

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Berkeley County

Honorable Edgar W. Dickson, Circuit Court Judge

BARRY JERROD STANLEY,

RESPONDENT

V.

STATE OF SOUTH CAROLINA,

PETITIONER

APPELLATE CASE NO. 2020-001079

RETURN TO PETITION FOR WRIT OF CERTIORARI

SARAH E. SHIPE
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR RESPONDENT

RECEIVED

Apr 14 2021

S.C. SUPREME COURT

INDEX

INDEX..... i

QUESTION PRESENTED BY THE STATE.....1

COUNTERSTATEMENT OF QUESTION PRESENTED2

STATEMENT OF FACTS3

ARGUMENT

Evidence supports the PCR court’s conclusion that trial
counsel’s clear failure to request case specific *voir dire* to
determine potential jurors’ bias with regard to a case involving
drugs, substantially prejudiced counsel’s ability to select and
impanel an impartial jury resulting in a deprivation of Stanley’s
rights under the Sixth and Fourteenth Amendments to the
Constitution.....7

CONCLUSION.....11

QUESTION PRESENTED BY THE STATE

Is Certiorari warranted to review and ultimately reverse this erroneous grant of relief because the post-conviction relief court, without taking any testimony or otherwise conducting a meaningful hearing, wrongly determined trial counsel was constitutionally ineffective for not requesting additional questions during *voir dire* where no specific *voir dire* is required and Stanley wholly failed to establish any prejudice?

COUNTERSTATEMENT OF QUESTION PRESENTED

Does any evidence support the PCR court's conclusion that trial counsel was ineffective in failing to request the trial court conduct case specific *voir dire* to determine the potential jurors' bias with regard to a case involving drugs, which substantially prejudiced his ability to impanel an impartial jury?

STATEMENT OF FACTS

Procedural history

On February 11, 2014, respondent, Barry Stanley, was indicted in Berkeley County for failure to stop for a blue light and trafficking cocaine base 28-100 grams, third offense. App. 738-741. On April 7, 2014, Stanley was tried before the Honorable Kristi Harrington and a jury. App. 50. Stanley was represented by David Schwacke and Chad Shelton. Michael Patterson and Charles Condon represented the state. App. 50. The jury convicted Stanley. App. 362. Judge Harrington sentenced Stanley to an aggregate term of thirty-three years' imprisonment. App. 371.

Stanley filed a timely notice of appeal. Appellate counsel, Tiffany Butler, argued the trial court erred by failing to direct a verdict of acquittal on the charge of trafficking in cocaine base, third offense, where the state failed to introduce direct or substantial circumstantial evidence at trial that appellant was in constructive possession of the drugs found. App. 744. The South Carolina Court of Appeals affirmed Stanley's conviction on May 11, 2016. *State v. Stanley*, Op. No. 2016-UP-194 (S.C. Ct. App filed May 11, 2016).

Thereafter, Stanley filed an application for PCR on October 31, 2016, alleging ineffective assistance of trial counsel for the following reasons:

1. Failure to conduct or request adequate *voir dire* to determine any potential bias of jurors, resulting in due process violation;
2. Failure to object to the state vouching for its witness, William Loflin;
3. Failure to object to testimony regarding how crack cocaine is made, failure to object to curative instruction, and failure to move to strike such testimony; and
4. Failure to object to and preserve for appellate review the "use of false inconsistent testimony of state's witnesses."

App. 781-97; 821-22.

On January 23, 2020, an evidentiary hearing was held before the Honorable Edgar Dickson. App. 808. Stanley was represented by Leslie Sarji, and Benjamin Limbaugh, assistant attorney general, represented the state. App. 808.

On April 2, 2020, Judge Dickson signed an order granting Stanley PCR. App. 820-825. On July 9, 2020, Judge Dickson denied the state's motion to alter or amend and the state's petition to this Court followed. App. 839.

Relevant facts

During *voir dire*, the trial court asked the venire the following questions:

1. whether anyone knew Stanley or his attorneys;
2. whether anyone had a relationship with any of the members of the solicitor's office or the police department;
3. whether anyone had a relationship with any of the potential witnesses in this case;
4. whether anyone or their family members were or had ever been employed in law enforcement including specialized training in forensic or crime scene analysis;
5. whether anyone or a member of their family had been a victim of domestic violence or if they had other moral or political beliefs that would hinder them from being fair or impartial in this case.

App. 36-46. At the conclusion of *voir dire*, trial counsel indicated the defense had no objections or motions and was ready to proceed. App. 48.

At trial, the state's witnesses testified that officers responding to a domestic violence call were dispatched to the apartment complex where Stanley lived with his children and girlfriend, Evette Nelson. Nelson had gone to their neighbor, Greg Rider's apartment where Rider's wife, Tanya Deane, called 911. Before police arrived, Rider claimed to have seen Stanley drive away in a dark blue Ford Crown Victoria. App. 145-148; 161. The state alleged that Stanley, while fleeing from police, threw a bag containing 28.8 grams of cocaine base out of his vehicle. App. 161-64. A bystander, William Loflin, testified that he saw someone throw something out of the window of the vehicle Stanley was allegedly driving. App. 186. Notably, Loflin never

identified Stanley as the driver of the vehicle. Additionally, there were no drugs or drug paraphernalia found when police searched the Crown Victoria and Stanley's apartment.

At the PCR hearing, the state conceded that according to the trial transcript and trial counsel's detailed notes, there was no case specific *voir dire* requested by trial counsel. App. 812-13. PCR counsel for Stanley argued Stanley's application for PCR should be granted because trial counsel was deficient in failing to request any case specific *voir dire* in a case involving drugs which resulted in prejudice to Stanley. App. 814-15. The attorney general, in response, averred that he would not put an "official position against this for the state on the record" but asserted Stanley might not be able to show prejudice. App. 816-17.

The court ruled that trial counsel's failure to request that the venire be asked about potential prejudice regarding drugs was "crucial and prejudicial." The court ruled that this allegation alone warranted a new trial stating, "with nothing in the record to satisfy that or to satisfy me that that was done when they're picking a jury, I believe it's, it's fatal." The court asked PCR counsel to prepare a proposed order and allowed the state to prepare a brief in opposition. App. 818.

The lower court's order granting PCR found that the state conceded trial counsel had not conducted any case specific *voir dire* to determine the potential jurors' bias with regard to a case involving drugs and/or crack cocaine. The court found that this allegation alone amounted to ineffective assistance of trial counsel sufficient to satisfy the test set forth in *Strickland* and therefore it was not necessary to address Stanley's remaining allegations. The PCR court held trial counsel's failure to request case specific *voir dire* resulted in a "merely perfunctory" *voir dire* examination by the trial court and, because counsel failed to request case specific *voir dire*

as to possible prejudice, Stanley was denied the ability to select and impanel an impartial jury.

App. 823-24.

ARGUMENT

Evidence supports the PCR court’s conclusion that trial counsel’s clear failure to request case specific *voir dire* to determine potential jurors’ bias with regard to a case involving drugs, substantially prejudiced counsel’s ability to select and impanel an impartial jury resulting in a deprivation of Stanley’s rights under the Sixth and Fourteenth Amendments to the Constitution.

“The Sixth Amendment guarantees that every criminal defendant shall receive ‘Assistance of Counsel’ in establishing a defense. U.S. Const. amend. VI.” *Nance v. Ozmint*, 367 S.C. 547, 551, 626 S.E.2d 878, 880 (2006). “On May 14, 1984, the United States Supreme Court handed down two opinions holding that the Sixth Amendment requires that a criminal defendant receive effective assistance of counsel, *United States v. Cronin*, 466 U.S. 648 (1984) and *Strickland v. Washington*, 466 U.S. 668 (1984).” *Id.*

In analyzing the prejudice of an ineffective assistance of counsel claim whether a court “require[s] the defendant to show actual prejudice - a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different - or whether [a court] instead presume[s] prejudice, turns on the magnitude of the deprivation of the right to effective assistance of counsel.” *Roe v. Flores-Ortega*, 528 U.S. 470, 482 (2000) (internal quotations and citations removed). “In certain Sixth Amendment contexts, prejudice is presumed. Actual or constructive denial of the assistance of counsel altogether is legally presumed to result in prejudice.” *Strickland*, 466 U.S. at 692 citing *United States v. Cronin*, 466 U.S., at 659. “Prejudice in these circumstances is so likely that case-by-case inquiry into prejudice is not worth the cost.” *Id.*

Courts “normally apply a strong presumption of reliability to judicial proceedings and require a defendant to overcome that presumption by showing how specific errors of counsel

undermined the reliability of the [proceedings].” *Flores-Ortega*, 528 U.S. 470 at 482 (internal quotations and citations removed). However, “in some cases the defendant alleges not that counsel made specific errors in the course of representation, but rather that during the judicial proceeding he was - either actually or constructively - denied the assistance of counsel altogether.” *Id.* at 483. “Under such circumstances, no specific showing of prejudice is required, because the adversary process itself is presumptively unreliable.” *Id.*

The PCR court correctly found trial counsel was ineffective in his failure to request any case specific *voir dire* because it substantially prejudiced counsel’s ability to select and impanel an impartial jury. As the lower court recognized in its order granting PCR, “*voir dire* plays a critical function in assuring the criminal defendant that his Sixth Amendment right to an impartial jury will be honored.” *Rosales-Lopez v. United States*, 541 U.S. 182 (1981). In this case, where trial counsel failed to request any additional *voir dire*, not to mention case specific *voir dire*, in order to uncover any potential juror bias related to drugs, a presumption of prejudice is appropriate. Due to trial counsel’s glaring omission, Stanley was denied the ability to select an impartial jury which resulted in the deprivation of his rights under the Sixth and Fourteenth Amendments to the Constitution.

However, even if the Court does not presume prejudice and analyzes Stanley’s claim under *Strickland*, it should still deny certiorari in this case. There is nothing in the record that demonstrates that trial counsel requested any *voir dire*, and the state conceded that at the PCR hearing. In its petition, the state argued Stanley failed to meet his burden of establishing defense counsel’s performance during the *voir dire* process fell below the prevailing standard of professional norms. However, the record reflects the PCR court, as well as another circuit court judge, disagree. App. 814, ll. 16-23; 818, ll. 2-5. The PCR court stated during the hearing that

the absence of any *voir dire* regarding potential bias regarding drugs was “crucial and prejudicial.” *Id.*

Moreover, because it is common knowledge that people have assumptions and biases regarding drugs, it is in fact the norm for defense counsel to request the venire be asked some version of the following questions in cases involving drug charges. First, whether any juror, a member of their family, friend, or acquaintance has been arrested or charged with a drug offense. Second, whether any juror has an affiliation to any group which has a primary concern in the promotion of law enforcement including but not limited to: Mother’s Against Drunk Driving (MADD), Students Against Destructive Decisions (SADD), South Carolina Law Enforcement Officers Association (SCLEOA), or any other victim’s against violent crimes associations. Mindy Hervey Lipinski, Rethinking Criminal Jury Selection, S.C. Law., May 2013, at 8.

The state’s evidence against Stanley was not so overwhelming as to preclude a finding of prejudice in this case. In fact, the state’s case did not contain any thing that should be considered “conclusive, such as a confession, DNA evidence demonstrating guilt, or a combination of physical and corroborating evidence so strong that the *Strickland* standard of ‘a reasonable probability ... the factfinder would have had a reasonable doubt’ cannot possibly be met.” *Smalls v. State*, 422 S.C. 174, 191, 810 S.E.2d 836, 845 (2018). Rather, the record reflects that during deliberation the jury struggled to come to a unanimous decision as to the trafficking charge. The trial court had to give the jury an *Allen*¹ charge before it was able to convict Stanley of trafficking. App. 357-361.

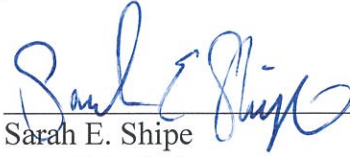
As the PCR court clearly stated during the hearing and concluded in its grant of PCR, Stanley was prejudiced by trial counsel’s deficient performance in that he was deprived of the

¹ *Allen v. United States*, 164 U.S. 492 (1896).

ability to select an impartial jury, thereby depriving him of his rights under the Sixth and Fourteenth Amendments to the Constitution. The PCR correctly granted relief on this issue. Certiorari most respectfully is not warranted in this case. However, should this Court grant the state's petition for certiorari and ultimately reverse the lower court's grant of PCR, counsel for respondent requests the case be remanded for a full hearing on the merits of all issues raised in Stanley's application for PCR.

CONCLUSION

The petition for certiorari should be denied.



Sarah E. Shipe
Appellate Defender

ATTORNEY FOR RESPONDENT

This 14th day of April, 2021.