The State of South Carolina

In the

Supreme Court

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

G. Thomas Cooper, Circuit Court Judge

Appellate Case No. 2019-000289

SHONDRE LAMOND WILLIAMS,

Petitioner,

– v. –

STATE OF SOUTH CAROLINA,

Respondent.

PETITION FOR WRIT OF CERTIORARI

ELIZABETH FRANKLIN-BEST
BLUME FRANKLIN-BEST &
YOUNG, LLC
900 Elmwood Avenue, Suite 200
Columbia, SC 29201
(803) 765-1044
Counsel for Petitioner

Other Counsel of Record:
JOHNNY JAMES
ASSISTANT ATTORNEY GENERAL
P.O. Box 11549
Columbia, SC 29211-1549
Counsel for Respondent

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QUESTIONS PRESENTED

I. Did trial counsel render ineffective assistance of counsel when he failed to object to the Solicitor's repeated improper, burden-shifting statements during closing arguments, because the statements were legally inaccurate, and diluted the State's burden of proving Petitioner guilty beyone a reasonable doubt?

II. Did trial counsel render ineffective assitance of counsel when he failed to provide all of the necessary discovery to him prior to trial, including telephone calls recorded between Petitioner and the confidential informant, and when Petitioner testified that he had heard the inculpatory phone calls, he would not have insisted on his right to trial, but would have pleaded guilty?

III. Did trial counsel render ineffective assitance of counsel when he failed to object to the Solicitor's questioning of the informant about prior drug dealings when it was not offered to prove Petitioner had a predisposition to purchase drugs but was merely an attempt to intorduce improper character evidence?

IV. Did trial counsel render ineffective assitance of counsel when he failed to inform Petitioner that, should he be found guilty, he would have to serve a "day-for-day" sentence, and not just 85% of his sentence?

STATEMENT OF THE CASE

Petitioner was indicted by the Spartanburg County Grand Jury for possession with intent to distribute cocaine base (2012-GS-42-5626) and trafficking cocaine (2012-GS-42-4098) and was tried between February 25-27, 2013 before the Honorable J. Derham Cole and a jury in Spartanburg County. Petitioner was represented by J. Falkner Wilkes. The State was represented by J. Hayes Holliday and Scott Spivey. Petitioner was convicted and sentenced to 25 years' incarceration. He received a 10-year sentence for PWID, which was ordered to be served concurrently with his 25 year sentence for trafficking.

Petitioner then timely appealed, and the South Carolina Court of Appeals affirmed his sentence and conviction. *State v. Shondre Williams*, Op. No. 2014-UP-367 (*filed* October 29, 2014). Petitioner filed a Petition for Rehearing on November 12, 2014. The South Carolina Court of Appeals denied the Petition on December 17, 2014. Petitioner then sought certiorari in the South Carolina Supreme Court. The Court denied the petition on June 18, 2015.

Petitioner then filed an application for post-conviction relief on August 5, 2015. During the pendency of that proceeding, Petitioner retained William G. Yarborough III who represented him at the evidentiary hearing held before the Honorable G. Thomas Cooper on November 13, 2017. The State was represented by Valerie Giovanoli. Judge Cooper issued an order of dismissal with prejudice on March 5, 2018. Petitioner then filed a Motion to Alter or Amend PCR Judgment or,

Alternatively, Grant New PCR Evidentiary Hearing which was denied by Judge Cooper on February 11, 2019.

This petition for writ of certiorari timely follows.

RELEVANT FACTS

Petitioner's case involves a reverse-buy operation, a unique factual situation in which a confidential informant solicits a drug buy from someone else. On March 1, 2012, Investigator Travis McJunkin of the Spartanburg County Sheriff's Office assisted Greenville County officers in executing a search warrant on an individual named Shondrell Williams[1]. App. 37, ll. 3-9; App. 177, l. 24- App. 178, l. 7. The police found enough drugs in Mr. Williams' home to make him eligible for a very substantial prison sentence given his prior drug convictions. App. 178, ll. 8-9; 24- App. 179, l. 3. They informed Mr. Williams that he could avoid prison by cooperating with them. App. 178, ll. 10-24. Williams agreed to act as a confidential informant in arranging to sell cocaine to Petitioner. App. 37, ll. 11-18; App. 178, ll. 4-7; App. 179, ll. 2-3.

With the police observing him, the informant called Petitioner to tell him that he had drugs to sell. App. 180, ll. 5-23. Petitioner turned down the offer. App. 191, l. 25- App. 192, l. 5. Petitioner later called the informant back, however, and agreed to purchase cocaine. App. 192, l. 5.

Meanwhile, Sergeant Joe Pharis of the Spartanburg County Sheriff's Office contacted Lieutenant Ashley Harris, a chemist in the forensic lab, and asked him to

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1 Not to be confused with the name of Petitioner in this case, Shondre Williams.

prepare a package containing approximately 250 grams of cocaine. App. 84, l. 21 to App. 85, l. 2; App. 141, l. 19- App. 202, l. 3. Investigator Matt Hutchins retrieved the package from Lieutenant Harris and delivered it to the narcotics office. App. 110, l. 17- App. 111, l. 12.

Once the operation was ready to proceed, Investigator McJunkin retrieved the drugs from that office and gave them to the informant. App. 114, l. 21- App. 115, l. 15. Investigator McJunkin and several other members of the sheriff's office then followed the informant to Petitioner's residence. App. 37, l. 19- App. 38, l. 1. The informant entered Petitioner's residence, and then left shortly afterwards. App. 44, ll. 18-20. Investigator William Tillinghast followed the informant to another location where he gave Tillinghast $4,000 that the informant said he received from Petitioner in exchange for the cocaine. App. 44, l. 25- App. 45, l. 3. Tillinghast then called Investigator Hutchins, who was at the sheriff's office, and told him that Petitioner had purchased cocaine from the informant. App. 45, ll. 4-9.

After a search warrant was secured by the Sheriff's Office, law enforcement searched Petitioner's home. App. 63, ll. 9-17. Petitioner informed the officers that he had hidden the cocaine in the hot water heater. App. 64, l. 21- App. 65, l. 20; 65, ll. 1-23. A search of the house also revealed crack cocaine hidden above a kitchen cabinet. App. 119, ll. 14-16. Petitioner was charged with those drugs and ultimately proceeded to trial where he was convicted.

ARGUMENTS

I. **Trial counsel rendered ineffective assistance of counsel when he failed to object to the Solicitor's repeated improper, burden-shifting statements during closing argument, because the statements were legally inaccurate, and diluted the State's burden of proving Petitioner guilty beyond a reasonable doubt.**

During his closing argument, the Solicitor improperly argued to the jurors that Petitioner had the burden to prove to them that he was not predisposed to commit this crime:

> And the judge is going to charge you on what in South Carolina we call entrapment. That means that the defendant-- in order for you to find the defense of entrapment applies you have to find that the defendant had no predisposition to commit the crime.
>
> And the **defendant bears that burden.** The **defendant has to prove to you** that he had no predisposition. That means that he would never do that, he's never done it before, he wouldn't do it again, and the cops came and forced it upon him, he wasn't willing, he didn't want to do it.
>
> **He's put up no evidence to that effect.** Now, normally in a criminal trial the state bears the burden, and for the rest of this stuff we do. And that burden is proof beyond a reasonable doubt...
>
> But on this instance for him to meet the **burden the law puts on him** for the defense of entrapment you're going to find that that applies. **He has to prove to you that he was not predisposed to commit this crime.** I submit he absolutely has not done that.

App. 234, l. 20- App. 235, l. 16 (emphasis added).

These were repeated misstatements of the law, and trial counsel did not object to them. He should have, because they were completely inaccurate and highly prejudicial to Petitioner. His failure to object rendered his performance substandard, and respectfully this Court should grant Petitioner's petition for writ of certiorari.

The PCR court judge erred when he found that the Solicitor did not improperly shift the burden to Petitioner to prove that he was entrapped by law enforcement into committing this offense. In its order of dismissal, the court held:

> Applicant alleges the Solicitor made improper burden shifting comments in closing. Specifically, Applicant claims page 316 of the trial transcript shows the Solicitor explaining it is the defendant's burden to prove a lack of predisposition to commit the crime if he raises the affirmative defense of entrapment. Applicant claims that because he is not compelled to testify or present evidence, the Solicitor's comments were improper and objectionable.
>
> One pleading entrapment has the burden of showing that he was induced, tricked or incited to commit a crime, **which he would not otherwise have committed**." (emphasis in order) (citations omitted). While comments from the State placing any burden on the defendant are generally impermissible, certain affirmative defenses do in fact place a burden on the defendant to prove or disprove certain facts. Entrapment is an affirmative defense that places upon the defendant the burden of proving both elements-- inducement and lack of predisposition. *Id.* The Solicitor's comments were a correct statement of the law. The Solicitor was only referring to the elements of the affirmative defense raised by Applicant, not the burden of proof the State was required to meet in proving the elements of the crime. Therefore, the comments by the Solicitor in closing were not objectionable and Counsel could not have been deficient by not objecting. There is no evidence in the record to suggest that but for the alleged error, there is a reasonable probability the outcome of the trial would have been different. This allegation is denied and dismissed with prejudice.
>
> App. 424-25.

The order of dismissal commits a grievous error of law-- asserting the defense of entrapment does not "in fact place a burden on the defendant to prove or disprove certain facts" nor does it "place upon the defendant the burden of proving" both inducement and lack of predisposition.

The affirmative defense of entrapment is available where there is the "conception and planning of an offense by an officer, and his procurement of its commission by one who would not have perpetrated it except for trickery, persuasion, or fraud of the officer. *State v. Jacobs*, 238 S.C. 234, 244, 119 S.E.2d 735, 740 (1961).

It is a well settled principle of law that the defense of entrapment is not available to a defendant exhibiting a predisposition to commit a crime independent of governmental inducement and influence. *Sorrells v. United States*, 287 U.S. 435 (1932). The fact that a government official "merely afford[s] opportunities or facilities for the commission of the offense does not constitute entrapment." *Sherman v. United States*, 356 U.S. 369, 372 (1958).

A defendant pleading entrapment has the burden of showing that he was induced, tricked or incited to commit a crime, which he would not otherwise have committed. *Babb v. State*, 240 S.C. 235, 125 S.E.2d 467 (1962); *Jacobs, supra.* The entrapment defense consists of two elements: (1) government inducement, and (2) lack of predisposition. *Matthews v. United States*, 485 U.S. 58, 63 (1988). The defendant has the initial burden to produce more than a scintilla of evidence that the government induced him to commit the charged offense, before the burden shifts to the government to prove beyond a reasonable doubt that the defendant was predisposed to commit the crime." *United States v. Sligh*, 142 F.3d 761, 762 (4th Cir. 1998). The United States Supreme Court has ruled that it is not necessary for a defendant to testify or present any evidence to invoke the defense of entrapment. *Sherman v. United States*, 356 U.S. 369, 373 (1958).

Both the order of dismissal and the Solicitor's argument improperly place the burden on a criminal defendant to prove particular facts. That is not correct. A criminal defendant need merely raise the defense that the government induced him to commit the crime, and then the burden shifts to the state (as it always does) to prove, beyond a reasonable doubt, that the defendant was predisposed to commit the crime. Although it is an affirmative defense, that does not mean that the defendant loses the presumption of innocence or that the State does not still have the burden of proving the elements of a crime beyond a reasonable doubt. *See In re Winship*, 397 U.S. 358 (1970) (holding the Due Process clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime charged.)

The Sixth Amendment to the United States Constitution guarantees a defendant the right to effective assistance of counsel. U.S. Constitution, Amendment VI; *Strickland v. Washington*, 466 U.S. 668 (1984); *Lomax v. State*, 379 S.C. 93, 665 S.E.2d 164 (2008)

The United States Supreme Court has established a two-pronged test to establish ineffective assistance of counsel by which a PCR applicant must show (1) counsel's performance was deficient, and (2) the deficient performance prejudiced the defendant. *Strickland,* 466 U.S. at 687; *Cherry v. State*, 300 S.C. 115, 386 S.E.2d 624 (1989). Under the second prong, the PCR 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." *Strickland*, 466 U.S. at 694. "A reasonable

probability is a probability sufficient to undermine confidence in the outcome of the trial." *Simmons v. State*, 331 S.C. 333, 338, 503 S.E.2d 164, 166 (1998).

Here, Petitioner was prejudiced by his lawyer's substandard performance because the Solicitor, repeatedly, and without objection, emphasized the wrong legal standard to the jury. The Solicitor also criticized Petitioner for his failure to put up any evidence although, of course, he had no legal duty to do so. *See Doyle v. Ohio*, 426 U.S. 610 (1976) (holding that the prosecution's use of a defendant's silence after having been Mirandized was a violation of due process). Trial counsel's performance was deficient, and Petitioner was prejudiced by his performance. Respectfully, this Court should grant Petitioner's petition for writ of certiorari and allow additional briefing on this issue.

II. **Trial counsel rendered ineffective assistance of counsel when he failed to provide all of the necessary discovery to him prior to trial, including telephone calls recorded between Petitioner and the confidential informant, and when Petitioner testified that had he heard the inculpatory phone calls, he would not have insisted on his right to trial, but would have pleaded guilty.**

At the PCR hearing, Petitioner testified that he did not hear the tapes provided by the State, purporting to be of Petitioner and the confidential informant, until PCR counsel provided them for him. He testified that, had he heard them, he would have pleaded guilty. App. 347-48. PCR hearing. App. 338. He did not believe that what was contained on the tapes was sufficient for an entrapment defense. App. 348.

> A: I just told you... being I heard my voice on the tapes, and I said some pertinent things that I didn't think it was right for us to move forward with that issue.

Q: Okay. Because you felt like they- and so you told me to stop with that issue, and I stopped, right?

A: Yeah. I'm saying I told you we could do it another way, you know what I'm saying, on that issue, saying like, basically like, I didn't hear the tapes. Had I heard the tapes, then I would have pled guilty because I heard my voice on them. I never heard the tape before I went to trial.

App. 348, ll. 14-25.

Petitioner reiterated that he did not hear the tapes prior to his trial. App. 365. Had he done so, he would have pleaded guilty. App. 367.

Trial counsel testified that he attempted to review the audio and video with Petitioner, but that his computer "died in the process." App. 374, ll. 19-20. He testified that they discussed what was on the video. App. 375. Counsel admitted that he thought Petitioner had heard the phone calls, but that he "may not have." App. 375, l. 18. Counsel reiterated that Petitioner had not heard all of the video tape. App. 380.

In addressing this claim, the PCR court held:

> Applicant did not express his desire to have the tapes admitted at trial, but rather expressed concern that he had not heard the recordings until a week prior to his PCR hearing. Despite the allegation pled in the amended application, applicant actually testified he would have pled guilty if he had heard the undercover phone recordings prior to trial. However, this Court finds Counsel's testimony on the issue more credible than Applicant's. Counsel testified Applicant did not hear all (or possibly any) of the undercover calls, but that Counsel had listened to them and discussed the contents with Applicant. Counsel conceded Applicant had a right to listen to them, but Applicant indicated to Counsel he was comfortable with their discussion and did not request or insist on hearing the recordings.[2] This Court finds Applicant has failed to meet his burden of proving any deficiency with regard to the handling

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2 Counsel cannot locate the record support for this claim.

> of the undercover phone calls. The record also demonstrates that absent any alleged error, the outcome of the trial would not have been different. This allegation is denied and dismissed with prejudice.

App. 427.

The PCR court erred because Petitioner had a right to review the discovery in his case. See Rules Crim. Proc., Rule 5. In *State v. Lawton*, 382 S.C. 122, 675 S.E.2d 454 (2009), the South Carolina Court of Appeals found the appellant in that case was prejudiced because the government's failure to produce discovery impacted his decision to testify, "a fundamental right." *Id.* at 127,457. As this Court noted in *Earley v. State*, 418 S.C. 255, 792 S.E.2d 226 (2016): "[Rule 5, SCRCrimP], of course, is intended to enable a defendant to obtain prior to trial any of his own statements relevant to the crime charged against him so that he will be able to prepare properly to face the evidence that may be introduced against him at trial." (quoting *United States v. Gleason*, 616 F.2d 2, 24 (1979)) (discussing the underlying purpose of the similar federal rule).

In this case, Petitioner testified, unequivocally, that he would have pleaded guilty had he reviewed the discovery prior to his trial. Had he pleaded guilty, he could have taken advantage of the State's offer of a 10-12 year sentence. App. 379. Petitioner was prejudiced by his attorney's substandard performance, and respectfully he asks this Court to grant his petition for writ of certiorari.

III. **Trial counsel rendered ineffective assistance of counsel when he failed to object to the Solicitor's questioning of the informant about prior drug dealings when it was not offered to prove Petitioner had a predisposition to purchase drugs but was merely an attempt to introduce improper character evidence.**

After the Solicitor showed the jury a videotape of the transaction (that Petitioner had not viewed himself prior to trial), he asked the informant the following questions:

> Q: (referring to the cocaine that was the basis of this arrest) And the money that we saw in the video that he paid to you—
>
> A: Yes, sir.
>
> Q: -- that's the same money that's in the courtroom today? It looked like he smelled the cocaine or something on the video. Is that typical?
>
> A: I—I don't know.
>
> Q: Okay. Did – did the defendant complain about the quality of any previous cocaine that you had sold to him?
>
> A: Yeah. He always wanted to do that.
>
> Q: Always complained about it. I think you say on the video that the previous cocaine you supplied him wouldn't drop. Do you know that that means?
>
> A: Wasn't dropped?
>
> Q: Yeah. Said it wasn't dropped. . . . So he was saying that the cocaine you had been giving him before wasn't up to par?
>
> A: I guess so.

App. 187-88.

Character evidence is not admissible to prove the accused possesses a criminal character or has a propensity to commit the crime with which he is charged. Rule 404(a), SCRE, states the general rule that [e]vidence of a person's character or a trait

of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion." *State v. Bowman*, 344 S.C. 70, 543 S.E.2d 552 (2001); *State v. Peake*, 302 S.C. 378, 380, 396 S.E.2d 362, 363 (1990).

Trial counsel, once again, rendered ineffective assistance of counsel by failing to object to the State's use of improper character evidence in an attempt to show that Petitioner was a regular drug user and had engaged in multiple transactions with the informant. This line of questioning did not appear to be directed at showing that Petitioner had a predisposition to use drugs, which he could have accomplished by simply asking the informant about prior exchanges. Instead, the Solicitor used this exchange to suggest that Petitioner was a significant drug user with a certain level of sophistication because he is discriminating in the drugs he chooses to purchase. Trial counsel should have objected and kept the Solicitor's focus narrow and to the point. Petitioner was prejudiced by his attorney's substandard performance because it led the jury to believe that Petitioner was a big-time drug dealer. Respectfully, this Court should grant Petitioner's petition for writ of certiorari and allow additional briefing on this issue.

IV. Trial counsel rendered ineffective assistance of counsel when he failed to inform Petitioner that, should he be found guilty, he would have to serve a "day-for-day" sentence, and not just 85% of his sentence.

Petitioner testified at the PCR hearing that his trial counsel never informed him that he would serve a day-for-day sentence if he were convicted. He believed he would serve only 85% of his sentence. App. 345. He testified that, had he known it was a day-for-day sentence, he would have pleaded guilty. Petitioner testified that

his lawyer affirmatively told him he would only serve 85%. App. 346. Trial counsel testified that he did not recall telling him that he would serve 85% of his sentence but that he read the statute to him. App. 387.

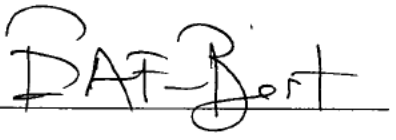
To prevail on a claim of ineffective assistance of counsel, Petitioner must satisfy the two prong test of *Strickland v. Washington*, 466 U.S. 668 (1984): (1) that counsel's advice was not within the range of competence demanded of attorneys in criminal cases, and (2) that there is a reasonable probability that, but for counsel's advice, he would have pleaded guilty and not insisted on trial. *See Hinson v. State*, 297 S.C. 456, 377 S.E.2d 338 (1989). A criminal defendant has the right to have his counsel provide him with accurate advice regarding his sentence. *Bennett v. State*, 371 S.C. 198, 638 S.E.2d 673 (2006). Trial counsel rendered ineffective assistance of counsel when he erroneously informed Petitioner that he would only serve 85% of his sentence, and not that he would serve a day-for-day sentence. As Petitioner testified, had he known that, he would have pleaded guilty. Respectfully, Petitioner asks this Court to grant his petition for writ of certiorari.

CONCLUSION

Respectfully, this Court should grant Petitioner's petition for writ of certiorari and allow for additional briefing on these claims.

Respectfully Submitted,

SHONDRE LAMOND WILLIAMS

By: 

ELIZABETH FRANKLIN-BEST
BLUME FRANKLIN-BEST & YOUNG, LLC
900 Elmwood Avenue, Suite 200
Columbia, SC 29201
(803) 765-1044
Counsel for Appellant

PROOF OF SERVICE

The undersigned hereby certifies that on this 23 of May, 2019, seven copies of the petition and two copies of the Appendix were sent via third party commercial carrier for overnight delivery to the clerk's office. This same date, a copy of each was sent via third party commercial carrier to all counsel of record, at the address below:

Johnny E. James Jr.
Assistant Attorney General
Office of the Attorney General
State of South Carolina
P.O. Box 11549
Columbia, SC 29211-1549
803.734.1216