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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

On Petition for Writ of Certiorari to Horry County
Court of Common Pleas

Honorable Edward B. Cottingham, Trial Judge
Honorable R. Kirk Griffin, Post-Conviction Relief Judge

Appellate Case No. 2021-000322

Alton Gore,

Petitioner,

v.

State of South Carolina,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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[1] Brady v. Maryland, 373 U.S. 83 (1963).

PETITIONER'S ISSUE PRESENTED

Whether the court erred in denying PCR where the state engaged in prosecutorial misconduct by failing to disclose Brady material, the details of the plea bargain with petitioner's co-defendant turned state's witness, resulting in violation of petitioner's rights under the Confrontation Clause of the United States Constitution?

RESPONDENT'S COUNTERSTATEMENT OF ISSUE PRESENTED

Did the PCR court correctly find there was no Brady violation or prosecutorial misconduct regarding the details of the codefendant's agreement with the State to testify against Petitioner where the State turned over a written proffer agreement ahead of the codefendant's testimony, the solicitor testified the only agreement with Petitioner was what was set forth in that document, and Petitioner provided no support for the allegation other than speculation?

STATEMENT OF THE CASE

Alton Gore (Petitioner) is currently confined in the South Carolina Department of Corrections. Petitioner was indicted at the June 2010 term of the Horry County Grand Jury for trafficking in cocaine, between 200 and 400 grams (2010-GS-26-02326).[2] Timothy Kirk Truslow (Counsel) represented Petitioner on the charge. Michael O'Sullivan, of the Fifteenth Circuit Solicitor's Office, prosecuted the case pre-trial. Nancy Cote and Bradley Richardson, of the Fifteenth Circuit Solicitor's Office, prosecuted the case at trial.

Petitioner appeared before the Honorable Steven H. John on March 15, 2011, for a pre-trial Franks[3] hearing regarding the propriety of the search warrant permitting the search of his residence. Judge John found the search warrant affidavit proper and denied Petitioner's motion to suppress the fruits of the search. On January 3 and 5, 2012, Petitioner proceeded to trial before the Honorable Edward B. Cottingham and a jury. The primary factual point of contention at trial was whether or not the house in which the drugs were found was, in fact, Petitioner's residence. The jury found Petitioner guilty as indicted on January 5, 2012. Judge Cottingham sentenced Petitioner to imprisonment for a term of twenty-five years and a fine of $100,000.00—the statutory minimum.

Petitioner filed a timely notice of appeal and a direct appeal was perfected by Nicole Nicolette Mace and Amy K. Raffaldt. The South Carolina Court of Appeals considered three issues:

1. "[Whether t]he trial judge properly denied Appellant's motion to suppress where the search warrant affidavit was not submitted with intent to deceive or with reckless disregard for the truth and where the affidavit provided probable cause for issuance of the search warrant. Further, even if the search warrant had been

[2] Applicant also faced seven other charges and indictments for various less severe drug crimes, all of which were dismissed without indictment or *nolle prosequi* after Applicant was convicted and sentenced on this indictment.

[3] Franks v. Delaware, 438 U.S. 154 (1978).

defective, the good-faith exception applied to preclude suppression of the fruits of the search."

2. "[Whether t]he trial judge properly allowed into evidence two photographs of Appellant which were relevant to proving he was a resident of the house, served to corroborate testimony, and which were not unfairly prejudicial. In any event, even assuming the judge erred, admission of the photographs was harmless in the context of the entire case."
3. "[Whether t]he trial judge properly denied Appellant's request for a lesser-included charge of simple possession where there was no evidence suggesting the Appellant was guilty of only the lesser-included offense."

The parties proceeded to oral arguments before the Court of Appeals on December 10, 2013. By opinion decided April 2, 2014, the South Carolina Court of Appeals affirmed Petitioner's conviction. State v. Gore, 408 S.C. 237, 758 S.E.2d 717 (Ct. App. 2014). Petitioner's petition for rehearing was denied by order filed June 19, 2014.

He then petitioned the Supreme Court of South Carolina for a writ of certiorari, which was initially granted in part (as to Questions I and II) and denied in part (as to Question III) by order dated January 16, 2015. The parties proceeded to oral arguments before the Supreme Court on October 21, 2015. By opinion decided December 2, 2015, the Supreme Court dismissed the writ of certiorari as improvidently granted. State v. Gore, 414 S.C. 577, 780 S.E.2d 261 (2015). The remittitur issued on December 2, 2015.

Petitioner timely commenced his post-conviction relief action on n November 29, 2016, and, through counsel, filed amendments on October 16, 2019. Respondent made its Return on October 6, 2017, and Amended Return on January 10, 2018.[4] An evidentiary hearing on the matter convened before the Honorable R. Kirk Griffin on December 10, 2020, via Cisco WebEx Meetings in accordance with the Chief Justice's administrative memorandum, *Court Operations*, dated

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[4] The State amended the Return solely to correct an error in the procedural history.

September 14, 2020.[5] James K. Falk, Esquire, represented Petitioner. By order filed February 25, 2021, Judge Griffin denied relief and dismissed Petitioner's application with prejudice.

Petitioner timely appealed the denial of his application for post-conviction relief.

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[5] See S.C. Sup. Ct. Memorandum dated September 14, 2020 ("Judges . . . have discretion to determine whether it is appropriate to conduct a hearing using remote communication technology. *Consent of the parties or counsel is not required.* Please use WebEx, the conferencing platform supported by the Judicial Branch." (emphasis added)). Nonetheless, the PCR court questioned Petitioner at the beginning of the hearing, and he gave his consent to the use of the WebEx platform.

STATEMENT OF THE FACTS

On March 5, 2010, narcotics officers with the Horry County Police Department executed a search warrant at Petitioner's residence at 309 Junco Circle in Longs. App. pp. 96-97, 129-30. The probable cause portion of the search warrant affidavit states as follows:

> A confidential and reliable informant made a buy for cocaine out of the residence while being recorded and monitored by agents in the area. Also within the last seventy two hours agents followed the defendant from the residence to another location and were able to monitor and record another buy for a quantity of cocaine. It is the affiants [sic] belief that there are more illegal narcotics in the residence.

App. pp. 315-16. The affidavit was based on two controlled drug buys conducted by a confidential informant in July 2009 and February 2010. App. pp. 7, 13, 315-16. During the second buy, officers followed Petitioner from the residence to another location where the transaction of cocaine occurred. App. pp. 13-14. The officers observed Petitioner leave the house, get into his vehicle, and drive directly to a nearby location to conduct the sale. App. pp. 13-14. A few days later, officers conducted a traffic stop, detained Petitioner, and executed the search warrant at the residence. App. pp. 98, 131-33. Officers found 375.88 grams of cocaine in the home. App. p. 232.

Petitioner's defense at trial centered around ownership of the residence and the items, including the drugs, found inside it. Petitioner's mother owned the home, although she did not live there at the time. App. p. 185. Petitioner's codefendant and former girlfriend, Angel Deangelo, had a lease agreement for a separate residence in North Carolina, although she testified that around the time of Petitioner's arrest, she was going to school and working in North Carolina during the day and driving down to spend three or four nights per week with Petitioner at his house on Junco Circle. App. pp. 165-66, 168-69, 171-72.

Prior to executing the search warrant, police obtained a key to the house from Petitioner. App. pp. 100, 133. Petitioner's vehicles were parked at the house. Police officers testified that

based on their observations during their narcotics investigation, Petitioner lived at the residence. App. pp. 130-31. A clerk's office employee testified the address listed on Petitioner's bond document (which was signed by Petitioner) was the same address where the cocaine was found. App. pp. 210, 212. A home-detention officer testified he monitored Petitioner on bond from March 2010 through 2011; Petitioner's address was the same address where the cocaine was found; and he visited Petitioner at that address while monitoring him. App. pp. 235-36. Men's clothing was found in the master bedroom, and the most of the cocaine was found hidden in a stack of men's pants in that bedroom. App. pp. 111-12. Additionally, officers found multiple pictures of Petitioner in the bedroom, wearing pants and clothing similar to the clothing found in the closet. App. pp. 110, 126-27, 151.

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 defer 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. Id. at 180, 810 S.E.2d at 839 (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)). However, pure questions of law will be reviewed *de novo* without deference to the lower court. Id. at 180-81, 810 S.E.2d at 839-40. 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 PCR court correctly found no <u>Brady</u> violation or prosecutorial misconduct regarding the details of the codefendant's agreement with the State to testify against Petitioner where the State turned over a written proffer agreement ahead of the codefendant's testimony, the solicitor testified the only agreement with Petitioner was what was set forth in that document, and Petitioner provided no support for the allegation other than speculation.

Petitioner alleges the PCR court erred in finding his constitutional rights were not violated by alleged prosecutorial misconduct. PWC p. 6. Specifically, Petitioner alleges the prosecutors on his case engaged in misconduct by failing to fully disclosure the details of the plea bargain between the State and Petitioner's codefendant after she agreed to testify against him. PWC p. 6. The PCR court, however, correctly found Petitioner wholly failed to support his allegation with anything more than self-serving speculation about the existence of a more defined plea bargain between his co-defendant and the State, other than as disclosed in the proffer agreement turned over to the defense at trial prior to the codefendant's testimony. App. pp. 398-99. Accordingly, the PCR correctly denied relief on this issue, and this Court should likewise deny certiorari. <u>See, e.g.</u>, <u>Porter v. State</u>, 368 S.C. 378, 385-86, 629 S.E.2d 353, 357 (2006), <u>abrogated on other grounds by</u> <u>Smalls v. State</u>, 422 S.C. 174, 810 S.E.2d 836 (2018) (mere speculation insufficient to support finding of ineffective assistance of counsel).

At the evidentiary hearing, Petitioner testified he believed there was already a specific deal in place between the State and his codefendant, Deangelo, before she testified against him at trial. App. p. 334. Petitioner speculated she must have had a specific deal in place because, afterwards, she was sentenced to time-served, the drug charges against her were dropped, and she pleaded guilty only to resisting arrest. App. pp. 335-36. Petitioner further testified the State told him only that they agreed to inform the judge about her cooperation, but given the ultimate outcome, it "had

to be something preordained." App. p. 335. Petitioner further testified he needed to know if Deangelo had received a deal because Counsel could have impeached her for bias, as she would have had motivation to blame Petitioner. App. pp. 336-37.

Counsel testified the information he was given about the agreement between Deangelo and the State was that she had signed a cooperation document, which he received. App. p. 351, 363; Supp. App. pp. 3-4. Counsel testified it was unusual to have a written agreement, and it set forth her reward, although it was vague, saying only that the State would take her testimony into consideration. App. p. 351. Counsel explained Deangelo was facing a mandatory minimum sentence of twenty-five years, so he did not think she would have agreed to plead guilty unless she expected not to be sentenced under that statute; however, he did not have any information or confirmation a specific deal had been made. App. pp. 351-52. Counsel also testified he expected from the inception of the case that Deangelo would ultimately "flip" and testify for the State against Petitioner, and he and Petitioner discussed that possibility at length. App. pp. 348, 361.

Finally, the prosecuting solicitor, Bradley Richardson, testified he could not recall who initiated Deangelo's cooperation, but after jury selection, she decided she wanted to cooperate with the State. App. p. 369. Richardson explained she elected to sign a proffer agreement, which he provided to Counsel. App. p. 369; Supp. App. pp. 3-4. Richardson testified the agreement stated she would not be deceptive and the State would take any cooperation she provided into consideration in disposing of her charges. App. p. 369; Supp. App. pp. 3-4. Richardson testified she had no agreement other than what was contained in the proffer agreement. App. p. 369. Richardson further testified the decision on how to dispose of her charges was made after the trial because the State needed to take into account whether her conduct at trial was consistent with the

agreement. App. pp. 369-70. The PCR court specifically found Richardson's testimony on this issue to be credible. App. p. 399.

Brady requires the State to disclose evidence in its possession favorable to the accused and material to guilt or punishment. Clark v. State, 315 S.C.385, 388, 434 S.E.2d 266, 268 (1993). Such a claim is complete if the accused can demonstrate (1) the evidence was favorable to the accused, (2) it was in the possession of or known to the prosecution, (3) it was suppressed by the prosecution, and (4) it was material to guilt or punishment. Gibson v. State, 334 S.C. 515, 524, 514 S.E.2d 320, 324 (1999). Under this requirement, "favorable" evidence includes both exculpatory evidence and impeachment evidence. State v. Kennerly, 331 S.C. 442, 453, 503 S.E.2d 214, 220 (Ct. App. 1998). However, "[e]vidence, even if exculpatory and material, is not required to be disclosed... if the defendant knows or should have known of 'the essential facts permitting him to take advantage of any exculpatory evidence. . . .' The Government is required, however, to disclose sufficient information to the defendant to insure that the defendant will not be denied access to exculpatory evidence *known only to the Government*." United States v. Frank, 11 F.Supp.2d 322, 327 (S.D.N.Y. 1988) (quoting United States v. Zackson, 6 F.3d 911, 918 (2d Cir. 1993)) (emphasis added).

First, in this case, it is undisputed the State disclosed the fact of Deangelo's cooperation, along with the written proffer agreement promising to take her cooperation into account in determining charges and sentencing, prior to Deangelo's testimony. Petitioner provided no evidence, other than self-serving speculation, that Deangelo had a specific deal in place at the time of her testimony.[6] App. p. 334. Importantly, Counsel also testified that although he assumed, based

[6] In his PWC, Petitioner asserts Counsel's testimony supports Petitioner's allegation, and thus the PCR court incorrectly found Petitioner "provided nothing more than speculation about the existence of a plea bargain." PWC p. 6. Petitioner also attempts to rely on his own self-serving

on his experience, Deangelo would not agree to testify unless she expected to be sentenced under a different statute that avoided the twenty-five year mandatory minimum sentence, he had no evidence of the existence of specific, undisclosed sentencing agreement. Richardson, however, credibly testified the only agreement in place at the time of trial was that outlined in the proffer document. App. p. 369.

Further, Petitioner testified information about a "deal" was important because Counsel could have used it to impeach Deangelo during her testimony. App. pp. 336-37. However, Petitioner was informed there was a "deal" – i.e. the State would consider Deangelo's cooperation in determining charges and at sentencing – and Counsel extensively cross-examined Deangelo on the terms of the agreement between herself and the State, including a lengthy discussion of the fact that she was facing a mandatory minimum sentence of twenty-five years if convicted at trial, which she hoped to avoid. App. pp. 192-97. Counsel also instructed Deangelo to read the provision of the proffer agreement stating the State would consider her cooperation "in the election of charges and at sentencing" and, moreover, Deangelo admitted she knew the State would not be interested in her testimony unless she was going to help its case against Petitioner, and she hoped "something good" would happen as a result of her testifying. App. pp. 165, 195, 197; Supp. App. pp. 3-4.

"In PCR proceedings, the burden of proof is on the applicant to prove the allegations in his application." Simuel v. State, 390 S.C. 267, 269, 701 S.E.2d 738, 739 (2010). Here, Petitioner failed to offer any competent evidence of a Brady violation. See Bannister v. State, 333 S.C. 298,

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testimony that Deangelo, at some point, told him she had a "deal" in place, despite the State's sustained objection to this testimony. PWC p. 5; App. p. 334. Again, all of this testimony, including Counsel's testimony about his suspicions as to what Deangelo expected, is unsupported speculation. Even if Deangelo *did* tell Petitioner she had a "deal," he has offered no proof that comment refers to anything more than the proffer agreement he already knew about, and notably, Petitioner did not call Deangelo as a witness at the evidentiary hearing.

303, 509 S.E.2d 807, 809 (1998) ("This Court has repeatedly held a PCR applicant *must produce the testimony* of a favorable witness *or otherwise offer the testimony in accordance with the rules of evidence* at the PCR hearing in order to establish prejudice. . . . [S]ince respondent neither produced [the witness] nor offered her testimony in some other manner consistent with the rules of evidence, her 'testimony' was purely speculative. ") (emphasis in original); Glover v. State, 318 S.C. 496, 499, 458 S.E.2d 538, 540 (1995) ("The applicant's mere speculation what the witnesses' testimony would have been cannot, by itself, satisfy the applicant's burden. . . ."). Petitioner offered nothing more than bald speculation that an undisclosed deal existed at the time of Deangelo's testimony. Deangelo's testimony at trial, while indirect, clearly conveyed to the jury she expected some benefit in exchange for her testimony. This is the exact information the State disclosed to Petitioner, and it was indisputably known by Counsel and discussed between him and Petitioner prior to Deangelo's testimony. Furthermore, Counsel aggressively cross-examined Deangelo on the issue during trial. Because the State did not suppress information regarding a deal with Deangelo, the PCR court therefore correctly found the State did not violate its obligations under Brady and denied relief. App. pp. 398-99. In turn, this Court should deny certiorari and affirm the decision of the PCR court.

CONCLUSION

For the reasons stated above, this Court should deny certiorari and affirm the PCR court's denial of post-conviction relief. Should this Court grant certiorari, Respondent requests permission under the rules to brief the issues discussed above fully.

Respectfully submitted,

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