STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Greenville County

R. Markley Dennis, Jr., Circuit Court Judge

HORACE ABNEY, JR.,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2013-000136

RETURN TO PETITION FOR WRIT OF CERTIORARI

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PETITIONER'S QUESTION PRESENTED

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?

RESPONDENT'S QUESTION PRESENTED

Does the record contain any evidence of probative value to support the PCR judge's finding that Respondent's appellate counsel provided ineffective assistance, in violation of the Sixth and Fourteenth Amendments to the United States Constitution, by failing to raise the critical issue of whether the trial judge erred in admitting evidence seized during an illegal search of Respondent's car during a traffic stop?

STATEMENT OF THE CASE

On June 27, 2000, a Greenville County grand jury indicted Respondent for trafficking cocaine in an amount greater than 400 grams. App. 262 – 263. On September 24, 2001, the Honorable C. Victor Pyle Jr., presided over a hearing on Respondent's motion to suppress evidence seized from the warrantless search of his automobile. App. 1. Kevin C. Romosca represented the state, and Andrew R. MacKenzie represented Respondent. App. 1. At the conclusion of the hearing, Judge Pyle denied the motion to suppress and found the evidence admissible. App. 21, line 20 – App. 22, line 5. Thereafter, the prosecutor served notice on Respondent to call his case for the week of December 3, 2001. App. 22, lines 10 – 17.

Over a year later, on December 11, 2002, the prosecutor called Respondent's case before Judge Pyle and a jury. Allen O. Fretwell represented the state, and Andrew MacKenzie continued his representation of Respondent. App. 24. Respondent was tried in his absence. The jury found Respondent guilty of trafficking in cocaine, and found the specific amount of cocaine to be 428.6 grams. App. 123, lines 12 – 16. Judge Pyle issued a sentence, which he then sealed. Additionally, he issued a bench warrant for Respondent. App. 125, lines 10 – 11.

On June 15, 2006, Respondent appeared before the Honorable John C. Few for the unsealing of his sentence and the disposition of two pending motions. Fretwell appeared on behalf of the state, and MacKenzie appeared on behalf of Respondent. App. 127. Judge Few denied Respondent's motion for new trial. App. 130, lines 18 – 25; app. 151, lines 9 – 11. Additionally, the judge denied Respondent's motion to dismiss based upon the interstate agreement on detainers. App. 158, lines 16 – 20. Judge Few unsealed Respondent's sentence and imposed a period of incarceration of thirty years and a mandatory fine of $200,000. App. 132, lines 5 – 11; App. 268.

Respondent filed a timely notice of appeal which was perfected by M. Celia Robinson. Robinson raised two issues on appeal challenging the court's denial of the motion for new trial and the motion to dismiss. App. 161 – 177. On September 20, 2010, the Court of Appeals affirmed Respondent's conviction and sentence in an unpublished opinion. App. 194 – 195; State v. Abney, Op. No. 2010-UP-414 (S.C. Ct. App. filed Sept. 20, 2010).

On January 19, 2011, Respondent filed an application for post-conviction relief (PCR). App. 196 – 206. On July 1, 2011, Respondent amended his application. App. 212 – 216. The matter proceeded to an evidentiary hearing on October 30, 2012 before the Honorable R. Markley Dennis, Jr. Respondent was represented by Rodney Richey, and the state was represented by Karen Ratigan. App. 217. On the record, Judge Dennis granted Respondent relief, finding appellate counsel was ineffective in failing to raise the issue concerning the search of Respondent's vehicle. App. 246, lines 5 – 12; App. 247, line 16 – App. 248, line 12. By order filed January 14, 2013, Judge Dennis granted Respondent relief based upon ineffective assistance of appellate counsel. App. 251 – 259.

Petitioner filed a petition for a writ of certiorari. Respondent now files this return.

ARGUMENT

The record contains evidence of probative value to support the PCR judge's finding that Respondent's appellate counsel provided ineffective assistance, in violation of the Sixth and Fourteenth Amendments to the United States Constitution, by failing to raise the critical issue of whether the trial judge erred in admitting evidence seized during an illegal search of Respondent's car during a traffic stop.

Relevant facts

Facts presented during the pretrial hearing

During a pretrial hearing concerning Respondent's motion to suppress evidence seized during a warrantless search of his automobile, the state presented the testimony of David Robinson, a member of the South Carolina Highway Patrol. App. 4, lines 3 – 9. Officer Robinson testified that he was in contact with marijuana three or four times a week. App. 5, lines 1 – 10. He knew what raw and burnt marijuana smelled like. App. 5, lines 13 – 16. He claimed each had a distinctive smell. App. 5, line 18. Furthermore, he claimed the ability to distinguish the smell of marijuana from tobacco. App. 5, lines 23 – 25.

On January 10, 2000, Officer Robinson stopped Respondent for speeding on the interstate. Robinson claimed Respondent was traveling at seventy miles per hour where the posted speed limit was fifty-five miles per hour. App. 6, lines 5 – 11. Officer Robinson approached the passenger side of the vehicle where the window was rolled down. App. 6, lines 12 – 21. Officer Robinson found the way Respondent was moving around in the vehicle to be unusual. Robinson claimed he could smell what appeared to be burnt marijuana coming from the vehicle. Officer Robinson smelled burnt marijuana immediately when he walked to the window and described the odor as being what he could "smell … over anything else." App. 7, lines 5 – 18. Officer Robinson asked Respondent

to exit his vehicle and stand to the rear while Robinson wrote a warning. App. 7, line 23 – App. 8, line 7. During this time, Officer Robinson called for backup for safety reasons because he believed Respondent was acting nervous. App. 8, lines 8 – 18. Officer Robinson further claimed his call for backup was to enable him to conduct a search based upon the smell of burnt marijuana. App. 8, lines 19 – 20.

After issuing the warning to Respondent for speeding, Officer Robinson asked Respondent if he could search the vehicle. Specifically, Officer Robinson testified as follows regarding the exchange between Respondent and him regarding the search:

> I asked him could I search his vehicle. He approached it, it's okay. But then he was hesitant in it, and he asked me why. And I explained to him that I could smell burnt marijuana coming from his vehicle. I asked him again for his consent. And he – he never said no, but he never said yes. So, I was still at that that I could - - you know, I informed him again that I could smell it was my reason.

App. 9, lines 1 – 11. Nevertheless, Officer Robinson testified he felt he had gotten consent to search the vehicle. App. 9, lines 12 – 16. In a jacket sitting on the passenger seat, Officer Robinson found a package containing a white powdery substance. App. 9, line 17 – App. 10, line 3; App. 10, lines 12 – 18; App. 10, lines 23 – App. 11, line 2.

On cross-examination, Officer Robinson admitted he found no marijuana in the vehicle. App. 13, lines 21 – 25. When questioned about his statements on the video tape of the traffic stop indicating his admission that he must have smelled cigar or cigarette smoke rather than marijuana, Officer Robinson said such a statement was "probably a derogatory remark" toward Respondent. App. 14, line 1 – App. 15, line 23.[1] On the issue of consent to search, Officer Robinson testified

[1] Respondent has moved this Court to include the videotape as part of the appendix that was filed by Petitioner. If this Court grants Respondent's motion, then the videotape will be on file as an exhibit with this Court.

that despite Respondent's reluctance, Robinson kept asking for consent because he "needed to get a yes or no." App. 17, lines 9 – 24.

Trial counsel argued to the trial judge that Officer Robinson lacked probable cause for the search. Trial counsel admitted that the law allowed a trooper to search a car if the trooper had a reasonable belief that he smelled the odor of marijuana. However, Officer Robinson had no reasonable belief that he smelled marijuana because there was no marijuana smell and the officer admitted on the tape that he must have smelled cigars or cigarettes. Officer Robinson's admission indicated he was unable to distinguish between tobacco and marijuana. Therefore, Officer Robinson had no reasonable belief that he smelled marijuana prior to his search of Respondent's vehicle. App. 18, lines 8 – 23. Further, trial counsel argued Respondent had not consented to the search because the prosecution failed to prove the search was conducted pursuant to voluntary affirmative consent by Respondent. Trial counsel explained that mere acquiescence to a search was not consent. App. 19, lines 3 – 16.

Judge Pyle denied the motion to suppress finding that the record contained evidence that the trooper smelled marijuana, which established probable cause for the search. Judge Pyle based his finding upon an unnamed South Carolina opinion. He did not reach the issue of consent. App. 21, line 20 – App. 22, line 5.

Facts presented during the trial

Over a year later, at Respondent's trial, Officer Robinson testified somewhat differently regarding his encounter with Respondent on January 10, 2000. He again testified that he was trained in the detection of narcotics, specifically in their appearance, odor, and "even patting someone down, feel what they feel like on a person." He claimed he was trained to detect the smell

of burnt marijuana. He was trained to distinguish the smell of burnt marijuana from raw marijuana and from the smell of tobacco. App. 53, lines 16 – 24; App. 56, line 20 – App. 57, line 3.

He again testified that he stopped Respondent for speeding on the interstate. App. 55, lines 1 – 6. Officer Robinson claimed he "noticed a smell of what appeared to me to be burnt marijuana like someone had smoked marijuana." App. 56, lines 12 – 15. Officer Robinson decided to search the car based upon Respondent acting "real nervous" and the smell of burnt marijuana in the vehicle. App. 57, lines 19 – 23. Officer Robinson asked Respondent if he could search the vehicle. App. 58, lines 3 – 8. According to Officer Robinson, Respondent responded as follows:

> He was hesitant. He never said I couldn't. After I explained to him why I wanted to, he kept asking about probable cause and why I needed to search his vehicle. I told him I could smell burnt marijuana. He gave me a head nod, but he never said, no, and he never said I could. I proceeded.

App. 58, lines 9 – 15. Officer Robinson testified that he determined the head nod meant it was okay to conduct the search. App. 58, lines 16 – 17. Officer Robinson then explained how he found cocaine in the jacket in the car. App. 58, line 18 – App. 59, line 13. When the state sought to introduce the actual drugs at the time of trial, trial counsel renewed his objection based upon the reasons stated in his pretrial motion that the items are recovered pursuant to an unlawful search and a nonconsensual search. App. 91, line 15 – App. 92, line 4.[2]

Direct appeal

Appellate counsel, M. Celia Robinson, raised two issues in the direct appeal brief on Respondent's behalf. Those issues concerned whether Respondent had voluntarily waived his right to be present at his trial and whether the indictment should have been dismissed pursuant to the

[2] At the conclusion of the prosecution's case, trial counsel renewed his previous motion regarding the search of the vehicle and the issue of consent. App. 101, lines 5 – 8.

Interstate Agreement on Detainers (IAD). App. 161 – 177. Christina Catoe represented the state in opposing Respondent's direct appeal. In her brief, the Assistant Attorney General argued the prosecution presented overwhelming evidence of Respondent's guilt at trial. The state explained that evidence was presented that police found 428.6 grams of cocaine in Respondent's jacket, which was found in his car, where Respondent was the sole occupant. The state noted in a footnote that Respondent's motion to suppress the drugs was not raised on appeal. In other words, the admission of the drugs was not being challenged on appeal. The state surmised that based on the evidence presented the "jury could have reached no verdict other than guilty." The state further argued that the IAD was inapplicable to Respondent's matter based upon its plain language. The language of the IAD and United States Supreme Court precedent indicated the IAD applied only to untried indictments and not to offenses for which an individual had already been tried and convicted. Therefore, the state argued the agreement did not apply to Respondent's sentencing hearing because he had already been tried and convicted. App. 178 – 193.

The Court of Appeals agreed with the state's position on the two issues and affirmed Respondent's conviction and sentence in a two-page unpublished opinion without oral argument. The Court was persuaded by the overwhelming evidence of guilt against Respondent and by the plain language of the IAD that it applied only to untried indictments. App. 194 – 195; State v. Abney, Op. No. 2010-UP-414 (S.C. Ct. App. filed Sept. 20, 2010).

Facts presented during the PCR hearing

During the PCR hearing, Respondent testified that when Officer Robinson requested permission to search his car, Respondent inquired as to why he wanted to search. Officer Robinson claimed to smell marijuana. Respondent denied smoking any marijuana and refused to give permission to search the car. Officer Robinson then proceeded to "badger" Respondent about

searching the vehicle. Respondent denied ever granting permission for the search. Respondent admitted that he may have made a hand gesture, but denied ever giving affirmative consent to search. App. 224, lines 2 – 18. Respondent explained that during the suppression hearing there was no testimony from the officer that Respondent gave explicit permission to search the car. App. 224, lines 21 – 24. Respondent further related that on the video of the traffic stop, the officer admitted "maybe I didn't smell marijuana, maybe it was cigarette smoke." App. 224, line 24 – App. 225, line 3.

Respondent spoke to his appellate attorney and asked her to raise the issue as a violation of his rights pursuant to the Fourth Amendment to the United States Constitution. Appellate counsel refused to raise the issue despite the fact that it was preserved for review. App. 225, line 22 – App. 226, line 5.

Trial counsel testified that suppression of the evidence seized during the search of the vehicle was the central issue in the case. In fact, he testified "the trial was really the suppression hearing. That was going to determine the outcome of the case." App. 236, lines 1 – 13. Additionally, trial counsel testified the issue was preserved for direct review. App. 236, lines 17 – 20.

At the conclusion of the presentation of evidence, Respondent argued that the central issue was ineffective assistance of appellate counsel. Respondent explained that the totality of the criminal case against him depended upon the outcome of the suppression hearing: "the drugs come in, it's done." App. 242, line 22 – App. 243, line 18. Respondent argued that appellate counsel could have no strategic reason for failing to brief the issue of suppression because the entire case depended upon the admissibility of the drug evidence. App. 245, line 20 – App. 246, line 4.

Petitioner admitted trial counsel preserved the issue for review. App. 244, lines 18 – 23.

Petitioner noted that appellate counsel did not testify to "explain why issues were raised over other issues" and that in general, attorneys representing clients on appeal rely on experience and discretion in choosing what to brief. Additionally, Petitioner argued there was overwhelming evidence of guilt because Respondent was arrested with over 400 grams of cocaine in his vehicle. Therefore, any failure by appellate counsel was not prejudicial. App. 244, lines 6 – 16.

The PCR judge explained that where there is an issue of a search in a drug case the case is won or lost on the outcome of the issue of suppression. The record demonstrated that trial counsel "did everything in his power to prevail on that." Specifically, the PCR judge found that trial counsel "presented succinctly the issues about the search, preserved the record, protected [Respondent] in every respect even throughout the trial." App. 246, lines 5 – 12. The PCR court found that "if there is ever an issue where there was no strategy" for failing to raise it, then this was one. The judge continued explaining the failure to brief the issue "doesn't make any sense." As a result, the PCR court found appellate counsel was ineffective. App. 247, line 16 – App. 248, line 12.

Order granting relief

In his order granting relief, the PCR judge found that the prosecution of Respondent "hinged on the admissibility of the drugs recovered during the traffic stop." In short, "if this evidence was suppressed it would have greatly affected the state's efforts to prosecute [Respondent]." The court found the issue was properly preserved by trial counsel, and therefore, ripe for review. Finally, the PCR court found appellate counsel's failure to brief the suppression issue prejudiced Respondent. App. 256.

Discussion

The proper standard for appellate review of a PCR order is whether "any evidence of probative value" exists to sustain the PCR court's findings. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). If any probative evidence exists to support the PCR court's decisions, the ruling must be upheld. Jackson v. State, 329 S.C. 345, 348, 495 S.E.2d 768, 769 (1998); Skeen v. State, 325 S.C. 210, 481 S.E.2d 129 (1997).

All criminal defendants are entitled to the effective assistance of appellate counsel. Evitts v. Lucey, 469 U.S. 387, 398 (1985). Courts review claims of ineffective assistance of appellate counsel using the test announced in Strickland v. Washington, 466 U.S. 668 (1984). See Southerland v. State, 337 S.C. 610, 616, 524 S.E.2d 833, 836 (1999). Thus, the reviewing court asks whether the record supports the PCR court's finding that appellate counsel's performance was deficient and the defendant was prejudiced by the deficient performance. Id. Appellate counsel is not required to raise all non-frivolous claims, but may exercise sound professional judgment in selecting the appropriate grounds for a direct appeal in order to maximize the likelihood of a favorable result. Smith v. Robbins, 528 U.S. 259, 288 (2000). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Strickland, 466 U.S. at 687-688. A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997).

The Fourth Amendment guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. Amend. IV. "[T]he underlying command of the Fourth Amendment is always that searches and seizures be reasonable." Wilson v. Arkansas, 514 U.S. 927, 931 (1995). The Fourth Amendment is applicable to the states through the Due Process Clause of the Fourteenth

Amendment. Mapp v. Ohio, 367 U.S. 643 (1961). Searches without a warrant are per se unreasonable under the Fourth Amendment unless some exception applies. Katz v. United States, 389 U.S. 347, 357 (1967); see also State v. Peters, 271 S.C. 498, 501, 248 S.E.2d 475, 476 (1978).

The United States Supreme Court created the exclusionary rule to safeguard Fourth Amendment rights. United States v. Calandra, 414 U.S. 338 (1974). The exclusionary rule prohibits the use of evidence obtained directly or indirectly through an unlawful search or seizure under the fruits of the poisonous tree doctrine. See Wong Sun v. United States, 371 U.S. 471, 484 (1963); see also State v. Nelson, 336 S.C. 186, 519 S.E.2d 786 (1999) (finding evidence is not admissible under the "fruit of the poisonous tree" doctrine when the police exploit an unlawful search to seize evidence that would not have otherwise come to light).[3] "The purpose of the Fourth Amendment is not to eliminate all contact between the police and the citizenry, but 'to prevent arbitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals.'" United States v. Mendenhall, 446 U.S. 544, 553–54 (1980) (quoting United States v. Martinez–Fuerte, 428 U.S. 543, 554 (1976)).

"The exceptions [to the warrant requirement] are 'jealously and carefully drawn,' and there must be 'a showing by those who seek exemption...that the exigencies of the situation make the course imperative.'" Coolidge v. New Hampshire, 403 U.S. 443, 454-455 (1971). More specifically, the burden is on the state to justify a warrantless search or seizure, and the recognized exceptions include: (1) search incident to a lawful arrest (2) "hot pursuit" (3) "stop

[3] The Fourteenth Amendment incorporates the rule of excluding evidence obtained through an illegal search or seizure and makes it applicable to the states. Mapp v. Ohio, 367 U.S. 643, 655 (1961).

and frisk" (4) "automobile exception" (5) the "plain view" doctrine (6) consent, and (7) abandonment. McHam v. State, 404 S.C. 465, 480, 746 S.E.2d 41 at 49-50 (2013).

Petitioner raised two exceptions to permit the introduction of the drugs seized from Respondent's car during the warrantless search – the automobile exception and consent. Respondent will discuss each in turn.

The automobile exception provides that police officers may conduct a warrantless search of an automobile when the officers have probable cause to believe the automobile contains evidence of criminal activity. Carroll v. United States, 267 U.S. 132, 153 (1925); see also State v. Cox, 290 S.C. 489, 491, 351 S.E.2d 570, 571 (1986). In United States v. Ross, 456 U.S. 798, 800 (1982), the Court defined the scope of the search in such situations as permitting officers to search as thorough as a magistrate could authorize in a warrant "'particularly describing the place to be searched.'" The Ross Court also explained that the probable cause determination must be made based upon objective facts that could justify the issuance of a search warrant by a magistrate. Id. at 808. In other words, the facts must justify the issuance of a warrant, even though a warrant was not actually obtained. Id. at 809. As explained by this Court, the standard for probable cause to conduct a warrantless search is the same as that for a search with a warrant. State v. Peters, 271 S.C. 498, 502, 248 S.E.2d 475, 477 (1978); see also State v. Bultron, 318 S.C. 323, 332, 457 S.E.2d 616, 621 (Ct. App. 1995).

Probable cause is a good faith belief that an individual is guilty of a crime. The good faith belief must rest upon such grounds as would induce an ordinarily prudent and cautious person, under the circumstances, to believe likewise. Wortman v. City of Spartanburg, 310 S.C. 1, 4, 425 S.E.2d 18, 20 (1992); State v. Blassingame, 338 S.C. 240, 250, 525 S.E.2d 535, 540 (Ct. App. 1999). Probable cause is a justifiable determination, based upon the totality of the circumstances as

available to law enforcement at the time of the search, that a crime is being committed or has been committed and incriminating evidence is involved. Bultron, 318 S.C. at 332, 457 S.E.2d at 621 (Ct. App. 1995). Put another way, "[p]robable cause to search exists where the known facts and circumstances are sufficient to warrant a man of reasonable prudence in the belief that contraband or evidence of a crime will be found in a particular place. State v. Brown, 389 S.C. 473, 482, 698 S.E.2d 811, 816 (Ct. App. 2010). "The burden of establishing probable cause as well as the existence of circumstances constituting an exception to the general prohibition against warrantless searches and seizures is upon the prosecution." Bultron, 318 S.C. at 332, 457 S.E.2d at 621.

In a prior case, the Court of Appeals found the scope and length of a traffic stop to be permissible based upon the officer having a reasonable, articulable suspicion of other illegal activity where the officer testified that he smelled marijuana and the trial judge found the testimony to be credible. State v. Morris, 395 S.C. 600, 607-608, 720 S.E.2d 468, 471 (Ct. App. 2011). The Court then found the officer's subsequent search of the vehicle to be based upon probable cause where the officer additionally saw hollowed cigars in the center console, loose tobacco in the car, which indicated the cigars had been recently hollowed in the car, and the smell of marijuana. Specifically, the Court stated "[c]onsidering these factors in conjunction with the background odor of marijuana, the circumstances [were] sufficient to warrant a reasonable and prudent person to believe [the defendant] possessed marijuana." Id. at 610, 720 S.E.2d at 473.

Morris presents important distinctions applicable to Respondent's case. The Court of Appeals found the officer had reasonable suspicion to broaden the scope of the stop and lengthen it in time where the officer smelled marijuana emanating from the car. Reasonable suspicion is "a particularized and objective basis that would lead one to suspect another of criminal activity." Id. at 607, 720 S.E.2d at 471 (internal citations omitted). Reasonable suspicion is not the equivalent of

probable cause – it is short of probable cause. State v. Corley, 383 S.C. 232, 241, 679 S.E.2d 187, 192 (Ct. App. 2009). The Court's probable cause determination in Morris required the prosecution to present something more than the smell of marijuana coming from the car. This is obvious from the Court's exploration of the totality of the circumstances, including the observation of hollowed cigars, which in the officer's experience was done to accommodate the smoking of marijuana, and the observation of loose tobacco in the car showing the cigars were recently hollowed. These discrete additional circumstances combined with the smell of marijuana to give the officer probable cause to search. Morris, 395 S.C. at 610, 720 S.E.2d at 473.

In sharp contrast to Morris, the only evidence presented to support the officer's claim of probable cause to search Respondent's car was the odor of burnt marijuana. The officer saw no other evidence of drug activity. Respondent's license was clean, he was the registered owner of the car, and the officer had decided to issue only a warning for the traffic violation. Further, the officer admitted on the videotape of the traffic stop that he may not have smelled marijuana, but may have smelled tobacco.

Additionally, the prosecution failed to carry its burden of showing Respondent gave voluntary consent to search the car. See State v. Wallace, 269 S.C. 547, 550, 238 S.E.2d 675, 676 (1977)(citing Schneckloth v. Bustamonte, 412 U.S. 218 (1973)); State v. Dorce, 320 S.C. 480, 482, 465 S.E.2d 772, 773 (Ct. App. 1995). The court must consider the totality of the circumstances to determine if consent was voluntary, or even given. Wallace, 269 S.C. at 550, 238 S.E.2d at 676. As an initial matter, the trial judge did not reach the issue of consent. Nevertheless, the evidence presented during the pretrial hearing would not support a finding of consent. Specifically, Officer Robinson testified as follows regarding the exchange between Respondent and him regarding the search:

> I asked him could I search his vehicle. He approached it, it's okay. But then he was hesitant in it, and he asked me why. And I explained to him that I could smell burnt marijuana coming from his vehicle. I asked him again for his consent. And he – he never said no, **but he never said yes**. So, I was still at that that I could - - you know, I informed him again that I could smell it was my reason.

App. 9, lines 1 – 11(emphasis added). Nevertheless, Officer Robinson claimed that he felt he had gotten consent to search the vehicle. App. 9, lines 12 – 16. Officer Robinson's testimony clearly indicated Respondent had not consented to a search of his vehicle no matter what Officer Robinson "felt" had transpired.

The record presented to the PCR judge contained evidence to support his decision that appellate counsel provided ineffective assistance by failing to raise the critical issue of whether the trial judge erred in failing to suppress drug evidence. The trial transcript demonstrated the drug evidence was critical evidence against Respondent; without the drugs, it is highly likely the case against Respondent would have been dismissed. The merits of the underlying claim – suppression of the drug evidence – were strong. Appellate counsel's failure to raise the issue prejudiced Respondent.

CONCLUSION

Respondent respectfully requests this court deny Petitioner's petition for writ of certiorari.

Respectfully submitted,

Susan B. Hackett
Appellate Defender

ATTORNEY FOR RESPONDENT.

This 25th day of November, 2013

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Greenville County

R. Markley Dennis, Jr., Circuit Court Judge

HORACE ABNEY, JR.,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2013-000136

I certify that a true copy of the return to petition for writ of certiorari in this case have been served on Karen Ratigan, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Mr. Horace Abney, Jr. #316024, at Perry Correctional Institution,430 Oaklawn Road, Pelzer, SC 29669, this 25th day of November, 2013.

Susan B. Hackett
Susan B. Hackett
Appellate Defender

ATTORNEY FOR RESPONDENT

SWORN TO BEFORE ME this 25th day
of November, 2013.

_____(L.S.)
Notary Public for South Carolina
My Commission Expires: October 30, 2022