STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. SUPREME COURT

CERTIORARI TO SUMTER COUNTY
Honorable Kristi F. Curtis, Post-Conviction Relief Judge

Appellate Case No. 2018-002044

LEROY CLILFTON GIBBS, III,

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

Whether the PCR Court correctly found Trial Counsel was not ineffective for failing to call Dianne Williams, Letroy Gibbs, and Darnell Green, where Trial Counsel articulated a reasonable trial strategy, where testimony of these individuals would have been cumulative, and where Petitioner was not prejudiced by this alleged deficiency because Petitioner prejudiced his own case by testifying on his own behalf against the advice of Trial Counsel, thereby opening the door to questioning regarding previous drug transactions in which Petitioner was involved.

STATEMENT OF THE CASE

Petitioner is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Sumter County Clerk of Court. In July 2011, Petitioner was indicted by the Sumter County Grand Jury for one count of trafficking cocaine base (10-28g), three counts of possession with intent to distribute cocaine base within ½ mile of a school or park, one count of manufacturing cocaine base, one count of possession with intent to distribute cocaine, two counts of possession of a firearm or knife during commission of a violent crime, and one count of possession of marijuana (2011-GS-43-1125). Petitioner was represented at trial by Charles T. Brooks, III, Esquire (Trial Counsel). On February 21-23, 2013, Petitioner proceeded to his first trial, which resulted in a mistrial after the jury could not come to a unanimous verdict on any of the counts. On June 3-5, 2013, Petitioner's second trial commenced before the Honorable W. Jeffrey Young and a jury. Petitioner was convicted of trafficking cocaine base (10-28g), manufacturing cocaine base, and possession with intent to distribute cocaine. Petitioner was sentenced on June 5, 2013 by Judge Young to fifteen years' imprisonment for possession with intent to distribute cocaine, fifteen years for manufacturing cocaine base, and ten years for trafficking cocaine base (10-28g), to be served concurrently.

Petitioner filed a timely notice of appeal. An appeal was perfected by Lara Caudy, Esquire. The South Carolina Court of Appeals affirmed Petitioner's conviction in an opinion filed March 2, 2016. State v. Gibbs, Op. No. 2016-UP-121 (S.C. Ct. App. 2016). The Remittitur was returned on March 21, 2016.

Petitioner filed his PCR application on July 1, 2016. Respondent submitted its Return on February 14, 2017. An evidentiary hearing was held on November 15, 2017, before the Honorable Kristi F. Curtis. Lance Boozer, Esquire, represented Petitioner. Assistant Attorney General Julie

Coleman represented Respondent. Judge Curtis denied Petitioner's application by an Order of Dismissal, dated September 25, 2018.

Petitioner subsequently filed a timely notice of appeal. Petitioner, through his counsel, Appellate Defender Lara M. Caudy filed a petition for writ of certiorari on August 9, 2019. This Return follows.

STATEMENT OF THE FACTS

On December 23, 2008, officers with the Sumter County Sheriff's Office reported to a home on Madison Avenue to execute outstanding arrest warrants on Petitioner for multiple prior drug transactions. (App. 543). Investigator Wayne Dubose testified that after officers knocked on the door of the home, officers heard "skirmishing" in the residence for approximately two minutes before an individual, later identified as Petitioner's wife, Kimberly Gibbs, answered the door. (App. 545-546). The officers informed Ms. Gibbs that they had arrest warrants for Petitioner. (App. 547, l. 22-25). Ms. Gibbs informed officers Petitioner was home. (App. 547, l. 22-25). Officers found Petitioner in the hallway outside of the master bedroom. (App. 547, l. 16-18). Because Petitioner was found in his underwear, Petitioner asked officers if he could put on a pair of pants prior to being handcuffed. (App. 547, l. 20 -548, l. 10). After searching Petitioner's pants, officers found $1,355 in Petitioner's pockets. (App. 548, l. 1-10).

Dubose testified that while he was arresting Petitioner, the officers noticed a smell of marijuana in the residence. (App. 49, l. 21- 40, l. 7). Officers asked Petitioner for his consent to use a drug dog in the home, but Petitioner told law enforcement he did not live at the residence. (App. 553, l. 16-18). Ms. Gibbs consented to the search. (App. 554, l. 1-9). Officers found baking soda, a measuring jar, Pyrex dishes, razor blades, and forks, which officers believed, based on their narcotics experience, were items used to manufacture crack cocaine. (App. 558-559). Many of the items, including the Pyrex dishes, fork, razor blades, and microwave, were field tested positive for crack cocaine. (App. 562, l. 14-25; 564, l. 1-3; 564, l. 24-565, l. 8). Officers also found a white powdery substance, which tested positive for cocaine. (App. 559, l. 1-25). Law enforcement also found marijuana in Ms. Gibbs's purse. (App. 569, l. 12-19). Officers also located two handguns at the residence. (App. 572, l. 10-20).

Subsequently, Petitioner admitted to law enforcement that he regularly engaged in the sale of narcotics. (App. 584-586). However, Petitioner then told law enforcement officers none of the items were his because he did not live at the residence and the items did not belong to either Petitioner or his wife. (App. 585, l. 17-25).

Petitioner's First Trial

In Petitioner's first trial, Ms. Gibbs denied that any of the drugs or paraphernalia belonged to her, including the drugs found in her purse. (App. 209). Ms. Gibbs testified Petitioner was within arm's reach of her purse when she went to answer the door for law enforcement. (App. 209, 18-25). Notably, Ms. Gibbs testified she previously witnessed Petitioner cook crack cocaine. (App. 211, l. 18-25).

Petitioner testified he was living at Ms. Gibbs's home on Madison Avenue "off and on." (App. 273, l. 7-14). Petitioner stated when he was not staying with Ms. Gibbs, he was staying with his mother. (App. 273, l. 7-25). Petitioner claimed the drugs and other items were not his, but that he could not say whether they belonged to Ms. Gibbs. (App. 274-275). Petitioner testified he and Ms. Gibbs were living in different residences, and that they respected each other's privacy. (App. 275, l. 14- 276). Petitioner claimed he had seen random cars belonging to unknown individuals at Ms. Gibbs's home. (App. 276, l. 5-20). Petitioner denied stating to law enforcement at the detention center that selling drugs was a lifestyle for him. He testified Ms. Gibbs supported the family. (App. 292-294). Petitioner remained adamant that he did not permanently live at the residence, and that he was dropped off by his brother the morning he was arrested. (App. 294).

Petitioner's mother, Dianne Williams, testified at Petitioner's first trial. Williams testified Petitioner went "back and forth" between Williams's residence and Ms. Gibbs' residence on

Madison Avenue. (App. 305). Williams testified Petitioner kept clothes at her house, and had mail sent to her residence as well. (App. 305).

Darnell Green, a friend of Petitioner, testified. He was with Petitioner the day prior to Petitioner's arrest. (App. 307, l. 5-17). Green testified he and Petitioner's brother dropped off Petitioner at Ms. Gibbs' home on Madison Avenue on the morning of Petitioner's arrest. (App. 307, l. 15-25). Green testified he knew Petitioner to live with his mother on South Pike. (App. 307, l. 20-25).

Petitioner's brother, Latroy Gibbs, also testified at Petitioner's first trial. Latroy testified he dropped Petitioner off at Ms. Gibbs' home on Madison Avenue on the day of Petitioner's arrest. (App. 309.) Latroy testified Petitioner lived with their mother at South Pike because Petitioner and Ms. Gibbs would "get into it" often. (App. 301, l. 7-14).

Petitioner's Second Trial

At Petitioner's second trial, Ms. Gibbs testified that she was the individual who signed the lease, and that she listed Petitioner and their son as occupants on the lease. (App. 648, l.20-24). Ms. Gibbs admitted she was the only individual who signed the lease, meaning Petitioner did not sign the lease. (App. 671, l. 11-14). Ms. Gibbs also acknowledged that Petitioner stayed with his mother "a lot." (App. 671, l. 15-672, l. 5). Ms. Gibbs denied that any of the items found, including the drugs in her purse, belonged to her. (App. 661-662). Ms. Gibbs testified she was the one who gave consent to search the home, and that Petitioner told law enforcement in her presence he was not living at the home at the time. (App. 651, l. 13- 652, l.652, l. 5). Notably, contrary to her testimony in Petitioner's first trial, Ms. Gibbs testified she had never seen Petitioner cook crack cocaine or any type of drug. (App. 660, l. 24- 661, l. 20; 666, l. 12-16).

After the prosecution's case in chief, the trial court discussed with Petitioner his Fifth Amendment rights. Trial Counsel informed the Court he advised Petitioner against testifying on his own behalf because, among other reasons, testifying would open the door to allow the prosecutors to discuss the reason they were executing the search warrant on Petitioner that day-the three previous drug transactions. (App. 680-681).

Contrary to Trial Counsel's advice, Petitioner testified on his behalf and was ultimately questioned regarding the three prior drug transactions. Petitioner testified neither the paraphernalia nor the drugs belonged to him. (App. 683). Additionally, contrary to the testimony of Dubose, Petitioner testified he did not tell any member of law enforcement that, "selling drugs [was] a lifestyle to [him]." (App. 683, l. 8-25, 699). Petitioner testified he resided with his mother at her home at South Peguese, and that he stayed with his mother eighty-five percent at the time. (App. 685, l. 16-18; 687, l. 1-6). Petitioner testified Ms. Gibbs often had friends, boyfriends, or "associates" at the residence because it was her home; she signed the lease and Petitioner did not even see the lease. (App. 687). Petitioner was ultimately impeached by his prior incidents of drug buys that provided the basis for the arrest warrant that was executed that day. (App. 704-707). Dianne Williams, Darnell Green, and Latroy Gibbs did not testify at Petitioner's second trial.

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 reviews 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 failing to call Dianne Williams, Letroy Gibbs, and Darnell Green, where Trial Counsel articulated a reasonable trial strategy, where testimony of these individuals would have been cumulative, and where Petitioner was not prejudiced by this alleged deficiency because Petitioner prejudiced his own case by testifying on his own behalf against the advice of Trial Counsel, thereby opening the door to questioning regarding previous drug transactions for which Petitioner was involved.

Petitioner argues the PCR court incorrectly found Trial Counsel was effective for failing to call Dianne Williams (Petitioner's mother), Latroy Gibbs (Petitioner's brother), and Darnell Green (Petitioner's friend) at Petitioner's second trial. Petitioner's argument is without merit, and, therefore, certiorari should be denied on this issue. Trial Counsel was implementing a reasonable trial strategy. Trial Counsel was clearly prepared to use these witnesses again at the second trial, however, he articulated a valid strategic reason for choosing not to call these witnesses based on the new testimony of the State's witnesses at trial.

Strickland requires that trial counsel must be given leeway to make reasonable strategic decisions. No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant. Strickland v. Washington, 466 U.S. 668, 688-689 (1984). "Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another." Id. 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). Because Trial Counsel articulated a valid trial strategy for choosing not to call these witnesses, he cannot be deficient. This is supported by the fact that all three witnesses were present at trial, and Trial Counsel spoke with the witnesses at Petitioner's second trial and explained he was not going to call them as witnesses because the wife already testified to the fact that Petitioner often stayed at a home other than her Madison Avenue home. (App. 885-886). Trial Counsel also testified he did not call Williams, Letroy Gibbs, or Darnell Green because he thought it would be "overkill," considering the purpose of calling these three witnesses would have been to suggest that Petitioner frequently stayed with his mother and not with Ms. Gibbs at Madison Avenue, which Ms. Gibbs already testified to. Additionally, Trial Counsel reiterated that, Ms. Gibbs, the State's star witness, changed her testimony on a key issue: whether she had witnessed Petitioner cook crack cocaine. (App. 886). Trial Counsel testified the change in Ms. Gibbs's testimony caused him to reevaluate his trial strategy, which resulted in his strategic decision not to call the three witnesses. (App. 886, l. 19-25). Additionally, Ms. Gibbs admitted that Petitioner stayed with his mother "a lot." (App. 883-886). Trial Counsel further testified at Petitioner's PCR hearing, "You have to adjust on the fly, but that's what happened in this trial…" (App. 887, l. 14-25).

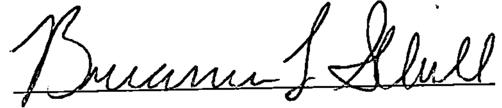
Furthermore, Petitioner cannot show that he was prejudiced by any alleged deficiency because all the testimony of the omitted witnesses would have been cumulative to the evidence already presented at trial by Applicant's wife, the State's witness, therefore none of their testimony would have changed the outcome of the trial. See Edwards v. State, 392 S.C. 449, 459, 710 S.E.2d 60, 66 (2011) (holding there was no prejudice from counsel's failure to call a witness at trial where the witness's testimony "simply would have been cumulative to evidence already introduced

through other witnesses.") As Trial Counsel testified at Petitioner's PCR hearing, the point of calling Ms. Williams, Letroy Gibbs, and Darnell Green was to suggest that Petitioner frequently stayed in a location other than Ms. Gibbs's home on Madison Avenue. This fact was testified to on cross-examination by Ms. Gibbs herself, the State's star witness. Accordingly, any testimony from Ms. Williams, Letroy Gibbs, or Darnell Green indicating Petitioner frequently stayed with his mother would not have changed the outcome of Petitioner's case.

Moreover, as Trial Counsel testified at Petitioner's PCR hearing, it was not the absence of this witness testimony that resulted in Petitioner's conviction, but rather Petitioner's own testimony at trial, which opened the door for the State to question him regarding his other pending drug charges. Trial Counsel testified that he begged Applicant not to testify at trial based on how the trial was going, and this conversation is reflected in the trial transcript. (App. 884-886). He told Petitioner the prosecution would be able to question Petitioner regarding previous drug transactions in which he was involved. (App. 884-886). The resulting testimony from Applicant's decision to testify ultimately prejudiced his case. Accordingly, based on the evidence presented at trial and Applicant's testimony from his knowing and voluntary decision to exercise his constitutional right to testify at trial, Applicant was not prejudiced from the failure to call these three witnesses. Accordingly, Petitioner's argument is without merit.

CONCLUSION

Based on the foregoing argument, 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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December 13th, 2019

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM SUMTER COUNTY
Honorable Kristi F. Curtis, Post-Conviction Relief Judge

Appellate Case No. 2018-002044

LEROY CLIFTON GIBB, III,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

CERTIFICATE OF SERVICE

I, Kaitlyn Slice, certify that I have served the within Return to Petition for Writ of Certiorari by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Lara M. Caudy, Esquire
S.C. Commission on Indigent Defense
Post Office Box 11589
Columbia, South Carolina 29211

I further certify that all parties required by Rule to be served have been served. This 13th day of December, 2019.

KAITLYN S. SLICE
LEGAL ASSISTANT