esquires, (collectively "Trial Counsel") represented Petitioner. (App. 425). E.B. Springs of the Sixteenth Circuit Solicitor's Office prosecuted the case. (App. 425). On February 9-11, 2009, Trial Counsel proceeded to a trial in Petitioner's absence before the Honorable Lee S. Alford, after which Petitioner was found guilty as indicted[1]. (App. 425). Petitioner and his counsel came before the court for sentencing on March 12, 2009. (App. 425). Petitioner was sentenced to imprisonment for life without parole for possession of cocaine with intent to distribute in proximity of a park, twenty-three years for possession with intent to distribute crack cocaine, one year for resisting arrest, one year for carrying a pistol unlawfully, and one year for possession of marijuana. (App. 425-26). All sentences were to run concurrently. (App. 426).

A timely Notice of Appeal was filed on Petitioner's behalf and an appeal was perfected. The South Carolina Court of Appeals affirmed Petitioner's conviction and sentence. State v. Robinson, 396 S.C. 577, 722 S.E.2d 820 (Ct. App. 2012). A Petition for Rehearing was filed by Petitioner and denied by the Court on March 29, 2012.

On June 8, 2012, Petitioner filed and served a Petition for Writ of Certiorari on one of the two issues presented on appeal to the Court of Appeals and Respondent submitted a Return to the

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[1] For resisting arrest, Petitioner was charged pursuant to subsection B of §16-09-320, but he was found guilty of the lesser included offense resisting arrest under subsection A of §16-09-320.

Petition for Writ of Certiorari on June 15, 2012. (App. 426). The South Carolina Supreme Court granted the Petition for Writ of Certiorari by order dated August 7, 2013. (App. 426). The Supreme Court affirmed Petitioner's convictions as modified by an opinion filed November 12, 2014. (App. 426). The remittitur was sent December 2, 2014. (App. 426).

On February 12, 2013, Petitioner filed an application for post-conviction relief. By an order dated June 24, 2013 and filed July 8, 2013, the Honorable John C. Hayes, III, dismissed the application without prejudice as Petitioner's direct appeal was still pending. (App. 426).

Petitioner filed this application for post-conviction relief on March 27, 2015. Leah Moody was appointed to represent Petitioner. (App. 525). Assistant Attorney General Justin Hunter of the South Carolina Attorney General's Office represented Respondent. (App. 525). An evidentiary hearing was convened on April 17, 2018, before the Honorable Roger E. Henderson. (App. 525). After a review of the record and all evidence presented, the PCR court denied relief and dismissed the action with prejudice. Petitioner appealed. Petitioner filed his Petition for Writ of Certiorari on June 11, 2019. This Return follows.

STATEMENT OF THE FACTS

The York County Multi-Jurisdictional Drug Enforcement Unit received numerous complaints about individuals selling drugs in the parking lot and on porches of the Hall Street apartment complex, as well as complaints of suspicious individuals possessing firearms. (App. 203, l. 3-5; App. 143, l. 2-20). Sergeant Rayford Ervin, Jr. testified law enforcement surveilled the area on Thursday, March 20, 2008, due to the complaints, and also because, based on his experience, Thursday and Friday nights are the busiest days for drug dealing. (App. 203, l. 8-24). Sergeant Ervin testified he witnessed vehicles pulling up to the apartment complex and, after pulling up, an individual would either walk up to the vehicles or meet someone in the parking lot who came out of the vehicle. (App. 204, l. 12-19). Rayford testified this was consistent with drug dealing activity. (App. 205, l. 10-25).

Lieutenant Mike Ligon testified he and Officer Brian Schettler received information that an individual wearing jeans and a black jacket was engaging in suspicious activity with various individuals in automobiles at the apartment complex. (App. 145, l. 7-12). Lieutenant Ligon testified he and Schettler approached the Hall Street Apartment Complex and saw five individuals sitting on a porch, two of which were dressed in a black jacket and jeans. (App. 146, l. 15-App.147, l.24). Officer Ligon testified as he approached the porch, he noticed the smell of unburnt marijuana on one of the two individuals. (App. 150, l.15- App. 151, l. 21). Officer Ligon testified he asked the two men for their identification. (App. 150, l. 15 – App. 151, l. 25). Lieutenant Ligon testified he noticed Petitioner had the butt of a pistol hanging out of his right jacket pocket. (App. 152, l. 8-9). Lieutenant Ligon testified that even if Petitioner had a concealed carry license, he would have been required by law to disclose the fact that he had one at that time. (App. 152, l. 10-18). Lieutenant Ligon testified Petitioner did not do so. (App. 152, l. 10-18). Lieutenant Ligon testified

he did not act on the fact that Petitioner had a pistol on him, but instead "kept [his] eyes on it." (App. 152, l. 21-25).

Lieutenant Ligon then advised the group that they were going to conduct a Terry[2] frisk at that time. (App. 152, l. 4-9). According to Lieutenant Ligon's testimony, Petitioner began to back away from the officers at that time. (App. 152, l. 4-9). Lieutenant Ligon testified this reaction scared him and he grabbed Petitioner's weapon from him. (A. 153, l. 15-25). Lieutenant Ligon testified Petitioner also began to reach for his gun, which resulted in a fight between Ligon and Petitioner. (App. 154, l. 14-25). Lieutenant Ligon testified he eventually ripped Petitioner's jacket off of him to end the fight. (App. 154, l. 14-25). Petitioner fled the scene. (App. 156, l. 17). The drugs were found in Petitioner's jacket pocket, and he was subsequently charged with the crimes at issue in this case. (App. 190, l. 1-7).

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[2] Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868 (1968).

STANDARD OF REVIEW

In a PCR case, appellate courts will uphold the PCR court's factual findings if there is any evidence of probative value in the record to support them. Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016). However, appellate courts give no deference to the PCR court's conclusions of law and review those conclusions de novo. Jamison v. State, 410 S.C. 456, 465, 765 S.E.2d 123, 127 (2014).

To establish ineffective assistance of counsel, the PCR Petitioner must prove (1) counsel's performance fell below an objective standard of reasonableness, and (2) the Petitioner sustained prejudice as a result of counsel's deficient performance. Strickland v. Washington, 466 U.S. 668, 687–88 (1984); Cherry v. State, 300 S.C. 115, 117–18, 386 S.E.2d 624, 625 (1989). To establish prejudice, the Petitioner must prove "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 (quoting Strickland, 466 U.S. at 694).

ARGUMENT

The PCR Court correctly found Trial Counsel was not ineffective for introducing the marijuana evidence during the cross-examination of Lieutenant Ligon before the State introduced the marijuana because Trial Counsel was implementing a legitimate trial strategy and because Petitioner was not prejudiced by the introduction of the evidence.

Petitioner argues the PCR court incorrectly found trial counsel was not ineffective for introducing the marijuana into the trial during trial counsel's cross-examination of Lieutenant Ligon before the state introduced the drugs including the marijuana, because it made Petitioner look "very guilty" of possessing all drugs found during this incident. Petitioner's argument is without merit, and therefore, certiorari should be denied on this issue.

In a post-conviction relief action, the Petitioner bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the Petitioner 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, 2064, 80 L.Ed.2d 674, 692 (1984); Butler, 334 S.E.2d 813.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. 668. Petitioner must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. Id. at 117, 386 S.E.2d at 625. First, the Petitioner must prove counsel's performance was deficient. Id. Under this prong, courts measure an attorney's performance by its "reasonableness under prevailing professional norms." Id. (citing Strickland, 466 U.S. at 688). Second, any deficient

performance must have prejudiced the Petitioner such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 117-18, 386 S.E.2d at 625.

At trial, Trial Counsel introduced as Defendant's Exhibit No. 1, the bag of marijuana, to question Ligon on his ability to smell the marijuana through the sealed bag. (App. 165-171). A discussion about Trial Counsel's decision to do this was held off the record and then reiterated on the record the follow day. (App. 200, l. 9-201, l. 6). During the on-the-record discussion, the prosecution discussed how Trial Counsel stated during the private bench discussion that he believed it was a good trial strategy to introduce the marijuana into evidence before the State. (App. 200, l. 9 – 201, l. 25). Additionally, Trial Counsel credibly testified at the evidentiary hearing that he made a pre-trial motion to suppress the drugs, but his motion was denied, so the State would eventually introduce the drugs. (App. 492, ll. 1-6). Trial Counsel further testified he made a strategic decision to introduce the marijuana into evidence because it was coming in regardless and he wanted to use the evidence to his advantage. (App. 492-93). Trial Counsel also testified, "We thought it wasn't a problem for me to introduce it because we were never claiming it was ours. We never said it came off us. Introducing it we did not admit that it was Jomar's pot." (App. 492, l. 7-10). Trial Counsel further testified, "[I] just wanted to just have the kind of shock value of having the cross examination when they weren't expecting it . . . I had to go with [the argument] they didn't have reasonable suspicion to even initiate the stop." (App. 492, l. 11-20). Trial Counsel further testified he had to rely on this strategy because Petitioner failed to appear for his trial and was being tried in his absence. (App. 493, l. 1-10). Trial Counsel testified he was not able to present evidence from Petitioner regarding his lack of possessory interest in the porch because Applicant was not present at his trial. (App. 490, l. 19-25).

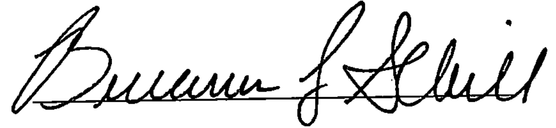
"Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another." Strickland, at 691. Therefore, judicial scrutiny of counsel's performance must be highly deferential. Id. at 689. Where counsel articulates a valid strategic reason for his action or inaction, counsel's performance should not be found ineffective. Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312 (1996); Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992); Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992). Courts must be wary of second guessing counsel's trial tactics; and where counsel articulates a valid reason for employing such strategy, such conduct is not ineffective assistance of counsel. Whitehead v. State, 308 S.C. 119, 417 S.E.2d 529 (1992).

Based on the trial transcript and Trial Counsel's PCR hearing testimony, Trial Counsel made a strategic decision to use the evidence to his advantage and show the jury that the officer likely could not have smelled the marijuana, like the officer claimed he did, to initiate a search. This trial strategy was reasonable, particularly given the circumstances of Petitioner's case: (1) Petitioner failed to appear at his trial, thereby limiting Trial Counsel's options as to how he could defend Petitioner's case; (2) the marijuana was going to be admitted eventually because the trial court denied Trial Counsel's motion to suppress; and (3) as Trial Counsel testified, the mere admission of the evidence was not an admission that the drugs were Petitioners. Trial Counsel made no concession regarding Petitioner being in possession of the marijuana, and made no insinuation regarding whether Petitioner in fact was in possession of the marijuana. This is further evidenced by Trial Counsel's cross examination of Lieutenant Ligon, during which he questioned Lieutenant Ligon about why he believed he smelled the marijuana on Petitioner, as opposed to one of the other four men present at the scene. Accordingly, the PCR court did not err in determining that Trial Counsel was not deficient.

Furthermore, Petitioner has not provided any evidence as to how he was prejudiced by the alleged deficiency. As previously noted, the marijuana evidence was going to be admitted into evidence at some point during Petitioner's trial because the trial court denied Trial Counsel's motion to suppress the evidence. Furthermore, Petitioner has not provided any evidence as to how this alleged deficiency prejudiced him beyond the mere speculation that it made him look "very guilty of having all the drugs." (Pet. For Writ of Cert., filed June 11, 2019). Trial Counsel made no concessions or insinuations regarding whether the marijuana belonged to Petitioner. Rather, Trial Counsel simply introduced the evidence so he could use it to his advantage and to properly implement a reasonable trial strategy. Accordingly, Petitioner was not prejudiced by any alleged deficiency, and therefore, this Petition is without merit and certiorari should be denied.

CONCLUSION

Based on the foregoing arguments, Trial Counsel was not deficient and Petitioner was not prejudiced by any alleged deficiency. Therefore, the State requests certiorari be denied.



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Oct. 24, 2019.

STATE OF SOUTH CAROLINA
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JOMAR ROBINSON, PETITIONER,

v.

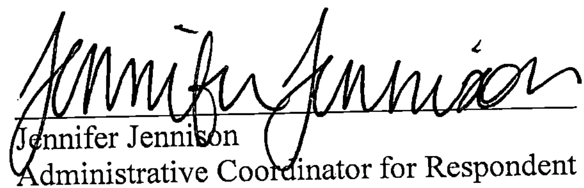
STATE OF SOUTH CAROLINA, RESPONDENT.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the **Return to Petition for Writ of Certiorari** has been served upon the applicant by placing one copy in the United States Mail, addressed to:

Adam S. Ruffin, Esquire
S.C. Commission on Indigent Defense
PO Box 11589
Columbia, SC 29201

This 24th day of October, 2019.



Jennifer Jennison
Administrative Coordinator for Respondent

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S.C. SUPREME COURT

ALAN WILSON
ATTORNEY GENERAL

October 24, 2019

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

RE: **Jomar Robinson v. State of South Carolina**
Appellate Case No.: 2018-002126

Dear Mr. Shearouse:

Enclosed please find the original and six copies of the **Return to Petition for Writ of Certiorari** in the above matter for filing. Please let me know if anything additional is needed.

Sincerely,

Brianna L. Schill
Assistant Attorney General
S.C. Bar # 103380

BLS/jj
Enclosures

cc: Adam S. Ruffin, Esquire
Victim Advocacy Division

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