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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI FROM GREENWOOD COUNTY
Court of Common Pleas
The Honorable J. Mark Hayes, II, Post-Conviction Relief Judge

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Appellate Case No. 2020-000530

MAUNWELL ERVIN,

RESPONDENT,

v.

STATE OF SOUTH CAROLINA,

PETITIONER.

REPLY BRIEF OF PETITIONER

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II. The PCR court erred in finding Counsel ineffective for not objecting to lay opinion testimony from narcotics officers because counsel exercised reasonable professional judgment in declining to object to the testimony and because the narcotics officers were not required to be qualified as experts to offer testimony based on the officers' experience.

III. Because the solicitor's closing argument was not improper, counsel's performance was not deficient for declining to object to the argument, and the PCR court's finding that counsel's stated strategy was unreasonable is controlled by an error of law. Further, the PCR court's finding that Ervin was prejudiced is not supported with probative evidence.

ARGUMENT

I.

Because trial counsel is not required to be clairvoyant and anticipate changes in the law, the PCR court erred in granting relief based on an instruction comporting with the law as it existed at the time of trial.[1] This Court told trial judges to provide the jury instruction under the law at the time of trial.

State v. Adams, 291 S.C. 132, 352 S.E.2d 483 (1987) was the controlling authority at the time of trial. Respondent Ervin attempts to argue Adams was not controlling law at the time of trial by contending, "A trial lawyer who has reasonably read the prior decisions of this Court would have known that Adams was an outlier and **destined** to be corrected." BOR, p. 3 (emphasis added). This statement misapprehends the Strickland standard and how changes in the law post-trial are viewed in the Strickland framework. Strickland v. Washington, 466 U.S. 668, 686 (1984). "[T]he case law is clear that an attorney's assistance is not rendered ineffective because he failed to anticipate a new rule of law." Kornaharens v. Evatt, 66 F.3d 1350 (4th Cir. 1995). In other words, trial counsel does not have to determine destiny. State v. Stewart, 433 S.C. 382, 858 S.E.2d 808, 813 (2021) establishes a new rule of law, evidence by the fact it explicitly overrules Adams.

Ervin further contends "any reasonably competent lawyer defending those accused of a crime should have been aware of the two cases [Yarborough v. Southern Ry., 78 S.C. 103, 58 S.E.936, 937 (1907) and Finch v. Atlanta and C. Airline Ry., 87 S.C. 190, 69 S.E. 208 (1907)] that were more than 100 years old at the time of the trial." BOR p. 3. Unlike Adams, neither of those cases concerned the proper constructive possession instruction for trial courts to provide. Further,

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[1] The PCR court found: (1) the charge was not supported by South Carolina law and violated Section V, § 21 of the Constitution of South Carolina and (2) the jury charge eliminated the *mens rea* requirement as to the possession of the drugs. However, because Petitioner's arguments apply to both findings, Petitioner addresses both findings in Issue I.

in fashioning the proper instruction in Adams, the justices participating in that case, as reasonably competent attorneys, would have been aware of the two cited 1907 cases and the constitution in fashioning the instruction it told the trial judges to provide. If trial counsel's judgment fell below professional norms, than so too would the professional judgment of the justices, which is simply untenable.

Ervin's analysis of what constitutes an improper instruction on the facts is far more expansive than what was contemplated by our state constitution. See Williams v. Southeastern Life Ins. Co., 197 S.C. 171, 171, 14 S.E.2d 895, 897 (1941) ("In our opinion, the proposition of law requested did not infringe upon the facts. It was nothing more than a statement of a legal conclusion which would result if the jury found certain facts alleged in the complaint to exist."). "Numerous cases uphold the proposition that a charge stating the legal conclusions which would result from the establishment of certain facts is not necessarily subject to objection as a charge on the facts, or as assuming the truth of the facts as stated." Id. More importantly, because Stewart did not reach the question, case law does not exist that the statement of law discussed in Stewart is actually an unconstitutional instruction on the facts. Therefore, counsel is not required to be clairvoyant and anticipate a change in law that has not occurred. Evatt, supra.

Ervin argues the *mens rea* argument was not properly charged and claims Adams did not address this issue. However, this issue was addressed in State v. Stewart, 433 S.C. 382, 858 S.E.2d 808 (2021) to both Stewart and Ervin's detriment. In Stewart, this Court explained that for a possession type drug offense, the prosecution must prove possession (actual or constructive) and "knowledge of the drugs and the intent to control their disposition or use." Id. at ___, 858 S.E.2d at 810 (internal quotation marks omitted). The jury instruction in Stewart, as in the instant case, included in its constructive possession charge a statement that "mere presence at the scene where

the drugs were found is not enough to prove possession." Id. This Court found the mens rea element was communicated to the jury when considering the jury instructions as a whole. Id. at ___, 858 S.E.2d at 812. Like Stewart, the jury instruction in the instant case sufficiently communicated the correct *mens rea* when the jury instruction was read as a whole.

Therefore, counsel was not ineffective for failing to object to the jury instruction and the PCR court's ruling is a misapplication of the Strickland standard and an error of law.

II.

The PCR court erred in finding Counsel ineffective for not objecting to lay opinion testimony from narcotics officers because counsel exercised reasonable professional judgment in declining to object to the testimony and because the narcotics officers were not required to be qualified as experts to offer testimony based on the officers' experience.

Ervin claims the question of whether a police officer may, based on the officer's experience, provide lay opinion testimony is a question of law. Ervin oversimplifies the analysis because he ignores the prism in which ineffective assistance claims are considered: the question is not whether in a hindsight analysis the attorney's assessment of the law proved correct, but whether at the time of trial, the attorney's assessment of the law is reasonable. Undermining any claim that trial counsel's assessment of the issue in the instant case was unreasonable is a case issued by our Court of Appeals only a few weeks prior to Ervin's Brief of Respondent – State v. Jonathan Stanley Ostrowski, Op. No. 5872 (S.C. Ct. App. filed November 24, 2021). In that case, the Court of Appeals observed,

> [I]n limited circumstances, law enforcement officers are allowed to draw on their experiences while testifying. The dividing line that many courts have drawn – and that our supreme court appears to have adopted – is that officers may provide lay opinions based on their observations, experience and training, but may not provide lay opinions on such matters if they did not either observe the events in question or actively participate in the investigation.

Id. (citations omitted). Citing federal authority, the Court of Appeals noted:

> Courts have frequently held that law enforcement officers can offer their opinion on certain aspects of the drug trade based on their personal experience or knowledge regarding the particular investigation at issue, or how those experiences and knowledge shaped their contemporaneous perceptions of what they saw while acting in the course of an investigation.

Id. (emphasis removed, citations omitted).

The Court of Appeals concluded that testimony from the officer "discussing how the objects he found were sometimes used in drug trafficking based on what he had seen in previous investigations" was permissible lay opinion testimony. Id.

"Rule 701 [FRE] does not prohibit lay witnesses from testifying based on particularized knowledge gained from their own personal experiences." United States v. Hill, 643 F.3d 807, 841 (11th Cir. 2011). "Lay witnesses may draw on their professional experiences to guide their opinions without necessarily being treated as expert witnesses." United States v. Jeri, 869 F.3d 1247, 1265 (11th Cir. 2017). "[L]aw enforcement officers may testify as lay witnesses even though their expertise often makes them more efficient or productive at their jobs." Id.

At the PCR hearing, Counsel testified she refrained from an objection to the officers' testimony and instead chose to challenge the officers' credibility during cross-examination. Counsel testified she "temper[ed] her objections with what was going to irritate the jury and the judge." App. p. 490, lines 1-3. Counsel further testified she believed she made her "point pretty sufficiently across through examination." App. p. 490. Counsel completed a thorough cross-examination of the officers, especially in challenging Agent Smith's testimony regarding Ervin's alleged admission. App. p. 337, lines 3-11; 347, lines 10-25.

However, Ervin focuses exclusively on the substantive issue and ignores the controlling question, which is whether counsel's strategic reason for not objecting is reasonable. Courts must be wary of second guessing counsel's trial tactics; and where counsel articulates a valid reason for employing such strategy, such conduct is not ineffective assistance of counsel. Whitehead v. State, 308 S.C. 119, 417 S.E.2d 529 (1992). The burden of disproving the reasonableness of trial strategy lies with the applicant. Burt v. Titlow, 571 U.S. 12, 17 (2013); Dunn v. Reeves, 141 S.Ct. 2405, 2410 (2021) ("[E]ven if there is reason to think that counsel's conduct was far from exemplary, a court still may not grant relief if the record does not reveal that counsel took an approach that no competent lawyer would have chosen.") (citation and internal quotation marks omitted).

III.

Because the solicitor's closing argument was not improper, counsel's performance was not deficient for declining to object to the argument, and the PCR court's finding that counsel's stated strategy was unreasonable is controlled by an error of law. Further, the PCR court's finding that Ervin was prejudiced is not supported with probative evidence.

Ervin fails to address the errors of law in the PCR court's order, as discussed in the Brief of Petitioner. Further, Ervin fails to address the controlling question as to whether counsel's strategic reason for not objecting to the prosecutor's statement was reasonable. To be clear, for the reasons explained in the Brief of Petitioner, the prosecutor's closing argument was not improper.

Counsel explained why she did not object to the prosecutor's comment:

> I didn't object to the closing for several reasons. One, I had done a pretty good job of discrediting his officers on that stand, and I feel like he made that statement solely to try to get some sort of rehabilitation back from what they had lost through my cross. And, second, objecting in a closing argument I think sometimes has a negative effect with both the judge and the jury. So I almost thought making that statement was him even further repudiating that they

weren't acting as they should to the standard.

App. p. 478, lines 3-11. Counsel testified she did not see the prosecutor's statement as bolstering at the time, although she testified, "I can see how you could view it that way now **in hindsight**."[2] App. p. 478, lines 12-19.

Counsel elected to offer a contrary opinion of law enforcement's performance, telling the jury in closing argument, "I think, I may be sure, I don't know, that's not good enough; okay?" App. p. 371. Amongst several examples she provided, she remonstrated: "Problem number one, no notes. . . . They didn't think it was important. If they had taken notes in this case we might have a different trial, a different suspect, maybe even a different defendant; okay? It wasn't important." App. p. 372, lines 14-25. She concluded, "What we have here, ladies and gentlemen, is sloppy investigation. Sloppy investigation." App. p. 375, lines 7-9.

Because the PCR court's ruling overlooks the high standard a PCR applicant must meet to find an attorney's articulated strategy was unreasonable, the PCR court's ruling is controlled by an error of law. Dunn v. Reeves, 141 S.Ct. 2405, 2410 (2021) ("[E]ven if there is reason to think that counsel's conduct was far from exemplary, a court still may not grant relief if the record does not reveal that counsel took an approach that no competent lawyer would have chosen.") (citation and internal quotation marks omitted). Note Ervin does not defend the misapplication of Strickland as discussed by Petitioner in the Brief of Petitioner.

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[2] See Strickland, 466 U.S. at 689 ("A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time.").

CONCLUSION

Based on the foregoing arguments, and those in its Brief of Petitioner, Petitioner respectfully requests this Court reverse the PCR court's grant of relief and for this Court to affirm the convictions and sentences.

Respectfully submitted,

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January 6, 2022