

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

The Honorable C. Victor Pyle, Jr., Trial Judge
The Honorable John C. Few, Sentencing Judge
The Honorable R. Markley Dennis, Jr., Post-Conviction Relief Judge

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S.C. Supreme Court

Appellate Case No. 2011-CP-23-0382

Horace Abney, Jr., Respondent,

v.

State of South Carolina, Petitioner.

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Did the PCR judge err in finding Respondent met his burden of proving appellate counsel was ineffective in failing to raise the issue of whether the motion to suppress should have been denied?

STATEMENT OF THE CASE

The June 2000 term of the Greenville County Grand Jury indicted Respondent for trafficking cocaine (2000-GS-23-4624). (App.pp.262-64). Andrew R. Mackenzie, Esquire represented Respondent.

On December 11, 2002, Respondent was tried in absentia and convicted of the charge as indicted. The Honorable C. Victor Pyle, Jr. sealed his sentence. (App.pp.123-25; p.261). On June 15, 2006, Respondent appeared before the Honorable John C. Few to be sentenced. Respondent received a sentence of thirty years imprisonment and Judge Few denied his motion for a new trial. (App.p.132; pp.137-58).

A notice of appeal was filed at the South Carolina Court of Appeals. M. Celia Robinson, Esquire of the South Carolina Office of Appellate Defense perfected the appeal. (App.pp.161-77). The Court of Appeals affirmed Respondent's conviction and sentence. State v. Abney, Op. No. 2010-UP-414 (S.C. Ct. App. filed Sept. 20, 2010). (App.pp.194-95).

Respondent filed an application for post-conviction relief (PCR) on January 19, 2011 (2011-CP-23-0382). (App.pp.196-205). A hearing was convened at the Greenville County Courthouse on October 30, 2012. (App.pp.217-49). Respondent was present and represented by Rodney W. Richey, Esquire. Karen C. Ratigan, Esquire of the South Carolina Attorney General's Office represented the State. The Honorable R. Markley Dennis, Jr. granted relief in an order filed January 14, 2013. (App.pp.251-58).

STANDARD OF REVIEW

The proper standard for review of a PCR evidentiary hearing is whether “any evidence of probative value” exists to sustain the post-conviction relief judge’s findings. Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989). In a post-conviction relief proceeding, the applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985).

ARGUMENT

The PCR judge erred in holding Respondent met his burden of proving appellate counsel was ineffective in failing to raise the issue of whether the motion to suppress should have been denied.

A.

At the pre-trial suppression hearing, trial counsel noted he was not challenging the validity of the traffic stop. Rather, trial counsel argued there was a lack of probable cause and that there “may also be an issue about whether or not the search was consensual.” (App.p.3). Trooper David Robinson testified he stopped Respondent’s vehicle for speeding and that, after he approached the vehicle, he immediately smelled the odor of burnt marijuana and “could smell it over anything else.” (App.pp.6-7). Trooper Robinson testified he asked Respondent to exit the vehicle so he could give him a written warning. (App.pp.7-8). Trooper Robinson testified he called for backup assistance both because of the marijuana smell and because Respondent was acting nervous. (App.p.8). Trooper Robinson testified he did not immediately confront Respondent about the marijuana smell because he was alone and concerned about his safety. (App.p.12). Trooper Robinson testified he asked Respondent for consent to search his vehicle after

his backup assistance arrived. (App.p.9). Trooper Robinson testified Respondent never said yes or no to his request to search. (App.p.9; p.17). Trooper Robinson testified he did not find marijuana in the car, but did discover ashes in the ashtray and a package in the jacket on the front seat. (App.p.9; p.13). The trial judge denied the motion to suppress, finding: (1) the smell of marijuana alone was a sufficient basis to establish probable cause for the search and (2) there was no need to reach the consent issue. (App.pp.21-22).

At Respondent's trial in absentia, Trooper Robinson testified again about the circumstances surrounding the traffic stop and search of Respondent's vehicle. Trooper Robinson testified that, at the time of the traffic stop, he was a member of the ACE Team (the drug team for the Highway Patrol). (App.p.53; p.71). Trooper Robinson testified he was trained in the detection of narcotics – including the smell of marijuana – and that he could tell the difference between burnt marijuana and tobacco. (App.p.53; p.56). Trooper Robinson testified he called for backup based on the strong smell of burnt marijuana from Respondent's vehicle and also because Respondent was acting "real nervous." (App.pp.56-57; p.73). Trooper Robinson testified backup was requested for officer safety reasons and that, once backup assistance arrived, he asked Respondent for consent to search the vehicle but that Respondent was hesitant. (App.p.58; p.65). Trooper Robinson testified, however, that Respondent "never said [he] couldn't" search the vehicle and in fact gave a head nod when asked whether the vehicle could be searched. (App.p.58). Trooper Robinson testified he determined this meant the search was consensual. (App.p.58). While he did not find marijuana in the vehicle, Trooper

Robinson testified he found ashes in the ashtray and a package of white powder in a jacket on the front seat. (App.p.59; pp.65-66; p.70). Trial counsel renewed his objection – based on the arguments raised in the pre-trial suppression hearing – when the 428.6 grams of cocaine from the package was moved into evidence. (App.pp.91-92; p.93).

The denial of the motion to suppress was not raised on appeal. Instead, appellate counsel raised the issues of whether Judge Few erred in (1) denying Respondent's motion for a new trial and (2) denying Respondent's motion to dismiss the indictment with prejudice pursuant to the Interstate Agreement on Detainers. (App.pp.161-77). The South Carolina Court of Appeals affirmed Respondent's conviction and sentence. (App.pp.194-95).

B.

At the PCR hearing, Respondent stated he was present at the suppression hearing and that the key issue was consent. (App.p.222). Respondent stated the officer stopped his vehicle for speeding and – after processing his information – asked him to step out of the vehicle. (App.p.223). Respondent stated the officer asked for consent to search the vehicle and, upon asking why, said it was because he had smelled marijuana. (App.p.224). Respondent stated he never gave verbal consent to the officer but that he “may have made a hand gesture like, you know, well you're going to do it anyway.” (App.p.224). Respondent stated the officer never testified he gave verbal consent to search his vehicle and that appellate counsel should have briefed this issue. (App.p.225). Respondent stated he asked appellate counsel to raise this issue but she said she would not do so because she felt the court would rule against it. (App.pp.225-27).

Trial counsel testified the main issue he raised at the hearing on the motion to suppress was whether probable cause existed. (App.p.240). Trial counsel testified he was also prepared to argue consent but the trial judge found there was probable cause so that issue was not reached. (App.p.240). Trial counsel testified he did not believe Respondent gave overt consent for the search and that he likely argued this at trial. (App.p.235; p.240).

In granting Respondent's application for post-conviction relief, the PCR judge found Respondent "met his burden of proving appellate counsel was ineffective" and that "appellate counsel's failure to brief the suppression issue prejudiced [Respondent]." (App.p.256).

C.

For an applicant to be granted PCR as a result of ineffective assistance of counsel, he must show both: (1) that his counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that he was prejudiced by his counsel's ineffective performance. See Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984); Porter v. State, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006). In order to prove prejudice, an applicant must show "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry v. State, 300 S.C. at 117-18, 386 S.E.2d at 625.

A defendant is constitutionally entitled to effective assistance of appellate counsel. Evitts v. Lucey, 469 U.S. 387, 105 S. Ct. 830 (1985). In analyzing a claim of ineffective assistance of appellate counsel, the Court applies the Strickland test just as it would when

analyzing a claim of ineffective assistance of trial counsel. See Bennett v. State, 383 S.C. 303, 309, 680 S.E.2d 273, 276 (2009); Southerland v. State, 337 S.C. 610, 616, 524 S.E.2d 833, 836 (1999) (noting courts apply the Strickland test to determine if appellate counsel was deficient for failing to raise an issue and whether the defendant was prejudiced from the failure to raise the issue).

D.

The PCR judge erred in finding Respondent met his burden of proving appellate counsel was ineffective. Respondent failed to prove the first prong of the Strickland test – that appellate counsel erred in not raising the issue of the denial of the suppression motion on appeal. “Although it is possible to bring a successful ineffective assistance of appellate counsel claim based on failure to raise a particular issue on direct appeal, the Supreme Court has reiterated that it is “difficult to demonstrate that counsel was incompetent.” United States v. Mason, No. 3:06–607–CMC, 2012 WL 5845807 at *1 (D. S.C. Nov. 19, 2012) (quoting Smith v. Robbins, 528 U.S. 259, 288, 120 S. Ct. 746, 765 (2000)). “Generally, only when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome.” Smith v. Robbins, 528 U.S. at 288, 120 S. Ct. at 765 (quoting Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1986)). Initially, the State notes Respondent did not present appellate counsel as a witness at the PCR hearing. Appellate counsel was not questioned, therefore, about the rationale used to select which issues would be raised on appeal. As such, it would be speculative to opine about why counsel did not raise the issue of the denial of the suppression motion in the brief to the Court of Appeals. Cf. Dempsey v. State, 363 S.C.

365, 370, 610 S.E.2d 812, 815 (2005) (finding that, as the applicant failed to have an expert testify at the evidentiary hearing, “any finding of prejudice is merely speculative”). Regardless, Respondent cannot prove appellate counsel erred in not raising this issue. The United States Supreme Court has held appellate counsel is not required to raise every meritorious issue on appeal, but instead may select among them in order to maximize the likelihood of a favorable outcome. See Smith v. Robbins, 528 U.S. at 288, 120 S. Ct. at 765; see also Bennett v. State, 383 S.C. at 309, 680 S.E.2d at 276. As such, it was not incumbent upon appellate counsel to raise the issue of the denial of the suppression motion merely because it was properly preserved. As will be discussed infra, appealing the denial of the suppression motion would not have had a high likelihood of success. Rather, appellate counsel chose to brief two issues that were raised and ruled upon during the sentencing hearing. The first issue dealt with whether Respondent received actual notice of the trial date. (App.pp.166-70). The second issue dealt with the novel issue of whether the Interstate Agreement on Detainers¹ was violated because Respondent was tried – but not sentenced – within 180 days of a request for final disposition. (App.pp.170-75). Both issues were hotly contested at the sentencing hearing and compelling issues for appeal. Respondent failed to articulate why the denial of the suppression motion was a stronger appellate issue than either of the issues that were briefed. See Smith v. Robbins, 528 U.S. at 288, 120 S. Ct. at 765. There was no probative evidence to support the PCR judge’s finding that appellate counsel erred in not raising the suppression issue on appeal. See Cherry v. State, 300 S.C. at 119, 386 S.E.2d

¹ S.C. Code Ann. § 17-11-10 (2006).

at 626.

Respondent also failed to prove the second prong of the Strickland test – that he was prejudiced by appellate counsel’s representation. “To establish prejudice relating to the actions of appellate counsel, Defendant must establish a reasonable probability that, but for his counsel's unreasonable failure to include a particular issue on appeal, he would have prevailed on his appeal.” United States v. Mason, 2012 WL 5845807 at *1 (citing Smith v. Robbins, 528 U.S. at 285-86, 120 S. Ct. at 764). The issue of whether the motion to suppress was properly denied would not have been a successful issue on appeal. It is well-settled that a law enforcement officer has probable cause to effect a search if there is an odor of marijuana. In United States v. Carter, 300 F.3d 415, 422 (4th Cir. 2002), the Fourth Circuit Court of Appeals found an officer has probable cause to search both the suspect and the vehicle’s passenger area if the odor of marijuana is detected during a lawful traffic stop. In State v. Lane, 271 S.C. 68, 245 S.E.2d 114 (1978), this Court found there was probable cause to seize and search a package based upon the odor of marijuana emanating from that package and the officer’s familiarity with that odor. In State v. Morris, 395 S.C. 600, 720 S.E.2d 468 (Ct. App. 2011), the Court of Appeals found officers had probable cause to search a vehicle’s trunk based upon the odor of marijuana and an officer’s knowledge of the common practice of using a hollow cigar to smoke marijuana. Trooper Robinson testified regarding his training in detecting the odor of drugs such as marijuana and stated he detected a strong odor of burnt marijuana when he approached Respondent’s car. (App.p.5; p.7; pp.53-57). Trooper Robinson then found the package of cocaine in the jacket on the front passenger seat.

(App.p.9; p.59). It is clear, therefore, that probable cause existed for Trooper Robinson to search the front passenger area of Respondent's vehicle and the trial judge did not err in denying Respondent's motion to suppress. There is no likelihood this issue would have been successful on appeal.² See United States v. Mason, 2012 WL 5845807 at *1. As such, there was no probative evidence to support the PCR judge's finding that Respondent was prejudiced by appellate counsel's decision not to raise the suppression issue on appeal. See Cherry v. State, 300 S.C. at 119, 386 S.E.2d at 626.

E.

Accordingly, Respondent failed to prove either prong of the Strickland test. As Respondent failed to meet his burden of proving ineffective assistance of appellate counsel, the PCR judge erred in granting Respondent's application for post-conviction relief. See Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) ("The burden of proof is on the applicant to prove his allegations by a preponderance of the evidence.").

² Likewise, the issue of whether Respondent consented to the search would not have been successful on appeal because the record is devoid of any evidence Respondent vocalized an objection to the search. Rather, Trooper Robinson testified Respondent nodded his head in response to his request to search and Respondent testified he gave "a hand gesture like, you know, well you're going to do it anyway." (App.p.58; p.224). As such, Respondent's voluntary consent would have been difficult to challenge on appeal. See State v. Pichardo, 367 S.C. 84, 105, 623 S.E.2d 840, 851 (Ct. App. 2005).

CONCLUSION

For the reasons stated above, this Court should grant the Petition for Writ of Certiorari and reverse the lower court's ruling. If this Court grants certiorari, the State asks permission under the rules to brief the issue discussed above fully.

Respectfully submitted,

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By: 
ATTORNEYS FOR PETITIONER

August 8, 2013

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

The Honorable C. Victor Pyle, Jr., Trial Judge
The Honorable John C. Few, Sentencing Judge
The Honorable R. Markley Dennis, Jr., Post-Conviction Relief Judge

Appellate Case No. 2011-CP-23-0382.

Horace Abney, Jr., Respondent,

v.


State of South Carolina, Petitioner.

CERTIFICATE OF SERVICE

I, Karen C. Ratigan, certify that I have today served the within Petition for Writ of Certiorari upon Respondent by depositing a copy of the same in the United States mail, postage prepaid, addressed to:

Susan B. Hackett, Esquire
South Carolina Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, South Carolina 29211-1589

I further certify that all parties required by Rule to be served have been served. This 8th day of August, 2013.


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ATTORNEY GENERAL

August 8, 2013

The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
Post Office Box 11330
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AUG - 8 2013

S.C. Supreme Court

Re: Horace Abney, Jr. v. State of South Carolina
Appellate Case No: 2013-000136
Lower Court Case No: 2011-CP-23-0382

Dear Mr. Shearouse:

Enclosed for filing please find an original and six (6) copies of the **Petition for Writ of Certiorari** in the above-captioned case. The Appendix was filed June 7, 2013.

Sincerely,

Karen C. Ratigan
Assistant Deputy Attorney General
SC Bar #68331

KCR/jacc
Enclosures

cc: Susan B. Hackett, Esquire
Trisha Allen, Victim Services Counselor