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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM OCONEE COUNTY
Court of Common Pleas

The Honorable J. Cordell Maddox, Jr., Circuit Court Judge

Appellate Case No. 2012-207126

James Randolph Frady, ... Petitioner,

v.

State of South Carolina, ... Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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ATTORNEYS FOR RESPONDENT

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QUESTION PRESENTED

1. Did the PCR judge err in finding Petitioner failed to meet his burden to prove counsel was ineffective for failing to research and argue the motion to suppress based upon an alleged Miranda violation?

2. Did this Court's order that Petitioner proceed with the appeal absent a full record from the PCR hearing result in a Due Process violation?

STATEMENT OF THE CASE

The Oconee County Grand Jury indicted Petitioner at the December 2004 term of General Sessions for two counts of murder (2004-GS-37-2072; -2073), one count of arson, second-degree (2004-GS-37-2004-GS-37-2070), one count of possession of a weapon during the commission of a violent crime (2004-GS-37-2074), one count of burglary, first-degree (2004-GS-37-2078), and one count of grand larceny (2004-GS-37-2071). (App.pp.937-54). D. Chuck Allen, Esquire, and Elizabeth Waldrep, Esquire, represented Petitioner.

The State called its case to trial on August 26, 2006. During the pre-trial motions, Officer Hunnicutt testified that he was dispatched to respond to an incident that involved a stolen van. (App.pp.8-15). A brief investigation led Hunnicutt and Officers Long and Hamilton to Petitioner's Yohlanda road residence where Hunnicutt questioned Petitioner regarding the van. Petitioner relayed that he had just returned home from a funeral. Hunnicutt noticed Petitioner's muddy boots and asked Petitioner if he could photograph them. Petitioner initially consented before he ended the encounter by telling Hunnicutt he wanted to see his attorney, Julian Stoudemire. (App.p.14). Hunnicutt testified Petitioner was not under arrest. (App.p.16). The trial judge ruled the encounter did not constitute a custodial interrogation. (App.pp.21-2).

The following day, an anonymous tip resulted in the discovery of the two murdered victims at the Westminster highway location by different police officers.. Petitioner had two outstanding arrest warrants for assault on each victim. (App.p.51). Keven Davis testified he issued arrest warrants from a June 11, 2004 incident where

Petitioner assaulted both victims. (App.pp.602-3). As a result, Officers Jenkins, Reed, and Bryant were instructed to locate and serve the prior arrest warrants on Petitioner. Jenkins testified he made contact with Petitioner outside of residence. Petitioner was immediately detained and asked if there were any undisclosed persons or weapons on the property. Petitioner told Jenkins that he had a shotgun in his home. (App.pp.377-8). A protective sweep was executed and did not result in the discovery of the shotgun. (App.p.490). Petitioner made the following voluntary statement to Jenkins after he had been Mirandized:

> [Petitioner] was asked about the shotgun in the residence. And he stated he had bought it from a friend previously. And he was asked when was the last time he had seen his family. And his response was that he hadn't seen his folks in two to three months.

(App.p.384, line 24—p.385, lines 3). The jury found Petitioner guilty as indicted. (App.pp.852-3). The Honorable Perry M. Buckner, III., sentenced Petitioner to two terms of life imprisonment plus a thirty year aggregate sentence. (App.pp.857-8).

A notice of appeal was filed at the South Carolina Court of Appeals. Joseph L. Savitz. III., Esquire, of the South Carolina Office of Appellate Defense perfected the appeal pursuant to Anders v. California, 386 U.S. 738 (1967). (App.pp.861-70). The Court of Appeals affirmed Petitioner's convictions and sentences. State v. James Randolph Frady, Op. No. 2008-UP-634 (Submitted November 8, 2008). (App.pp.871-2).

Petitioner filed an application for post-conviction relief (PCR) on April 13, 2009 (2009-CP-37-451) (App.pp.874-88). A hearing was convened at the Oconee County Courthouse on October 3, 2011. (App.pp.902-13). Petitioner was present and

represented by Rodney W. Richey, Esquire. Kaelon E. May, Esquire, of the South Carolina Attorney General's Office represented Respondent. The Honorable J. Cordell Maddox denied relief in an order dated January 19, 2012. (App.pp.914-36).

Petitioner filed a motion to remand for record reconstruction on July 12, 2012. (App.pp.955-8). Respondent filed its return motion on July 16, 2012. (App.pp.1028-30). Petitioner filed a reply on July 20, 2012. (App.pp.1031-4). This Court granted Petitioner's motion to remand the matter to the Honorable J. Cordell Maddox, Jr., to reconstruct the missing portions of the record in an order dated August 10, 2012. (App.pp.1035-6).

A hearing was convened on February 25, 2013 pursuant to this Court's order. On February 28, 2013, the Honorable J. Cordell Maddox, Jr. issued a letter on the matter. (App.p.1037). On March 18, 2013, this Court ordered Petitioner proceed the Petition with the present record. This appeal follows.

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

I.

Certiorari is not warranted where the PCR judge correctly ruled counsel was not ineffective for failing to argue Petitioner's invocation of his right to counsel in a non-custodial encounter with one officer unbeknownst the arresting officer constituted a valid basis to suppress Petitioner's voluntary post-arrest statement.

In denying Petitioner's application for post-conviction relief, the PCR judge found Petitioner failed to meet his burden to prove counsel was ineffective for failing to research and argue the motion to suppress based upon a Miranda violation. (App.p.927).

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 reasonable probability is a probability sufficient to undermine confidence in the outcome of trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984)).

Respondent submits the PCR judge correctly ruled on the matter. "The Fifth Amendment right to counsel is not offense-specific; once an accused invokes the right to counsel for interrogation regarding one offense, he may not be approached regarding any

offense unless counsel is present." State v. McCray, 332 S.C. 536, 546-47, 506 S.E.2d 301, 306 (1998). (citing Arizona v. Roberson, 486 U.S. 675, 108 S.Ct. 2093, 100 L.Ed.2d 704 (1988)). "If the accused invokes the right to counsel, interrogation must cease and police may not conduct interrogation unless the accused initiates communication, exchanges, or conversations with the police." Id. (citing Edwards v. Arizona, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981)). "If the police do subsequently initiate an encounter in the absence of counsel (**assuming there has been no break in custody**), the suspect's statements are presumed involuntary and therefore inadmissible as substantive evidence at trial." McNeil v. Wisconsin, 501 U.S. 171, 177, 111 S. Ct. 2204, 2208, 115 L. Ed. 2d 158 (1991) (Emphasis added). "This is designed to prevent police from badgering a defendant into waiving his previously asserted Miranda rights," Id. Michigan v. Harvey, 494 U.S. 344, 350 (1990)). "As the Court in McNeil noted, in order for Edwards to apply, the suspect must be in custody from the time he invokes his right to the time when the subsequent interrogation is initiated." United States v. Bautista, 145 F.3d 1140, 1150 (10th Cir. 1998).

Petitioner's application of Edward's is at odds with the Court's intended purpose to prevent concerted police badgering of suspects in custody through renewed interrogation. Petitioner's unfounded "presumption of involuntariness" would create disastrous implications that would hinder prosecution well past any necessary prophylactic justification. The record shows Petitioner had nearly half a day to contact his attorney after his brief non-custodial encounter with Hunnicutt. Additionally, Petitioner decided not to notify Jenkins of the previous encounter and invocation of right to counsel.

Certainly, if Petitioner still needed to consult his attorney, he should have informed Jenkins or Davis while being advised of his post-arrest Miranda rights.

At the time of Petitioner's trial, most jurisdictions had delineated a sufficient time period to where a "break in custody" allowed police reinitiate an interrogation after a suspect invoked his right to counsel. See McFadden v. Garraghty, 820 F.2d 654, 661 (4th Cir. 1987). Respondent submits a temporal inquiry is not dispositive in the present case because Petitioner was not in custody when questioned about the stolen van. See Maryland v. Shatzer, 559 U.S. 98, 105, 130 S. Ct. 1213, 1220, 175 L. Ed. 2d 1045 (2010) (Roberson, 486 U.S., at 686) ("The Edwards presumption of involuntariness ensures that police will not take advantage of the mounting coercive pressures of prolonged police custody.") "The fact that the investigation has focused on the suspect does not trigger the Miranda warnings unless he is in custody." State v. Sprouse, 325 S.C. 275, 282, 478 S.E.2d 871, 875 (Ct. App. 1996) (citing Minnesota v. Murphy, 465 U.S. 420 (1984)). "The initial determination of whether an individual was in custody depends on the objective circumstances of the interrogation, not the subjective views harbored by either the interrogating officers or the person being questioned." Id. (citing Stansbury v. California, 511 U.S. 318 (1994)).The record shows Petitioner's interactions with Hunnicutt constituted a voluntary encounter. Hunnicutt and the other two deputies on night patrol did not approach Petitioner in a coercive manner or insistent on entering the residence. Hunnicutt immediately terminated the encounter when Petitioner insisted he wanted to speak to his attorney.

Furthermore, the record shows Jenkins, Bryant, and Reed had no knowledge

Petitioner had previously been questioned by police regarding a property theft crime. Jenkins was questioned on the matter at trial:

> Q: And did [Bryant and Reed] talk to [Petitioner] or did those officers just have previous knowledge, perhaps, one of the officers from the night before about who [Petitioner] was and what he looked like?
>
> A: You know, one particular officer, Sergeant Keven Davis, was familiar with him from working a previous case.
>
> Q: He could have been a victim or something like that, but just said knew him some which way?
>
> A: Yes

(App.p.195, lines 1-9). The officers worked different shifts. Mark Lyles, the property crimes investigator, testified he had not received notice of the stolen vehicle report that named Petitioner as a possible suspect until the following day, September 23, 2004. He did not puruse any further investigation until later in the afternoon. In contrast, the murder investigation began at 8:45 on the morning of September 23, 2004. (App.p.250). Thus, Jenkins' good faith attempt to obtain a post-Miranda statement from Petitioner was reasonable under the circumstances. See Oregon v. Elstad, 470 U.S. 298, 105 S.Ct. 1285, 84 L.Ed.2d 222 (1985).

Second, Petitioner's disclosure of the shotgun in his home was admissible regardless of the present inquiry pursuant to Miranda's public safety exception. (App.p.182). Despite Petitioner's attempt to relitigate the issue, counsel properly objected and preserved the issue for appellate review.

Third, Petitioner's post-arrest statements that concerned purchasing the shotgun

from a friend were subject to the doctrine of inevitable discovery. See State v. Spears, 393 S.C. 466, 483, 713 S.E.2d 324, 333 (Ct. App. 2011). Petitioner told Hunnicutt he was at a funeral. An investigation of Petitioner's alibi story resulted in police interviews of Douglass Blackwell and Chris Kelly. Blackwell testified he drove Petitioner to a funeral on the afternoon in question. (App.pp.364-5). Blackwell further testified he observed a shotgun in Petitioner's home. Petitioner told Blackwell he purchased the shotgun from Kelly. (App.p.357). Additionally, the funeral involved one of Kelly's relatives. Last Petitioner's statement that had not recently been in contact with the victims was of no consequence. Petitioner's grandfather, James C. Frady, testified Petitioner lived in a separate neighborhood from his immediate family. (App.p.306).

Accordingly, Petitioner failed to prove the first prong of the Strickland test – that counsel failed to render reasonably effective assistance under prevailing professional norms by not making an additional suppression argument that lacked merit. Similarly, Petitioner also failed to prove the second prong of Strickland – that he was prejudiced by trial counsel's performance.

As Petitioner failed to meet this burden of proving ineffective assistance of trial counsel on this issue, the PCR judge did not err in denying the PCR application. 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.").

II.

Certiorari is not warranted where Petitioner suffered no constitutional deprivation from a partial PCR hearing transcript where the trial transcript provides a sufficient record for this Court's review the PCR Judge's ruling regarding the sole substantive issue raised on appeal.

The present record on appeal supports this Court's decision not to remand Petitioner's case for a new PCR hearing. "The authority of the trial court in South Carolina to reconstruct the record for appellate purposes aligns our state with the majority of jurisdictions that hold the inability to prepare a complete verbatim transcript, in and of itself, does not necessarily present a sufficient ground for reversal." State v. Landon, 373 S.C. 320, 324, 644 S.E.2d 271, 273 (2007) (internal quotations and citations omitted). As demonstrated in Respondent's prior argument, the substantive issue before this Court constitutes a matter of law that can be soundly resolved from review of the trial transcript alone. See Koon v. State, 358 S.C. 359, 368, 595 S.E.2d 456, 461 (2004).

CONCLUSION

For the foregoing reasons, Respondent submits this Court should deny the Petition for Writ of Certiorari. However, if this Court grants certiorari, Respondent requests the opportunity to fully brief the issue discussed above.

Respectfully submitted,

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By: _____
ATTORNEYS FOR RESPONDENT

Nov. 18th, 2013

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Oconee County
Court of Common Pleas

The Honorable J. Cordell Maddox, Circuit Court Judge

JAMES FRADY,

PETITIONER,

v.

THE STATE OF SOUTH CAROLINA,

RESPONDENT.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the **Return to Petition for Writ of Certiorari** has been served upon opposing counsel by mailing two (2) copies in the United States mail, postage prepaid:

Benjamin J. Tripp, Esq.
1330 Lady St. Suite 401
Columbia, SC 29201

This 18th day of November, 2013

Troyeshi Brailey
LEGAL ASSISTANT for the Respondent

ALAN WILSON
ATTORNEY GENERAL

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NOV 20 2013

S.C. SUPREME COURT

November 18, 2013

The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
PO Box 11330
Columbia, SC 29211-1330

RE: **James Frady v. State of South Carolina**
Appellate Case No.: 2012-207126
Lower Court Case No: 2009-CP-37-0451

Dear Mr. Shearouse:

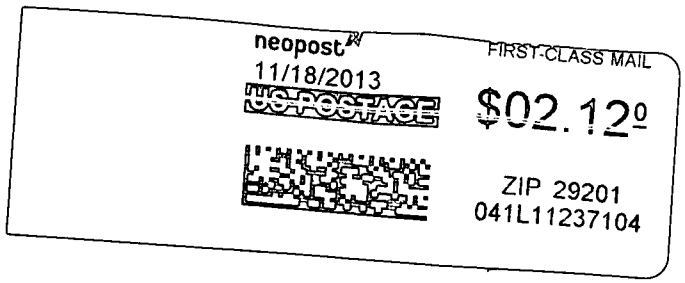
Enclosed for filing are the original and six (6) copies of the **Return to Petition for Writ of Certiorari** in the above-referenced case. By copy of this letter we are serving the opposing counsel today.

Sincerely,

J. Walt Whitmire
Assistant Attorney General

JWW/tb
Enclosures

cc: Benjamin J. Tripp, Esq. (2 copies with all the attachments)



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