

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Certiorari to Greenville County

Honorable Alex Kinlaw, Circuit Court Judge

LORGIO D. MORALES,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2019-000072

ANDERS BRIEF OF PETITIONER PURSUANT TO WHITE V. STATE

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SC Court of Appeals

TABLE OF CONTENTS

TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
ISSUE PRESENTED.....	1
STATEMENT.....	2
STANDARD OF REVIEW	4
ARGUMENT	
The court erred where it admitted evidence seized via a search warrant, where the search warrant was obtained by exploiting the illegality of a prior warrantless entry by law enforcement, since Petitioner had a reasonable expectation of privacy in the premises, and since there was no emergency to justify the warrantless entry	5
<i>Relevant facts</i>	5
<i>Discussion</i>	8
CONCLUSION.....	11

TABLE OF AUTHORITIES

Cases

<i>Bumper v. North Carolina</i> , 391 U.S. 543 (1968)	8
<i>California v. Ciarolo</i> , 476 U.S. 207 (1986).....	9
<i>Katz v. United States</i> , 389 U.S. 347 (1967)	8
<i>Mapp v. Ohio</i> , 367 U.S. 643 (1961)	8, 9
<i>Michigan v. Tyler</i> , 436 U.S. 499 (1978)	9
<i>Mincey v. Arizona</i> , 437 U.S. 385 (1978)	9
<i>Rakas v. Illinois</i> , 439 U.S. 128 (1978).....	8
<i>State v. Jones</i> , 435 S.C. 138, 866 S.E.2d 558 (2021)	7
<i>State v. Missouri</i> , 361 S.C. 107, 603 S.E.2d 594 (2004)	8
<i>State v. Tindall</i> , 388 S.C. 518, 698 S.E.2d 203 (2010).....	4
<i>State v. Wright</i> , 391 S.C. 436, 706 S.E.2d 324 (2011)	4
<i>United States v. Karo</i> , 468 U.S. 705 (1984)	8, 9
<i>Weeks v. United States</i> , 232 U.S. 383 (1914)	9
<i>White v. State</i> , 263 S.C. 110, 208 S.E.2d 35 (1974)	3
<i>Wong Sun v. United States</i> , 371 U.S. 471 (1963)	9, 10

Constitution

U.S. CONST. amend. IV	4, 8, 9
U.S. CONST. amend. XIV	8

ISSUE PRESENTED

Whether the court erred where it admitted evidence seized via a search warrant, where the search warrant was obtained by exploiting the illegality of a prior warrantless entry by law enforcement, since Petitioner had a reasonable expectation of privacy in the premises, and since there was no emergency to justify the warrantless entry?

STATEMENT

During the February 2016 term, a Greenville County Grand Jury indicted Lorgio Morales, Petitioner, for the offenses of trafficking marijuana, manufacturing marijuana, theft of electrical current, and tampering with a utility meter for the purpose of growing a controlled substance. App. 319 – 326. Petitioner was tried before the Honorable Edward W. Miller and a jury, from February 5 – 6, 2018. App. 1. Petitioner was represented by Scott David Robinson. Katryna Owens prosecuted the case. App. 1.

Petitioner was convicted as indicted and he was sentenced to serve concurrent terms of imprisonment of twenty-five years, twenty years, time served, and ten years, respectively. App. 225, ll. 8-12. Petitioner was also fined twenty-five thousand dollars. App. 225, ll. 8-12. Defense counsel did not file a notice of appeal.

On May 24, 2018, Petitioner filed an application for post-conviction relief (PCR), and alleged, *inter alia*, that counsel provided ineffective assistance when he failed to file and serve notice of appeal. App. 228 – 236. A hearing was held on the matter before the Honorable Alex Kinlaw, Jr., on December 17, 2018. App. 244. R. Mills Ariail, Jr., represented Petitioner. App. 244. Janell H. Gregory represented the State. App. 244. On January 9, 2019, the PCR court issued an order of dismissal. The PCR court denied Petitioner a belated direct appeal, ruling that he was not entitled to one given counsel's testimony that Petitioner never asked counsel to file an appeal. App. 302 – 318.

Petitioner filed a petition for writ of certiorari and the State made its return. On January 29, 2020, the South Carolina Supreme Court transferred the appeal to this Court pursuant to Rule 243(l), SCACR. On January 4, 2022, this Court granted the petition for writ of certiorari as to Question 1, whether Petitioner knowingly and intelligently waived his right to direct appeal

pursuant to *White v. State*, 263 S.C. 110, 208 S.E.2d 35 (1974). This brief of the direct appeal issue follows this Court's grant of certiorari.

STANDARD OF REVIEW

In Fourth Amendment search and seizure cases, the standard of review is limited to the following:

The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion. An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support. When reviewing a Fourth Amendment search and seizure case, an appellate court must affirm if there is any evidence to support the ruling. The appellate court will reverse only when there is clear error.

State v. Wright, 391 S.C. 436, 442, 706 S.E.2d 324, 326 (2011) (citations and internal quotation marks omitted). This deference does not bar appellate courts from conducting their own review of the record to determine whether the trial judge's decision is supported by the evidence. *State v. Tindall*, 388 S.C. 518, 521, 698 S.E.2d 203, 205 (2010).

ARGUMENT

The court erred where it admitted evidence seized via a search warrant, where the search warrant was obtained by exploiting the illegality of a prior warrantless entry by law enforcement, since Petitioner had a reasonable expectation of privacy in the premises, and since there was no emergency to justify the warrantless entry.

After the lock on the gate to the property was cut, law enforcement entered the building without a search warrant and absent an emergency. Upon seeing marijuana while inside, officers obtained a search warrant and collected the evidence admitted against Petitioner. The court erred by failing to suppress this evidence as fruit of the poisonous tree.

Relevant facts

A Greenville County Grand Jury indicted Petitioner for trafficking marijuana, manufacturing marijuana, theft of electrical current, and tampering with a utility meter for the purpose of growing a controlled substance. App. 319 – 326. At trial, the State alleged that Petitioner assisted in a large marijuana-growing operation that took place in a rented warehouse. App. 67, ll. 3-24; App. 161, ll. 4-11. Officers went to the warehouse at the request of Duke Energy since Duke Energy “wanted Uniform Patrol to come sit at the incident location while they had to break the lock on a fenced-in warehouse that was taking power. So they wanted deputies there to sit while they entered that property and cut the fence gate.” App. 56, ll. 12-17.

After Duke Energy cut off the electricity to the warehouse, police officers entered without a warrant and found growing marijuana. App. 56, l. 12 – 59, l. 2; App. 66, l. 25 – 67, l. 24. Officer Reece then obtained a search warrant for the warehouse and the warrant was executed. App. 68, l. 15 – 69, l. 5. Six hundred and eighty-seven (687) marijuana plants, and one hundred and twenty-five (125) pounds of packaged marijuana were seized, as was equipment including buckets, sumps,

tanks, and bulbs. App. 154, ll. 2-7; App. 155, ll. 2-6; Supp. Appx. 1 – 7. Thirty fingerprints that matched to Petitioner were collected from the living area of the warehouse and from various objects in the warehouse including an electrical panel, air conditioning unit, and lamp hood. App. 85, ll. 12-14; App. 79, l. 23 – 85, l. 3. In closing argument, the solicitor emphasized that Petitioner’s fingerprints were found in the “living quarters” of the warehouse. App. 194, l. 23 – 195, l. 5. “[T]he defendant is in the room. He’s living in the living quarters . . .” App. 196, ll. 6-10.

During pretrial motions, defense counsel made a “motion to suppress the evidence that was seized in the building. This is based on the search warrant being faulty in this case.” App. 35, ll. 6-9. Defense counsel provided a copy of the search warrant to the trial judge.¹ Defense counsel’s motion was based on his argument that the circumstances did not meet the exigent circumstances exception to the warrant requirement since the power had already been shut off. App. 36, l. 4-17.

“Judge, there wasn’t an exigent circumstance in this matter. He observed the building. They shut the power off to the building.” App. 36, ll. 4-6. “But what he [Officer Reece] talks about here [in the search warrant affidavit], he says there’s still possibly power to the property and the threat of a fire hazard.” App. 36, ll. 7-9. “[T]here was no fire hazard in this manner, no fire going on . . . And, judge, because of that, we don’t believe there was an exigent circumstance in this case to allow him to get into this building without a warrant in this matter.” App. 36, ll. 10-17. Defense

¹ Although the search warrant was not made an exhibit, defense counsel stated he was handing up a copy of the search warrant and the Court said, “Okay. Thank you.” The court initially stated that it only saw “one page” of the search warrant, but the court subsequently stated it was providing the witness, Officer Reece, with the court’s copy of the search warrant. Officer Reece went on to refer to and testify about multiple pages of the warrant. Therefore, the search warrant was before the court. App. 35, l. 9 – 43, l. 2. A copy of the search warrant is located at pp. 1 – 7 of the Supplemental Appendix.

counsel further argued that the warrant was only obtained after officers had looked inside the warehouse. App. 36, ll. 18-20.

The power had already been shut off before Officer Reece arrived. App. 43, ll. 19-22. Even though the power had been shut off already, in his warrant affidavit, Reece stated he entered the warehouse “[b]ased on the exigent circumstances of there possibly still being power to the property and the threat of a fire hazard entry was made into the warehouse.” The affidavit further stated that upon entry, Reece smelled marijuana and saw marijuana growing. Supp. Appx. 2.

The court heard testimony from Reece, who claimed he entered the warehouse without a warrant because he was told someone resided in the warehouse and “[w]e entered the structure to ensure there was no one within and no fire going on inside.” App. 40, ll. 4-6. Officers present when the power was shut off claimed they felt a “huge gust of hot air” come from the building. App. 44, ll. 10-11. “There was heat emitting from the building, there was melting wires leading into the building . . . at that point in time, I believed there to be an issue of a possible fire inside.” App. 38, ll. 5-9. “I’ve seen wires melt and cause a fire before, and that’s what I believed was occurring at the time.” App. 39, ll. 11-13. However, no one had seen fire and Reece admitted he did not smell smoke. App. 39, ll. 2-7. There was no fire.

The State argued Petitioner had not established a reasonable expectation of privacy in the building. App. 46, l. 24 – 47, l. 3.

The court found the search warrant was not defective. App. 46, ll. 10-20. This was a final ruling.² The seizures from the warehouse comprised the evidence that was admitted against

² See *State v. Jones*, 435 S.C. 138, 144, 866 S.E.2d 558, 561 (2021) (“where a court rules after a hearing on a constitutional issue . . . the ruling is final and, unless something changes during trial that may reasonably cause the trial judge to alter the pretrial ruling, no further objection is required to preserve the issue for appellate review”).

Petitioner at trial. App. 154, l. 1 – 155, l. 24; App. 59, ll. 24-25; App. 99, l. 25 – 100, l. 5; App. 95, ll. 11-16; App. 118, l. 1 – 140, l. 16; App. 177, ll. 10-11.

Petitioner was convicted as indicted and he was sentenced to twenty-five years for trafficking marijuana; twenty years for manufacturing marijuana; time served for the theft of electrical current; and ten years for tampering with a utility meter for the purpose of growing a controlled substance. App. 225, ll. 8-12. Petitioner also received a twenty-five thousand dollar fine. App. 225, ll. 8-12.

Discussion

The Fourth Amendment protects against unreasonable searches and seizures, and requires that probable cause support the issuance of a warrant. U.S. CONST. amend. IV. The Fourth Amendment applies to the states via the Fourteenth Amendment guarantee of due process. *Mapp v. Ohio*, 367 U.S. 643, 655 (1961). The Fourth Amendment applies whenever a person has a reasonable expectation of privacy in a particular location. *Katz v. United States*, 389 U.S. 347, 353 (1967). “To claim protection under the Fourth Amendment of the U.S. Constitution, defendants must show that they have a legitimate expectation of privacy in the place searched.” *State v. Missouri*, 361 S.C. 107, 112, 603 S.E.2d 594, 596 (2004) (citing *Rakas v. Illinois*, 439 U.S. 128, 143 (1978)).

Persons have a reasonable expectation of privacy in their residences. *See Bumper v. North Carolina*, 391 U.S. 543, 546-550 (1968) (error to admit evidence against defendant that was taken from his grandmother’s home, where he lived, in violation of Fourth Amendment); *United States v. Karo*, 468 U.S. 705, 714 (1984) (“private residences are places in which the individual normally expects privacy free of governmental intrusion not authorized by a warrant, and that expectation is plainly one that society is prepared to recognize as justifiable”). A person must take precautions

to prevent casual observers from noticing his conduct in order to claim his Fourth Amendment privacy right has been violated. *California v. Ciarolo*, 476 U.S. 207, 213-14 (1986). Here, Petitioner had a legitimate expectation of privacy in the warehouse—the State alleged that he was living there, which made it his residence. *Karo*, 468 U.S. at 714. The contraband was inside the warehouse, and the warehouse was surrounded by a fence. Moreover, the fence’s gate was closed and locked—the lock was cut, showing that precautions had been taken to secure Petitioner’s privacy. *Ciarolo*, 476 U.S. at 213-14.

The emergency doctrine allows law enforcement to enter a location without a warrant when they believe a person is in need of immediate aid; the justification is to preserve life. *Mincey v. Arizona*, 437 U.S. 385, 392 (1978). Ingress to fight a fire is an emergency which justifies warrantless entry. *Michigan v. Tyler*, 436 U.S. 499, 511 (1978). In this case, the power company had shut off power to the building when officers entered purportedly due to exigent circumstances. But no smoke was smelled. No flames were seen. There was no fire. As defense counsel correctly argued, there was no fire hazard to justify entry without a warrant under the emergency doctrine. App. 36, ll. 10-17. Therefore, the search was unlawful.

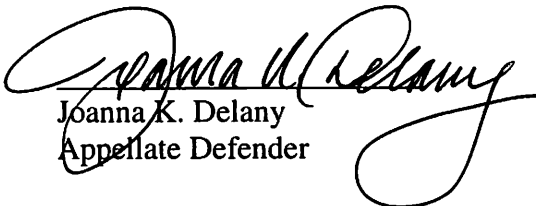
When searches and seizures violate the Fourth Amendment, the evidence is to be excluded from court proceedings. *Mapp v. Ohio*, 367 U.S. at 655; *see also Weeks v. United States*, 232 U.S. 383, 393 (1914). Evidence that is obtained or derived as a result of an unlawful search or seizure is excluded as “fruit of the poisonous tree.” *Wong Sun v. United States*, 371 U.S. 471, 488 (1963).

Here, the evidence was derived from the unlawful search since the unlawful entry was used to get the warrant to search the warehouse and seize the evidence admitted at trial. Officers would not have had probable cause to obtain the search warrant absent their unlawful entry. The physical evidence of the crimes (marijuana and growing equipment) and the evidence connecting Petitioner

with the crimes (fingerprints) were derived from the unlawful search and seizure. Because the primary entry was illegal, the evidence that was obtained by exploiting that illegality should have been suppressed by the trial judge. *Wong Sun*, 371 U.S. at 488.

CONCLUSION

Based on the foregoing argument, this Court should reverse Petitioner's convictions and sentences and grant him a new trial.

A handwritten signature in black ink, appearing to read "Joanna K. Delany", written in a cursive style.

Joanna K. Delany
Appellate Defender

ATTORNEY FOR PETITIONER

This 29th day of March, 2022.

STATE OF SOUTH CAROLINA

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Honorable Alex Kinlaw, Circuit Court Judge

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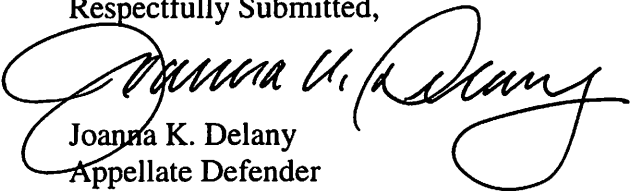
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Lorgio D. Morales states:

1. She is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent petitioner.
2. She has reviewed the record of petitioner's trial before Judge Edward W. Miller, which was held February 5-6, 2018 and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. She has, pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967), briefed an arguable legal issue which arose during the course of the trial.

WHEREFORE, She asks the Court to relieve her as counsel for Lorgio D. Morales.

Respectfully Submitted,



Joanna K. Delany
Appellate Defender

ATTORNEY FOR APPELLANT

This 29th day of March, 2022.

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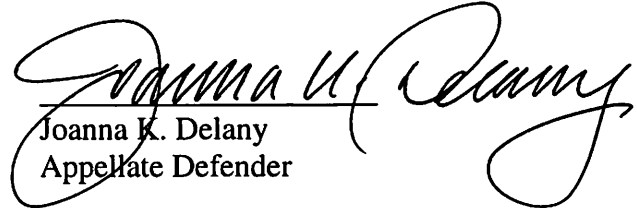
Mar 29 2022

CERTIFICATE OF COUNSEL

SC Court of Appeals

The undersigned certifies that to the best of my ability this Anders Brief of Petitioner Pursuant to White v. State complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

March 29, 2022.



Joanna K. Delany
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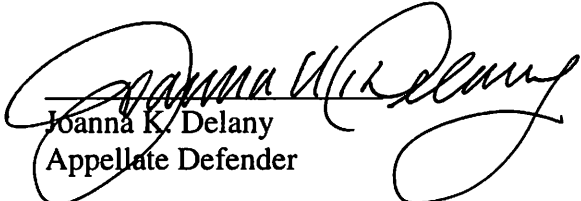
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RESPONDENT

APPELLATE CASE NO. 2019-000072

CERTIFICATE OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies that a true copy of the Anders Brief of Petitioner Pursuant to White v. State and a copy of the Supplemental Appendix in the above referenced case has been served upon Taylor Z. Smith, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS); and on Lorgio Danilo Morales, #375312, at Perry Correctional Institution, 430 Oaklawn Road, Pelzer, SC 29669, this 29th day of March, 2022.


Joanna K. Delany
Appellate Defender

ATTORNEY FOR PETITIONER

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