STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

RECEIVED

Jul 12 2022

S.C. SUPREME COURT

Certiorari to Kershaw County

Honorable Diane Schafer Goodstein, Circuit Court Judge

LUCRUZ MCCLOUD,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

APPELLATE CASE NO. 2021-001307

AMENDED PETITION FOR WRIT OF CERTIORARI

Kathrine H. Hudgins
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR PETITIONER

INDEX

ISSUE PRESENTED

Did the PCR judge err in refusing to find that the guilty plea was rendered involuntary by counsel's deficient performance in failing to advise Petitioner about the ability to challenge the search of the motel room and move to suppress the crack cocaine found as a violation of the Fourth Amendment?

STATEMENT

In February of 2017, the Kershaw County Grand Jury indicted Petitioner, Lucruz Danielle McCloud, for trafficking in cocaine base over 10 grams, third offense and simple possession of marijuana, indictments # 2017-GS-28-355, 356. (App. pp. 25-28). On May 15, 2017, Petitioner appeared before the Honorable R. Knox McMahon and pled guilty to the lesser included offense of trafficking in cocaine base over 10 grams, second offense and simple possession of marijuana. Ronald Wade Moak represented Petitioner at the plea. Brett Allen Perry prosecuted the case. Pursuant to negotiations with the State, Judge McMahon sentenced Petitioner to fifteen (15) years for trafficking and thirty (30) days, time served, for the marijuana. (App. pp. 29-30). Petitioner did not appeal the conviction or sentence.

On August 18, 2017, Petitioner filed an application for post-conviction relief [PCR]. An amended application was filed on May 12, 2019. The return was filed on June 19, 2019. That same day, on June 19, 2019, an evidentiary hearing was held before the Honorable Diane S. Goodstein. Kristy Goldberg represented Petitioner at the PCR hearing. Samuel Key represented the State. In a written order signed October 7, 2021, and filed October 27, 2021, Judge Goodstein denied relief and dismissed the application. A timely notice of intent to appeal was served on November 5, 2021. This petition for writ of certiorari follows.

ARGUMENT

The PCR judge erred in refusing to find that the guilty plea was rendered involuntary by counsel's deficient performance in failing to advise Petitioner about the ability to challenge the search of the motel room and move to suppress the crack cocaine found as a violation of the Fourth Amendment.

Officers with the Kershaw County Sheriff's Office knew that Petitioner had an active arrest warrant from Fairfield County. (App. p. 14, lines 19-22). Officers learned that Petitioner was staying at a motel in Lugoff in Kershaw County. (App. p. 14, lines 16-24). Officers went to the motel, talked with the motel clerk about the room Petitioner rented with a female, and then found Petitioner in a breezeway. (App. p. 15, lines 1-10). The officers arrested Petitioner and found marijuana in his pocket. (App. p. 15, lines 10-12). The officer testified that they got consent from the motel owner[1] to walk a K-9 around the common areas of the motel. (App. p. 16, lines 1-5). According to the officer, Taz, the K-9, alerted on the room where Petitioner was staying. (App. p. 16, lines 4-7). The officers then secured the room by entering it rather than obtaining a search warrant. (App. p. 16, lines 8-14). The officer testified that they saw a small amount of marijuana in plain view while they were inside the motel room. (App. p. 16, lines 10-12). The officers then backed out of the motel room and obtained a search warrant. (App. p. 16, lines 12-14). The affidavit in support of the search warrant included the marijuana the officers saw when they entered the room. (App. p. 143).

Upon execution of the search warrant officers found crack cocaine and items linking Petitioner to the motel room. (App. p. 16, line 15 – p. 17, lines 1-13). According to the officer, Petitioner admitted that the motel room was his and the marijuana and crack were his. (App. p. 17, lines 15-19). Petitioner pled guilty to the lesser included offense of trafficking in cocaine

[1] The affidavit in support of the search warrant indicates the clerk rather than the owner gave permission for the K-9 to sniff. (App. p. 143).

base over 10 grams, second offense and simple possession of marijuana for a negotiated fifteen-year sentence.

In the amended PCR application Petitioner alleged that, "Trial counsel failed to identify, investigate, research, and make the Applicant aware of issues regarding the illegal search which could and should have been challenged during a jury trial or in pre-trial motions and failed to prepare for a jury trial and failed to advise the Applicant that he should proceed to jury trial;" (App. p. 39). During the PCR hearing Petitioner testified that plea counsel did not discuss the search issue with him prior to trial. (App. p. 67, lines 13-15). Petitioner testified that plea counsel only discussed the plea offer but not the case. (App. p. 73, lines 5-6). Petitioner testified that if he had realized the officers entered the motel room prior to getting the search warrant, he would have gone to trial. (App. p. 66, lines 8-23).

Plea counsel testified, "And – and this is what goes into the trial strategy had we went to trial because at the preliminary hearing, they testified they searched the room because they took a dog, and the dog alerted to that room, and they did enter the room prior to search warrant to make sure nothing got messed with while they got the search warrant." (App. p. 81, lines 1-6). There is no evidence to indicate that anyone else was in the motel room when the officers entered. There is no evidence of exigent circumstances to justify the warrantless entry into the motel room.

The PCR lawyer asked plea counsel, "Would you have had an argument to make in trial that that whole incident should've ended right there, that they exceeded their authority by continuing to try and go in the room?" (App. p. 97, lines 3-6). Plea counsel answered by discussing the inconsistent testimony given at the preliminary hearing and testified that this would be the best argument at trial. (App. p. 97, line 7 – p. 98, lines 1-5). Plea counsel did not

address any challenge to the officers entering the motel room prior to obtaining the search warrant.

In the order of dismissal the PCR judge wrote, "This Court finds Plea Counsel was not deficient in determining further investigation of the search issue would be futile and would not result in the development of a viable defense for trial." (App. p. 177). Plea counsel testified that he did not see a problem with law enforcement seeking information from the motel clerk about Petitioner and the room he might be staying in. (App. p. 94, line 18 – p. 95, lines 1-11). Plea counsel did not, however, testify that investigation of the search issue would be futile and would not result in the development of a viable defense. Plea counsel did not testify that he advised Petitioner about the ability to challenge to the search.

The PCR judge additionally wrote in the order of dismissal:

> This Court finds Plea Counsel credibly testified that after Applicant was arrested pursuant to a valid warrant, marijuana was located on his person and a K-9 indicated the presence of narcotics in Applicant's room after being walked around common areas and the entire second floor of the motel. The Court additionally finds credible Plea Counsel's testimony that after entry to the room, officers then observed contraband in plain sight and did not need a warrant to conduct a search, but instead combined this observation with the lawful arrest, marijuana resulting from the search of Applicant's person, and positive alert from the K-9, to support the search warrant ultimately obtained.
>
> Based on those facts, this Court finds Counsel's strategic decision not to pursue a challenge to the search was reasonable.

(App. pp. 177-178)(footnote omitted). The PCR judge erred.

Plea counsel did not testify that he made a strategic decision not to pursue a challenge to the search. Plea counsel failed to advise Petitioner about a challenge to the initial warrantless entry into the motel room. Petitioner was arrested in the breezeway, not in the motel room. The affidavit in support of the search warrant reflects that the officers knew that Marshetta M. Whitaker, Petitioner's girlfriend, was not in the motel room when the officers entered. (App. p.

143). The affidavit also indicates that the motel room was in Marshetta M. Whitaker's name. (App. p. 143). There is no evidence of exigent circumstances to justify the warrantless entry.

The PCR judge additionally found no prejudice writing, "Moreover, Applicant failed to present any evidence or testimony to establish that he had a meritorious defense to the search that Counsel failed to present." (App. p. 178). The PCR judge erred. In the amended PCR application Petitioner specifically alleged that, "Trial counsel failed to identify, investigate, research, and make the Applicant aware of issues regarding the illegal search which could and should have been challenged during a jury trial or in pre-trial motions and failed to prepare for a jury trial and failed to advise the Applicant that he should proceed to jury trial;" (App. p. 39). Plea counsel was ineffective in failing to discuss with Petitioner the ability to challenge the search based on the warrantless entry into the motel room without exigent circumstances. Petitioner was prejudiced by the deficient performance.

A criminal defendant is guaranteed the right to effective assistance of counsel under the Sixth Amendment to the United States Constitution. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Courts evaluate allegations of ineffective assistance of counsel using a two-pronged test. Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989) (citing Strickland, 466 U.S. at 668, 104 S.Ct. 2052). First, the applicant must demonstrate counsel's representation was deficient, which is measured by an objective standard of reasonableness. Strickland, 466 U.S. at 687–88, 104 S.Ct. 2052. "Under this prong, '[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms.'" Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 688, 104 S.Ct. 2052). Second, the applicant must demonstrate he was prejudiced by counsel's performance in such a manner that, but for counsel's error, there is a reasonable

probability the result of the proceedings would have been different. Strickland, 466 U.S. at 694, 104 S.Ct. 2052. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id.

The Strickland test operates similarly when an applicant claims counsel was ineffective in the context of a guilty plea. Hill v. Lockhart, 474 U.S. 52, 58, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985). A guilty plea may not be accepted unless it is voluntarily and understandingly made. Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969). "To find a guilty plea is voluntarily and knowingly entered into, the record must establish the defendant had a full understanding of the consequences of his plea and the charges against him." Roddy v. State, 339 S.C. 29, 33, 528 S.E.2d 418, 421 (2000). "A defendant's knowing and voluntary waiver of the constitutional rights which accompany a guilty plea 'may be accomplished by colloquy between the Court and the defendant, between the Court and defendant's counsel, or both.' " Pittman v. State, 337 S.C. 597, 599, 524 S.E.2d 623, 625 (1999) (quoting State v. Ray, 310 S.C. 431, 437, 427 S.E.2d 171, 174 (1993)). "The longstanding test for determining the validity of a guilty plea is 'whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant.' " Hill, 474 U.S. at 56, 106 S.Ct. 366 (quoting North Carolina v. Alford, 400 U.S. 25, 31, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970)).

In Frierson v. State, 423 S.C. 257, 262, 815 S.E.2d 433, 436 (2018), the South Carolina Supreme Court wrote:

> In order to establish prejudice when challenging a guilty plea, a defendant must prove "there is a reasonable probability that, but for counsel's errors, the defendant would not have pled guilty, but would have gone to trial." Harden v. State, 360 S.C. 405, 408, 602 S.E.2d 48, 49 (2004). The crux of the inquiry is whether counsel's ineffective performance affected the outcome of the plea process, not whether the defendant would have been successful had he gone to trial. Alexander v. State, 303 S.C. 539, 542, 402 S.E.2d 484, 485 (1991). As the United States Supreme Court stated in Hill v. Lockhart, 474 U.S. 52, 59, 106 S.Ct.

366, 88 L.Ed.2d 203 (1985), "[I]n order to satisfy the 'prejudice' requirement, the defendant must show there is a reasonable probability that, but for counsel's errors, he would not have pled guilty and would have insisted on going to trial."

In the present case the guilty plea was rendered involuntary by trial counsel's failure to advise Petitioner about the ability to challenge the search based on the warrantless entry into the motel room without exigent circumstances. There is a reasonable probability that, but for counsel's error, Petitioner would not have pled guilty, but would have gone to trial. At trial Petitioner could have moved to suppress the crack cocaine seized pursuant to a search warrant based, in part, on drugs the officers saw in plain view when they first entered the motel room without a warrant and without exigent circumstances.

In State v. Herring, 387 S.C. 201, 210, 692 S.E.2d 490, 495 (2009), the South Carolina Supreme Court wrote:

> A warrantless search is justified under the exigent circumstances doctrine to prevent a suspect from fleeing or where there is a risk of danger to police or others inside or outside a dwelling. Minnesota v. Olson, 495 U.S. 91, 100, 110 S.Ct. 1684, 109 L.Ed.2d 85 (1990). In such circumstances, a protective sweep of the premises may be permitted. See Maryland v. Buie, 494 U.S. 325, 337, 110 S.Ct. 1093, 108 L.Ed.2d 276 (1990); *cf.* State v. Abdullah, 357 S.C. 344, 592 S.E.2d 344 (Ct.App.2004).

Exigent circumstances did not exist in the present case to justify the warrantless entry into the motel room.

In State v. Wright, 416 S.C. 353, 368, 785 S.E.2d 479, 487 (Ct. App. 2016), the South Carolina Court of Appeals wrote:

> "Generally, a warrantless search is *per se* unreasonable and violates the Fourth Amendment prohibition against unreasonable searches and seizures." Id.[2] "However, a warrantless search will withstand constitutional scrutiny where the search falls within one of several well-recognized exceptions to the warrant requirement." Id. "The State bears the burden to demonstrate that

---

2 State v. Weaver, 374 S.C. 313, 319, 649 S.E.2d 479, 482 (2007).

it was entitled to conduct the search or seizure under an exception to the Fourth Amendment's warrant requirement." State v. Robinson, 410 S.C. 519, 530, 765 S.E.2d 564, 570 (2014).

There are exceptions, however, to the warrant requirement. In State v. Johnson, 410 S.C. 10, 18–19, 763 S.E.2d 36, 41 (Ct. App. 2014), the South Carolina Court of Appeals wrote:

> Generally, a warrantless search is *per se* unreasonable and thus violates the Fourth Amendment's prohibition against unreasonable searches and seizures. State v. Abdullah, 357 S.C. 344, 350, 592 S.E.2d 344, 348 (Ct.App.2004). However, a warrantless search will withstand constitutional scrutiny where the search falls within one of a few specifically established and well delineated exceptions to the Fourth Amendment exclusionary rule." Id. "[B]ecause the ultimate touchstone of the Fourth Amendment is 'reasonableness,' the warrant requirement is subject to certain exceptions." State v. Herring, 387 S.C. 201, 210, 692 S.E.2d 490, 494 (2009) (citing Katz v. United States, 389 U.S. 347, 357, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967)). "The exigent circumstances doctrine provides an exception to the Fourth Amendments [sic] protection against warrantless searches, but only where, from an objective standard, a compelling need for official action and no time to secure a warrant exist." Abdullah, 357 S.C. at 351, 592 S.E.2d at 348. A warrantless search is justified under the exigent circumstances doctrine where there is a risk of danger to police. Id. (citing Minnesota v. Olson, 495 U.S. 91, 100, 110 S.Ct. 1684, 109 L.Ed.2d 85 (1990)). "In such circumstances, a protective sweep of the premises may be permitted." Id. (citing Maryland v. Buie, 494 U.S. 325, 337, 110 S.Ct. 1093, 108 L.Ed.2d 276 (1990)). "A 'protective sweep' is a quick and limited search of premises, incident to an arrest and conducted to protect the safety of police officers or others." Maryland v. Buie, 494 U.S. 325, 327, 110 S.Ct. 1093, 108 L.Ed.2d 276 (1990).

In both the Wright case and the Johnson case the South Carolina Court of Appeals found that exigent circumstances justified the warrantless entry of a hotel/motel room. In Wright the Court wrote:

> We find evidence supports the trial court's ruling that the officers did not violate Wright's Fourth Amendment rights by seizing the drugs and money found in plain view in his motel room because the officers' entry into the motel room was justified by the exigent circumstances exception to the warrant requirement. We find this case is distinguishable from Olson. First, in Olson, law enforcement suspected the individual inside the duplex was only the driver of the getaway car and knew he was not the murderer. However, here, at the time the officers entered the motel room, law enforcement had identified both Powell and Wright as suspects in the Victim's murder. Law enforcement had issued an arrest warrant for Powell the day before the search and had been tracking Wright's cell phone for

> two days. Detective Chatfield testified that when one of the two murder suspects opened the motel room door, stepped outside, and saw the officers—who identified themselves as police officers—he tried to close the door on the officers. At that point, the officers entered the motel room. In addition, in Olson, the murder weapon had been recovered at the time the officers entered the duplex; however, here, the murder weapon had not been recovered at the time the officers entered the motel room. Therefore, there was an ongoing danger here that was not present in Olson. We find this evidence showed that a potentially armed and dangerous murder suspect was attempting to flee, creating exigent circumstances justifying the officers' warrantless entry into the motel room.
>
> Moreover, even though Detective Chatfield testified he went inside the motel room because he was looking for Wright, we find a reasonable officer would have entered the room to prevent the suspects from fleeing and to conduct a protective sweep for officer safety because both Wright and Powell were murder suspects. *See Wright,* 391 S.C. at 444, 706 S.E.2d at 328 ("[T]he Fourth Amendment's concern with 'reasonableness' allows certain actions to be taken in certain circumstances, *whatever* the subjective intent. In the Fourth Amendment context, a court is concerned with determining whether a reasonable officer would be moved to take action." (emphasis in original) (quoting *Whren,* 517 U.S. at 814, 116 S.Ct. 1769)). Accordingly, because evidence showed exigent circumstances justified the warrantless entry into Wright's motel room, the trial court did not err in refusing to suppress the drugs and money found in plain view in the room.

Wright, 416 S.C. at 369–70, 785 S.E.2d at 487–88. The exigent circumstances justifying the warrantless entry into the motel room in Wright were not present in this case. There was no evidence in the present case that a potentially armed and dangerous suspect was attempting to flee. Petitioner was arrested for a drug charge outside of his motel room and there were no other people inside the motel room at the time.

In Johnson officers approached a hotel room to execute an arrest warrant for someone inside the room. When the officers entered the room to make the arrest, several factors including the behavior of other people in the room gave the officers concern. The Court of Appeals wrote:

> We find these circumstances rightfully compelled the protective sweep to ensure the deputies' safety. See State v. Brown, 289 S.C. 581, 587, 347 S.E.2d 882, 886 (1986) (finding that a protective sweep of a motel room was justified because it was reasonable to believe that concealed persons within the room might pose a danger); Abdullah, 357 S.C. at 351, 592 S.E.2d at 348 (noting a protective sweep may be permitted under the exigent circumstances doctrine where there is a risk

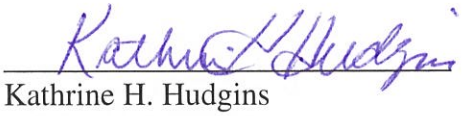
> of danger to police); id. at 352, 592 S.E.2d at 348 (holding the totality of the circumstances gave officers reasonable grounds from an objective standard for a search of the premises with a goal of securing the scene against perpetrators); id. at 352, 592 S.E.2d at 349 (stating it was improvident to presuppose that subduing the defendant foreclosed the officers' objectively reasonable need to perform a protective sweep of the premises).

Johnson, 410 S.C. at 19–20, 763 S.E.2d at 41–42. There was no risk of danger to the police in the present case. Petitioner was arrested outside of the unoccupied motel room. There were no exigent circumstances to justify the warrantless entry.

The record reflects that the police unlawfully entered the motel room, saw marijuana in plain view and then sought a search warrant. Counsel should have argued that the marijuana the officers saw when they unlawfully entered the motel room could not be considered as a basis for the search warrant as "fruit of the poisonous tree" pursuant to Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963). Counsel then should have argued that without the marijuana seen in the motel room, the police lacked probable cause to search the motel room and moved to suppress the cocaine base found pursuant to the search warrant lacking probable cause. The guilty plea was rendered involuntary by counsel's deficient performance.

CONCLUSION

Based on the above argument, this Court should grant the petition for writ of certiorari to allow further briefing on the issue.



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

This 12th day of July, 2022.