STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Spartanburg County

J. Mark Hayes, II, Circuit Court Judge

MABLE IRENE LEEBEY,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

Appellate Case No. 2012-213132

PETITION FOR WRIT OF CERTIORARI

CARMEN V. GANJEHSANI
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

ATTORNEY FOR PETITIONER

INDEX

ISSUES PRESENTED

I. Did the PCR court err in finding that trial counsel provided effective assistance of counsel where trial counsel failed to object under State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923) to the admission into evidence of finger scales and marijuana that were found in a search of Petitioner and her hotel room where such evidence irrelevantly and prejudicially put her character into evidence?

II. Did Petitioner's trial counsel err in failing to discover that Petitioner's previous marijuana conviction was not a conviction for possession of twenty-eight grams, but rather an uncounseled guilty plea to simple possession of marijuana which resulted in imprisonment that should not have been considered by the Trial Court in sentencing Petitioner as a third offender?

STATEMENT

Indictments

On July 30, 1998, Petitioner Mable Irene Leebey was indicted by the Spartanburg County Grand Jury for trafficking ten grams or more of cocaine. App. 271-272.

Trial and Sentence

On October 28-29, 1999, Petitioner appeared before the Honorable J. Derham Cole and a jury. App. 1-121. Petitioner was represented by Stephen Welch, and the State was represented by Assistant Solicitor Anthony Mabry. App. 1. The jury found her guilty of trafficking cocaine as indicted. App. 116, ll. 8-14. The State asserted, and defense counsel agreed, that Petitioner had two prior offenses - a 1992 conviction for possession of crack cocaine and a 1997 conviction for possession of twenty-eight grams of marijuana. App. 119, ll. 10-24. Judge Cole, finding Petitioner's conviction to be a third offense, sentenced her to the mandatory minimum term of twenty-five years imprisonment and a $50,000.00 fine. App. 121, ll. 3-9; S.C. CODE ANN. § 44-53-370(e)(2)(a)(3) (1999).

Direct Appeal

Petitioner timely filed a direct appeal to the S.C. Court of Appeals. Former Chief Appellate Defender Daniel T. Stacey submitted an appellant's brief on behalf Petitioner, arguing that the trial court erred when it permitted evidence of Petitioner's involvement with marijuana as such evidence irrelevantly and prejudicially put her character in evidence without any basis under State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923). App. 123-133. On May 21, 2002, the Court of Appeals affirmed, holding that the Lyle objection was not made at trial and was therefore not preserved for the court's review. App. 147-149.

First PCR Application and Hearing (2002-CP-42-3944)

On October 29, 2002, Petitioner filed her first PCR application requesting relief (2002-CP-42-3944). App.150-154. The State filed its Return on July 15, 2003. App. 155-158.

On January 13, 2005, an evidentiary hearing was held before the Honorable Roger L. Couch. App. 159-227. Petitioner was represented by J. Patricia Anderson, and the Respondent was represented by Assistant Attorney General Molly R. Crum. App. 159.

At the hearing, Petitioner testified that she was entitled to relief because, among other things, (1) her trial counsel did not preserve the Lyle objection for appeal; and (2) her trial attorney did not discover that her second conviction was not for possession of twenty-eight grams of marijuana, but only a conviction for simple possession of marijuana for which she pled guilty without the advice of counsel. App. 172, l. 1 – 175, l. 23; 229. Petitioner asked the court for a new trial and testified that she would also like her sentence reduced on the basis that she committed a second offense instead of a third. App. 179, ll. 2-12.

In her closing statement to the PCR court, Petitioner's counsel argued that Petitioner's trial counsel did not provide effective assistance of counsel because (1) he did not object to the other evidence of bad acts under Lyle; and (2) did not discover that the previous marijuana conviction was not a conviction for possession of twenty-eight grams, but only for simple possession to which Petitioner pled guilty without the advice of counsel which therefore cannot be used as a sentence enhancer under the principles set forth in Alabama v. Shelton, 535 U.S. 654 (2002). App. 220, l. 20 – 222, l. 25.

Order of Dismissal (2002-CP-43-3944)

On May 9, 2005, Judge Couch ruled in his Order of Dismissal that trial counsel was not ineffective for not objecting to the admissibility of the other bad acts under Lyle, agreeing with trial

counsel's position that the finger scales and marijuana evidence "would have constituted post arrest bad acts and would not have been objectionable under the Lyle case." App. 238.

Judge Couch also found "[i]t is clear that the Trial Court was misinformed as to one of the convictions from the Applicant's criminal record." Id. at 239. Judge Couch, however, found that simple possession would have served as one of the strikes necessary for Petitioner to be sentenced as a third offender such that "the resulting sentence would not have changed and she would have still been sentenced under the statute which required a mandatory sentence of 25 years in prison and a fine of fifty thousand dollars ($50,000)." Id.

On those grounds, Judge Couch denied Petitioner's PCR application. Id.

Petitioner did not file a timely Notice of Appeal.

Second PCR Application and Hearing (2010-CP-42-1494)

On March 29, 2010, Petitioner filed a second PCR application requesting relief. (2010-CP_42-1494). App. 244-250. Petitioner requested relief to appeal Judge Couch's denial of her first PCR application. App. 245. The State filed its Return on August 12, 2010. App. 251-254.

On November 2, 2010, the Honorable J. Mark Hayes, II held a hearing on the second PCR application. App. 255-259. Petitioner was represented by John E. Rogers, II, and the Respondent was represented by Assistant Attorney General Suzanne H. White. App. 255.

At the hearing the State consented to Petitioner's request for a belated appeal under Austin v. State, 305, S.C. 453, 409 S.E.2d 395 (1991):

> Apparently Ms. Lee-Bey at one point did attempt to file a pro se notice of appeal, which was dismissed for some reason. From looking at the files, we couldn't determine, other than maybe timeliness.
>
> I've spoken with her PCR counsel, who has informed me that she should have appealed the PCR. And, therefore, again, the State would consent to the Austin appeal.

> But Ms. Lee-Bey did file, I believe, a couple of other allegations in her application. And we'd just move to dismiss all of those as based as successive and based on the Statute of Limitations other than the belated PCR appeal, which we would consent to.

App. 258, ll. 7-18.

Petitioner's second PCR counsel stated that Petitioner was willing to consent to the dismissal of her other grounds in her second PCR application provided the agreement with the State that she will be granted an appeal of her original PCR. App. 258, ll. 19-24.

Consent Order Granting Belated PCR Appeal Pursuant to Austin and Dismissing All Other Claims (2010-CP-42-1494)

On November 18, 2010, Judge Hayes found in his Order of Dismissal that Petitioner "did not knowingly and voluntarily waive her right to appellate review" where her first PCR attorney failed to file an appeal following the denial of the first PCR application. App. 262-263. Judge Hayes subsequently granted Petitioner a belated PCR appeal pursuant to Austin. Id.

Petitioner filed a Notice of Appeal of this consent order on September 26, 2012 after not receiving the order from the State until September 17, 2012.

This petition follows.

ARGUMENT

I. The PCR court erred in finding that trial counsel provided effective assistance of counsel because trial counsel failed to object under State v. Lyle, 125 S.C. 406, 118 S.E.803 (1923) to the admission into evidence of finger scales and marijuana that were found in a search of Petitioner and her hotel room where such evidence irrelevantly and prejudicially put her character in evidence.

Petitioner was charged with trafficking cocaine. App. 272. Rhonda Williams, who was employed at the Peach Blossom restaurant, was the first to testify at trial. App. 38, ll. 13-23. She stated she saw Petitioner and another woman in a booth and they may have had a small child with them. App. 39, ll. 1-3. After they left, another customer came in, sat down in the booth, and then brought Williams a change purse the customer said was found in the booth. App. 39, ll. 4-6. Williams gave the change purse to Johnny Petris, the owner of the restaurant. App. 39, ll. 7-9. Petris and Williams looked in the purse and saw something wrapped in tissue. App. 40, ll. 14-16, 47, ll. 4-8. Petris had his son call Officer Rocky Correll to come out and check what was in the purse. App. 47, ll. 8-12. When the police came, they field tested the item and said it was cocaine. App. 47, ll. 17-20.

Petris then called the girl in hotel room 108, Petitioner, and asked her to come get her purse. App. 41, ll. 16-18; 47, ll. 22-25. She took the purse and when she walked out of building onto the sidewalk, the police arrested her. App. 41, ll. 18-19. On cross-examination, Williams admitted that she had never waited on Petitioner or the other lady and had never seen them with the purse. App. 44, ll. 16 – 45, l. 1.

Officer David Taylor arrested Petitioner. App. 57, ll. 8-10. She was searched of her person incident to the arrest and consented to a search of her hotel room where a baggie of marijuana and finger scales were found in her pocket and room respectively. App. 58, ll. 2-5; App. 61, l. 24.

Petitioner's trial counsel did move to exclude this evidence on the basis that such evidence was highly prejudicial. App. 58, l. 14 – 59, l. 19. The trial court overruled the objection, and these items were put into evidence. App. 60, l. 11; 61, l. 24 – 62, l. 18.

During closing argument, the solicitor put emphasis on the possession of marijuana as circumstantial evidence of Petitioner's guilt. App. 89, ll. 6-22.

They jury ultimately convicted Petitioner of trafficking cocaine, and Judge Cole sentenced her to the mandatory minimum of twenty-five years imprisonment and a $50,000 fine. App. 116, ll. 8-14; 121, ll. 3-9.

Petitioner appealed her conviction, but the S.C. Court of Appeals affirmed, holding that trial counsel had not preserved an objection to the marijuana and finger scales evidence under State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923). App. 123-133; 147-149.

Petitioner's trial counsel erred in failing to object to the admission of the marijuana and finger scale evidence under Lyle where this was evidence of nothing other than unrelated drug activity which had nothing to do with the matter for which Petitioner was on trial. State v. Barroso, 328 S.C. 268, 493 S.E.2d 854 (1997).

To establish ineffective assistance of counsel, Petitioner must satisfy the two-prong test set forth in Strickland v. Washington, 466 U.S. 668 (1984). "First, a defendant must show that counsel's performance was deficient. Under this prong, [t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms." Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989) (internal citations omitted). "The second prong of the Strickland test requires a showing that the deficient performance prejudiced the defendant to the extent that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. The defendant is required to

overcome the presumption that counsel was effective in order to receive relief." Id. at 117-18, 386 S.E.2d at 625 (internal citations omitted).

The evidence of other drug activity was not admissible where it put Petitioner's character into evidence without any basis under Lyle. Under Lyle, evidence of other bad acts by the defendant is not admissible to prove the defendant committed the crime charge unless the evidence establishes:

> (1) motive; (2) intent; (3) the absence of mistake or accident; (4) a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the others; [or] (5) the identity of the person charged with the commission of the crime on trial.

Lyle, 118 S.E. at 807; see also State v. Hough, 325 S.C. 88, 94, 480 S.E.2d 77, 80 (1997) ("Evidence of other crimes or bad acts is generally inadmissible to prove the bad character of the defendant or that he acted in conformity therewith.").

This Court has held that testimony of other bad acts in a cocaine prosecution involving marijuana use was reversible error. The evidence adduced at trial in Barroso showed isolated purchases of marijuana in amounts demonstrating the defendants were merely personally users. The State asserted that this marijuana evidence was admissible as "other bad acts" under Lyle. Barroso, 328 S.C. at 271, 493 S.E.2d at 855. This Court held "we fail to see how this evidence of isolated marijuana transactions is probative of [defendants'] participation in the marijuana conspiracy, much less how it is probative value of [defendants'] alleged roles as dealers in the cocaine trafficking conspiracy." Id. at 272, 493 S.E.2d at 856. This Court found no evidence of a common scheme or plan within the meaning of Lyle. Id.

In the instant case, the problem was even more compounded. There was no evidence that Petitioner was trying to traffic marijuana. She simply had some in her pocket. This evidence was probative of her bad character, without any real relevance to the trafficking in cocaine charge that

was brought in the indictment. The solicitor's contention that the evidence went to the knowledge of the existence of the other drug - "it's like having a gun on you" - articulates no legitimate theory of admissibility pursuant to Lyle. App. 60, ll. 4-6.

The trial counsel's error in failing to properly object to the admissibility of the other bad act evidence was not harmless. The change purse was brought from the table to the cashier by a mystery person who did not testify at trial. Furthermore, there was a second individual seated with Petitioner at the restaurant table. Obviously, there was a period of time during which the Petitioner was not in possession of her purse. The evidence is far from being so convincing to declare the error harmless here. Clearly, the solicitor invited the jury to use the marijuana possession in their deliberation process, and it cannot be said that the matter did not contribute to the verdict in this case.

At the PCR hearing, Petitioner's trial counsel testified that he did not object to the admissibility of the other drug evidence under Lyle because this other drug evidence was subsequent bad acts, not prior bad acts, and that as such, a Lyle objection would not have been proper. App. 202, ll. 18-24. The PCR court agreed that these subsequent bad acts would have not been objectionable under Lyle. App. 238.

There is, however, no rule that the analysis in Lyle cannot be applied to subsequent bad acts. The rule is that evidence of *other* crimes or bad acts is generally inadmissible as character evidence. This is not limited to only prior bad acts. See Hough, 325 S.C. at 94-96, 480 S.E.2d at 80-81. In fact, this State's appellate courts have discussed the admissibility of subsequent bad acts under the common scheme or plan exception under Lyle. See, e.g., State v. Whitener, 228 S.C. 244, 265, 89 S.E.2d 701, 711 (1955); State v. Weaverling, 337 S.C. 460, 469, 523 S.E.2d 787,

791 (Ct. App. 1999). The PCR court erred in holding that the subsequent bad acts were not objectionable under Lyle.

The failure of Petitioner's trial counsel to object to the other drug evidence that was clearly inadmissible under Lyle was ineffective assistance of counsel. Substantial prejudice resulted from this failure to challenge under Lyle the admission of other drug evidence unconnected to the charged offense where solicitor argued to the jury that they should consider this other drug evidence in determining whether Petitioner was guilty of trafficking cocaine. App. 89, ll. 6-22.

In Holman v. State, this Court held that trial counsel's failure to object to admission of a handgun that had no relevance to the offenses for which defendant was charged amounted to ineffective assistance of counsel. 381 S.C. 491, 674 S.E.2d 171 (2009). This Court remarked "the admission of this irrelevant and prejudicial evidence undermines confidence in the outcome of the trial." Id. at 493, 674 S.E.2d at 172.

In this case, both the deficient performance and prejudice prongs of the Strickland test are met. Petitioner requests this Court to reverse the denial of the PCR and grant a new trial.

II. Petitioner's trial counsel erred in failing to discover that Petitioner's previous marijuana conviction was not a conviction for possession of twenty-eight grams, but rather an uncounseled guilty plea to simple possession of marijuana which resulted in imprisonment that should not have been considered by the Trial Court in sentencing Petitioner as a third offender.

The PCR court agreed that the Trial Court was misinformed as to one of the convictions from Petitioner's criminal record. App. 239. The solicitor informed the Trial Court that Petitioner had a prior 1992 conviction for possession of crack cocaine and a prior 1997 conviction for possession of twenty-eight grams of marijuana or ten grams of hashish. App. 119, ll. 10-17. Petitioner's counsel agreed. App. 119, ll. 20-24. Based upon this information, the Trial Court sentenced Petitioner to the mandatory minimum term of twenty-five years imprisonment and a $50,000.00 fine as a third offender under S.C. CODE ANN. § 44-53-370(e)(2)(a)(3) (1999).

At the first PCR hearing, however, Petitioner produced a Certified Court Disposition entered as Exhibit 1 which showed that her 1997 conviction was for simple possession of marijuana, not possession of twenty-eight grams. App. 229. Petitioner pled guilty and received either a fine of $304 or 30 days imprisonment. Id. Petitioner testified that she did not have an attorney when she pled guilty to this conviction. App. 173, ll. 21-25. She also testified that she did spend time in jail for this 1997 conviction. App. 174, ll. 1-2.

In, Argersinger v. Hamlin, the United States Supreme Court held "that absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial." 407 U.S. 25, 37 (1972); see also Alabama v. Shelton, 535 U.S. 654, 658 (2002) (holding "a suspended sentence that may "end up in the actual deprivation of one's liberty" may not be imposed unless the defendant was accorded 'the guiding hand of counsel' in the prosecution for the crime charged"); Scott v. Illinois, 440 U.S. 367, 373-74 (1979) ("We therefore hold that the Sixth and Fourteenth Amendments to the

United States Constitution require only that no indigent criminal defendant be sentenced to a term of imprisonment unless the State has afforded him the right to assistance of appointed counsel in his defense').

Petitioner was therefore entitled to counsel when she pled guilty in 1997 to simple possession of marijuana.

The United States Supreme Court has also stated that "to permit a conviction obtained in violation of [the Sixth Amendment] to be used against a person either to support guilt or enhance punishment for another offense . . . is to erode the principle [in Gideon v. Wainwright, 372 U.S. 335 (1963).]" Burgett v. Texas, 389 U.S. 109, 115 (1967). The Court went on further: "Worse yet, since the defect in the prior conviction was denied of the right to counsel, the accused in effect suffers anew from the deprivation of that Sixth Amendment right." Id.; see also United States v. Tucker, 404 U.S. 443 (1972) (remanding case where the trial judge in imposing sentence for bank robbery conviction gave explicit consideration to three previous felony convictions, two which were later determined to be constitutionally invalid, having been obtained in violation of the right to counsel, and it appeared that the sentence might have been different if the sentencing judge had known that at least two of the previous convictions had been unconstitutionally obtained).

Under the principles expounded by the United States Supreme Court, Petitioner's second uncounseled conviction which resulted in imprisonment should not have been considered by the Trial Court in sentencing Petitioner as a third offender. Cf. Nichols v. United States, 511 U.S. 738, 749 (1994) (holding "that an uncounseled misdemeanor, valid . . . because no prison term was imposed, is also valid when used to enhance punishment at a subsequent conviction").

Petitioner notes that the Certified Court Disposition for her 1997 conviction has a notation that she received "credit for time served," but does not indicate how much credit she received. App.

229. In any event, Petitioner testified at the evidentiary hearing that she did serve prison time for this conviction. App. 173, l. 21 – 174, l. 2.

Petitioner's trial counsel was deficient in failing to investigate Petitioner's prior offenses since he knew that prior offenses would be used against Petitioner by the sentencing court. See Robinson v. State, 380 S.C. 201, 669 S.E.2d 588 (2008) (remanding case for resentencing where defense counsel rendered ineffective assistance of counsel by failing to challenge the use of defendant's prior uncounseled conviction as a sentence enhancer).

Had the Trial Court known that Petitioner's 1997 conviction was constitutionally invalid, Petitioner would have only been sentenced as a second offender under § 44-53-370(e)(2)(a)(2), which provides for a term of imprisonment "of not less than five years nor more than thirty years . . . ." There is a twenty-year difference between the mandatory minimum imprisonment for a second offender versus a third offender.

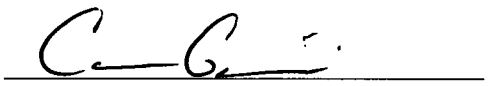
Petitioner was therefore substantially prejudiced by her trial counsel's failure to discover that her second conviction was actually for an uncounseled guilty plea to simple possession of marijuana where the sentencing court would have had greater discretion in sentencing Petitioner as a second offender. See Scott v. State, 334 S.C. 248, 513 S.E.2d 100 (1999) (finding petitioner was prejudiced by his attorney's failure to challenge circuit court's decision to treat marijuana bond forfeiture as a first offense when sentencing offender where petitioner received a thirty year sentence as a second offender but would have only received a maximum of ten years as a first offender); see also Thompson v. State, 340 S.C. 112, 116, 531 S.E.2d 294 (297 (2000) (holding that whether a defendant is sentenced within the sentencing range is irrelevant in showing the absence of prejudice).

Petitioner accordingly requests that in the alternative to the relief sought under Issue Number One of this Petition, that her case be remanded to the Trial Court for resentencing as a second offender under § 44-53-370(e)(2)(a)(2).

CONCLUSION

For the reasons set forth herein, the PCR court erred in denying Petitioner's Application for Post-Conviction Relief. This Court should grant Petitioner's writ of certiorari with the ultimate relief of either (1) a new trial; or alternatively, (2) a remand for resentencing.

Respectfully submitted,



Carmen V. Ganjehsani
Appellate Defender

ATTORNEY FOR PETITIONER

This 1st day of May, 2013.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Spartanburg County

J. Mark Hayes, II, Circuit Court Judge

MABLE IRENE LEEBEY,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

Appellate Case No. 2012-213132

CERTIFICATE OF SERVICE

I certify that a true copy of the petition for writ of certiorari and a copy of the appendix in this case have been served on Suzanne H. White, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 1st day of May, 2013.

Carmen V. Ganjehsani
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 1st day of May, 2013.

(L.S.)
Notary Public for South Carolina
My Commission Expires: July 24, 2022.