July 25, 2023

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S.C. SUPREME COURT

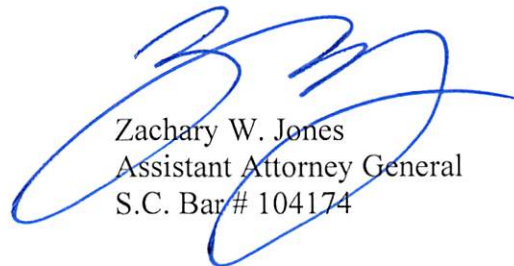
The Honorable Patricia A. Howard
Supreme Court of South Carolina
Post Office Box 11330
Columbia, South Carolina 29211
(via e-filing only - supctfilings@sccourts.org)

RE: Greer Ashley v. State of South Carolina
Appellate Case No.: 2022-001222

Dear Ms. Howard:

Enclosed please find the original Return to Petition for Writ of Certiorari in the above matter for filing. Please let me know if anything additional is needed.

Sincerely,



Zachary W. Jones
Assistant Attorney General
S.C. Bar # 104174

ZWJ/jmo
Enclosures

cc: Wanda H. Carter, Esquire
Victim Advocacy Division

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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
In the Supreme Court

CERTIORARI TO ABBEVILLE COUNTY
Court of Common Pleas
The Honorable J. Mark Hayes, II, Circuit Court Judge

Appellate Case No. 2022-001222

Greer Ashley,

Petitioner,

v.

State of South Carolina,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

ALAN WILSON
Attorney General

DON J. ZELENKA
Deputy Attorney General

ZACHARY W. JONES
S.C. Bar No. 104174
Assistant Attorney General

Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3737

ATTORNEYS FOR RESPONDENT

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PETITIONER'S STATEMENT OF THE ISSUE PRESENTED

1. Trial counsel erred in failing to conduct proper investigations into the status of the property where petitioner was detained because the property in question as private property, which police officers illegally entered without warrants or consent and without notice of posted "no trespassing" signs, because the inclusion of this Fourth Amendment violation in the motion to suppress would likely have led to the dismissal of the drug charge filed against petitioner.

RESPONDENT'S COUNTERSTATEMENT OF THE ISSUE PRESENTED

1. The PCR court's finding that Counsel was not ineffective regarding the motion to suppress because police officers had authority to enter Larry's property pursuant to valid arrest warrants was not challenged on appeal and is, therefore, the law of the case.

2. The PCR court correctly found Counsel was not ineffective regarding the motion to suppress because Petitioner did not have a reasonable expectation of privacy in his uncle's land and, therefore, could not assert a Fourth Amendment challenge to the introduction of the drug evidence.

STATEMENT OF THE CASE

On November 21, 2016, officers from the Honea Path Police Department and the Abbeville County Sherriff's Office were attempting to serve active arrest warrants on two subjects in Abbeville County: Donnie Brook and Desiree Young. According to information law enforcement received, the two wanted subjects were in the Honea Path area of Abbeville County. As the officers pulled onto a piece of property where the subjects were believed to be located,[1] the officers saw Petitioner, who fled the area on foot. The officers were able to apprehend Petitioner after a brief pursuit. Petitioner was clutching a detergent bottle like a football, and he "chucked it" as the officers caught up with him. After he was caught, Petitioner repeatedly stated, "My life is over," and the officers asked him what he was talking about. The officers then went over to where the detergent bottle lay and noticed the top had been cut off and a large quantity—971 grams—of methamphetamine was inside. After being advised of his rights pursuant to *Miranda*[2], Petitioner gave a statement to law enforcement, in which he admitted the substance in the bottle was twenty-thousand dollars' worth of methamphetamine. (App.pp.10–12).

During the March 31, 2017 term, the Abbeville County Grand Jury indicted Petitioner for trafficking methamphetamine 400 grams or more (2017-GS-01-0063). Bruce Byrholdt, Esquire ("Counsel"), represented Applicant. Assistant Solicitor Micah Black of the Eighth Circuit Solicitor's Office prosecuted the case.

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[1] The property belonged to Petitioner's uncle Larry Ashley ("Larry"), not to Petitioner. (App.p.67, lines 13–18).

[2] *Miranda v. Arizona*, 384 U.S. 436 (1966).

On October 23, 2017, Applicant pleaded guilty to the lesser included offense of trafficking methamphetamine 28–100 grams, second offense, before the Honorable Frank Addy, Jr. Pursuant to a negotiated sentence between the State and the Applicant, Judge Addy sentenced Applicant to imprisonment for fifteen years, with credit for time served of sixty days. Applicant did not appeal his guilty plea or sentence.

Petitioner filed an application for post-conviction relief ("PCR") on June 4, 2018, and an amended application on January 14, 2021. An evidentiary hearing into the matter was held before the Honorable J. Mark Hayes, II, via the WebEx virtual courtroom platform on January 28, January 29, and March 15, 2021. The PCR court denied and dismissed the application with prejudice on August 31, 2021. Petitioner filed a motion for reconsideration on September 7, 2021, and a virtual hearing was held on June 22, 2022. On August 29, 2022, the PCR court denied Petitioner's motion for reconsideration.

Petitioner thereafter filed a timely notice of appeal. By and through counsel Wanda H. Carter, Esquire, Petitioner filed a petition for writ of certiorari on April 10, 2023. This Return follows.

STANDARD OF REVIEW

The post-conviction relief court's findings of fact receive great deference during appellate review and will be upheld if "any evidence of probative value" exists in the record to support the lower court's findings. *Sellner v. State*, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016). Questions of law are reviewed *de novo*, and appellate courts will reverse the decision of the post-conviction relief court when it is controlled by an error of law. *Id.*; *Smalls v. State*, 422 S.C. 174, 180–81, 810 S.E.2d 836, 839 (2018). In a post-conviction relief action, an applicant has the burden of proving the allegations in his or her application. Rule 71.1(e), SCRCP; *Butler*

v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

An unappealed ruling, right or wrong, is the law of the case. *See Smith v. State*, 413 S.C. 194, 196, 775 S.E.2d 696, 697 (2015) (citing *Atl. Coast Builders & Contractors, L.L.C. v. Lewis*, 398 S.C. 323, 329, 730 S.E.2d 282, 285 (2012)); *see also* Rule 208(b)(1)(B), SCACR ("Ordinarily, no point will be considered which is not set forth in the statement of the issues on appeal."). "Under the two issue rule, where a decision is based on more than one ground, the appellate court will affirm unless the appellant appeals all grounds because the unappealed ground will become law of the case." *Atl. Coast Builders & Contractors, L.L.C.*, 398 S.C. at 328, 730 S.E.2d at 284 (quoting *Jones v. Lott*, 387 S.C. 339, 346, 692 S.E.2d 900, 903 (2010)).

ARGUMENT

1. The PCR court's finding that Counsel was not ineffective regarding the motion to suppress because police officers had authority to enter Larry's property pursuant to valid arrest warrants was not challenged on appeal and is, therefore, the law of the case.

Petitioner argued to the PCR court that Counsel was ineffective for failing to visit and investigate the property where Petitioner was apprehended with the drugs. Petitioner claims that, if Counsel had visited the property, he would have noticed the multiple "no trespassing" signs posted around and could have argued that the officers who caught Petitioner with the drugs were trespassing at the time. Petitioner believes this evidence would have strengthened his motion to suppress the drug evidence because it would have shown that the officers' entry onto his uncle's property violated the Fourth Amendment.

The PCR court found that, despite the "no trespassing" signs, the officers' entry onto Larry's property did not violate Petitioner's Fourth Amendment rights because the officers were serving valid arrest warrants on two individuals believed to be staying at that location and because Petitioner did not have a reasonable expectation of privacy in Larry's property.

In his petition for a writ of certiorari, Petitioner now argues the PCR court erred in finding he did not have a reasonable expectation of privacy in the property.[3] However, the petition does not challenge the PCR court's finding that the officers had authority to enter the property pursuant to valid arrest warrants.

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[3] Petitioner's argument on this point is addressed in Respondent's Issue 2, *infra*.

The Sixth and Fourteenth Amendments to the United States Constitution guarantee criminal defendants the right to "assistance by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair." *Strickland v. Washington*, 466 U.S. 668 (1984). Where, as in this case, a PCR applicant alleges ineffective assistance of counsel as a ground for relief, the applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that [it] cannot be relied upon as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 686 (1984); *Butler v. State*, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985).

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in *Strickland*: first, the applicant must prove that counsel's performance was deficient. *Strickland*, 466 U.S. at 686; *Cherry v. State*, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." *Cherry*, 300 S.C. at 117, 386 S.E.2d at 625 (quoting *Strickland*, 466 U.S. at 690). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. *Butler*, 286 S.C. at 442, 334 S.E.2d at 814.

Second, counsel's deficient performance must have prejudiced Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Cherry*, 300 S.C. at 117–18, 386 S.E.2d at 625. In the context of a guilty plea, Applicant must show that there is a reasonable probability that, but for counsel's alleged errors, he would not have pleaded guilty and would have insisted on going to trial. *Hill v. Lockhart*, 474 U.S. 52, 59 (1985). The applicant bears the burden of proving the

allegations in his application by a preponderance of the evidence. *Butler*, 286 S.C. at 442, 334 S.E.2d at 814; Rule 71.1(e), SCRCP.

Petitioner argues that, if Counsel had more thoroughly investigated the case, he would have learned that the police entered Larry's property without consent, as evidenced by the "no trespassing" signs posted at multiple locations. Petitioner claims that, because the police officers did not have search warrants or consent from the property owner, they violated the Fourth Amendment by entering Larry's property. Petitioner further claims that, if Counsel had raised these issues in his motion to suppress the drug evidence, the motion would likely have succeeded, and Petitioner would not have pleaded guilty but would have proceeded to trial and relied on the strength of his suppression motion.

The PCR court, however, found that "the officers entered the property in an attempt to apprehend two individuals who had outstanding arrest warrants," citing *State v. Sims*, 304 S.C. 409, 418–19, 405 S.E.2d 377, 382–83 (1991) (holding police do not violate the Fourth Amendment by entering property pursuant to a valid arrest warrant). The PCR court found that, because the officers had the authority to enter the property in search of the individuals named in the arrest warrants, they had the right to ignore any "no trespassing" signs. Therefore, the PCR court found that Petitioner's suppression motion was not likely to succeed, even if Counsel had known about the signs. (App.pp.436–37).

This finding alone is dispositive of Petitioner's PCR claim. Nevertheless, Petitioner does not challenge this finding in his petition for a writ of certiorari. Therefore, this finding is the "law of the case," and Petitioner's appeal must fail. Where a decision is based on more than one ground, the decision will be affirmed unless the appellant appeals *all* grounds. *See Atl. Coast Builders & Contractors, L.L.C.*, 398 S.C. at 328, 730 S.E.2d at 284.

Because Petitioner's appeal must fail based on the "law of the case" doctrine, Respondent asks this Court to deny the petition for a writ of certiorari.

2. **The PCR court correctly found Counsel was not ineffective regarding the motion to suppress because Petitioner did not have a reasonable expectation of privacy in his uncle's land and, therefore, could not assert a Fourth Amendment challenge to the introduction of the drug evidence.**

Petitioner also claims the PCR court erred in finding Petitioner did not have a reasonable expectation of privacy in Larry's land. Petitioner argues he *did* have a reasonable expectation of privacy in Larry's property, due to family ties and business connections, and that Counsel was therefore ineffective for failing to make a more thorough motion to suppress the drug evidence.

This argument is meritless. The PCR court correctly found Applicant could not assert a reasonable expectation of privacy in his uncle's land; therefore, even if the police had illegally entered Larry's property, Applicant had failed to show that his *own* Fourth Amendment rights were violated. (App.p.375; p.437).

"A person who is aggrieved by an illegal search and seizure . . . of a third person's premises or property has not had any of his Fourth Amendment rights infringed." *Rakas v. Illinois*, 439 U.S. 128, 134 (1978). A person making a motion to suppress must show that he, personally, had a reasonable expectation of privacy in the area that was illegally searched. *State v. Robinson*, 410 S.C. 519, 528, 765 S.E.2d 564, 569 (2014). A person who is merely present on another's property, with the consent of the owner, does not necessarily have a reasonable expectation of privacy in the property. *See id.* at 530, 765 S.E.2d at 570 (holding a defendant who was not a renter, overnight guest, or otherwise connected with the searched property could

not assert a Fourth Amendment violation merely because he was present with the owner's consent).

Robinson set forth many factors a court could use to determine whether a defendant had standing to challenge an illegal search of a third person's property:

a. whether the defendant owned the home or had property rights to it;
b. whether he was an overnight guest at the home;
c. whether he kept a change of clothes at the home;
d. whether he had a key to the home;
e. whether he had dominion and control over the home and could exclude others from the home;
f. how long he had known the owner of the home;
g. how long he had been at the home;
h. whether he attempted to keep his activities in the home private;
i. whether he engaged in typical domestic activities at the home, or whether he treated it as a commercial establishment;
j. whether he alleged a proprietary or possessory interest in the premises and property seized (even if only at a motion to suppress, where that admission cannot be used against him to determine his guilt); and
k. whether he paid rent at the home.

Robinson, 410 S.C. at 528–30, 765 S.E.2d at 569–70.

Petitioner cites the *Robinson* factors in his petition. (Pet.p.14). However, he fails to address most of these factors in support of his claim to a "reasonable expectation of privacy" in Larry's property. His sole argument is that he "exercised dominion and control over the property as a family member who lived next door with respect to business or social ventures." (Pet.p.15).[4]

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[4] In support of this argument, Petitioner makes a number of tenuous inferences based on sparse evidence:

1. The presence of a vehicle body shop, plus vehicles, campers, and trailers on the adjoining properties "indicated apparently that both Petitioner and his Uncle Larry Ashley had authority over the property as a possible family enterprise of sorts" (Pet.p.13);

Petitioner's status "as a family member who lived next door" does not necessitate a finding that he had a reasonable expectation of privacy in Larry's land. Even if that fact established that Petitioner "had dominion and control" over Larry's property—which is far from obvious—Petitioner has failed to prove any of the remaining *Robinson* factors. The first and tenth *Robinson* factors, regarding whether the defendant had property rights or a proprietary interest in the premises, are clearly not met in this case; all parties agree the land in question belonged to Larry, not Petitioner. Furthermore, there is no evidence in the record that Petitioner was ever an overnight guest at the property, kept a change of clothes there, had a key, could exclude others, had been at the property for a long time, attempted to keep his activities there a secret (from anyone other than the police, that is), engaged in typical domestic activities there, or paid rent. Therefore, the PCR court correctly found that Petitioner had failed to prove he had a reasonable expectation of privacy in Larry's property.

Consequently, Petitioner could not assert a Fourth Amendment violation based on the officers' entry onto the property, and any motion to suppress the drugs was doomed to fail.

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2. The fact Petitioner's driveway was connected to Larry's driveway indicated that "Petitioner had a connected relationship, arguably free reign, to his uncle's property" (Pet.p.14);
3. Petitioner's status "as a nephew" suggested that he "had free roam of his uncle's property" (Pet.p.15).

Elsewhere in the petition, Petitioner asserts Larry's property contained "business enterprises, which Petitioner presumably took part in"; a vehicle body shop, "which [Larry] presumably owned and controlled, probably along with Petitioner"; campers and trailers strewn along the property, "which was likely a rental business that [Petitioner] was tied to along with his uncle"; and "various businesses along the way, with which Petitioner was probably associated." (Pet.p.11).

Each of these inferences is debatable. The mere assertion of all these possibilities, probabilities, and presumptions cannot justify reversing the findings of the PCR court, which are entitled to great deference and must be upheld if there is any evidence to support them. *Sellner*, 416 S.C. at 610, 787 S.E.2d at 527.

Therefore, the PCR court correctly found Counsel was not ineffective for failing to more thoroughly investigate the case prior to making his motion to suppress. Because the decision of the PCR court was correct, this Court should deny the petition for a writ of certiorari.[5]

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[5] The petition includes a section in which Petitioner argues the "open field doctrine" does not apply in this case. Although the State argued that the officers intrusion onto Larry's property was legal under the open field doctrine, the PCR court did not reach this issue.

CONCLUSION

For the foregoing reasons, this Court should deny this Petition for Writ of Certiorari. Should this Court grant the petition, the State seeks permission to more fully brief the issues herein.

Respectfully submitted,

ALAN WILSON
Attorney General

DON J. ZELENKA
Deputy Attorney General

ZACHARY W. JONES
S.C. Bar No. 104174
Assistant Attorney General

By: ______________________
ATTORNEYS FOR RESPONDENT

Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3737

7/25______________, 2023