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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM YORK COUNTY
Court of Common Pleas
Post-Conviction Relief

Roger L. Couch, Circuit Court Judge

Appellate Case No.: 2019-001317

Jacquese Underwood, ... Petitioner,

vs.

State of South Carolina, ...Respondent.

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the post-conviction relief court erred in not granting relief on the basis plea counsel was ineffective in failing to prepare for or proceed with trial after her motion to suppress evidence was denied and, as a result, cause Petitioner to enter an involuntary guilty plea?

STATEMENT OF THE CASE

Petitioner is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the York County Clerk of Court. Petitioner was indicted during the May 2014 term of the York County Grand Jury for one count of trafficking in cocaine, 400 grams or more (2013-GS-46-2073). Petitioner proceeded to a jury trial on August 25 and 26, 2014, during which pre-trial motions were heard. Leah B. Moody, Esquire represented Petitioner and Matthew Shelton, Esquire of the Sixteenth Circuit Solicitor's Office prosecuted the case. After a recess, trial resumed on September 2, 2014 whereupon Petitioner entered a no contest plea to conspiracy of trafficking cocaine between 28-100g, second offense.[1] On the same date, the Honorable Lee S. Alford sentenced Petitioner to a negotiated term of imprisonment of twelve years and six months. Petitioner did not appeal his conviction or sentence.

Petitioner filed an application for post-conviction relief on March 16, 2015, by and through Tommy A. Thomas, Esquire, in which he alleged ineffective assistance of counsel and involuntary guilty plea. A return was filed August 12, 2015 by the State. An evidentiary hearing on Petitioner's Application was convened on November 8, 2016 at the Moss Justice Center in York, South Carolina before the Honorable Roger L. Couch. Petitioner was represented by Tommy A. Thomas, Esquire. Justin J. Hunter, Esquire represented the Respondent. An order of dismissal was signed by the Judge Couch on August 27, 2018. Petitioner filed a motion to alter or amend on September 13, 2018, to which Respondent filed a return on or about December 18, 2018, and to which Petitioner filed a reply January 14, 2019. A hearing on this motion was held May 6, 2019

[1] Petitioner notes that, across the various documents in the record referencing his charge and conviction, it is sometimes stated that he is convicted of trafficking cocaine, 28-100g, second offense and sometimes conspiracy to traffic cocaine, 29-100g, second offense. Though these fall under the same code section, there were several instances where a distinction was made in court between the two, particularly if having possession of imitation drugs constituted possession.

before Judge Couch at the Richland County Courthouse with venue waived by agreement of the parties. An order denying Petitioner's motion was filed July 9, 2019. A timely Notice of Appeal was filed.

STATEMENT OF FACTS

Petitioner, Jacquese Underwood, was indicted during the May 14 term of the York County Grand Jury for one count of trafficking in cocaine, 400 grams or more (2013-GS-46-2073). Petitioner entered a no contest plea to conspiracy of tracking cocaine between 28-100g, second offense. This plea was entered after two days of argument on pre-trial motions, mostly consisting of requests to suppress certain evidence.

The underlying incident was that, on October 30, 2012, a package was delivered via UPS to a home on Shenandoah Circle in Rock Hill, South Carolina. Shortly after the package was delivered, a car drove by slowly, leading Petitioner to bring the package inside the home with him. (App. p.275) Shortly thereafter, he placed the package in the trunk of his car, which was parked in the home's garage, and backed it out into the driveway. (App. p.275) At this time, law enforcement officers descended upon the residence, leading both Petitioner and his co-defendant who had driven by as an alleged lookout, to flee. (App. p.275) Petitioner attempted to flee through the backdoor of the home but was stopped by officers, so he locked himself in the home. (App. p.275) Eventually, he opened the residence for the officers who had an anticipatory search warrant for the residence. (App. p.275) Co-defendant, Duane Harrison, fled in his vehicle and then on foot as he attempted to evade officers. (App. p.275) As he fled, he threw several cell phones into the woods which were later recovered by law enforcement officers. (App. p.275)

Unknown to the co-defendants at the time was that this package had previously been intercepted by the Drug Enforcement Agency Task Force at the UPS facility in Rock Hill, South Carolina. (App. p.272-3) Agent Frank Finch and his K9 responded to a report of a suspicious package and, upon conducting a lineup, the K9 alerted to this package. (App. p.273) A search warrant was obtained and executed, revealing what officers estimated to be a kilogram of cocaine.

(App. p.273-4) The cocaine was removed and replaced with imitation cocaine then re-sealed so officers could conduct a controlled delivery. (App. p.274) The package was addressed to Shaerica White who was determined to be a resident of the address to which the package was directed. An officer from Lexington County was dressed as a UPS delivery driver and sent to make the delivery, as another officer was in the neighborhood conducting surveillance. (App. p.274) It was he who saw Harrison driving through the yard and noticed the signal given to Petitioner to retrieve the package. (App. p.274)

After Petitioner was detained in the home, officers located the target package in the trunk of his car, as well as a cell phone in the front seat of his car. (App. p.275) This cell phone's number was saved as "Jacq" in the contacts of one of the cell phones tossed by his co-defendant. (App. p.275) Text messages between these numbers included Petitioner's phone sending the address of the home where the package was delivered to his co-defendant. (App. p.276)

Prior to trial, Petitioner's counsel filed numerous pre-trial motions that she summarized during the hearing as follows:

1) I would ask the Court to limit any testimony coming from Dalmicos Hemphill as it relates to my client and only use his testimony, if necessary, for rebuttal purposes;
2) Limit the text messages prior to October 30, 2012; I believe they have amended their indictment which is -- it encompasses some text messages that show they communicated, but it doesn't give enough – it's not credible in my opinion, and I think they will be subject to not coming in under the 403.
3) And then last one, the one that is, I think, really quick, is preventing any testimony from State's witness Shureka White regarding any prior knowledge of Mr. Underwood's criminal history.

(App. p.5-6) The State agreed to the stipulations of the third motion. Later, Petitioner's counsel also presented to the trial court that she was going to challenge the search warrant for the intercepted parcel. (App. p.28) As noted above, despite lengthy testimony over two days of pretrial hearings, both defendants entered pleas after a weekend break.

In the Petitioner's Application for Post-Conviction Relief, he alleges two main grounds:

1. Ineffective assistance of counsel
2. Involuntary guilty plea

During the hearing, these morphed into the two grounds of ineffective assistance of counsel for failing to prepare for trial and ineffective assistance of counsel by advising Applicant to plead no contest, which contained elements of the allegation of involuntary guilty plea. The same was reflected in the order produced after the hearing.

The first witness at the post-conviction relief hearing was Leah Moody, plea counsel for Petitioner. She testified that, until they returned to court after the pre-trial motions, this case was always going to go to trial, as Petitioner maintained his innocence, and this became the theory of the case. (App. p.347) She further testified that plea offers had been made, including one that was contingent on Petitioner testifying on behalf of the State, which Petitioner refused to consider despite plea counsel's recommendation. (App. p.313, lines3-4; p.330, lines8-11) During her testimony, plea counsel testified that before its ruling on the record, the trial court informed counsel it would be allowing entry of the text messages. (App. p.328) This effectively changed the defense's position, she stated, as it would be much more difficult to keep out any argument regarding conspiracy. (App. p.328; p.330, lines 19-22) This, in addition to the discovery that Petitioner's co-defendant was intending to plead guilty and perhaps implicate him, led plea counsel to outline to Petitioner the difficulties he would have at trial. (App. p.346, line 24-p.347, line 21)

Regarding her preparation and arguments, plea counsel testified that she reviewed all discovery, including the volumes of text messages produced. (App. p.339, lines 4-9) Further, she examined the chain of custody of the drugs found in the parcel but did not argue the way the imitation drugs played into the chain. (App. p.331, lines 9-14) She stated that her focus was on

keeping out evidence of a conspiracy and the existence of drugs because Petitioner claimed that he thought children's books were in the package per what Ms. White told him. (App. p.342, lines 21-23)

The next witness was Petitioner himself, who testified to the facts as he recalled them, including that Ms. White was an ex-girlfriend, they had breakfast that morning, and he hung out at her house. (App. p.362, lines 21-22) She was expecting some books to be delivered and asked him to drop them off at her work if they came before she got home. (App. p.363, line 22 – p.364, line 4) He also testified that there was another man living in her house, her current boyfriend Gregory Parker. (App. p.363, lines 15-19) Petitioner testified he told plea counsel he was concerned that Mr. Parker may be involved in drug dealing, as he had prior drug convictions, but plea counsel did not follow up on the information. (App. p.364, line 23 – p.365, line 6, lines 4-10) He further testified that it was his understanding the phone numbers did not match – the contact in the co-defendant's phone was "JOC, " not "Jacq," and the numbers were not the same, plus some of the phones were purchased in California where he had never visited. (App. p.367, lines 13-20) Petitioner testified that he did not discuss suppression issues with plea counsel when it came to the drugs, nor did they discuss chain of custody of either the real drugs or the imitation drugs. (App. p.313, lines 3-24) He testified that it was not possible for anyone to find drugs in his car because there were no drugs. (App. p.345, lines 12-22) Further, he did not know that the drugs had been substituted until he got to trial and, therefore, did not have a chance to speak with counsel about this fact. (App. p.370-2)

Petitioner testified that, on the morning he entered his plea, plea counsel advised him to do so. (App. p.378, lines 6-9) He further testified that he did not believe his plea was freely, voluntarily, knowingly, and intelligently entered because he did nothing, knew he was innocent,

and did not understand the elements of the case. (App. p.378, line 10-p.379, line 4) He further testified that he believed much of what plea counsel said was not true, including that he was offered multiple pleas, when he was only offered one plea of twelve years to testify for the State. (App. p.379, lines 17-23) Further, he testified that plea counsel knew the text messages upon which the State was relying to make its conspiracy case did not come from his phone. (App. p.388, line 22 – p.389, line 8)

The third witness for Petitioner was his mother, Vanessa Simpson. The bulk of her testimony was to relay that Petitioner was still close with Ms. White and her children. It was not unusual for Petitioner to have dealings with her children or their belongings, including visiting her house. (App. p.395, lines 3-9)

The State called Matthew Woodrow Shelton, the assistant solicitor from the Sixteenth Circuit who prosecuted the case. He began by testifying that this case involved a lot of investigation and it took several months before he was comfortable conveying a plea offer. When he did, it was for twelve years, contingent upon Petitioner testifying against his co-defendant. (App. p.400, lines 3-12) He provided extensive testimony regarding recovering the phones, analyzing the data, and connecting the dots as to who was talking to whom. However, he was satisfied that, approximately two weeks prior to the package's delivery, Petitioner's co-defendant sent Petitioner a text with the address of this home, and that other texts outlined a similar pattern of behavior. (App. p.402, line 24 – p.403, line 2) He testified that the co-defendant was willing to testify against Petitioner, even though law enforcement considered co-defendant to be the mastermind, and this is what led to the development of the scheme where both pleaded to the same charge and received the same sentence. (App. p.404, line 13 – p.405, line 5) He further testified

that Ms. White was not charged based on the information and advice of law enforcement, who felt that she was honest and truly did not know what was happening. (App. p.408, lines 2-15)

Post-Conviction Relief Court's Findings

Ineffective assistance of counsel for failing to prepare for trial

The post-conviction relief court found plea counsel was not deficient in her handling of the pretrial hearing or plea negotiations. It further found that she made motions to limit testimony and to suppress text messages. She made arguments regarding admissibility and prejudice under Rule 403, SCRE. The court found her testimony credible that she thoroughly reviewed all evidence and discovery material and was in trial posture until the motion to suppress the text messages was unsuccessful. Petitioner failed to provide credible evidence that there was any way counsel could have better prepared for trial.

Ineffective assistance of counsel by advising Applicant to plead no contest

The post-conviction relief court reviewed the standard necessary to challenge a guilty plea via collateral attack and applied the elements to the case at hand. It determined that Petitioner knew the charges against him, his constitutional rights, and the consequences of entering a plea. The court found that the trial judge's decision to admit the cell phone records and substantial evidence against Petitioner resulted in plea counsel's recommendation that he accept the offer instead of proceeding. Therefore, she was not deficient in her representation. Further, the court found that the plea waiver signed by Petitioner explained all information relevant to the plea, as well as that Petitioner received a substantially lower sentence by pleading than he faced by going to trial. Such entry into this plea was done freely, voluntarily, knowingly, and intelligently.

Post-trial Motion and Ruling

On September 13, 2018, Petitioner filed a motion to alter or amend due to the order of dismissal lacking specific testimony, certain allegations were omitted and not addressed by the court, and that an affidavit of Gregory Parker needed to be addressed by the court. The motion included an appendix of testimony that should have been added to the order. Regarding the affidavit, Petitioner provided to the court – between the hearing and the issuance of the order of dismissal – an affidavit of Gregory Parker stating that he often ordered clothing and other merchandise from the same company in California that sent the suspicious parcel. During the time frame of the incident at hand, he ordered a package that he never received.

A hearing on this motion was held May 6, 2018 in Richland County before Judge Couch. The court declined to reopen the record in this case to consider and address the affidavit of Mr. Parker, holding it may be addressed as newly-discovered evidence in a subsequent post-conviction relief action. Further, the court found that there was no need to alter or amend the order as written.

ARGUMENT

Did the post-conviction relief court err in not granting relief on the basis plea counsel was ineffective in failing to prepare for or proceed with trial after her motion to suppress evidence was denied and, as a result, did Petitioner enter an involuntary guilty plea?

Standard of Review and Applicable Law

For post-conviction relief cases

In post-conviction relief actions, the applicant bears the burden of proving the allegations in the 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 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. 2051 (1984); Butler, 286 S.C. at 442. The proper measure of performance is whether the attorney provide representation within the range of competence required in criminal cases. The court presume the counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. at 690. The Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). Counsel's assistance is considered constitutionally ineffective when "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland, 466 U.S. at 687-88.

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of counsel. Franklin v. Catoe, 346 S.C. 563, 570, 552, S.E.2d 718, 722 (2001). First, the applicant must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625, citing Strickland. Second, counsel's deficient performance

must have prejudiced the applicant such that "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, 286 S.E.2d at 625.

For post-conviction relief appeals

The standard of review in post-conviction relief cases is entirely dependent on the specific issues raised. Smalls v. State, 422 S.C. 174, 180, 810 S.E.2d 836, 839 (2018). During review of factual findings made by the post-conviction relief court, the appellate court will defer to the findings and uphold them if they are supported by any evidence of probative value appearing in the record. Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016). Alternately, when reviewing a question of law, an appellate court will consider the matter *de novo* and is not required to defer to the post-conviction relief court's rulings. Jamison v. State, 410 S.C. 456, 465, 765 S.E.2d 123, 127 (2014).

> The post-conviction relief court erred in not granting relief on the basis plea counsel was ineffective in failing to prepare for or proceed with trial after her motion to suppress evidence was denied and, as a result, Petitioner entered an involuntary guilty plea.

Petitioner asserts his trial attorney was ineffective for, *inter alia*, failing properly prepare for trial. A major point in this case is that the parcel of which Petitioner had possession did not contain illegal substances when he possessed it. The relevant statute is S.C. Code Ann. § 44-53-0372(e)(2)(b)(2), part (e) stating that, "any person who knowingly sells, manufactures, cultivates, delivers, purchases, or brings into this State, or who provides financial assistance or otherwise aids, abets, attempts, or conspires to sell, manufacture, cultivate, deliver, purchase, or bring into this State, or who is knowingly in actual or constructive possession or who knowingly attempts to become in actual or constructive possession of..." with subsection (b) pertaining to "cocaine or

mixtures containing cocaine" and the further subsections delineating punishment based on weight of the drug and number of offense.

Based on the evidence presented at pre-trial motions and in the post-conviction relief hearing, at no time does anyone allege that Petitioner was in actual or constructive possession of cocaine. Certainly, Solicitor Shelton argues that Petitioner was in constructive possession of a package once containing cocaine, and it is reasonable to believe that, since this package once contained cocaine, a drug-sniffing canine may alert to the same. However, Petitioner never possessed cocaine, therefore not being able to meet the elements of the statute in that manner. This fact was never brought to light by plea counsel because she never intended to challenge the chain of custody of the real cocaine or the imitation drugs. (App. p.331, lines 12-16, p.333, lines 1-10)

Failure to challenge evidence such as this, particularly during pre-trial motions, is deficient performance on the part of plea counsel. Viewing the facts in the light most favorable to the Petitioner, he was in this home with permission of the owner and was retrieving a package addressed to her that he believed contained books. Though he had informed his co-defendant of the address of this home via text message approximately two weeks before the incident, it could be read that he needed assistance with something. (App. p.9, lines 3-7)

Therefore, the record shows, the case turned to conspiracy and whether Petitioner and/or his co-defendant engaged or agreed to engaged in any of the behavior proscribed by the statute. The State argued that this was never a possession case and always about conspiracy, and that there was probable cause even without the cell phone data. (App. p.414, lines 1-4) Further, Mr. Shelton testified during the post-conviction relief hearing that narcotics officers were watching the house, ready for this conspiracy to culminated. (App. p.405, lines 18-23) In reality, though, they were

watching the controlled delivery and had no prior knowledge of these men or the delivery until the suspicious parcel was intercepted at UPS.

The record, taken as a whole, does not provide much evidence against Petitioner; however, as soon as plea counsel's motion regarding the text messages was denied, she switched from being ready to try the case to convincing Petitioner that he should plead. Petitioner testified that he maintained his innocence throughout the proceedings, and plea counsel recalled that he maintained he did not know what was in the package and was not involved. (App. p.317, lines 22-23; p.327, lines 21-23; p.378, lines 18-21) He refused to admit guilt and testify for the state because he was not guilty and could not testify about a crime of which he had no knowledge. (App. p.379, lines 20-22)

Regardless, plea counsel was not prepared enough to entertain the possibility of going to trial with the text messages not having been suppressed. She did not search out information that may bolster Petitioner's defense if the messages were deemed admissible. Plea counsel did not explore the chain of custody of the real drugs or the artificial drugs. Plea counsel did not find Gregory Parker to ask him about his involvement in the scenario, despite his name being on the search warrant and Petitioner asking her to investigate him. These are all clear deficiencies on the part of plea counsel, any and all of which could and did lead to Petitioner experiencing prejudice in the proceedings as contemplated by Cherry.

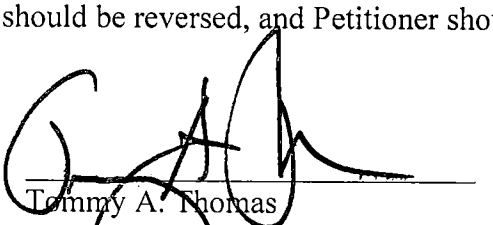
Specifically, Petitioner felt forced to enter into a guilty plea due to plea counsel's lack of preparation. This definitive sentence versus a potential acquittal is an obvious prejudice. The opinion in Stalk v. State, 383 S.C. 559, 681 S.E.2d 592 (2009) speaks directly to this. Stalk filed a post-conviction relief claim alleging that he was forced to plead guilty due to plea counsel's ineffectiveness in failure to adequately prepared for trial. The Supreme Court looked first to the

United States Supreme Court's opinion in Hill v. Lockhart for the well-established proposition that "[a] claim of ineffective assistance of guilty plea counsel requires the applicant present evidence satisfying two prongs: first, evidence that counsel's performance was deficient; and second, evidence that the applicant was prejudiced by that deficiency." Stalk, 383 S.C. at 560-61, 681 S.E.2d at 593 (citing Hill v. Lockhart, 474 U.S. 52, 106 S. Ct. 366 (1985)). It furthered this analysis by holding that "Stalk needed to present some evidence that had counsel done an investigation he would have found a witness or evidence that was helpful to Stalk, that is, something that would have affected counsel's advice to Stalk to accept the plea bargain offered or that would have caused Stalk to decline to accept it." Stalk, 383 S.C. at 564, 681 S.E.2d at 594.

In the case at bar, Petitioner has done just that. In addition to the examples of lack of preparation, Petitioner has presented the affidavit of Gregory Parker – a willing witness who was not only closely involved in the case, but even named on the search warrant. She failed to explore him as a useful source of information or alibi for Petitioner. This failure, in combination with others, led to Petitioner feeling no choice but to take a deal. Had plea counsel had this information, it is highly likely that she would have changed her recommendation and advice to Petitioner and not encouraged him to plead no contest. Therefore, Petitioner's petition for writ of certiorari should be granted, and the post-conviction relief court's ruling should be reversed.

CONCLUSION

The post-conviction relief court's decision should be reversed, and Petitioner should be granted a new trial.



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January 8, 2020

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM YORK COUNTY
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CERTIFICATE OF SERVICE

I, Janet Johnson, Assistant to Tommy A. Thomas, Esq., certify that I have served a copy of the Appendix and Petition for Writ of Certiorari by hand delivering a copy to the office of the Attorney General to:

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March 4, 2020