STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO SPARTANBURG COUNTY
Court of Common Pleas

The Honorable Roger L. Couch, Trial Judge
The Honorable Thomas A. Russo, PCR Judge

RECEIVED
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S.C. SUPREME COURT

Appellate Case No. 2019-001319

TAIWAN J. HARDY.....Petitioner,

v.

STATE OF SOUTH CAROLINA.....Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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Petitioner's Statement of Issue on Certiorari

Whether the post-conviction relief 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?

Respondent's Counterstatement of Issue on Certiorari

Whether the post-conviction relief court properly found Petitioner failed to establish constitutionally ineffective assistance of counsel for failing to object to an allegedly prejudicial comment by the State's witness because Counsel utilized strategic judgement when refusing to object at trial and Petitioner was not prejudiced as a result?

STATEMENT OF THE CASE

Taiwan J. Hardy (hereafter "Petitioner") is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Spartanburg County Clerk of Court. During its December 2014 term, the Spartanburg County Grand Jury indicted Petitioner for Distribution of Cocaine Base (2014-GS-42-5877).[1] The factual basis of the indictment was that on March 10, 2014, a confidential informant purchased twenty dollars crack cocaine from Petitioner. (App. 52, 66). The informant was equipped with video and audio equipment to record the transaction with. (App. 63). Petitioner was represented by William Bean, Esquire (hereafter "Counsel"). Assistant Solicitors Hunter Blouin, Esquire, and Edward Hunter, Esquire, from the Seventh Circuit Solicitor's Office, represented the State. On July 22-23, 2015, the case proceeded to trial before the Honorable Roger L. Couch. On July 23, 2015, the jury found Petitioner guilty of the crime charged. Judge Couch sentenced Petitioner to life without parole.

At trial, the judge heard potential testimony from the confidential informant who bought drugs from Petitioner during the incident in question. (App. 58-59). Within the line of questioning initially conducted outside the presence of the jury, the witness testified that she knew Petitioner of ten or eleven years and met him because she used to do drugs with Petitioner. (App. 59-60). The witness testified the man she used to do drugs with was in the courtroom and is the person she bought drugs from during the incident in question. (App. 60). Counsel stated he did not object to this line of questioning. (App. 61). The jury was called back in the courtroom and the State pursued the same line of reasoning in their presence. (App. 61-62).

On cross-examination, Counsel confirmed that the informant is a crack cocaine addict

[1] Petitioner was also indicted by the Spartanburg County Grand Jury in October 2003 term for Trafficking in Crack Cocaine (2003-GS-42-3498) and in September 2011 was indicted for two counts of Distribution of Methamphetamine or Cocaine Base (2011-GS-42-5541 and -5542).

and has been for thirteen years. (App. 75). The witness testified that she has never bought or possessed drugs for something other than personal use or assisting law enforcement. (App. 76). The witness testified she assisted law enforcement or "work off charges". (App. 76-80). On re-direct examination, the witness testified she was clean for the past ninety-eight days, that she showed up to testify sober, and did not cooperate with law enforcement this time to work off charges or for money. (App. 90-91).

Petitioner filed a timely notice of appeal on July 31, 2015, that was perfected by Wanda H. Carter, Esquire, who filed a brief pursuant to *Anders v. California*, 386 U.S. 738 (1967), on March 30, 2016 and moved to be relieved as counsel. The following issue was addressed on appeal:

> The trial judge erred in coercing appellant in effect to withdraw defense exhibit #1, which was a prior controlled drug purchase agreement signed by the confidential informant used in this case, in order to secure the last closing argument to the jury because this exhibit was corroborative evidence that established the unreliableness of this informant deemed critical to appellant's defense.

The South Carolina Court of Appeals dismissed Applicant's appeal by unpublished opinion and granted Counsel's motion to be relieved. *State v. Hardy*, Op. No. 2016-UP-460 (S.C. Ct. App. 2016). The Remittitur was issued on December 2, 2016.

Petitioner filed a Post-Conviction Relief (hereafter "PCR") Application on June 26, 2017. In this application, Petitioner alleged:

1. "Ineffective assistance of trial counsel and appellant counsel."
    a. "Counsel failed to [] investigate."

2. "Due Process violation."
    a. "Failed to supervise informant."

3. "Subject Matter Jurisdiction."
    a. "Court lacked jurisdiction to sentence."

The "Amendment to Application for Post-Conviction Relief" was filed on November 9, 2017. In the amendment, Petitioner, through Counsel, alleged:

1. "Ineffective assistance of counsel," in that:
    a. "Failure to properly prepare and investigate the case."
        i. "Including the failure to investigate and obtain evidence, surveillance video, cell phone records, cell phone video recordings, etc., that would establish a defense in the case."
    b. "Failure to obtain transcripts from court proceedings wherein potential witnesses had given previous testimony or to obtain records relevant to the impeachment of the testimony of "confidential informants" or other witnesses."
    c. "Failure to follow instructions or requests of the applicant."
    d. "Failure to properly present an adequate defense based on the facts and circumstances of the case."
    e. "Failure to properly conduct discovery in the case."
    f. "Failure to properly subpoena and call witnesses and present evidence in the case."
    g. "Failure to raise proper objections during the trial to present and preserve evidentiary issues."
    h. "Making improper stipulations or giving consent on issues during the trial which were adverse to the defense of the case."
    i. "Failure to move for appropriate suppression hearings and properly object to the testimony of witnesses and evidence in a timely manner."
    j. "Failure to properly and effectively cross-examine the State's witnesses."
    k. "Failure to raise and properly argue and preserve record and issues for appeal."
        i. "Failure to make a proffer of evidence when warranted by the circumstances of the case and properly present and preserve issues for appeal."
        ii. "Failure to make and preserve record in cases of conferences at the bench and in chambers."
    l. "Failure of counsel to communicate all plea offers to the Applicant and to adequately discuss same."
        i. "Failure to fully and timely explain the advantages of a guilty plea and the plea offers and the risks of trial."
    m. "Failure to properly discuss the case and advise the Applicant on the applicable law and procedure and facts known or believed to exist."
        i. "Including failure to meet with the applicant adequately and the failure to, in a timely manner, fully review and discuss the discovery material, evidence, law, and procedure so that the applicant would fully understand the charges, consequences and choices, including plea options."
    n. "Failure to fully advise as to the right to testify and the associated

risks."

2. "Discovery Violation," in that:
    a. "Failure of the state, including law enforcement, to provide discoverable information that would have materially aided in the preparation and presentation of the defense as required under Rule 5, Brady, and other authority."

Respondent made its Return on December 29, 2017. The evidentiary hearing occurred on March 7, 2019, before the Honorable Thomas A. Russo. J. Faulkner Wilkes, Esquire was the Petitioner's attorney. Johnny E. James, Jr. of the South Carolina Attorney General's Office represented Respondent.

At the PCR hearing, Petitioner testified that he decided to go to trial because he was unaware of the evidence the State had against him. (App. 240). Petitioner stated there was video evidence available, but the video did not show Petitioner handing the drugs to the confidential informant. (App. 247). Petitioner stated he did not understand why he was charged and did not think there was enough evidence to incriminate him. (App. 248-49). Consequently, he rejected all plea deals and proceeded to trial. (App. 249). Petitioner stated he was never told by Counsel he would likely be convicted. (App. 249-250). Petitioner stated he was not shown video evidence until after he committed to going to trial, but saw photographs showing Petitioner with a bag of crack in hand. (App. 250). Petitioner stated Counsel told Petitioner he had a fifty percent chance of being convicted at trial. (App. 250). Petitioner said he would have pled guilty if he knew video evidence existed of him with a bag of drugs and incriminating audio content. (App. 250-51). Other than the fact that the camera turned for a fraction of a second away from the deal, no other defenses existed that Petitioner was aware of when deciding whether or not to go to trial. (App. 251). Petitioner stated Counsel told him he would die in prison if he turned down the plea offer. (App. 253).

Additionally, Counsel testified that before he was given the State's video, he was provided with several still photographs, one of which involved Petitioner with a bag of cocaine. (App. 259). Additionally, Counsel stated they knew there was a video taken by an informant and there was an inference that the informant bought or received cocaine from Petitioner. (App. 259). Counsel testified he told Petitioner multiple times that, in his opinion, if the case proceeded to trial be would be convicted and he should plead guilty because, otherwise, he would spend the rest of his life in prison. (App. 259-60). At trial, the informant testified that she knew Petitioner because they did drugs together. (App. 264). Counsel initially objected to testimony, but the State was still able to admit it at trial. (App. 264). Once this testimony came out at trial, Counsel did not renew his objection as a part of a strategic decision. (App. 264). When asked, Counsel stated that he chose not to renew the objection because there was a video involving Petitioner possessing drugs, testimony to that effect and he thought it would be beneficial to Petitioner to allow that testimony in because he thought evidence of the informant's drug use would negatively impact her credibility. (App. 265).

On July 12, 2019, the Court denied and dismissed Petitioner's PCR application. Petitioner appeals from the denial of relief based upon the allegation that Counsel was ineffective for failure to object to a statement made by one of the State's witnesses.

STANDARD OF REVIEW

The standard of review for PCR matters depends on the specific issues before the appellate court. *Smalls v. State*, 422 S.C. 174, 810 S.E.2d 836 (2018). Overall, reviewing courts "give[] great deference to the post-conviction relief court's findings of fact and conclusions of law", *Dempsey v. State*, 363 S.C. 365, 368, 610 S.E.2d 812, 814 (2005), with the petitioner shouldering the burden of proof. Rule 71.1(e), SCRCP; *Caprood v. State*, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000); *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985). Further, a PCR court's findings will be upheld if there is "any evidence of probative value sufficient to support them." *Id.* Reversal of the lower court's findings occurs when there is no probative evidence to support the initial finding. *Pierce v. State,* 338 S.C. 139, 526 S.E.2d 222 (2000). Courts must conduct a de novo review when evaluating questions of law and are required to reverse the initial holding when the decision is controlled by an error of law. *Smalls*, 422 S.C. at 180-81, 810 S.E.2d at 839-40; *Goins v. State*, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

ARGUMENT

The post-conviction relief court properly found Petitioner failed to establish constitutionally ineffective assistance of counsel for failing to object to an allegedly prejudicial comment by the State's witness because Counsel utilized strategic judgement when refusing to object at trial and Petitioner was not prejudiced as a result.

On appeal, Petitioner argues the PCR court erred in denying him relief because Counsel was ineffective for failure to object to a prejudicial comment made by one of the State's witnesses. Specifically, Petitioner argues that the witness's testimony that he and Petitioner "used to do drugs together" required Petitioner to either testify to counter the narrative, but open himself up to questioning, or stay silent and allow the testimony to be used against him without a response. This strategic decision allegedly led to Petitioner being found guilty, despite the already overwhelming evidence of guilt. However, the PCR court properly rejected this argument, finding that Counsel had a valid strategy behind his decision not to object and Petitioner was not prejudiced by Counsel's strategic decision not to object. These findings are not controlled by an error of law and are supported by probative evidence in the record. Consequently, this Court should deny certiorari.

In a PCR action, the petitioner bears the burden of proving allegations contained in the application. *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985). When a petitioner asserts ineffective assistance of counsel as a ground for relief, the petitioner must show "counsel's conduct so undermined the proper functioning of the adversarial process that [it] cannot be relied upon as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 686 (1984); *Butler*, 286 S.C. at 442, 334 S.E.2d at 814. Ineffective assistance of counsel is governed by the Sixth Amendment, as explained by the United States Supreme Court in *Strickland v. Washington*.

Pursuant to the first prong of the *Strickland* analysis, the petitioner must prove defense

counsel's performance was deficient. *Id*. at 686; *Cherry v. State*, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). To show deficiency, the petitioner must prove by a preponderance of the evidence that counsel's actions fell outside of the zone of "reasonableness under prevailing professional norms." *Strickland*, 466 U.S. at 688. S*ee also* Rule 71.1(e), SCRCP ("The applicant has the burden of establishing his entitlement to relief by a preponderance of the evidence."). Reasonableness is determined by the "variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how to best represent a criminal defendant," and the scope of the reasonableness inquiry is limited to facts counsel had available at the time of representation. *Id.* at 689. "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Yarborough v. Gentry*, 540 U.S. 1, 5 (2003) (citing *Strickland*, 466 U.S. at 690). Judicial scrutiny of counsel's performance remains highly deferential towards defense counsel with a strong presumption that counsel acted competently, because competent representation may be executed in virtually "countless" ways. *Strickland*, 466 U.S. at 688-89.

Second, counsel's deficient performance must have prejudiced the petitioner so 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. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. The court makes this determination based upon the totality of the evidence. *Id.* at 695. Realistically, this matters "'only in the rarest case'" because "[t]he likelihood of a different result must be substantial, not just conceivable." *Harrington v. Richter*, 562 U.S. 86, 111-12 (2011) (quoting *Strickland*, 466 U.S. at 697).

These standards do not establish mechanical rules; the ultimate focus of inquiry must be

on the fundamental fairness of the proceeding whose result is being challenged. *Strickland*, 466 U.S. at 696. A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies; if it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. *Id.* at 696-97.

Whether failure to object to a line of questioning constitutes deficient performance generally hinges on whether or not a valid trial strategy was utilized. *See Thompson v. State*, 423 S.C. 235, 241, 814 S.E.2d 487, 490 (2018) (finding Counsel was deficient because the failure to object was not related to an otherwise valid trial strategy); *Stokes v. State*, 308 S.C. 546, 548, 419 S.E.2d 778, 779 (1992) (where "counsel articulates a valid reason for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel").

Here, Petitioner contends Counsel was ineffective for failure to object to a statement made by one of the State's witnesses. Specifically, Counsel failed to object when the confidential informant, Brandy Cannon, testified she knew Petitioner for ten or eleven years and they "used to do drugs together." (App. 59-62).

Counsel did not act deficiently. At the evidentiary hearing, Counsel stated that he used his strategic judgement at trial, stating he was valuing the damage to the confidential informant's credibility over the potential damage to his client. (App. 265). Counsel stated that he failed to renew the objection because there was a video involving Petitioner possessing drugs, testimony to that effect and he thought it would be beneficial to Petitioner to allow that testimony in because he thought evidence of the informant's drug use would negatively impact her credibility. (App. 265).

This strategy was executed at trial. During cross-examination of the witness, Counsel

confirmed that the informant is a crack cocaine addict and has been for thirteen years. (App. 75). Additionally, the witness testified that she has never bought or possessed drugs for something other than personal use or assisting law enforcement. (App. 76). Further, the witness testified she assisted law enforcement or "work off charges". (App. 76-80). Thus, a valid trial strategy was executed at trial and, thus, Counsel was not deficient.

Even if Counsel was deficient, Petitioner was not prejudiced by Counsel's alleged inaction. Photograph and video evidence existed involving Petitioner holding a bag of cocaine in his hand. (App. 63, 259). Other than the fact that the camera turned for a fraction of a second away from the deal, no other defenses existed that Petitioner was aware of when deciding whether or not to go to trial. (App. 251). After becoming aware of the video and photograph evidence, Counsel testified he told Petitioner multiple times that, in his opinion, he would likely be convicted at trial, based upon the video and photograph evidence that would be admitted to trial. (App. 63, 259-60). Applicant confirmed he was told this by Counsel. (App. 253). Thus, even if Counsel was deficient, Petitioner was not prejudiced by this deficiency because the evidence against Petitioner was overwhelming, no viable defense existed, and the probability of conviction was all but certain. Objecting to this line of questioning would not have made a difference concerning the trial's outcome. Consequently, Petitioner's claim is without merit and the appeal should be denied.

CONCLUSION

For the reasons stated above, this court should deny certiorari and affirm the PCR Court's findings that Petitioner had effective assistance of counsel. However, if this Court decides to grant the petition of writ of certiorari, Respondent respectfully requests permission to more fully brief the issues herein.

Respectfully submitted,

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