STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Certiorari to Richland County

G. Thomas Cooper, Circuit Court Judge

RAYMOND EDMONDS,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2010-168749

BRIEF OF PETITIONER

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ISSUE PRESENTED

Whether defense counsel was ineffective in failing to provide an adversarial challenge to the State's case?

STATEMENT

Petitioner was convicted of trafficking in crack cocaine, unlawful possession of a weapon, and possession with intent to distribute marijuana after a jury trial held before the Honorable Clifton Newman in Richland County on August 5, 2004. Respective sentences of twenty-five (25) years, five (5) years, and ten (10) years were imposed. Kana Johnson, Esq. was trial counsel.

Petitioner appealed his convictions and the appeal was dismissed by the Court of Appeals on April 25, 2006, after a review pursuant to Anders v. California, 386 U.S. 738 (1967). State v. Edmonds, Op. No. 2006-UP-158.

Petitioner filed an application for post-conviction relief on October 8, 2007. An evidentiary hearing was held on August 14, 2009, before the Hon. G. Thomas Cooper, Jr. Petitioner was present and was represented by Tricia Blanchette, Esq. Respondent was represented by Brian T. Petrano, Assistant Attorney General. Petitioner, trial counsel, Angela Williams, and Philana James testified at the hearing.

On February 5, 2010, Judge Cooper issued an order denying and dismissing petitioner's application for post-conviction relief. A subsequent Rule 59(e) motion was denied on July 29, 2010.

On November 23, 2010, a Johnson petition was submitted to the court. On January 14, 2013, this court granted the petition.

This brief of petitioner follows.

ARGUMENT

Defense counsel was ineffective in failing to provide an adversarial challenge to the State's case.

In post-conviction, a petitioner may be granted relief based on ineffective assistance of counsel under the Sixth Amendment to the United States Constitution if he shows: (1) that trial counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that he was prejudiced by counsel's ineffective performance. Strickland v. Washington, 466, U.S. 668, 104 S.Ct. 2052 (1984). To prove prejudice, petitioner must show that there was a reasonable probability that but for counsel's errors, the result of proceeding would be different. Cherry v. State, 300 S.C. 386 S.E.2d 624 (1989). A "reasonable probability" is simply a probability sufficient to undermine confidence in the outcome of the trial.

In Nance v. Ozmint, 367 S.C. 547, 626 S.E.2d 878 (2006) this Court observed how prejudice may be presumed in the context of ineffective assistance of counsel:

> The Supreme Court also recognized in both Strickland and Cronic that in certain circumstances "prejudice is presumed" because prejudice "is so likely that case-by-case inquiry... is not worth the cost." Strickland, 466 U.S. at 692, 104 S. Ct. 2052 (citing Cronic, 466 U.S. at 658, 104 S. Ct. 2039). In *552 Cronic, the Court identified three distinct situations in which a presumption of prejudice is appropriate. First, prejudice is presumed when the defendant is completely denied counsel "at a critical stage of his trial." Cronic, 466 U.S. at 659, 104 S.Ct. 2039. Second, per-se prejudice occurs if there has been a constructive denial of counsel. This happens when a lawyer "entirely fails to subject the prosecution's case to meaningful adversarial testing," thus making "the adversary process itself presumptively unreliable." Id. Third, the Court identified certain instances "when although counsel is available to assist the accused during trial, the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial." Id. (citing Powell v. Alabama, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932).

> A finding of per-se prejudice under any of these three prongs is "an extremely high showing for a criminal defendant to make." Brown v. French, 147 F.3d 307, 313 (4th Cir. 1998).

367 S.C. at 551-552, 626 S.E.2d at 880.

In this case, Petitioner and his wife lived in a two bedroom home. They rented one bedroom to Danny Brown. A search warrant was executed at the home and drugs were found. Petitioner and his wife were arrested. At the time of the trial they could not locate Danny Brown who at one time admitted the drugs were his. Petitioner also admitted the drugs were his when the police threatened to call DSS to pick up the children.

At the evidentiary hearing, petitioner testified that he had a number of witnesses he wanted defense counsel to meet with but she never met with them. Counsel never conducted an independent investigation of the facts in his case. (App. p. 609, lines 14-21) He asked counsel to have the witnesses sequestered in his case, but she never asked the court for sequestration. (App. p. 610, line 9 – p. 611, line 9)

Petitioner said a motion was made to compel the identity of the confidential informant but counsel never got a ruling on the motion. (App. p. 612, lines 21-23) Counsel never explained the standard for having disclosure of a confidential informant. (App. p. 613, lines 11-15)

Counsel made a motion to suppress the search warrant in this case but she did not have petitioner testify. At trial Investigator Poole testified that the informant was a concerned citizen. But earlier he testified that he was a paid informant. Defense counsel did not raise any objection about this inconsistency or the wrong information in the search warrant. (App. p. 614, line 2 – p. 616, line 24) Counsel failed to object to the warrant not being specific enough when it asked to search "all persons." (App. p. 619, line 22 – p. 621, line 5)

The trial court ordered a hearing on the admissibility of petitioner's statement. Counsel did not request it and she did not have petitioner testify or call any of the witnesses who were at the scene. (App. p. 623, line 20 – p. 626, line 3)

Petitioner said defense counsel did not ask for a continuance when they could not find Danny Brown. (App. p. 633, lines 6-16) Counsel did not discuss third party guilt with him. (App. p. 634, lines 13-15) She did not object to the drugs, a weapon, and some paperwork coming into evidence. (App. p. 635, lines 23 – p. 636, line 24)

As can be seen from petitioner's testimony, defense counsel was deficient in many respects. Per se prejudice occurred in this case because defense counsel failed to subject the State's case "to meaningful adversarial testing."

CONCLUSION

Petitioner's convictions should be reversed.

Respectfully submitted,

Robert M. Pachak
Appellate Defender

ATTORNEY FOR PETITIONER.

This 13th day of February, 2013

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CERTIFICATE OF SERVICE

I certify that a true copy of the brief of petitioner, in this case has been served on Robert D. Corney, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 13th day of February, 2013.

Robert M. Pachak
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 13th day of February, 2013.

_____(L.S.)
Notary Public for South Carolina
My Commission Expires: July 24, 2022.