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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Cherokee County

H. Steven DeBerry, IV, Circuit Court Judge

NICHOLAS BONNER,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2022-000085

PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

In September 2012, the Cherokee County Grand Jury indicted Nicholas A. Bonner for trafficking in crack cocaine, more than 400 grams (2012-GS-11-00820) and trafficking in cocaine, more than 400 grams (2012-GS-11-00821). On April 24, 2017, Mr. Bonner proceeded to trial before the Honorable R. Keith Kelly. He was represented by Attorney Candice K. Lapham. Assistant Solicitor Christopher M. Bain of the Seventh Circuit Solicitor's Office prosecuted the case. The jury found Mr. Bonner guilty of the lesser included offense of trafficking in crack cocaine, 28-100 grams. The jury did not reach a verdict on indictment number 2012-GS-11-00821 for trafficking powder cocaine resulting in a mistrial. Judge Kelly sentenced the appellant to imprisonment for a term of 20 years. Trial counsel moved to reconsider the sentence and for a new trial on May 5, 2017. After a hearing, Judge Kelly denied the motions on May 30, 2017.

Trial counsel filed a notice of appeal, but then moved to remand the case to the circuit court to resolve pending post-trial motions. The South Carolina Court of Appeals granted Mr. Bonner's motion and dismissed the appeal without prejudice on August 24, 2017. The Remittitur was issued on September 15, 2017.

Mr. Bonner then filed an second motion for a new trial and a hearing on the motion was convened before Judge Kelly. Mr. Bonner was again represented by attorney Lapham, and the State was represented by Assistant Solicitor Bain. By written order filed December 5, 2017, Judge Kelly denied the motion. Following the denial of his motions, Ms. Lapham failed to file a notice of appeal.

Bonner filed a post-conviction relief action with a number of allegations and requesting belated appellate review of direct appeal claims pursuant to *White v. State,* 263

S.C. 110, 119, 208 S.E.2d 35, 40 (1974). An evidentiary hearing was held before the Honorable H. Steven DeBerry on August 4, 2021. Bonner was present at the hearing and represented by Attorney Susannah Ross. Assistant Attorney General William H. Ray represented Respondent. In an order filed December 23, 2021, Judge DeBerry found that trial counsel's failure to timely file and serve the notice of appeal deprived Mr. Bonner of an opportunity to seek appellate review of his conviction and that he was entitled to belated review. The judge denied relief on all other allegations and dismissed the application. After the denial of Bonner's Motion to Alter or Amend the Judgment, a timely notice of intent to appeal was filed on January 26, 2022. This petition for writ of certiorari and a separately filed brief pursuant to *White* follow.

STATEMENT OF THE FACTS

On August 6, 2012, the Cherokee County Sheriff's Office ("CCSO") and the City of Gaffney Police Department executed a search warrant on 126 Iris Lane. (R. 201-03; R. 280-84; R. 347-48). This search warrant was for marijuana based on the statement of Sheriff's Officer Brandon Gardner that a confidential reliable informant (CRI) had informed him over speakerphone that he had seen marijuana at 126 Iris Lane within the past 72 hours. (R. 283, l. 22, 843). This was the home of Gwendolyn A. Bonner, Nicholas Bonner's mother, where the State alleged that he lived along with his brother, Chris Bonner. (R. 292, l. 7, 708, l. 15). Police found a number of people including Nicholas Bonner, Jarvis McCluney, Stephon Adams, Travis Davidson, Ronald Littlejohn, and Eric Lattimore at the residence. They also found cocaine in Littlejohn's front right pocket, approximately two ounces of crack cocaine in the oven, $13,084 in cash in the top drawer of the nightstand in the left bedroom, $615 in another bedroom, and $1,250 in Appellant's front right pocket. (R. 203-08; R. 291-92; R. 294-98; R. 303-09).

After the search and arrest of the occupants of the Bonner home, law enforcement got a warrant and searched the abandoned property across the street at 125 Iris Lane where they found over 400 grams of cocaine and crack cocaine in a trash can under the carport. (R. 209-10; R. 235, l. 11-15; R. 240-41; R. 249-50; R. 349-50). The second search warrant for 125 Iris Lane was issued August 6, 2012, at 7:20 p.m. It was based on City Officer Ronnie Anderson's affidavit saying that there was probable cause to search because a CRI who was known to him to be reliable and to recognize cocaine had seen cocaine at 126 Iris Lane within 72 hours. (R. 847). Anderson said that during the raid of 126 Iris Lane, Detective Todd Parker approached him and said that his CI, Prentiss

Jeffries, told him a large quantity of narcotics was across the street. (R. 234), He said Parker then called the CI handed over the phone and the CI relayed that there was a large amount of cocaine belonging to Nick Bonner across the street so Anderson then got the search warrant for 125 Iris Lane. (R. 234, 248).

Nicholas Bonner gave a statement to law enforcement saying Eric Lattimore came into the house looking for a scale to weigh his crack cocaine and the police raided the house soon after. (R. 319-20; R. 351-52). This statement was corroborated by the testimony and statements made by all the witness at the scene except Eric Lattimore. (R. 258-60; R. 268; R.382; R. 393; R. 587; 698). Lattimore was the only witness to contradict this saying he went to Nick Bonner's house to buy beer and a cigarette when he witnessed Nick make a drug sale. Without objection, he said a typical day at Nick Bonner's house was a lot of guys smoking reefer and selling drugs. (R. 160, l. 17). He then said he witnessed Nick make drug sales from the house every time he had been there before. (R. 161-62).

State Witnesses

Prentiss Jeffries, the confidential informant who Officers Garrett and Anderson claimed provided the tip supporting the two search warrants in the case, testified that he had had not been to 126 Iris Lane in the 72 before prior to the raid and did not provide the tip. (R.126, l. 21). He said he had only dealt with Investigator Todd Parker giving information about property crimes. (R. 120) He said that he started working as a CI with officer Todd Parker in 2008 signing a CI agreement with his thumbprint. (R. 116). He said he had worked off some charges years before and Todd Parker had his charges dismissed (R. 118). He said he was not the tipster here and denied providing information

to law enforcement or speaking with officers until after the search. (R. 120-1). He said Investigators Todd Parker and Ronnie Anderson met with him a couple of days after the bust, coached him on what to say, and paid him to put his thumbprint to sign an undated false statement against Mr. Bonner. (R. 124, 128). Prentiss Jeffries read out the statement which said he saw Nick Boner at 126 Iris Lane with a large amount of cocaine which he bagged and handed off to Pee-Wee who took the cocaine across the street and put in a trash can. (R. 123). Jeffries then testified that the statement was not true. (R. 123, l. 17).

Todd Parker testified that he was fired from the Cherokee County Sheriffs Office two days following the raid. (R. 144) He said beginning in 2008 until the time of this search, he was working property crimes with CI Prentiss Jefferies. (R. 136, 139) He said that on August 6, 2012, Jeffries provided a tip that a shipment of drugs came to 126 Iris Lane. (R. 140) Because he did not work narcotics, he put Jeffries on speakerphone so narcotics investigator Brandon Gardner could hear the tip and get the search warrant. (R. 142). He said that he was involved with the raid of 126 Iris Lane and later that day after failing to find a large shipment of drugs, a second call with Jeffries revealed that the drugs had been moved across the street. Parker gave that information to Ronnie Anderson but did not remember if Anderson was there during the phone call. (R. 143).

Eric Lattimore said he went to Mr. Bonner's home, and saw Bonner send a person to retrieve bags from across the street to get drugs for "[s]ome dude from out of town[.]". (R. 151-52). He said Mr. Bonner produced scales, weighed what Lattimore described as "some white stuff like cocaine, crack cocaine[,]" and gave it to the out-of-towner. (R. 152-53; R. 159, l. 5-14). He said Mr. Bonner then directed his man to return the bag of drugs across the street. (R. 153, l. 3-4). The police raided the house soon after and

arrested everyone present. (R. 159-60). He gave law enforcement a written statement consistent with his trial testimony. (R. 167-68). Lattimore told the jury that he had been to Mr. Bonner's "a lot" and had seen Bonner dealing out of his house in crack and powder cocaine every time he went to the house. (R. 161-62). A motion to exclude the testimony was argued and denied by the trial judge before opening statements but counsel did not renew the objection. (R. 93).

Stephon Adams testified that when he was in Mr. Bonner's house, Eric Lattimore walked in and asked for a scale which Lattimore used to weigh cocaine that he had brought with him. (R. 258-60). Soon after Mr. Bonner said, “there go the cops[,]” and people began to flee the house. (R. 255-56). As he was leaving Adams saw Lattimore at the back door near the stove trying to get out. (R. 270) Adams was apprehended and arrested for trafficking crack cocaine. (R. 256, 11-14). While the group, minus Lattimore, were transported in the police van, Mr. Bonner asserted to the group that the drugs belonged to Lattimore. (R. 260-61). Adams denied knowing anything about the drugs recovered from across the street. (R. 264-65).

Jarvis McCluney testified that he was at Mr. Bonner’s house smoking marijuana. (R. 380). McCluney denied familiarity with drugs other than marijuana, but said he saw Lattimore arrive and produce a hard, white substance and ask for a scale. McCluney admitted he handed him the scale. (R. 381-83). McCluney denied ever seeing an exchange of drugs but admitted during direct examination that Lattimore came to the door and called Mr. Bonner outside. (R. 384, 1-19). Somebody yelled the police had arrived, and McCluney pocketed his scale and stepped through the door while Lattimore ran toward the kitchen. (R. 385, 17-22). McCluney saw an argument between Mr. Bonner

and Lattimore because, "Eric was asking everyone to put the drugs on a 14 year old." (R. 385-86). McCluney said everyone was put in a van and transported to the jail except Lattimore. He transported in Inv. Ronnie Anderson's jeep. (R. 387, l. 17; R. 395, l. 7) Lattimore denied knowing anything about the drugs recovered from across the street. (R. 390-91). McCluney gave a statement to law enforcement largely consistent with his trial testimony. (R. 392, 15-23).

Defense Witnesses

Nicholas Bonner testified that he did not live at 126 Iris Lane but visited his mother there every day and listed her address on his paperwork to ensure that she received it. (R. 613-14). He testified his mother had worked for nearly forty years after inheriting the home from her own father and the cash was her savings. (R. 614-15). This testimony was corroborated by a number of defense witnesses. The day of the raid, Appellant said he was in his mother's house with friends when Eric Lattimore came in asking for a scale. McCluney gave Lattimore the scale. (R. 615-16). Bonner testified that when he saw Lattimore's dope, he told him, "get the hell out of my house. By that time the police come on up in there." (R. 616, l. 13-15).

Appellant said Lattimore fled to the back door from the kitchen at the time police arrived and threw drugs in the stove when he found the back door was nailed shut and could not get out the back. (R. 617, 3-17). Jarvis McCluney and Stephon Adams also said Lattimore ran to the kitchen. (R. 270; R. 385). Mr. Bonner said he hit Lattimore in the front yard after Lattimore refused to admit the drugs were his and said to "put the drugs on the 14 year old." (R. 617-18). He recalled after hitting Lattimore in the mouth, Officer Anderson asked why he hit his informant. (R. 618-19). Mr. Bonner explained the cash in

his pocket was from selling a four-wheeler to Gus Logan, who testified that he had bought the four-wheeler from Bonner for $2500. (R. 619-20, 544).

On cross-examination, Mr. Bonner read the statement he gave to law enforcement saying that Lattimore entered the home, pulled out a bag with a big block of crack, asked for a scale, said he would sell his crack for $350, and that the police came right after. (R. 640, 12-19). Bonner said he thought his Mama had $35,000, not $13,084 implying the police had underreported the cash to steal it and noted that Parker was fired for unlawfully selling poker machines. (R. 631-34). He was confronted with Eric Lattimore's statement. (R. 647). When asked how Lattimore could have known the color of the bag and scale, Mr. Bonner testified that Lattimore would have known the colors because the drugs were his and he weighed them on the scale. (R. 648-9).

When confronted with CI Prentiss Jeffries' unsigned or dated statement; Mr. Bonner asked, "Did Prentiss tell you he was coached and paid $3500 to sign a statement on me?". (R. 649). The Applicant was admonished for failing to answer the question though Prentiss Jeffries had, in fact, testified that Investigators Todd Parker and Ronnie Anderson met with him after the bust, coached him on what to say, and paid him to sign a false statement against Mr. Bonner. (R. 121-2)

Rodney Love, a friend of Mr. Bonner's, arrived at the house after the police had raided the building and testified that he saw law enforcement retrieve a red bag from the woods, then bring it back to Mr. Bonner's property. (R. 463-65). Love also testified he observed Ofc. Anderson leave with Lattimore in custody, then return around fifteen minutes later. (R. 468, 9-14). After Anderson returned, the entire raid team converged on the abandoned house across the street from Mr. Bonner; when they opened the trash can,

they began to celebrate. (R. 468-69). Love said Bonner did not live at the home, but visited every day to see his mother, Gwen Bonner. (R. 471-72).[1] Love also testified the nightstand in which the $13,000 cash was found was Gwen's "money drawer." (R. 487, 6-23).

Daphine Bonner, Mr. Bonner's aunt, testified Mr. Bonner did not live at the home, but would visit every day. (R. 530-31). Daphine testified Gwen trusted banks, but when confronted with the $13,840 from the "money drawer," Daphine found nothing strange about it, explaining she also had such a drawer. (R. 534-35). DeeGee Bonner, Mr. Bonner's older sibling, testified Mr. Bonner visited his mother often and denied any drug transactions or other suspicious activity was taking place at the home. (R. 705-06). DeeGee explained the money in the drawer was her mother's savings, separate from her checking account. (R. 706-10). DeeGee denied ever seeing Mr. Bonner use, buy, or transport drugs. (R. 710-11).

Chris Bonner, Mr. Bonner's cousin, said he was sitting by the big tree when Lattimore arrived and asked him for a scale; Chris denied knowing anything about a scale and Lattimore went into the house. (R. 578-80). Chris did not see what occurred inside the house, and testified he never saw Lattimore and Mr. Bonner walk out. (R. 580-81). Chris denied it was common for people to come and go from the house buying and selling drugs, and testified he never saw Mr. Bonner involved in drug activity. (R. 581, 11-21). Chris was present and arrested during the raid. (R. 586-87). As the police brought everybody out of the house, Lattimore said, "put the drugs on the young guy, and [Mr. Bonner] hit him in his mouth." (R. 587, 6-11).

[1] Gwen Bonner was deceased at the time of trial. (R. 494, 22-24).

Nickcos Smith testified he was at the house when Lattimore entered and sat down next to him. (R. 697-98). A few minutes later, Ronnie Littlejohn entered and threw marijuana down on the table while Lattimore was looking out the back window. (R. 698, l. 7-11; R. 701, l. 6-14). Smith also recalled Lattimore producing the crack and asking McCluney for the scale, and that Mr. Bonner told him to get out with the drugs. (R. 699-701). When the police raided the house, he saw Lattimore throw his crack into the stove. (R. 699, 13-14). Smith denied ever seeing Prentiss Jefferies at the house or any person from North Carolina buy drugs from Nick that day. (R. 698, l. 15-20). Smith affirmed his own nickname was "Pee Wee." (R. 701, 22-23).

ARGUMENT

1. **The PCR judge correctly found that petitioner was entitled to a belated appeal because he did not knowingly and voluntarily waive his right to a direct appeal.**

To establish a claim of ineffective assistance of counsel, petitioner must show counsel's representation fell below an objective standard of reasonableness and that defendant was prejudiced by such deficient performance. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *Gallman v. State*, 307 S.C. 273, 414 S.E.2d 780 (1992). After the client is convicted and sentenced, trial counsel in all cases has a duty to make certain that the client is fully aware of the right to appeal, and if the client is indigent, assist the client in filing an appeal. *In re Anonymous Member of the Bar*, 303 S.C. 306, 307, 400 S.E.2d 483 (1991); see also *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967).

In this case, trial counsel filed a notice of appeal but then moved to remand the case to the circuit court to resolve pending post-trial motions. The South Carolina Court of Appeals granted the motion and dismissed the appeal without prejudice. However, after all post trial matters were resolved, counsel failed to appeal. Trial counsel admitted error and testified at the PCR hearing that Mr. Bonner wanted and requested an appeal but due to an oversight on her part the appeal was not effectuated, and she did not file a timely notice of appeal. (R. 903-4). In light of this testimony, the PCR judge was correct in finding Mr. Bonner was entitled to a belated appeal. *See White v. State*, 263 SC 110, 208 S.E.2d 35 (1974).

2. The PCR judge erred in refusing to find counsel ineffective for failing to make a contemporaneous object to the admission of prior bad act testimony.

Before the Petitioner's trial, the state proffered the testimony of Eric Lattimore about prior bad acts of Bonner selling drugs arguing it was admissible to show intent and absence of mistake for the aiding and abetting element of the charge of trafficking. (R. 82, 90, 91). *State v. King* was cited to support to support this position. *State v. King*, 561 S.E.2d 640, 349 S.C. 142 (S.C. App. 2002). (R. 82, 90, 91). The defense moved to exclude the testimony and the judge ruled that he would allow it because "aiding and abetting was in this case and the probative value outweighs the prejudicial effect". (R. 93). Without objection, Lattimore then told the jury that he had been to Bonner's "a lot" and had seen Bonner dealing out of his house in crack and powder cocaine every time he went to the house. (R. 161-62). During redirect Lattimore agreed to leading questions by the Solicitor that he was not surprised that there were drugs at the petitioner's house because Lattimore was familiar with the drug dealers in the community and people go to Nick Bonner's house at 126 Iris Lane to get drugs. (R. 180-1). Trial counsel did not make a contemporaneous objection to this testimony and the State highlighted the prior bad act testimony in closing argument. (R. 762, l. 21).

Deficient Performance

To preserve an issue for appellate review, a party must make a "contemporaneous objection that is ruled upon by the trial court." *State v. Sweet* , 374 S.C. 1, 5, 647 S.E.2d 202, 205 (2007). If an evidentiary ruling is pretrial, a contemporaneous objection must be raised during trial when the evidence is admitted, whereas a party need not renew an objection if the decision is final. *See State v. Wiles* , 383 S.C. 151, 156, 679 S.E.2d 172, 175 (2009).

However, there is a practical exception to this requirement when a judge makes an evidentiary ruling on the record immediately prior to the introduction of evidence. *Id*. at 156, 679 S.E.2d at 175. Lattimore was the third witness called by the State after the pretrial ruling. While Petitioner argues in his *White* brief that the pretrial ruling was a final ruling that did not require a contemporaneous objection, if the Court finds this issue was not preserved for appellate review, trial counsel was deficient for failing to object and preserve the issue.

The PCR judge found that trial counsel's failure to object was not deficient because the trial judge's ruling on prior bad act testimony was legally proper so the failure to object could not be deficient. (R. 1016). This finding was an error of law. Nick Bonner was charged with trafficking, and the State's burden in the case was to prove his knowing possession of trafficking quantities of drugs found at 126 and 125 Iris Lane on August 6, 2012, beyond a reasonable doubt. The State sidestepped the requirement that prior bad act evidence be clear and convincing arguing under *State v. Wilson* and *State v. King* the credibility of a witness is an issue solely reserved for the jury and, "[I]f there is any evidence to support the admission of the bad act evidence, the trial judge's ruling will not be disturbed on appeal." (R. 91) *State v. Wilson*, 345 S.C. 1, 6, 545 S.E.2d 827, 830 (2001); *State v. King*, 561 S.E.2d 640, 349 S.C. 142 (S.C. App. 2002). The trial judge ruled that because the jury was the judge of credibility, a co-defendant arrested at 126 Iris Lane who all the other witnesses at the trial accused of bringing cocaine into the house, could testify that Nick Bonner sold drugs out of the house in the past. (R. 93). This ruling was in error allowing unreliable propensity evidence which had nothing to do with whether Bonner was guilty of trafficking or had knowing possession of the drugs found that day.

After *Lyle*, incorporated in Rule 404(b) of the rules of evidence, a defendant's prior bad acts may not be admitted to show propensity but only to prove: (1) motive; (2) identity; (3) the existence of a common scheme or plan; (4) the absence of mistake or accident; or (5) intent. *See State v. Lyle*, 125 S.C. 406, 118 S.E. 803 (1923); Rule 404(b), SCRE. The evidence of prior bad acts must be clear and convincing to be admissible. *State v. Adams*, 322 S.C. 114, 470 S.E.2d 366 (S.C. 1996). To admit prior bad acts regarding Bonner's prior drug dealing under the *Lyle* exception, there must be a logical relevance between the acts in question and the purpose for introduction other than to simply show propensity. *See State v. King*, 334 S.C. 504, 512, 514 S.E.2d 578, 582 (1999). "[I]f the court does not clearly perceive the connection between the extraneous criminal transaction and the crime charged, that is, its logical relevancy, the accused should be given the benefit of the doubt, and the evidence should be rejected.'..." *State v. Ostrowski*, 435 S.C. 364, 397, 867 S.E.2d 269 (S.C. App. 2021).

The State argued that the bad act evidence was admissible under *Lyle* and the rules of evidence because it showed intent because Bonner was charged with aiding and abetting is in this case. (R. 90-93). These trafficking charges were clearly based on possession of a statutorily sufficient amount of drugs. "Showing that the defendant had intent to distribute the drugs is not listed in the statute as necessary for a [trafficking] conviction." *State v. Ostrowski*, 435 S.C. 364, 867 S.E.2d 269 (S.C. App. 2021). Lattimore's testimony that Bonner sold drugs before was not relevant to his charges of trafficking and only served to show criminal propensity.

Prejudice

"Under our system of justice, a conviction must be based upon evidence of the offense for which the accused is on trial rather than prior criminal or immoral acts." *State v. Gore*, 283 S.C. 118, 120, 322 S.E.2d 12, 13 (1984). "It is well established that evidence of other crimes or prior bad acts is inadmissible to show criminal propensity or to demonstrate the accused is a bad individual." *State v. Coleman*, 301 S.C. 57, 60, 389 S.E.2d 659, 660 (1990). "Further, the danger of prejudice is enhanced when, as here, there has been no trial and conviction for the [alleged previous criminal activity]. The subsequent acts remain accusations. The manifest prejudice of this evidence is obvious." *State v. Wilson*, 274 S.C. at 638, 266 S.E.2d at 427; *State v. Bostick*, 307 S.C. 226, 414 S.E.2d 175, 176-7 (S.C. App. 1991). Here, the prior bad act testimony created the precise type of inference of propensity prohibited by *Lyle*.

All the trial witnesses stated they saw Eric Lattimore with the crack, except Lattimore and he was allowed to sully the proceeding with improper prejudicial prior bad act testimony to show criminal propensity. Lattimore testified that he was not surprised that there were drugs at the petitioner's house because he had seen Bonner dealing out of his house in crack and powder cocaine every time he went there. (R. 161-62). He then said he was familiar with the drug dealers in the community and people go to Nick Bonner to get drugs. (R. 180-1). The State made the most of this in closing argument saying Lattimore told you Nick Bonner is the kingpin. (R. 762, l. 21). This was fundamentally unfair and affected the outcome of the case.

The prejudice is clear. The case was a close one with the jury hung on the cocaine trafficking charge and a finding of guilt of trafficking a reduced weight of crack. The jury

sent a note asking if knowledge of drugs was the same as being guilty of trafficking. (R. 966-7). They were then improperly instructed that knowledge evidenced intent to control its disposition and that knowledge may be substituted for the intent element. (R. 801, l.22, 802, l.20). *See State v. Stewart*, 858 S.E.2d 808 (S.C. 2021). (The jury charge instructing a jury it may infer knowledge or possession when a substance is found on property under the defendant's control should no longer be given.) The jury's note and verdict show they were struggling even after the improper inference instruction. Without the evidence of prior bad acts, the outcome of the trial would likely have been different.

3. The PCR judge erred in refusing to find counsel ineffective for failing to take exception to the jury instructions on inference.

The jury was instructed that "possession of an object or on [sic] the premises gives rise to an inference that the person charged has both the power and intent to control the use and disposition of the object. Actual knowledge of the controlled subject is evidence of intent to control its disposition and use." (R. 792, l.17). The jury sent a note asking if knowledge of drugs was the same as being guilty of trafficking. They were then reinstructed that knowledge of the presence of controlled substance could be inferred from possession of the object or premises and evidenced intent to control its disposition and that knowledge may be substituted for the intent element. (R. 801, l.22, 802, l.20). This instruction was improper. "The jury charge instructing a jury it may infer knowledge or possession when a substance is found on property under the defendant's control should no longer be given." *State v. Stewart*, 858 S.E.2d 808 (S.C. 2021).

Deficient Performance

Counsel did not take exception to these instructions. (R. 805). The PCR judge found this omission was not ineffective given the law at the time. (R. 1033). However, *State v. Stuart* did not codify new law. It simply overruled *State v. Adams* on the point that while parties could argue inferred knowledge from possession of the premises on which the contraband was found, jurors should not be instructed by the judge on this inference. *Id.* at 813. Furthermore, the *Adams* court found "The proper charge on constructive possession is to instruct the jury that the defendant's knowledge and possession may be inferred if the substance was found on premises under his control" but "[T]he trial judge should explain to the jury that it is free to accept or reject this permissive inference of knowledge and possession depending upon its view of the evidence. *State v. Peterson, supra*." *State v. Adams*, 291 S.C. 132, 136, 352 S.E.2d 483 (S.C. 1986). No such explanation was given in Mr. Bonner's case. Thus, the instruction in Mr. Bonner's case was improper under the law at that time and had an objection been made and an appeal filed Mr. Bonner's would likely have been the case overturned on appeal.

Prejudice

"When considering whether an error with respect to a jury instruction was harmless, we must "determine beyond a reasonable doubt that the error complained of did not contribute to the verdict." *State v. Kerr*, 330 S.C. 132, 144–45, 498 S.E.2d 212, 218 (Ct.App.1998)..." *State v. Middleton*, 407 S.C. 312, 755 S.E.2d 432 (S.C. 2014). The jury's note is a strong indicator they misunderstood the law of the case after the initial instruction so they were again given the improper instruction and soon returned a guilty verdict for a

lesser weight of drugs likely reflecting those drugs found in Bonner's house. (R. 805). The erroneous instruction certainly contributed to the guilty verdict.

4. The PCR judge erred in refusing to find counsel ineffective for failing to move to suppress evidence or object to its admission.

The PCR judge found that trial counsel's failure to challenge the search warrants and move to suppress the evidence in Petitioner's trafficking cases to be deliberate because her strategy was to present evidence that the drugs belonged to someone else. (R. 1007). He further found that there was no reasonable probability that challenging the search warrant would result in suppression of evidence in the case. (R. 1008). The record is replete with evidence showing that this finding is in error.

Deficient Performance

There were three pretrial hearings in this case: the State's Motion to exclude third-party guilt, a *Jackson v. Denno* hearing, and the State's proffer of bad act testimony. (R. 54-5) Trial counsel did not challenge either of the search warrants nor did she object to the evidence discovered pursuant to the search stating at the PCR hearing that she did not think the judge would suppress the drugs so her strategy was to not challenge the drugs but to argue they did not belong to her client. (R. 243, 244, 441, 443, 451-3, 1002). This is strategy is ineffective as there would be no case against Mr. Bonner if the search warrants were found to be invalid.

All of evidence in the case was discovered after the search and seizures at 126 and 125 Iris Lane which were based on two different search warrants, sworn to by two different officers and signed by two different judges within hours of each other. Given the unusual

and contorted testimony of the officers as to the facts supporting their respective warrants' affidavits as well as the CI Prentiss Jeffrey's testimony that the officers were lying and paid him to give a statement after the raid, there was strong evidence that the warrants contained false statements or omissions intended to mislead or in reckless disregard to whether they could mislead the issuing judges. (R. 280-5, 234-5, 123, 126) *See Franks v. Delaware,*438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978). Therefore, Mr. Bonner would be entitled to a Franks hearing. *See State v. Missouri*, 524 S.E.2d 394, 337 S.C. 548 (S.C. 1999).

Counsel's failure to argue a *Franks* violation, or that the search violated the Fourth Amendment of the United States Constitution and Article 1, § 10 of the South Carolina Constitution, and that the search warrants did not comply with South Carolina Code § 17-13-140 constituted deficient performance that satisfies the first prong of the *Strickland* test. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); U.S. Const. amend IV; S.C. Const. art. 1 § 10; S.C. Code Ann. § 17-13-140; *See also Butler v. State*, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985); *McHam v. State*, 404 S.C. 465, 746 S.E.2d 41 (S.C. 2013). Had counsel made that argument there is a strong likelihood the outcome would have been different.

Prejudice

"When the defendant claims that counsel's failure to articulate a Fourth Amendment claim was ineffective assistance, defendant must show that such claim is meritorious and that the verdict would have been different absent the evidence that should have been excluded." *Kimmelman v. Morrison*, 477 U.S. 365, 106 S.Ct. 2574, 91 L.Ed.2d 305 (1986). *Sikes v. State*, 323 S.C. 28, 448 S.E.2d 560, 562 (S.C. 1994).

The search warrants are problematic on their face and when combined with the affiants testimony would not survive challenge. (R. 841-8, 964) The first one seeks marijuana at 126 Iris Lane based on Affiant, County Sheriff Officer Gardner's statement that a CI known to be reliable had provided true information about the illegal drug trade and knows marijuana said he saw marijuana there in the past 72 hours. The second warrant cocaine or crack at 125 Iris Lane based on City Officer Anderson's statement that a CRI who had provided true information regarding the illegal drug trade leading to arrest and convictions and knows cocaine, said he saw cocaine in the past 72 hours. Anderson had no personal knowledge of Jeffries or his reliability. The first warrant was supposedly for marijuana though the alleged tip was cocaine. There was a substantial omission in the first affidavit and it defies logic that the drugs being across the street would not be mentioned in the initial tip. Combined with the implausible testimony presented at trial, the search warrants would likely be found to be invalid.

The trial testimony by Gardner, Anderson, and Todd Parker was that the information for both warrants was provided by Prentiss Jeffries, a CI who Parker worked with in past cases. Parker, fired for misconduct two days after the raid, said while working property crimes he asked Jeffries about drugs in the area and was told it was dry but a shipment was expected. (R. 141). He said Jeffries called him August 6, 2012 and said the shipment of drugs had come in so he put the call on speakerphone so Brandon Gardner, a narcotics officer, could hear. (R. 143). He said he spoke to Jeffries again later that day and learned that the drugs were across the street so he relayed that information to Officer Anderson who then got a warrant. (R. 143).

Gardner testified that he had met Jeffries one time before the search warrant and was told Jeffries had seen marijuana at 126 Iris Lane but expected a large amount of cocaine. (R. 279, l. 14, 281). He said they got a search warrant for marijuana which expired before he heard the tip over speakerphone that the large shipment of cocaine had arrived. He then got a second search warrant for marijuana because he knew that Jeffries had been used as a CI for marijuana in the past and the search for that would find the cocaine, too. (R. 285, l. 10).

Anderson said that during the raid of 126 Iris Lane, Detective Todd Parker approached him and said that his CI told him a large quantity of narcotics was across the street. (R. 234) He said Parker then called the CI handed over the phone and Jeffries relayed that there was a large amount of cocaine belonging to Nick Bonner across the street so Anderson then got the search warrant for 125 Iris Lane. (R. 234, 248).

Prentiss Jeffries denied these calls ever occurred and said after the raid he met with Parker and Anderson who coached and paid him to give a false statement. (R. 128). There were no phone records showing any calls were made to or from Jeffries and no witnesses saw Jeffries around 126 Iris Lane that day before the raid or at any time within the past three days and Jeffries himself denied being there. (R. 126, l. 19).

From this testimony problems are clear. Even if the officer's trial testimony were true, which the CI denies, Anderson and Gardner did not have prior dealings with Jeffries to substantiate their oath that they knew him to be reliable or that he had provided information leading to narcotics convictions. Gardner said he had met the CI once and got a tip about marijuana that was not investigated so he did not know that the CI was reliable. Gardner admitted the tip was for cocaine, but that he purposefully procured a search warrant for

marijuana. Either he failed to inform the magistrate of this discrepancy, or the magistrate issued the warrant based on false information. Regardless, no one had personal knowledge of Jeffries reliability or whether he knew marijuana or cocaine when he saw it.

The warrants could not stand without the lies and omissions in the affidavits. "A CI who I have never worked with before told me he saw marijuana at 126 Iris Lane a few weeks ago and just called today to say a shipment of cocaine had came in," is not probable cause for a search warrant for marijuana. The Anderson warrant would similarly fail. "I heard a CI who I have never dealt with say over the phone that he forgot to mention earlier during a initial tip leading to a raid of 126 Iris Lane for marijuana that the drugs are actually cocaine and crack across the street at 125 Iris Lane." Again, without the misstatements and omissions this does not establish valid grounds for a search warrant.

"Entitlement to a Franks hearing is a matter of law subject to de novo review." *Horton v. City of Columbia*, 408 S.C. 27, 36, 757 S.E.2d 537, 541 (Ct.App.2014). Here, if the CI Prentiss Jeffries' testimony is believed the affidavits in both search warrants are complete fabrication. Given their irregularities, the warrant affidavits do not ring true as discussed above. At best, the affiants in both warrants were misleading to the magistrates about the affiants' knowledge of the CI's reliability and contained wording 'designed to mislead' or 'in reckless disregard of whether it would mislead'. *See United States v. Tate*, 524 F.3d 449, 455 (4th Cir.2008), *State v. Lynch*, 412 S.C. 156, 180, 771 S.E.2d 346 (S.C. App. 2015).

These warrants are also misleading as to the basis of CI Prentiss Jeffries knowledge as there was no testimony that the CI had been to either address prior to the raid and seen drugs. "A warrant based solely on information provided by a confidential informant must

contain information supporting the credibility of the informant and the basis of his knowledge." *State v. 192 COIN-OP. VIDEO GAME MACH.*, 338 S.C. 176, 192, 525 S.E.2d 872 (S.C. 2000). Here, this standard was not met and the failure to challenge the search warrant changed the outcome of the case. "If a Franks hearing is appropriate and an affiant's material perjury or recklessness is established by a preponderance of the evidence, the warrant 'must be voided' and evidence or testimony gathered pursuant to it must be excluded." *United States v. Colkley*, 899 F.2d 297, 300 (4th Cir.1990), *State v. Lynch*, 412 S.C. 156, 771 S.E.2d 346 (S.C. App. 2015).

CONCLUSION

Based on the above argument, the convictions should be reversed and the case remanded for a new trial.

Respectfully submitted,

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