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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Beaufort County

Honorable Brooks P. Goldsmith, Circuit Court Judge

MARION BONDS,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

APPELLATE CASE NO 2019-000447

JOHNSON PETITION FOR WRIT OF CERTIORARI PURSUANT TO AUSTIN V. STATE

David Alexander
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
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ATTORNEY FOR PETITIONER

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ISSUE PRESENTED

Whether appellate counsel's failure to raise the issue of a duplicative, second indictment for trafficking crack cocaine based on double jeopardy and merger constitutes ineffective assistance of counsel?

STATEMENT

A Beaufort County grand jury indicted petitioner for assault and battery with the intent to kill, attempted armed robbery, a weapons charge, trafficking crack cocaine between 28-100 grams, trafficking crack cocaine between 10-28 grams, and a school proximity charge and on December 13, 2010, his case was tried before the Honorable Carmen T. Mullen and a jury. App. 1. App. 138. Angie Tanner represented the State and Ian Deysach represented petitioner. App. 2. Petitioner was convicted of the lesser-included offense of assault and battery of a high and aggravated nature, the weapons charge, the more severe trafficking charge, and the proximity charge. App. 558, l. 9 – 559, l. 15. He was acquitted of ABIK, attempted armed robbery, and the less severe trafficking charge. App. 558, l. 9 – 559, l. 15. On appeal, petitioner was represented by Elizabeth A. Franklin-Best. App. 577. The Court of Appeals affirmed and this Court denied certiorari. App. 652, 679.

On August 8, 2014, petitioner filed a PCR application and on May, 18, 2016, the Honorable Brooks P. Goldsmith held a hearing. App.680, 693. Jim Brown represented petitioner and J. Rutledge Johnson represented the State. App. 694. Judge Goldsmith denied the application. App. 756. No appeal was filed and on November 16, 2017, petitioner filed a second PCR application seeking review pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991). App. 777. The State consented to Austin review and Judge Perry M. Buckner, III, granted petitioner's application. App. 790. This petition follows.

STANDARD OF REVIEW

The standard of review in PCR cases depends on the specific issue before the Court. Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016) (citing Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013)). The Court defers to a PCR court's findings of fact and will uphold them if there is evidence in the record to support them. Id. The Court reviews questions of law without deference to trial courts. Id. See also Smalls v. State, 422 S.C. 174, 810 S.E.2d 836, 839–40 (2018).

ARGUMENT

Appellate counsel's failure to raise an issue regarding a duplicative, second indictment for trafficking crack cocaine based on double jeopardy and merger constitutes ineffective assistance of counsel.

The State arbitrarily split crack cocaine found on one day on the same premises into two separate charges. When the police first searched the room where petitioner was arrested, they found three quantities of crack cocaine in that room. App. 123, l. 4 – 125, l. 14. The police found crack in a shoe and two pill bottles under a mattress. App. 123, l. 4 – 124, l. 2. After listening in on a call petitioner made from jail, the police conducted an additional search of the house on the same day and found more crack cocaine under a sink in a bathroom. App. 124, ll. 3 – 13.

Instead of charging petitioner with one count of trafficking crack cocaine, the State split the crack into two indictments based on when the police found them. App. 124, ll. 3 – 13. The first search resulted in an indictment for trafficking in an amount between 28 and 100 grams. App. 799. The second search resulted in an indictment for trafficking crack in an amount between 10 and 28 grams. App. 138, ll. 12 – 15. App. 446, l. 8 – 447, l. 14.

Trial counsel correctly recognized the problem with the two charges at the outset of the trial. After the trial court denied petitioner's motion to suppress the drugs, the judge expressed confusion over the two trafficking charges. App. 123, ll. 10 – 14. Judge Mullen stated, "I'm just trying to figure out the different charges." App. 123, ll. 10 – 14. Trial counsel told the court that "at the directed verdict stage, we've got—these charges need to merge." App. 124, ll. 21 – 25. Petitioner pointed out that the only difference between the two charges "was just that the police didn't end up finding" all of the drugs in their first search. App. 125, ll. 1 – 6.

Judge Mullen directed defense counsel to research the issue and the trial began. App. 125, l. 8 – 126, l. 3.

After the close of the evidence, petitioner moved for directed verdict and argued that the two trafficking charges should merge. App. 442, l. 18 – 446, l. 6. Trial counsel stated, "one motion I want to make right now is the merging of the two trafficking charges." App. 443, ll. 4 – 6. Trial counsel pointed out that the State combined "three separate amounts" from the first search for one trafficking charge. App. 443, ll. 4 – 10. The police then took petitioner into custody, but "nothing could have changed once he was taken into custody in order to bring those drugs there." App. 443, ll. 11 – 18. Trial counsel argued, "And I don't think that just because they have—they didn't find everything the first time that they can split up the amounts to make separate traffickings. . . ." App. 443, ll. 18 – 21. Counsel cited State v. Brown, 319 S.C. 400, 461 S.E.2d 828 (Ct. App. 1995) in support of his merger argument. App. 444, ll. 4 – 15. He stated the double jeopardy implications when he argued the State was "giving themselves multiple bites of the apple" for the two trafficking charges. App. 445, ll. 17 – 24.

The State argued the smaller trafficking charge was based on the phone call petitioner made from jail in which he told Richard Lewis to hold the drugs for him. App. 446, l. 8 – 447, l. 14. The State claimed that petitioner conspired with Lewis to traffic the secondly found crack when he got out of jail and that constituted separate charges. App. 446, l. 8 – 447, l. 14. But as trial counsel pointed out, from the point of view of the defendant's conduct it made no difference because he allegedly possessed the drugs found in the second search at the same time he possessed the drugs found in the first search. App. 447, l. 15 – 448, l. 8. Both indictments charged conspiracy. App. 447, l. 15 – 448, l. 8.

The trial judge denied the motion. App. 448, l. 9 – 452, l. 22. However, the court noted the argument was "interesting." App. 452, ll. 15 – 22. Instead of briefing the merger and double jeopardy argument, appellate counsel chose a search issue and a lineup issue. App. 580. The Court of Appeals affirmed in a unanimous unpublished opinion and this Court denied certiorari. App. 625-26. App. 679. The PCR court found appellate counsel was not deficient because petitioner was found not guilty of the second trafficking charge. App. 772-73.

Appellate counsel was ineffective under the Sixth Amendment in failing to brief the merger and double jeopardy issue. "To prove appellate counsel was ineffective, a petitioner must first show counsel's performance was deficient, meaning it fell below an objective standard of reasonableness." Pantovich v. State, 427 S.C. 555, 561, 832 S.E.2d 596, 599 (2019) citing Strickland v. Washington, 466 U.S. 668, 688 (1984). "The petitioner must then show prejudice by demonstrating that, but for counsel's deficient performance, there is a reasonable probability the result of the appeal would have been different." Id.

The trial court erred in not merging the two trafficking charges and allowing petitioner to be twice placed in jeopardy for the same crime. Trial counsel cited the correct case, State v. Brown, but the trial court failed to rule correctly and appellate counsel failed to brief the issue. In Brown, the defendant tried to sell an undercover officer four ounces of crack. Brown at 406-07, 461 S.E.2d at 832. The agent only bought two ounces. Id. The police later tied the "residual two ounces" to Brown and charged Brown with a separate offense for possession with attempt to distribute. Id. The court held, "Under these circumstances, the contemporaneous possession with the intent to distribute merged with the completed crime of distribution." Id. Important to the court's analysis was that the police refused to buy the "residual two ounces" during the undercover transaction. Id. The Court held the Double Jeopardy Clause required

reversal and vacation of the PWID conviction. Id. See also Matthews v. State, 300 S.C. 238, 387 S.E.2d 258 (1990) (vacating conviction and sentence for possession of marijuana with intent to distribute where defendant was convicted of possession with intent to distribute and trafficking based on the same act).

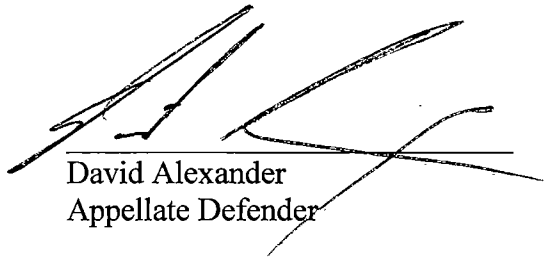
Just like in Brown, here it is police action (or inaction) that required the merger of the two trafficking charges. In Brown, the police could have bought all four ounces of crack, but did not. Here, the police could have found all of the crack in the residence, but because of the failure to search more diligently, did not. Had appellate counsel briefed the issue, under Brown, merger would have applied and forbidden the dual prosecution.

The PCR court erred in finding no prejudice because of the acquittal on the second trafficking charge. "[T]he Double Jeopardy Clause protects an individual against more than being subjected to double punishments. It is a guarantee against being twice put to trial for the same offense." Abney v. United States, 431 U.S. 651, 660–61 (1977). This constitutional guarantee protects against the risk that an accused faces. Id. It also serves to deter the State from making multiple attempts to convict a citizen. Id.

Petitioner faced the risk of double conviction and punishment, a violation of his constitutional rights under the Double Jeopardy Clause. To effect deterrence against overreaching by the State and because of the unknown effect the double trial had on jury deliberations and a possible compromise verdict, it is possible that all of petitioner's convictions would have been reversed on appeal. The PCR court failed to appreciate this aspect of appellate counsel's deficient performance and petitioner's convictions should be reversed.

CONCLUSION

For the foregoing reasons, this Court should grant certiorari and reverse petitioner's convictions.



David Alexander
Appellate Defender

ATTORNEY FOR PETITIONER

This 25th day of November, 2019.

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for Marion Bonds states:

1. He is Appellate Defender for the South Carolina Office of Appellate Defense and was appointed to represent petitioner.

2. He has reviewed the record of petitioner's post-conviction relief hearing before Judge Brooks P. Goldsmith, which was held on May 18, 2016, and, in his opinion, the appeal is without legal merit sufficient to warrant a new trial.

3. He has, pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), briefed an arguable legal issue which arose during the post-conviction relief process.

Therefore, counsel requests that the Court relieve him as counsel for Marion Bonds.

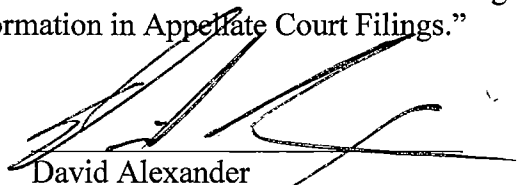
Respectfully Submitted,

David Alexander
Appellate Defender
ATTORNEY FOR PETITIONER

This 25th day of November, 2019.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of his ability this Johnson Petition for Writ of Certiorari Pursuant to Austin v. State complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Johnson Petition for Writ of Certiorari Pursuant to Austin v. State and a copy of the Appendix in the above referenced case has been served upon Sara Gunton, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Johnson Petition for Writ of Certiorari Pursuant to Austin v. State and a copy of the Appendix have been served on Marion Bonds, #293431, at Turbeville Correctional Institution, PO Box 252, Turbeville, SC 29162, this 25th day of November, 2019.

David Alexander
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 25th day of November, 2019.

~~(L.S)~~
Notary Public for South Carolina
My Commission Expires: October 22, 2024.