STATE OF SOUTH CAROLINA
IN COURT OF APPEALS

ON PETITION FOR A WRIT OF CERTIORARI TO GREENWOOD COUNTY
Court of Common Pleas

The Honorable J. Mark Hayes, II, Post-Conviction Relief Judge
The Honorable Donald B. Hocker, Trial Judge

Appellate Case No. 2018-001004

JOVAN MITCHELL, ...Petitioner,

v.

STATE OF SOUTH CAROLINA, ...Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED ON CERTIORARI

Petitioner's Statement of Issue Presented

Did the PCR court err by dismissing Petitioner's ineffective assistance of counsel claim, in which Petitioner alleged Counsel failed to object to the trial court charging the jury on the charge of grand larceny $1,000 to $5,000?

Respondent's Counterstatement of Issue Presented

The post-conviction relief court properly found Petitioner failed to establish counsel was constitutionally ineffective for failing to object to the trial court charging the jury on the lesser-included offense of grand larceny between one-thousand to five-thousand dollars, where the jury charge was proper based on the evidence presented, and accordingly, Petitioner can establish neither deficiency of counsel nor prejudice.

STATEMENT OF THE CASE

During its September 2013 term, the Greenwood County Grand Jury indicted Petitioner Jovan Mitchell for Grand Larceny (2013-GS-24-1568). App. 339. On October 1, 2013, Petitioner proceeded to a jury trial before the Honorable Donald B. Hocker. App. 1. Carson Henderson, Esquire, represented Applicant. Assistant Solicitors Shannon S. Odom, Cam Morrow of the Eighth Circuit Solicitor's Office prosecuted the case.

Judge Hocker charged the jury with grand larceny of a value greater than $5,000, grand larceny in the amount of $1,000 to $5,000, and grand larceny in the amount under $1,000. App. 206. L. 14-23. The jury found Petitioner guilty of grand larceny in the amount of $1,000 to $5,000. App. 212. L. 14-16. Judge Hocker sentenced Petitioner to five years imprisonment, suspended upon the service of eighteen months, and two years of probation. App. 238. L. 2-6. Additionally, Judge Hocker ordered restitution in the amount of $1,000. App. 238. L. 6-8.

Petitioner filed a timely notice of appeal and was represented on appeal by Appellate Defenders Carmen V. Ganjehsani and Laura R. Baer. On appeal, Petitioner argued the trial court erred in denying a directed verdict because Petitioner stole metal from real property owned by the victim and the metal belonged to the company owned by the victim, therefore the evidence was insufficient for the jury to determine that Petitioner stole the metal from another. Petitioner additionally argued there was insufficient evidence to support the verdict that the property taken was worth between $1,000 and $5,000. Petitioner finally argued the trial court erred by not properly instructing the jury on the defense of mistake of fact.

Petitioner's conviction was affirmed by the South Carolina Court of Appeals. State v. Jovan Mitchell, Op. No. 2015-UP-543 (S.C. Ct. App. Nov. 25, 2015). The Court of Appeals found there was sufficient evidence to determine that Petitioner stole the metal from another and that his

request for a directed verdict was properly denied. The Court of Appeals also found trial counsel failed to preserve the issue of the courts charge to the jury because he failed to make a timely objection. Finally, the Court of Appeals found the trial court did not err in declining to give Petitioner's full requested jury charge because the court's instruction as a whole sufficiently charged the jury of the law of mistake of fact. The case was remitted back to the circuit court on December 21, 2015.

Petitioner commenced the underlying PCR action on December 12, 2016. App. 241-247. Respondent submitted its return requesting an evidentiary hearing on April 10, 2017. App. 248-251. Petitioner responded with an amended PCR application on September 13, 2017. App. 252-255. An evidentiary hearing convened on February 26, 2018, before the Honorable J. Mark Hayes, II. App. 256-320. Petitioner was present and represented by Ashley McMahan, Esquire. Assistant Attorney General Justin Hunter represented Respondent. App. 256. On April, 25, 2018, the PCR court issued an order denying relief and dismissing the action with prejudice. App. 321-337.

Petitioner filed a timely notice of appeal, and appellate counsel filed a Johnson[1] Petition for Writ of Certiorari and petition to be relieved as counsel on January 22, 2019. The petition to be relieved was denied, and the South Carolina Supreme Court ordered that the post-conviction relief appeal be transferred to the South Carolina Court of Appeal on March 14, 2019. The Court of Appeals requested the submission of a Petition for Writ of Certiorari from Petitioner, and a Return to the Petition for Writ of Certiorari from Respondent.

[1] Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988).

STATEMENT OF THE FACTS

Stan Gaines testified he ran a machine shop for a living named Synehi Castings. App. 43 L. 24- App. 44 L. 2. Gaines testified Synehi Casting owned two storage facilities to store their iron, one located at 310 Ginn Street and one located at 109 Smythe Avenue, both in Greenwood County. App. 44 L. 8-16. Gaines described the Smythe Avenue property as a two acre lot surrounded by chain link fences, with locked gates and a no trespassing sign on the property. App. 45 L. 21- App. 46 L. 5.

Gaines testified on March 24, 2010, at around 10:00 a.m., he encountered Petitioner on the property at Smythe Avenue. App. 45 L. 7-12. Gaines noticed the lock had been cut and a car and a trailer in the middle of his property with Petitioner loading iron onto the trailer. App. 45 L. 15-20.

Gaines testified the metal taken from the property was a combination of regular cast iron parts, along with a valuable type of metal called niresist. App. 49 L. 15-19. Gaines stated over 7,000 pounds of metal was taken from his warehouse, and the value of the metal taken by Petitioner over the period of March 20 through March 24, 2010 was over $22,000. App. 50 L. 11-25, App 51, L. 22-24. Gaines testified the actual value of the metal is much higher than someone would receive selling it to a scrap yard because scrap yards do not have a spectrometer or other resources to tell what type of metal it is. Gaines testified 5,069 pounds of the metal taken was niresist, with a value around $20,000. App. 51 L. 25-App. 52 L. 5. The remainder of the cast iron metal had a value of 84 cents a pound. App. 52 L. 8-10.

Gaines testified he did not know how many pounds of metal Petitioner was actually loading on his trailer on March 24, 2010, because Petitioner put the metal back on the property after the

officers arrived. However, Gaines was able to confirm Petitioner was loading additional metal onto his trailer on March 24, 2010. App. 52 L. 20- App. 53 L. 4.

On cross-examination, Gaines admitted the incident report did not include any mention of any locks being cut. App. 54 L. 12-16. Gaines introduced a document he provided to the State where he valued the combination of niresist and scrap iron at $22,584.28. App. 75 L. 6-17; Defense Ex. 1.

Officer Matt Blackwell of the Greenwood City Police Department received a call about an alleged larceny in progress at Smythe Avenue on March 24, 2010. App. 95 L.14-22. When Officer Blackwell arrived, Petitioner and Stan Gaines were at the scene. App. 95 L. 23- App. 96 L. 3. Officer Blackwell testified when he spoke with Petitioner, Petitioner admitted he was on the property scrapping metal and had been scrapping metal from this property for several weeks. App. 97 L. 9-16. Officer Blackwell testified he did not take any video or any photographs of the scene. App. 100 L. 12- App. 101 L. 18. Officer Blackwell also testified he did not inventory the metal on Petitioner's trailer when he arrived at the scene. App. 107 L. 20-22. Petitioner eventually admitted he did not have permission to be on the property or to take scrap metal. App. 127 L. 25- App. 128 L. 3.

Virginia Calvert worked at Harvley's Scrap Metal as the office manager. App. 109 L. 13, 22. She testified in March 2010, Harvley's recorded purchases of scrap metal on hand tickets. A vehicle bringing scrap metal to Harvley's would pull on a scale which would register the total weight of the vehicle. The driver would then unload the metal and bring the vehicle back to the scales to be weighed. Harvley's would subtract the empty weight from the full weight to determine had much metal the driver had sold. All scrap metal purchased by Harvley's was done by weight. App. 110 L. 4-22. Calvert testified that Harvley's did have a spectrometer on site to determine the

types of metal, but it was only used for odd specialty metals or certain grades of aluminum of stainless steel. The spectrometer was not used on general scrap steel. App. 110 L. 23- App. 111 L. 3.

When Harvley's purchased the scrap metal, it would make a copy of the driver's photo ID to include on the ticket. The ticket would also show the weight of metal sold and the price paid to the driver by Harvley's. App. 111 L. 7-18. Calvert testified as to the following scrap metal sold by Petitioner to Harvley's:

1. 1,000 pounds of metal sold on March 22, 201 0 for $90.00;
2. 700 pounds of metal sold on March 22, 2010 for $63.00;
3. 4,000 pounds of metal sold on March 23, 2010 for $360.00;
4. 240 pounds of metal sold on March 23, 2010 for $21 .60;
5. 3,000 pounds of metal sold on March 23, 201 0 for $277.20; and
6. 1,800 pounds of metal sold on March 24, 2010 for $162.00.

App. 111 L. 25- App. 115 L. 20; State's Exs. 8-13.

The total Harvley's paid Petitioner for scrap metal he sold from March 22-24, 2010 was $973.80.

Virginia Calvert testified Harvley's owned a barometer that could scan metal and identify the chemical makeup of the metal. App. 118 L. 10-16. Calvert testified the tickets indicate Petitioner only sold scrap steel and not aluminum, copper, tin or iron, and that if any other metal had been indicated there would have been a separate ticket for that metal. App. 119 L. 2- App. 120 L. 3. Calvert also said that if anything suspicious came through the yard, Danny Harvley would call the police. There were no records indicating that Danny Harvley called the police about Petitioner. App. 120 L. 4-18.

Lieutenant Jeff Crisp testified he was contacted by Officer Blackwell on March 24, 2010, about an incident at the old mill site on Smythe Avenue. When Lieutenant Crisp arrived at the site, he was advised by Officer Blackwell that Petitioner had been seen loading property onto his trailer. App. 126 L. 18-25. Lieutenant Crisp asked Petitioner why he was there taking metal and Petitioner apparently advised Lieutenant Crisp that he had gotten permission from Exit Realty to retrieve the metal. Exit Realty had a sign up on the back side of the property. App. 127 L. 3-8. Lieutenant Crisp said he called Exit Realty but it did not have the property under contract and did not know why an Exit Realty sign was up on the property. App. 127 L. 9-20. When Lieutenant Crisp advised Petitioner that Exit Realty had not given Petitioner permission to be on the property. Petitioner clarified he tried to call Exit Realty but could not get an answer. App. 127 L. 21- App. 128 L. 3.

Lieutenant Crisp stated when he arrived on the scene, Petitioner was inside the fence with his SUV with a trailer attached. The gate was open and the SUV was backed into the property. Lieutenant Crisp said he saw some metal on Petitioner's trailer. Petitioner unloaded the metal at the officers' request. After Petitioner unloaded the property from the trailer, he agreed to go to the police department where he gave a recorded statement. Petitioner's recorded statement was published to the jury. App. 128 L. 9- App. 129 L. 7.

Petitioner gave a statement to police where he said he drive by the site and happened to see the metal on the site. He stated the fence was open so he just went inside. Petitioner tried to call the number on the realtor sign on the property because many times realty companies would tell him that he could take the scrap metal off the properties that they were selling. He thought Exit Realty would have no problem with him removing the scrap metal. Petitioner said he first we to the site on Saturday, March 20 and then went back on Monday, March 22. He sold some scrap metal at Harvley’s on Monday. On Tuesday, March 23, Petitioner said he took two loads from the

site and sold it at Harvley's. He took one load to Harvley's Wednesday, March 24. Petitioner stated the property seemed to be abandoned. He said there was a gate at the top of the hill that was open, so he went in that gate. Petitioner stated another gate on the property was open so he drive through that gate as well. Petitioner did not see any signs indicating the property was private, and Petitioner did not see any signs with the name of the owner on the property. Petitioner thought the metal came from the old mill that was previously located on the property. App. 131 L. 7- App. 133 L. 4.

STANDARD OF REVIEW

The standard of review for post-conviction relief matters depends on the specific issues before the appellate court. Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018). On appellate review, courts give great deference to a post-conviction relief court's findings of fact and will uphold them if there is any evidence in the record to support them. Smalls, 422 S.C. at 179, 810 S.E.2d at 839-40 (citing Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016); Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013); Caprood v. State, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000)). However, pure questions of law will be reviewed *de novo* without deference to the lower court. Id. Appellate courts will reverse the decision of the post-conviction relief court when it is controlled by an error of law. 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 counsel was constitutionally ineffective for failing to object to the trial court charging the jury on the lesser-included offense of grand larceny between one-thousand to five-thousand dollars, where the jury charge was proper based on the evidence presented, and accordingly, Petitioner can establish neither deficiency of counsel nor prejudice.

Petitioner contends the PCR court erred in finding he was not prejudiced by trial counsel's failure to object to a jury instruction on the lesser included offense of grand larceny between one-thousand to five-thousand dollars. Specifically, Petitioner contends the evidence presented at trial only supported a conviction as indicted or for grand larceny of less than a thousand dollars, and accordingly, the jury should not have been charged with and he should not have been convicted of grand larceny between one-thousand to five-thousand dollars. However, the post-conviction relief court properly denied relief, because sufficient evidence was presented to support a jury charge and conviction of grand larceny between one-thousand to five-thousand dollars. Specifically, evidence was presented at trial from which the jury could determine the value of the metal was between one-thousand to five thousand dollars. Accordingly, Petitioner cannot establish any constitutional ineffectiveness of counsel and the post-conviction relief court properly denied relief. This Court should deny certiorari.

The Sixth and Fourteenth Amendments to the United States Constitution guarantee Petitioner, like all other defendants, the right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668 (1984); Taylor v. State, 404 S.C. 350, 359, 745 S.E.2d 97, 101 (2013). In a post-conviction relief action, the applicant bears the burden of proving the allegations by a preponderance of the evidence—a mere allegation of ineffective assistance is not sufficient to warrant granting relief. Rule 71.1(e), SCRCP; Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985).

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove that counsel's performance was deficient. Under this prong, the attorney's performance is measured by its "reasonableness under professional norms." Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625, (1989), (citing Strickland v. Washington, 466 U.S. 668, 690 (1984)). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume, that counsel tendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. at 690. The Applicant must overcome this presumption in order to receive relief. Cherry 300 S.C. at 118.

Second, Counsel's deficient performance must have prejudiced the Applicant such 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. Even if a defendant shows that particular errors of counsel were unreasonable... the defendant must show that they actually had an adverse effect on the defense. Strickland, U.S. at 693. As stated in Strickland "…actual ineffectiveness claims alleging a deficiency in attorney performance are subject to a general requirement that the defendant affirmatively prove prejudice." Strickland, 466 U.S. at 693. An applicant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Strickland, 466 U.S. at 694. Petitioner has not presented evidence that Counsel's performance was prejudicial because the evidence presented in this case was sufficient to support the trial courts jury charge of grand larceny between one-thousand to five-thousand dollars.

The PCR court correctly found any resulting error from trial counsel's failure to object to the jury instruction of grand larceny between one-thousand to five-thousand dollars did not prejudice Petitioner because sufficient evidence supported this jury charge and subsequent conviction. The PCR court stated that because it is a question of fact whether the metal was worth between the amounts claimed by the owner and the amount presented by Petitioner, the trial court correctly instructed the jury on the lesser-included offenses, including the charge of $1,000 to $5,000. App. 336.

The trial court was proper by giving a range of grand larceny charges because there was a genuine dispute of fact in this case regarding the value of the stolen metal and there was evidence to support the jury instruction for each range. The trial court is required to charge a jury on a lesser included offense "if there is any evidence from which it could be inferred the lesser, rather than the greater, offense was committed." Abney v. State, 408 S.C. 41, 45–46, 757 S.E.2d 544, 546 (Ct. App. 2014). The law to be charged to the jury is determined by the evidence presented at trial. State v. Scott, 414 S.C. 482, 487, 779 S.E.2d 529, 531 (2015) (quoting State v. Sams, 410 S.C. 303, 308, 764 S.E.2d 511, 513 (2014)). The trial court is required to charge a jury on a lesser-included offense if there is evidence from which it could be inferred that the defendant committed the lesser, rather than the greater, offense. Id. The evidence presented at trial is such that the jury could find Petitioner was guilty of grand larceny between one-thousand to five-thousand dollars.

In the case at hand, there was a question of fact as to the value of the metal taken by Petitioner. "In cases like this, where the jurors are familiar from personal observation and common knowledge with the value of property stolen, and there is reasonable room for difference of opinion as to the value, they need not accept as true the statements of witnesses, but may bring to their assistance in arriving at the value of the property their own knowledge, drawn from experience

and observation, and reach a different conclusion from that expressed by the witnesses.". Saylor v. Commonwealth, 214 S.W. 826, 826 (Ky. Ct. App. 1919).

Sufficient evidence has been presented to show the metal valued between one-thousand to five-thousand dollars. Evidence was presented that some of the metal was sold as scrap for a total of $973.80 from previous days' thefts and in addition, more metal was already loaded on Petitioner's trailer when the police arrived. The jury, through their own prior experience and common sense are capable of determining the true value of the metal that was stolen. The jury can accept that the value of the metal is higher than the scrap value, but not as high as the value offered by the property owner. The jury may also considered the value of the metal from the scrap tickets, along with the additional value of the metal that was on the Petitioner's trailer when the police arrived and came to the conclusion that the full value of the metal stolen was above one-thousand dollars. Therefore, sufficient evidence was presented in this case to allow the judge to charge the jury on all three levels of grand larceny, and the jury is entitled to make their own determination of the true value of the stolen metal.

Since there was sufficient evidence in this case to allow the jury to determine that the value of the metal stolen exceeded one-thousand dollars, the trial court was correct in charging the jury with the lesser included charge of grand larceny between one-thousand to five-thousand dollars. Since the lesser included charge was properly presented to the jury, and the jury determined the property to be valued above one-thousand dollars Petitioner has failed to show that the inclusion of this lesser included charge prejudiced Petitioner. Therefore Petitioner's counsel was not constitutionally ineffective.

CONCLUSION

For the forgoing reasons, this Court should deny this Petition for a Writ of Certiorari. Should this Court grant the petition, Respondent seeks permission to more fully brief the issues herein.

Respectfully submitted,

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By: s/ Michael Neubauer
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October 26, 2020

RECEIVED
Oct 29 2020
SC Court of Appeals

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PROOF OF SERVICE

Pursuant to the Supreme Court's Order "RE: Operation of the Appellate Courts During the Coronavirus Emergency," dated March 20, 2020, the undersigned hereby certifies a true copy of the Return to Petition for Writ of Certiorari has been served upon opposing counsel by sending to opposing counsel's primary e-mail address as listed in the Attorney Information System (AIS):

David Alexander, Esquire
dalexander@sccid.sc.gov

This 29th day of October, 2020.

s/ Michael J. Neubauer
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ALAN WILSON
ATTORNEY GENERAL

October 29, 2020

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211
(By Electronic Filing Only)

Re: Jovan Mitchell v. State of South Carolina
Appellate Case No. 2018-001004

Dear Ms. Kitchings:

Enclosed please find a copy of the Return to Petition for Writ of Certiorari for filing in the above-referenced post-conviction relief appeal. By copy of this letter, I am serving opposing counsel with this Return.

Sincerely,

s/ Michael J. Neubauer
Michael J. Neubauer
Assistant Attorney General
SC Bar No. 104450

MJN/ks
Enclosures

cc: David Alexander, Esquire (via electronic mail)