

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Beaufort County

Jennifer B. McCoy, Circuit Court Judge

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Sep 02 2020

S.C. SUPREME COURT

OSIEL NARCISO GOMEZ,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2020-000202

JOHNSON PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

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STATEMENT

On August 25, 2005, a Beaufort County Grand Jury indicted Petitioner for the offense of trafficking cocaine, one hundred grams or more. R. 908 – 909; R. 60, ll. 14-18. Appellant was tried before the Honorable Howard P. King and a jury, from January 16 – 18, 2007. R. 1. Petitioner was represented by Donald Colongeli (trial counsel). R. 1. The State was represented by Kimberly Smith and Angela Tanner. R. 1.

On August 3, 2005, members of the Beaufort County Sheriff's Office, drug task force, began surveilling Petitioner for the first time and saw him come and go from his hotel to several auto parts stores and a gas station. Officer Florencio claimed he was told that another officer, Woodward, witnessed Petitioner put a t-shirt filled with something in the back of his car and drive off. R. 185, ll. 5-16; R. 198, l. 4 – 209, l. 11. However, Woodward did not testify at Petitioner's trial.

Florencio radioed yet another officer, Cobb, and said he believed Petitioner's tag was suspended and Petitioner did not have a driver's license. Cobb verified through dispatch that the tag on the car was suspended and pulled Petitioner over. R. 185, l. 17 – 186, l. 14; R. 128, l. 20 – 130, l. 13. The car did not belong to Petitioner but to a relative. R. 133, ll. 13-25; R. 218, ll. 1-10. Cobb asked Petitioner if he had a driver's license and Petitioner said no. Cobb arrested Petitioner for driving without a license and Petitioner was taken to the Sheriff's Office. R. 130, l. 9 – 131, l. 10.

Officers then had a trained dog sniff the car and the dog indicated the presence of drugs. R. 131, ll. 10-12; R. 150, l. 20 – 152, l. 15. Florencio arrived and searched the car, finding cocaine near the console and inside a t-shirt in a laundry basket in the rear cargo area of the car.

R. 186, l. 15 – 188, l. 5. Drug analysis would show that Florencio seized several bags that contained cocaine with a total weight of one hundred and eleven grams. R. 266, ll. 9-11.

Florencio met with Petitioner at the Sheriff's Office and provided him with *Miranda*¹ warnings in Spanish. R. 192, l. 16 – 193, l. 11. Florencio did not record the interrogation but claimed that upon questioning Petitioner about the cocaine, Petitioner admitted he had bought four ounces of cocaine. Florencio claimed that when he asked Petitioner from whom he bought the cocaine, Petitioner said he did not want to answer any more questions and he wanted a lawyer. R. 194, ll. 14-25; R. 202, ll. 17-19. Trial counsel did not object to this testimony by Florencio that Petitioner invoked his rights to silence and counsel.

Petitioner was convicted as indicted and he was sentenced to twenty-five years in prison. R. 325, ll. 5-9; R. 332, ll. 16-19; R. 910. Trial counsel stated on the record that he would file and serve a notice of intent to appeal Petitioner's conviction and sentence, but he did not timely do so. R. 331, ll. 2-4

This case had an atypical procedural history. On August 1, 2007, Petitioner filed an application for post-conviction relief (PCR). R. 336 – 344. The State made its return. R. 345 – 348. On August 26, 2008, a consent order granting Petitioner a belated direct appeal pursuant to *White v. State*, 263 S.C. 110, 208 S.E.2d 35 (1974), was issued by the Honorable J. Cordell Maddox, Jr. R. 349 – 350. The wording of the order would prove problematic, because it stated that Petitioner waived his right to raise any other PCR issues. R. 350. Petitioner appealed the consent order. R. 351 – 357.

¹ *Miranda v. Arizona*, 384 U.S. 436, 444 (1966).

Petitioner eventually did receive belated direct appellate review pursuant to *White v. State, supra*, and this Court considered the issue of whether the trial court erred when it failed to suppress evidence obtained from the traffic stop of Petitioner.² R. 451 – 461. *Narciso v. State*, 397 S.C. 24, 723 S.E.2d 369 (2012); R. 451 – 461.

In that belated direct appeal, this Court found that police officers did violate Petitioner’s Fourth Amendment rights when they searched his car after he had been arrested for driving without a license. However, this Court held the exclusionary rule did not apply to preclude the admission of drug evidence from the car. This Court also found remand was required to determine whether Petitioner’s waiver of his right to raise any other PCR allegations was made knowingly and voluntarily. R. 451 – 461.

On February 20, 2014, a remand hearing was held before the Honorable James R. Barber, III. R. 463. Carol and Harley Ruff represented Petitioner. R. 463. Ashleigh Wilson represented the State. R. 463. The remand court found that Petitioner was a native Spanish speaker from

² Both Petitioner’s PCR counsel at his 2019 PCR hearing and the PCR court in its 2019 order of dismissal appeared to be under the mistaken impression that Petitioner never received direct appellate review. However, Petitioner did receive belated direct appellate review pursuant to *White v. State* by this Court. R. 451 – 461. The procedural history was as follows. On February 17, 2009, Petitioner filed a brief of appellant pursuant to *White v. State*. *See* R. 374. On June 22, 2009, the State filed a motion to strike. R. 373 – 377. On July 9, 2009, this Court granted the motion to strike. R. 378 – 379. On July 14, 2009, Petitioner filed an amended brief of appellant pursuant to *White v. State* and an amended petition for writ of certiorari. R. 358 – 372; R. 400 – 407. On November 30, 2009, the State filed a brief of respondent pursuant to *White v. State* and a return to petition for writ of certiorari. R. 380 – 399; R. 408 – 417. On December 16, 2010, this Court issued an order in which granted the petition for writ of certiorari and proceeded with further review of the direct appeal issue. R. 418 – 419. On March 21, 2011, petitioner filed a brief of petitioner. *See* R. 422. On July 19, 2011, the State filed a motion to strike and Petitioner’s counsel responded through letter. R. 420 – 426; R. 427. On August 4, 2011, this Court granted the motion to strike. R. 429 – 430. On August 11, 2011, Petitioner filed an amended brief of petitioner. R. 431 – 439. On September 9, 2011, the State filed a brief of respondent. R. 440 – 450. On March 14, 2012, this Court issued an opinion affirming in part and remanding in part. *Narciso v. State*, 397 S.C. 24, 723 S.E.2d 369 (2012); R. 451 – 461.

Mexico who could not read the consent order (which was written in English) and found that no one had read or translated the consent order to Petitioner in Spanish. R. 509. Therefore, the remand court found that Petitioner's purported waiver of his PCR rights in the consent order was not knowingly, voluntarily, and intelligently made and granted his request to bring a PCR application.³ R. 510.

On September 9, 2015, Petitioner filed this application for PCR. R. 554 – 590. On September 28, 2018, the State filed a return and partial motion to dismiss, to which it attached a large number of records. R. 592 – 823. On March 31, 2019, Petitioner filed an amended PCR application. R. 824 – 826. A hearing was held on April 28, 2019 before the Honorable Jennifer McCoy. R. 827. Petitioner was represented by James Falk (PCR counsel) and the State was represented by Benjamin Limbaugh. R. 827. The PCR court heard testimony from Petitioner and from trial counsel. R. 828.

PCR counsel asked trial counsel, "Did you consider whether or not you should have objected to Sgt. Florencio's statement about him wanting to exercise his right to counsel and to exercise his *Miranda* rights?" R. 859, ll. 13-16. Trial counsel said he thought he had objected to Florencio's testimony but "if the record reflects that I did not make any issue as to that, I stand to be corrected." R. 859, ll. 17-23.

On January 31, 2020, the PCR court issued an order of dismissal in which it addressed Petitioner's PCR claims, including his claim that trial counsel was deficient for "[f]ailure to object to Sergeant Florencio's testimony concerning Applicant's invocation of his right to silence

³ The State appealed the remand court's decision and filed a petition for writ of certiorari. R. 507; R. 513 – 524. Petitioner made a return. R. 525 – 551. This Court denied the petition for certiorari in an order dated June 17, 2015 and remittitur was issued on July 6, 2015. R. 552 – 553.

and his right to an attorney.” R. 902 – 906. In concluding that Petitioner was not entitled to relief based on this allegation of ineffective assistance of counsel, the PCR court’s order of dismissal cited, *inter alia*, *Griffin v. California*, 380 U.S. 609 (1965); *Doyle v. Ohio*, 426 U.S. 610 (1976); *Edmond v. State*, 341 S.C. 340, 534 S.E.2d 682 (2000); *State v. Truesdale*, 285 S.C. 13 (1984); and *State v. Arther*, 290 S.C. 291, 350 S.E.2d 187 (1986). The PCR court did not make a finding as to whether trial counsel’s performance was deficient, but it did find that Petitioner was not prejudiced. R. 902 – 906. The order of dismissal stated,

First, the reference to Applicant’s right to remain silent appears to have been a single reference. Second the reference does not appear to have been alluded to at any other point in the trial. Third, the prosecutor made no efforts to tie Applicant’s exercise of his rights to his exculpatory story as there was no real exculpatory story put forth. Fourth, Applicant did not present any, or at least not an apparent, exculpatory story. Fifth, the evidence against Applicant was overwhelming considering his voluntary admission to law enforcement about purchasing four ounces of cocaine and the drugs were found in his vehicle. Therefore, Applicant has failed to show how counsel’s failure to object to the testimony concerning Applicant’s invocation of his rights amounted to sufficient prejudice to warrant reversal. R. 905 – 906.

This petition for writ of certiorari follows.

ARGUMENT

The PCR court erred where it found counsel provided effective representation where counsel failed to object to Officer Florencio's testimony that Petitioner said he did not want to answer any more questions and he wanted a lawyer, since Florencio's testimony violated Petitioner's rights under the Fifth, Sixth, and Fourteenth Amendments.

Petitioner's rights to remain silent and have the assistance of counsel were constitutionally guaranteed and Florencio's comment on Petitioner's exercise of those rights was improper. Trial counsel was ineffective for failing to object. U.S. CONST. amend. V; U.S. CONST. amend. VI; U.S. CONST. amend. XIV. It was undisputed that Petitioner had been provided with *Miranda* warnings⁴ when he invoked his rights to silence and counsel. Silence in the wake of *Miranda* warnings may be nothing more than the accused's exercise of these *Miranda* rights. *Doyle v. Ohio*, 426 U.S. 610, 617 (1976); *see also Griffin v. California*, 380 U.S. 609, 615 (1965).

"Disclosure to the jury of an accused's silence at any stage of an interrogation violates his constitutional protection against self-incrimination." *State v. Arther*, 290 S.C. 291, 296, 350 S.E.2d 187, 190 (1986), citing *Doyle v. Ohio*, *supra*. In *Edmond v. State*, 341 S.C. 340, 343, 534 S.E.2d 682, 684 (2000), a PCR case, the police testified that Edmond made a statement following his arrest, but that the day after making the statement, Edmond invoked his rights to counsel and to remain silent. The solicitor then commented on Edmond's invocation of his rights during her closing argument. *Id.* at 343-44, 534 S.E.2d at 684. Edmond's attorney failed to object to either the officer's testimony or the solicitor's closing argument. *Id.* at 344, 534 S.E.2d at 684. This Court reversed

⁴ *Miranda* held that procedural safeguards must ensure an accused is informed "that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed." *Miranda v. Arizona*, 384 U.S. 436, 444 (1966).

Edmond's conviction, finding trial counsel's performance was deficient for failing to object. *Id.* at 347, 534 S.E.2d at 686. Similarly, here, trial counsel failed to object to the officer's testimony that Petitioner invoked his rights and this Court should reverse.

The Fourth Circuit Court of Appeals has observed that “[b]ecause the nature of a *Doyle* error is so egregious and so inherently prejudicial, reversal is the norm rather than the exception.” *Williams v. Zahradnick*, 632 F.2d 353, 363 (4th Cir. 1980). Had trial counsel objected to the offending testimony by Florencio and preserved the issue for direct appeal, Petitioner could have received a new trial.

Officer Florencio improperly commented on Petitioner's invocation of his Fifth and Sixth Amendment rights. Trial counsel did not object and he gave no strategic explanation for this failure. At the PCR hearing, he said he thought that he had objected to the testimony. Counsel's performance here was deficient. The Sixth Amendment to the United States Constitution guarantees an accused the right to effective assistance of counsel. U.S. CONST. amend. VI; *Strickland v. Washington*, 466 U.S. 668 (1984). The United States Supreme Court has established a two-pronged test to evaluate allegations of ineffective assistance of counsel. A petitioner must prove “that counsel's performance was deficient” and fell below reasonable professional norms, and the deficient performance prejudiced the petitioner. *Id.* at 687.

Doyle violations are treated with a different prejudice analysis than other PCR cases. *Edmond* 341 S.C. at 348, 534 S.E.2d at 686-87. A review of the entire record must demonstrate beyond a reasonable doubt that the error was harmless. *Id.* “To be harmless, the record must establish the reference to the defendant's right to silence was a single reference, which was not repeated or alluded to; the solicitor did not tie the defendant's silence directly to his exculpatory

story; the exculpatory story was totally implausible; and the evidence of guilt was overwhelming.”
Id. See State v. Truesdale, 285 S.C. 13, 18–19, 328 S.E.2d 53, 56 (1984).

Here, Petitioner was prejudiced because evidence of guilt was not overwhelming. This was a constructive possession case in which a small quantity of cocaine was found in between the driver’s seat and the console, and a large quantity of cocaine was found in a shirt within a laundry basket in the rear cargo area of a car driven by Petitioner. Neither were in plain view. It was undisputed that the car did not belong to Petitioner and belonged instead to a relative.

The officer who allegedly saw Petitioner put a t-shirt into the back of the car did not testify at trial and the laundry was not otherwise shown to belong to Petitioner. Although Florencio claimed that Petitioner admitted to buying four ounces of cocaine, this alleged confession was not video or audio-taped, despite the abundant existence of such technology in 2005. Moreover, although the State repeatedly referred to an “ongoing investigation” of Petitioner, Florencio admitted the investigation of Petitioner only commenced the day of his arrest.

Using the factors from *Edmond*, Petitioner therefore was prejudiced by trial counsel’s deficient performance. *Strickland*, 466 U.S. at 687; *Edmond*, 341 S.C. at 348, 534 S.E.2d at 686-87.

CONCLUSION

Based on the foregoing argument, petitioner respectfully requests that a writ of certiorari be granted to allow full briefing on this issue.

s/ Joanna K. Delany

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Appellate Defender

ATTORNEY FOR PETITIONER

This 2nd day of September, 2020.

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Counsel for Osiel Narciso Gomez states:

1. She is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent petitioner.
2. She has reviewed the record of petitioner's post-conviction relief hearing before Judge Jennifer B. McCoy, which was held on August 28, 2019, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. She has, pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), briefed an arguable legal issue which arose during the post-conviction relief process. Therefore, counsel requests that the Court relieve her as counsel for Osiel Narciso Gomez.

Respectfully Submitted,

s/ Joanna K. Delany

Joanna K. Delany
Appellate Defender
ATTORNEY FOR PETITIONER

This 2nd day of September, 2020.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of her ability this Johnson Petition for Writ of Certiorari complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled “Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings.”

s/ Joanna K. Delany

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