STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Florence County

Honorable William H. Seals, Circuit Court Judge

ROBERT JACKSON,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

APPELLATE CASE NO. 2019-001497

PETITION FOR WRIT OF CERTIORARI

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ISSUES PRESENTED

1.

Did the post-conviction relief (PCR) judge correctly grant Petitioner a belated direct appeal pursuant to White v. State, 236 S.C. 110, 108 S.E.2d 35 (1974)?

2.

Did the post-conviction relief (PCR) judge err by finding trial counsel was not ineffective when he failed to object to the assistant solicitor's impermissible comments on Petitioner's right to remain silent during his closing argument, and where Petitioner was prejudiced because the solicitor's comments (1) suggested Petitioner was guilty merely because he exercised his right to remain silent after his arrest and (2) were specifically tied to Petitioner's exculpatory story, which a reasonable jury could have believed?

STATEMENT OF THE CASE

On June 2, 2015, the Florence County Sheriff's Office received a tip alleging possible drug activity at Cruizers, a local convenience store. The tip identified the suspect as an occupant of a burgundy Nissan Altima in the parking lot. App. 124, ll. 3-10. When Investigator Jason Pate arrived at the store, he immediately located a burgundy Nissan Altima. App. 124, ll. 11-13. The driver's door of the car was open and a man, who was later identified as Petitioner, was sitting in the driver's seat with his legs out of the vehicle. App. 124, ll. 14-18. As Pate approached the car, he noticed a pill bottle with the label torn in the side compartment of the driver's door. App. 124, ll. 19-25; App. 136, l. 22 – 137, l. 17.

Pate asked Petitioner for his driver's license. As Petitioner "was fumbling around," Pate noticed a plastic bag in Petitioner's shirt pocket. App. 125, ll. 1-3. He asked Petitioner what was inside the bag and Petitioner allegedly admitted it was heroin. App. 125, ll. 4-9. Petitioner "voluntarily" handed the bag to Pate. App. 138, ll. 11-19. Pate ultimately determined there were fifty wax paper packages referred to as "bindles" containing a substance consistent with heroin inside the plastic bag. App. 128, ll. 10-16; App. 130, ll. 5-8.

Based on this finding, law enforcement searched Petitioner's car. App. 150, ll. 9-24. In the center console, officers found a "bundle" of fifty "bindles" of a substance consistent with heroin and an addition ten "bindles" on the floorboard of the front passenger seat. App. 151, ll. 3-14.

The substance was later confirmed to be heroin with a total weight of 4.68 grams. App. 204, ll. 4-9; App. 204, l. 22 – 205, l. 2. Inside the pill bottle located in the pocket of the driver's door were thirty pills identified as alprazolam, also known as Xanax, and four pills identified as oxycodone. App. 204, l. 15 – 204, l. 3; App. 213, ll. 8-10.

Petitioner testified in his own defense. He was seventy-six years old at the time of trial, has a fifth grade education, and cannot read or write. App. 261, l. 17 – 262, l. 1. Petitioner explained that he has been disabled since 2002 and suffers from diabetes. App. 263, ll. 18-21; App. 265, l. 25 – 266, l. 9. He admitted to possessing the heroin found in his shirt pocket. App. 272, ll. 20-24. He testified that he has used heroin for pain management since his left leg from the knee down had to be amputated due to gangrene. App. 263, l. 22 – 264, l. 20. Since the amputation, Petitioner has suffered from phantom pains. App. 266, ll. 14-19. His right foot, which is also infected with gangrene, always hurts and burns, and, at the time of trial, his doctor planned to amputate that foot soon. App. 267, ll. 5-23. For whatever reason, Petitioner's doctor refused to prescribe him any pain medications so Petitioner was forced to self-medicate. App. 267, l. 24 – 268, l. 9; App. 275, l. 12 – 276, l. 1.

While Petitioner admitted the heroin found in his shirt pocket belonged to him, he denied possessing the heroin found in his car. App. 268, ll. 16-25. He testified that he had just purchased the heroin found in his pocket before law enforcement arrived at the convenience store. The man who he bought the heroin from was in Petitioner's car and, shortly before the officers arrived, had left the car and gone into Cruizers. App. 268, l. 16 – 269, l. 24; App. 272, l. 20 – 273, l. 7. Petitioner believed the heroin found in his car belonged to this unidentified man. App. 273, l. 21 – 274, l. 20.

A Florence County Grand Jury indicted Petitioner on August 24, 2017 for trafficking in heroin, second or subsequent offense, and possession of a controlled substance, second or subsequent offense. App. 431-432. His case was called to trial on September 14, 2017 before the Honorable Thomas A. Russo, and a jury. App. 1. Assistant Solicitor J. Ryan White represented the state, and B. Scott Suggs represented Petitioner. App. 1.

On September 15, 2017, the jury found Petitioner guilty as indicted. App. 342, ll. 15-25. He was sentenced to twenty-five years for trafficking heroin and one year concurrent for possession of a controlled substance. App. 349, l. 20 – 350, l. 4. Petitioner's trial counsel failed to file a notice of appeal.

On April 16, 2018, Petitioner filed an application for post-conviction relief seeking, *inter alia*, a belated direct appeal. App. 352-356. The state filed a return to this application dated October 24, 2018. App. 357-363. With the assistance of counsel, Petitioner filed an amended application on June 19, 2019. App. 364-365. An evidentiary hearing was convened on June 28, 2019 before the Honorable William H. Seals, Jr. App. 366. Assistant Attorney General Brianna Schill represented the state, and Jonathan D. Waller represented Petitioner. App. 366.

By order filed September 4, 2019, the judge granted Petitioner a belated direct appeal pursuant to White v. State, 263 S.C. 110, 108 S.E.2d 35 (1974). App. 417-430. However, the judge denied Petitioner's remaining PCR allegations. App. 417-430.

This petition for writ of certiorari follows.

ARGUMENT

1.

The post-conviction relief (PCR) judge correctly granted Petitioner a belated direct appeal pursuant to *White v. State*, 236 S.C. 110, 108 S.E.2d 35 (1974).

The PCR court correctly granted Petitioner a belated direct appeal pursuant to White v. State, 236 S.C. 110, 108 S.E.2d 35 (1974). The judge found there was no evidence Petitioner made a knowing and intelligent decision not to pursue a direct appeal. App. 429. The judge further found Petitioner's testimony that he intended to pursue an appeal credible. App. 429. He concluded trial counsel should have filed a notice of appeal to protect Petitioner's appellate rights. App. 429.

"The appropriate scope of review of this Court is that any evidence of probative value is sufficient to uphold the PCR judge's findings." Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989). When a client is convicted and sentenced, trial counsel has a duty to make certain the client is fully aware of the right to appeal. In re Anonymous Member of the Bar, 303 S.C. 306, 400 S.E.2d 483 (1991); White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974). "In the absence of an intelligent waiver by the defendant, counsel must either initiate an appeal or comply with the procedure in Anders v. California, 386 U.S. 738 (1967)." Smith v. State, 309 S.C. 413, 424 S.E.2d 480 (1992). "To waive a direct appeal, a defendant must make a knowing and intelligent decision not to pursue the appeal." Simuel v. State, 390 S.C. 267, 271, 701 S.E.2d 738, 740 (2010) (citing Sheppard v. State, 357 S.C. 646, 651, 594 S.E.2d 462, 465 (2004)).

In this case, there is no probative evidence that (1) Petitioner knowingly waived his right to a direct appeal, or (2) trial counsel made certain Petitioner was fully aware of his right to appeal. See Simuel, 390 S.C. at 271, 701 S.E.2d at 740. Trial counsel testified that he advised Petitioner of

his right to appeal in advance of trial. He asserted, "I alerted him as I do all clients that I don't handle appeals. So if it came to pass that his case would go to trial and he were convicted, he probably should do something proactive to prepare himself in some fashion to contact an appellate lawyer to do that for him, but no, I don't handle appeals in my office." App. 397, ll. 9-19. It is apparent from counsel's testimony that he did not make certain Petitioner was fully aware of his right to appeal. Consequently, the PCR judge properly concluded Petitioner is entitled to a belated direct appeal pursuant to White v. State.

Respectfully, this Court should grant the petition for writ of certiorari and consider Petitioner's belated direct appeal.

2.

The PCR judge erred by finding trial counsel was not ineffective when he failed to object to the assistant solicitor's impermissible comments on Petitioner's right to remain silent during his closing argument, and where Petitioner was prejudiced because the solicitor's comments (1) suggested Petitioner was guilty merely because he exercised his right to remain silent after his arrest and (2) were specifically tied to Petitioner's exculpatory story, which a reasonable jury could have believed.

Relevant Facts

During his closing argument, the assistant solicitor argued:

> Now, **the defense wants you to believe that there's some slippery drug dealer out there. As law enforcement arrived, they [the drug dealer] got out of Dodge in the nick of time. Just in the nick of time.**
>
> I think Mr. Suggs [trial counsel] described himself as a natural investigator. ***He described his client [Petitioner] as fully cooperative. Well, this slippery drug dealer scenario is - - today is the first time I've heard of it. He said this case is two years old.*** **How much investigation?** ***How much cooperation by Mr. Jackson [Petitioner]?***

App. 326, ll. 9-18 (emphasis added).

Trial counsel, Scott Suggs, did not object to this improper argument commenting on Petitioner's constitutional right to remain silent. During the evidentiary hearing, Suggs maintained that it was his normal practice to only interrupt a lawyer during closing argument if he believed the lawyer argued facts not in evidence or "said something improper." App. 407, ll. 8-17. Suggs admitted he had no strategy for failing to object to the solicitor's comments on Petitioner's right to remain silent. App. 410, ll. 12-25. He further claimed he did not find the comments objectionable. However, Suggs's explanation as to why he did not find the comments objectionable made little sense. App. 411, l. 6 – 412, l. 7.

The PCR judge found credible Suggs's testimony that he did not believe the solicitor's comments were objectionable, particularly under the facts of Petitioner's case. App. 427. The judge further found the solicitor's comments did not concern Petitioner's right to remain silent since Petitioner testified at trial. App. 427. Accordingly, the judge concluded Suggs was not deficient for failing to object to the solicitor's comments during closing argument. App. 428.

Moreover, the judge found Petitioner failed to prove he was prejudiced by Sugg's failure to object. App. 428. The judge maintained Petitioner presented no evidence to support his argument that the solicitor's comments on Petitioner's right to remain silent "damaged" Petitioner's defense, and asserted "it was one comment in a lengthy closing argument." App. 428. Consequently, the judge determined Petitioner failed to prove he was prejudiced by any alleged deficiency. App. 428.

Discussion

The Sixth Amendment to the United States Constitution guarantees a defendant the right to the effective assistance of counsel. Strickland v. Washington, 466 U.S. 668 (1984). In order to show ineffective assistance of counsel as a ground for relief, Petitioner must prove that "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." Id. at 686; Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Strickland, 466 U.S. at 687-688.

The United States Supreme Court has established a two pronged test to evaluate allegations of ineffective assistance of counsel. Petitioner must prove "that counsel's performance was deficient" and fell below reasonable professional norms, and the deficient performance

prejudiced Petitioner. Strickland, 466 U.S. at 687. Under the second prong, Petitioner must show "there is a reasonable probability that, but for counsel's unprofessional errors, the result would have been different." Cherry v. State, 300 S.C. 115, 117-118, 386 S.E.2d 624, 625 (1989) (citing Strickland, 466 U.S. at 688). "A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland, 466 U.S. at 668).

"It is improper for the State to refer to or comment upon a defendant's exercise of a constitutional right." Edmond v. State, 341 S.C. 340, 345, 534 S.E.2d 682, 685 (2000) (citing State v. Johnson, 293 S.C. 321, 360 S.E.2d 317 (1987)); See Payne v. State, 355 S.C. 642, 645, 586 S.E.2d 857, 859 (2003). "Such comments may not be made either directly or indirectly." Id. (citing State v. Goolsby, 275 S.C. 110, 268 S.E.2d 31 (1980), *overruled on other grounds by* State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991)); See State v. Rouse, 262 S.C. 581, 206 S.E.2d 873 (1974).

"In particular, the State may neither comment upon nor present evidence at trial of a defendant's decision to exercise his right to remain silent or be represented by an attorney." Id.; See Doyle v. Ohio, 426 U.S. 610 (1976) (the due process clause of the Fourteenth Amendment is violated when a state prosecutor seeks to impeach defendants' exculpatory story, told for the first time at the trial, by cross-examining them about their post-arrest silence after receiving Miranda warnings); Griffin v. California, 380 U.S. 609 (1965) (the Fifth and Fourteenth Amendments forbid comment by the prosecution on the accused's silence or failure to testify); State v. Cockerham, 294 S.C. 380, 365 S.E.2d 22 (1988) (holding that a prosecutor's indirect reference to the defendant's silence and indirect comments on the defendant's exercise of his rights to counsel and a jury trial violated the defendant's due process rights).

"The obvious purpose [of excluding such comments] is to try to prevent jurors from improperly inferring the accused is guilty simply because he exercised rights guaranteed him by the state and federal constitutions." Id. at 346, 534 S.E.2d at 685. "Such an inference is constitutionally impermissible because the burden at all times remains upon the State to prove beyond a reasonable doubt every element of a crime with which the accused is charged." Id. (citing In Re Winship, 397 U.S. 358 (1970) and State v. Schrock, 283 S.C. 129, 322 S.E.2d 450 (1984)).

In this case, trial counsel was deficient for failing to object to the assistant solicitor's comments on Petitioner's post-arrest silence during his closing argument since such comments were indirect comments on Petitioner invocation of his constitutional right to remain silent. The solicitor's comment that Petitioner's testimony at trial was the "first time" he heard the "slippery drug dealer scenario" and his challenge to trial counsel's assertion that Petitioner had fully cooperated with law enforcement could only be interpreted as comments on Petitioner's invocation of his right to remain silent after he was arrested.

Moreover, there is no probative evidence to support the PCR judge's conclusion that "the state's closing argument was not a comment regarding [Petitioner's] right to remain silent because [Petitioner] testified at trial." See App. 427. The solicitor's impermissible comments were related to Petitioner's *post-arrest* silence and obviously not his right to remain silent at trial since Petitioner chose to testify in his defense.

In deciding the prejudice prong in a PCR action, counsel's deficient performance in failing to object to such comments "will not be deemed prejudicial when the record shows the reference to the defendant's right to silence or to an attorney was a single reference, which was not repeated or alluded to; the prosecutor did not tie the defendant's exercise of his right directly

to his exculpatory story; the exculpatory story was totally implausible; and the evidence of guilt was overwhelming." Edmond, 341 S.C. at 348, 534 S.E.2d at 686-687 (citing State v. Pickens, 320 S.C. 528, 530-531, 466 S.E.2d 364, 367 (1996)).

Here, while the solicitor's comment was a single reference to Petitioner's constitutional right to remain silent, the solicitor tied Petitioner's post-arrest silence to his exculpatory story at trial, which was not implausible. The solicitor questioned trial counsel's assertion that Petitioner had cooperated with law enforcement and emphasized that Petitioner did not tell police the "slippery drug dealer scenario" after his arrest. Petitioner's testimony was plausible as it was entirely possible he had purchased the heroin found in his pocket from the unidentified dealer who then got out of Petitioner's car to make a purchase from the convenience leaving behind the remainder of his heroin. A reasonable jury could have found this testimony credible and convicted Petitioner of a lesser included offense, such as mere possession of heroin, which was Petitioner's defense at trial.

In Edmond v. State, a detective, who interviewed Edmond after his arrest for first degree burglary, testified that Edmond invoked his right to counsel and his right to remain silent. 341 S.C. at 343, 534 S.E.2d 684. The detective "honored that right." Id. Subsequently, during his closing argument while describing the detective's testimony, the prosecutor commented that Edmond had "invoked his right to counsel, smartly enough." Id. at 343-344, 534 S.E.2d at 684. Edmond's trial counsel did not object to the detective's testimony nor the prosecutor's closing argument. Id. at 344, 534 S.E.2d at 684. This Court held the detective's testimony and the prosecutor's closing argument were direct and improper references to Edmond's exercise of his constitutional rights. Id. at 348, 534 S.E.2d at 686. Consequently, the Court concluded Edmond proved his counsel was deficient for failing to object. Id. at 347, 534 S.E.2d at 686.

Moreover, this Court held Edmond proved he was prejudiced by counsel's deficient performance. Id. The Court asserted, "Jurors may have used the improper testimony and comments to infer [Edmond] was guilty simply because he exercised his rights." Id. at 348, 534 S.E.2d at 686. The Court further emphasized that trial counsel did not request nor did the judge give a curative instruction. Id. Finally, this Court concluded, "[Edmond] has shown prejudice because the record contains three direct references to the exercise of his right to remain silent or be represented by counsel. Immediately after stating that [Edmond] had invoked his right to counsel, the prosecutor told jurors that the man at whom [Edmond] had pointed the finger testified he did not commit the crimes. The prosecutor tied the exercise of the right to [Edmond's] exculpatory story, which was not totally implausible. Finally, evidence of [Edmond's] guilt was not overwhelming as the State's entire case was built on circumstantial evidence." Id. at 348-349, 534 S.E.2d at 687.

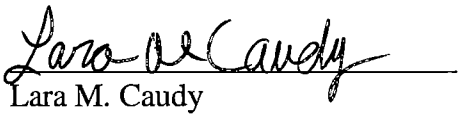
Likewise, in this case, the solicitior tied Petitioner's exercise of his right to remain silent after he was arrested to his exculpatory story to which he testified at trial. Petitioner's testimony as to what occurred that day was not "totally implausible." See Id. at 348-349, 534 S.E.2d at 687. Moreover, trial counsel did not request nor did the trial judge give a curative instruction. Consequently, there is a reasonable probability the jury inferred Petitioner was guilty of trafficking merely because he exercised his right to remain silent after his arrest.

Respectfully, this Court should grant certiorari, reverse the PCR judge's findings that counsel was not deficient and Petitioner was not prejudiced, and ultimately grant Petitioner a new trial.

CONCLUSION

Petitioner respectfully requests this Court grant the petition for writ of certiorari and consider Petitioner's belated direct appeal.

Respectfully Submitted,



Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER

This 26th day of March, 2020.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Florence County

Honorable William H. Seals, Circuit Court Judge

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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 Briana L. Schill, 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 Robert Jackson, #138725, at Lee Correctional Institution, 990 Wisacky Highway, Bishopville, SC 29010, this 26th day of March, 2020.

Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 26th day of March, 2020.

_____ (L.S)
Notary Public for South Carolina
My Commission Expires: March 10, 2025.