

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

ORIGINAL

Certiorari to Spartanburg County

RECEIVED

Honorable Thomas A. Russo, Circuit Court Judge

MAR 30 2020

TAIWAN J. HARDY,

S.C. SUPREME COURT

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2019-001319

PETITION FOR WRIT OF CERTIORARI

TAYLOR D GILLIAM
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR PETITIONER

INDEX

INDEX i

ISSUE PRESENTED 1

STATEMENT 2

ARGUMENT 3

CONCLUSION 8

ISSUE PRESENTED

Whether the PCR court erred in denying relief, where trial counsel failed to object to a highly prejudicial comment by the state's first witness that she used to do drugs with Petitioner, where in a drug case, propensity testimony regarding Petitioner's alleged prior use of drugs was mentioned to the jury, where an objection would have been sustained, and where no strategic reason existed not to object?

STATEMENT

In 2014, Petitioner was indicted by a Spartanburg County grand jury for distribution of cocaine base. App 288 – 289. On July 22, 2015, he proceeded to trial before the Honorable Roger L. Couch and a jury. William Bean represented Petitioner; Hunter Blouin and Edward Hunter appeared on behalf of the state. The state served notice of a life sentence pursuant to S.C. Code Ann. § 17-25-45(A) in March 2015. App. 6 ll. 7 – 13. Two plea offers were made, one for a negotiated eighteen year sentence and the second for a fifteen to thirty year sentence, but both were rejected by Petitioner. App. 7 ll. 5 – 10.

At the conclusion of the two-day trial, the jury returned a guilty verdict on the distribution of cocaine base charge. App. 185 l. 22 – App. 186 l. 4. The trial judge sentenced him to life without parole. App. 191 ll. 11 – 16.

On June 26, 2017, Petitioner filed an application for post-conviction relief. App. 193 – 199. It contained allegations of ineffective assistance of counsel, including claims that counsel failed to perform an investigation. App. 195. The state filed a Return, Partial Motion to Dismiss, and Motion for More Definite Statement on December 29, 2017. App. 209 – 221. Through counsel, Petitioner's application was later amended to include numerous other contentions. App. 207 – 208.

An evidentiary hearing was held before the Honorable Thomas A. Russo on March 7, 2019. App. 230. J. Faulkner Wilkes represented Petitioner; Johnny E. James, Jr. appeared on behalf of the state. Petitioner and trial counsel testified at the hearing. The PCR judge indicated his intent to take the matter under advisement. App. 273 ll. 18 – 22. An Order of Dismissal was filed on July 12, 2019.

This petition follows.

ARGUMENT

The PCR court erred in denying relief, where trial counsel failed to object to a highly prejudicial comment by the state's first witness that she used to do drugs with Petitioner, where in a drug case, propensity testimony regarding Petitioner's alleged prior use of drugs was mentioned to the jury, where an objection would have been sustained, and where no strategic reason existed not to object.

Relevant facts

The evidence at Petitioner's two-day trial was elicited from four witnesses, including Brandy Cannon. Cannon worked with Travis McJunkin from the Spartanburg County Sheriff's Department in order to receive fifty dollars. App. 55 l. 9 – Tr. 57 l. 25. She candidly testified that she has “cooperated with law enforcement” approximately three hundred times. App. 58 ll. 1 – 3. Cannon had a lengthy criminal record, including five fraudulent check charges, driving under the influence, driving under suspension, forgery, shoplifting, and possession of crack. App. 56 ll. 4 – 15.

Initially outside the presence of the jury, Cannon testified that she and Petitioner used to do drugs together. App. 59 ll. 20 – 22. Following the proffer, the identical testimony was elicited without objection. App. 61 ll. 14 – 17. The jury therefore heard that Petitioner and Cannon used to do drugs together.

Cannon then testified that she bought crack cocaine from Petitioner on March 10, 2014. App. 62 ll. 2 – 4. Law enforcement provided her with money and she traveled to a hotel and allegedly purchased twenty dollars worth of crack cocaine from Petitioner. App. 62 l. 10 – App. 66 l. 7. The transaction was recorded. Following the purchase, Cannon immediately received

fifty dollars. App. 69 ll. 20 – 24. She indicated that there was “nothing owed to [her]” at the time of trial. App. 69 l. 25 – App. 70 l. 6.

On cross-examination, trial counsel questioned Cannon about her drug use, including the fact that she has used drugs for thirteen years. App. 75 ll. 2 – 23. Throughout that time, she never sought treatment for her addiction. App. 87 ll. 4 – 6. Cannon claimed that for “some of” the three hundred times she had cooperated with law enforcement resulted in charges being dropped against her. App. 76 l. 16 – App. 77 l. 2. Cannon received as much as two hundred dollars in other cases. App. 81 ll. 7 – 25.

At the evidentiary hearing, trial counsel had difficulty remembering many details of his representation. He did not recall any revocation hearings that Petitioner had testified about at great length. App. 256 ll. 2 – 11. He did not remember the first time he discussed the facts of the case with Petitioner. App. 256 ll. 12 – App. 257. He could not recall how he was able to speak with Petitioner or whether the case was on a trial docket. App. 258 ll. 8 – 24. He could not answer when asked if he had to prepare for trial more than once. Id. When asked if he had notes that might reflect meeting dates, counsel said he “may have some” and would have to “look through this rather large file.” App. 259 l. 25 – App. 259 l. 4. He was unable to remember when the state served Petitioner with the LWOP notice. App. 262 ll. 20 – 22. He could not estimate the proximity to trial as to when the notice would have been served. App. 262 l. 23 – App. 263 l. 2.

Counsel nonetheless recalled Cannon’s testimony of purported drug use with Petitioner. App. 264 ll. 5 – 9. He remembered that it was proffered and then allowed in by the trial judge. App. 264 ll. 5 – 15. Counsel remembered not objecting to preserve that matter for direct appeal.

App. 264 ll. 16 – 24. When asked why he did not object, counsel offered the following explanation:

My, my thinking was that the fact that this was clearly a drug case. They had a video with drugs, and testimony to that effect. I felt like it would be beneficial to the defense if the drug use by the informant was admitted because, obviously, they had evidence that Mr. Hardy was involved with drugs, and I felt like the credibility of the informant would be affected in a negative way if she indicated, which she did, that she had used drugs multiple times I think - - I believe that was in there with Mr. Hardy.

App. 265 ll. 2 – 10.

At trial, counsel thoroughly cross examined Cannon regarding her prior drug use. App. 75 l. 6 – 77 l. 4. He even impeached her credibility with the CI information sheet after she claimed to have never been charged with any drug possession offenses. App. 77 l. 3 – App. 79 l. 3. Accordingly, at the PCR evidentiary hearing, he agreed that his actions at trial “overwhelming [took] care of that issue, and [made] objecting to [Petitioner’s] drug use less valuable [for impeaching Cannon’s credibility].” App. 265 ll. 11 – 24. Notably, trial counsel admitted that Cannon’s remarks regarding Petitioner’s prior drug use prejudiced the defense. App. 266 ll. 3 – 7.

Discussion

“There is a two-prong test for evaluating claims of ineffective assistance of counsel. First, a PCR applicant must show that his counsel's performance was deficient such that it falls below an objective standard of reasonableness.” Suber v. State, 371 S.C. 554, 558, 640 S.E.2d 884, 886 (2007) (citing Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); Alexander v. State, 303 S.C. 539, 541, 402 S.E.2d 484, 485 (1991)). “Second, an applicant must show there is a reasonable probability, but for counsel's unprofessional errors, the

result of the proceeding would have been different.” Id. (citing Strickland, 466 U.S. at 687, 104 S.Ct. 2052; Alexander, 303 S.C. at 541–42, 402 S.E.2d at 485).

Under Rule 404(b), SCRE, “[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith.” It is well-settled that absent specific exceptions, evidence of other bad acts is inadmissible to show criminal propensity or to demonstrate the accused is a bad person. State v. Coleman, 301 S.C. 57, 389 S.E.2d 659 (1990); State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923).

Counsel’s offered reason for not objecting cannot be justified as a valid trial strategy. He successfully impeached Cannon’s credibility and established her prior criminal record. Accordingly, the value from the jury hearing that she used to do drugs was nonexistent. Instead, the jury learned that Petitioner had potentially used drugs in the past. Counsel had advance knowledge that the testimony was coming, having heard it via proffer. App. 59 l. 11 – App. 61 l. 12. Even the solicitor recognized the delicate and objectionable nature of her testimony; he requested the proffer:

Your Honor, I believe we are getting into the part where she’s going to explain how her - - how her relationship with Mr. Hardy - - and we thought maybe the best thing to do would be to proffer because Mr. Bean had brought that up previously in chambers.

App. 59 ll. 11 – 15.

Even after raising the issue in chambers and being afforded a larger window to object during the proffer, trial counsel failed to object. If he had objected, it is likely that the trial judge would have prevented Cannon from testifying about Petitioner’s alleged prior drug use under Rule 404(b), SCRE. However, trial counsel never objected. The trial judge was not given an opportunity to exclude the testimony, and appellate counsel was unable to raise the matter on appeal.

The admission of this irrelevant and prejudicial evidence undermines confidence in the outcome of the trial. Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007) (“[The prejudice prong is satisfied when] there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial.”) (internal citations omitted); Von Dohlen v. State, 360 S.C. 598, 603, 602 S.E.2d 738, 740–41 (2004) (“In order to prove counsel was ineffective, the applicant must show that counsel's performance was deficient and that there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial.”). As both the deficient performance and prejudice prongs are satisfied, we hold trial counsel was ineffective. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

The testimony from Cannon was improper and should have resulted in an objection. The fact that it was elicited in front the jury placed a burden on Petitioner to respond. He was faced with two options: 1) testify in order to counter the narrative offered by Cannon but open himself up to questioning on his record; and 2) stay silent and allowing that testimony to be used against him without a response. Because his attorney failed to object, Petitioner was placed in a no-win situation. He was not afforded effective representation in this regard. Because counsel erred and the failure to object prejudiced the trial, Petitioner is entitled to a new trial.

CONCLUSION

Based on the foregoing, Petitioner respectfully requests that this Court grant certiorari to allow further briefing on the issues raised herein.

s/ Taylor D. Gilliam
Taylor D Gilliam
Appellate Defender

ATTORNEY FOR PETITIONER

This 27th day of March, 2020.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED

MAR 30 2020

Certiorari to Spartanburg County

S.C. SUPREME COURT

Honorable Thomas A. Russo, Circuit Court Judge

TAIWAN J. HARDY,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon Chelsey Marto, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Petition for Writ of Certiorari and a copy of the Appendix have been served on Taiwan J. Hardy, #321387, at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 27th day of March, 2020.

s/ Taylor D. Gilliam
Taylor D Gilliam
Appellate Defender

SUBSCRIBED AND SWORN TO before me ATTORNEY FOR PETITIONER
this 27th day of March, 2020.

Mary Allaire (L.S)
Notary Public for South Carolina
My Commission Expires: May 12, 2027.