

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Certiorari to Charleston County

Honorable Maite Murphy, Circuit Court Judge

DALE GOULD,

RESPONDENT,

V.

STATE OF SOUTH CAROLINA,

PETITIONER.

APPELLATE CASE NO. 2018-000876

BRIEF OF RESPONDENT

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ISSUE PRESENTED

Did the post-conviction relief judge correctly find trial counsel was deficient for failing to object to the trial court's jury instruction that "actual knowledge of the presence of the cocaine is strong evidence of the defendant's intent to control its disposition or use" when our Supreme Court had instructed trial judges to no longer use the "strong evidence" charge, and that Respondent was prejudiced since the erroneous instruction was a comment on the weight of the evidence and negated the mere presence charge, and no witnesses saw Respondent place the drugs on the floor?

STATEMENT OF THE CASE

A Charleston County Grand Jury indicted Respondent in January 2014 for distribution of cocaine. App. 294-295. His case was called to trial on November 19, 2014 before the Honorable Deadra Jefferson, and a jury. App. 1. Assistant Solicitors J. Whit Sowards and Stephanie Linder represented the state, and Melissa Gay represented Respondent. App. 1.

On November 20, 2014, the jury found Respondent guilty as indicted. App. 256, l. 20 – 257, l. 10. He was sentenced to ten years' imprisonment and a fifty thousand dollar fine. App. 280, ll. 6-24.

After his appellate counsel filed a brief pursuant to Anders v. California, 378 U.S. 738 (1967), Respondent moved to withdraw his direct appeal. App. 297-314. The Court of Appeals dismissed the appeal by order filed October 1, 2015. App. 313.

On April 1, 2016, Respondent filed an application for post-conviction relief (PCR). App. 332-350. The state filed a return to this application on June 23, 2016. App. 351-356. With the assistance of counsel, Respondent filed an amended application dated November 27, 2017 raising the claim addressed in this appeal. App. 357-358. An evidentiary hearing was held on January 30, 2018 before the Honorable Maite D. Murphy. Assistant Attorney General Rasheeda Cleveland represented the state, and Rodney Davis represented Respondent. App. 359. By order dated March 29, 2018, the PCR judge granted Respondent a new trial. App. 398-406.

On September 28, 2018, the state filed a petition for a writ of certiorari with the Supreme Court. Respondent filed a return to this petition on February 13, 2019. By order dated February 27, 2019, the Supreme Court transferred this appeal to the Court of Appeals pursuant to Rule 243(l), SCACR. This Court granted the petition for writ of certiorari by order filed September

22, 2020. The state filed a brief of petitioner on October 22, 2020. This brief of respondent follows.

STATEMENT OF FACTS

Taylor Boyd was a student at the College of Charleston who was arrested for being a minor in possession of alcohol. App. 78, l. 8 – 80, l. 4. In an effort to have her charges dismissed, Boyd told law enforcement that she knew someone who was selling illegal narcotics out of Joe Pasta, a restaurant in downtown Charleston, and that she was willing to cooperate with law enforcement. App. 86, l. 16 – 87, l. 1; App. 103, l. 13 – 104, l. 17. Detective Patrick Gill, the case agent, confirmed Boyd’s charges were dismissed in exchange for her cooperation in this case. She was also paid one hundred dollars. App. 103, l. 13 – 104, l. 17.

Boyd, along with an undercover officer, Melanie Fredrick, conducted an undercover “buy operation” for the Charleston City Police Department on October 10, 2013. The two women went to Joe Pasta where Respondent worked as a manager. Frederick was wearing an audio wire and a front facing camera. They sat at the bar and eventually made contact with Respondent. App. 60, l. 4 – 65, l. 24; App. 71, l. 24 – 73, l. 5; App. 80, l. 17 – 82, l. 14.

The three went outside and talked. Boyd and Frederick told Respondent they “were going to a friend’s birthday” party. App. 82 l. 15 – 83, l. 3. They returned inside the restaurant and went into an office in the back. Frederick shut the door. App. 73, ll. 8-23; App. 83, ll. 4-21. Respondent pointed to “a bag of white powder” that was on the floor. App. 73, l. 24 – 74, l. 8; App. 83, l. 22 – 84, l. 2. Boyd admitted that she did not see Respondent place the bag on the floor. App. 83, l. 1-2. Frederick eventually picked it up. App. 74, ll. 9-11. According to Boyd, Respondent suggested they use the substance in the office as he did not want the women to leave with it. App. 84, ll. 3-8. However, Frederick and Boyd refused.

Boyd and Frederick returned to the bar without the substance. App. 84, ll. 12-19; App. 87, ll. 2-17. Respondent eventually came out and allegedly “pointed down to the ground where

another small plastic bag of white powder was found.” App. 74, ll. 12-25. Frederick picked up the bag, which she believed contained “possibly cocaine.” Frederick and Boyd then left and returned to the undercover team. App. 74, l. 20 – 75, l. 3; App. 84, l. 17 – 85, l. 13. The bag contained 0.23 grams of cocaine. App. 134, l. 18 – 136, l. 12; App. 293.

At trial, Boyd and Frederick both testified concerning the incident. App. 70, l. 23 – 87, l. 22. Neither of them saw Respondent place the cocaine on the floor in the office nor on the floor near the bar. App. 73, l. 7 – 74, l. 25; App. 83, l. 24 – 84, l. 24. Respondent did not testify. App. 153, ll. 6-24.

After closing arguments, the trial judge charged the jury:

Mere presence at the scene where the drugs were found is not enough to prove possession. **Actual knowledge of the presence of the cocaine is strong evidence of the defendant’s intent to control its disposition or use.**

...

I further instruct you that mere presence at the scene is not sufficient to prove someone guilty of a crime. A defendant’s presence where a crime is being committed or mere association with a person who commits a crime does not make him an accomplice or an aider or abettor of the person committing the crime.

App. 214, ll. 1-5 (emphasis added).

Trial counsel did not object to the “strong evidence” instruction. App. 219, ll. 6-10.

During its deliberations, the jury requested the trial judge reinstruct them on the law. App. 240, ll. 10-21. Accordingly, the judge reread her entire jury charge, including the “strong evidence” language emphasized above. App. 241, l. 5 – 255, l. 11. Trial counsel again failed to object to the “strong evidence” instruction. App. 255, ll. 17-21.

Respondent testified at the PCR hearing that his trial counsel was ineffective for failing to object to the trial judge’s “strong evidence” jury charge. App. 376, ll. 6-9.

Melissa Gay, Respondent's trial counsel, testified at the PCR hearing that she "botched" the jury charge. App. 388, ll. 3-6. Gay admitted she should have objected to the "strong evidence" instruction. She said she was aware of State v. Cheeks, 401 S.C. 322, 737 S.E.2d 480 (2013), but was exhausted at the end of the trial and did not "catch" the erroneous language in the trial judge's charge. App. 388, ll. 3-13.

Respondent's PCR counsel argued the PCR judge should grant Respondent a new trial based on trial counsel's deficient performance in failing to object to the erroneous "strong evidence" jury instruction. App. 395, ll. 2-4. He emphasized that our Supreme Court's opinion in Cheeks instructing trial judges to no longer use the "strong evidence" charge because it is an improper expression of the judge's view of the weight of the evidence was published before Respondent's trial. PCR counsel further emphasized trial counsel's admission that she should have objected to the charge. App. 393, l. 25 – 394, l. 25.

Citing to State v. Cheeks, 401 S.C. 322, 727 S.E.2d 480 (2013), the PCR judge found trial counsel was ineffective for failing to object to the "strong evidence" jury instruction. App. 405. The judge further determined that Respondent was prejudiced by counsel's deficient performance and that the outcome of Respondent's trial would have been different if trial counsel had properly objected. App. 405.

STANDARD OF REVIEW

The standard of review in post-conviction relief (PCR) cases depends on the specific issue before the Court. Smalls v. State, 422 S.C. 174, 180, 810 S.E.2d 836, 839 (2018). The Court defers to a PCR court's findings of fact and will uphold them if there is evidence in the record to support them. Id. (citing Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016)). The Court reviews questions of law de novo, with no deference to trial courts. Id. at 180-181, 810 S.E.2d at 839-840 (citing Sellner, 416 S.C. at 610, 787 S.E.2d at 527).

ARGUMENT

The post-conviction relief judge correctly found trial counsel was deficient for failing to object to the trial court’s jury instruction that “actual knowledge of the presence of the cocaine is strong evidence of the defendant’s intent to control its disposition or use” when our Supreme Court had instructed trial judges to no longer use the “strong evidence” charge, and that Respondent was prejudiced since the erroneous instruction was a comment on the weight of the evidence and negated the mere presence charge, and no witnesses saw Respondent place the drugs on the floor.

In order to show ineffective assistance of counsel as a ground for relief, an applicant 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.” Strickland v. Washington, 466 U.S. 668, 686 (1984); 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.

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. An applicant must prove “that counsel’s performance was deficient” and fell below reasonable professional norms, and 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); Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007).

In State v. Cheeks, 401 S.C. 322, 737 S.E.2d 480 (2013), our Supreme Court overruled prior precedent and held trial judges should no longer instruct juries “that actual knowledge of the presence of [a drug] is strong evidence of a defendant’s intent to control its disposition or use.” Cheeks was convicted of trafficking in crack cocaine and possession of crack cocaine with intent to distribute. Id. at 324, 737 S.E.2d at 482. While executing a search warrant “at witness Markley’s house,” law enforcement “interrupted [Cheeks] in the process of cooking crack cocaine.” Id. at 326, 737 S.E.2d at 483. Cheeks was observed fleeing from the kitchen, where water was boiling and materials used in the manufacture of crack cocaine and a digital scale were found. Id. Additionally, 650 grams of crack, most of which was divided into “baggies,” was seized from the kitchen where Cheeks “had been found cooking.” Id. Moreover, on the day of his arrest, Cheeks sent his uncle to the store to buy baking soda and then on an errand. When the car the uncle was driving was stopped and searched, two ounces of crack was found, “the inference being that the uncle was delivering crack” for Cheeks. Id.

After charging the jury on actual and constructive possession, the trial judge instructed the jury: “Now, mere presence at a scene where drugs are found is not enough to prove possession. *Actual knowledge of the presence of the crack cocaine is strong evidence of a defendant’s intent to control its disposition or use.*” Id. at 327, 737 S.E.2d at 483 (emphasis added). Cheeks objected to this “actual knowledge/strong evidence” charge, arguing it was a comment on the facts and the weight of those facts, and that it nullifies or at least conflicts with the mere presence charge. Id.

The Supreme Court agreed with Cheeks that the charge both improperly weighs the evidence, and largely negates the mere presence charge. Id. at 328, 737 S.E.2d at 484. The Court asserted, “[C]harging a jury that ‘actual knowledge of the presence of a drug is strong

evidence of intent to control its disposition or use' unduly emphasizes that evidence, and deprives the jury of its prerogative both to draw inferences and to weigh the evidence. This charge converts all persons merely present who have actual knowledge of the drugs on the premises into possessors of that drug. We agree with [Cheeks] that this charge largely negates the mere presence charge, and erroneously conveys that a mere permissible evidentiary inference is, instead, a proposition of law." Id. at 328-329, 737 S.E.2d at 484. Moreover, the Court held the instruction was "improper as an expression of the judge's view of the weight of certain evidence." Id. at 329, 737 S.E.2d at 484. Consequently, the Court instructed "the bench to no longer use the 'strong evidence' charge" and overruled Solomon v. State, 313 S.C. 526, 443 S.E.2d 540 (1994), which approved of the instruction. Id.

Nonetheless, the Court determined Cheeks could not show prejudice from the charge since there was no evidence that he was merely present at the house when the search warrant was executed. Id. Rather, the Court concluded, "the evidence was that he was actively cooking crack cocaine when the warrant was served, and that he possessed the 650 grams of crack found on the kitchen counter." Id.

In this case, the PCR judge correctly found trial counsel was deficient for failing to object to the "strong evidence" charge in light of our Supreme Court's holding in Cheeks, which was published before Respondent's trial. Moreover, the PCR judge correctly concluded Respondent was prejudiced by the "strong evidence" charge because there is a reasonable probability that the outcome of Respondent's trial would have been different if counsel had properly objected and the erroneous instruction had not been given. See App. 405. The "strong evidence" charge unduly emphasized the evidence that Respondent knew the drugs were on the floor and deprived the jury of its right both to draw any inference it chose from this evidence and to weigh the

evidence. The charge converted all persons merely present who had actual knowledge of the drugs, including Respondent, into possessors of the drug. Consequently, the erroneous instruction negated the mere presence charge and prejudiced Respondent. Moreover, the charge was a comment by the trial judge about his opinion of the evidence. Lastly, but significantly, the improper instruction was read to the jury *twice* after the jury requested to be recharged on the law further causing prejudice to Respondent. See App. 240, l. 10 – 255, l. 11.

The state argues that like the appellant in Cheeks, Respondent was not prejudiced by the erroneous instruction because there was overwhelming evidence of guilt. However, Respondent's case is easily distinguished from Cheeks. No one saw Respondent drop the bag of cocaine found on the floor. The testimony established that he only pointed to the bag. This is evidence of his mere presence at the scene where the drugs were found. While Respondent was allegedly seen using a substance suspected to be cocaine in the office, he later stated he was going to throw the remainder away when Boyd and Frederick refused to try it. Neither Boyd nor Frederick took the bag containing possible cocaine from the office. Importantly, this bag of alleged cocaine was never seized nor tested. App. 159, ll. 14-22. Accordingly, there is ample evidence to support the PCR judge's finding that Respondent was prejudiced by counsel's deficient performance.

Respectfully, because there is evidence to support the PCR judge's finding that Respondent was prejudiced by trial counsel's deficient performance, this Court should affirm the decision to grant Respondent a new trial.

CONCLUSION

Based on the foregoing argument, this Court should affirm the ruling of the PCR judge and remand for a new trial.

Respectfully submitted,

s/ Lara M. Caudy _____
Lara M. Caudy
Appellate Defender

ATTORNEY FOR RESPONDENT

This 8th day of February, 2021.