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S.C. Supreme Court

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to York County

John C. Hayes, III, Circuit Court Judge

RICHARD JAMES COLEMAN,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

APPELLATE CASE NO. 2013-001198

PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Whether the PCR court erred in finding that plea counsel rendered effective assistance of counsel where plea counsel erroneously advised Petitioner to accept the plea offer when a suppression hearing would have resulted in the drug charges being dismissed because the officers exceeded the scope of Petitioner's consent to search a particular bag when the officers then opened a second bag that contained drugs without obtaining Petitioner's consent and thereafter conducted a full search of Petitioner's apartment based on evidence discovered during the illegal search?

STATEMENT

Indictments

On October 13, 2011, Petitioner Richard James Coleman was indicted by the York County Grand Jury for (1) trafficking crack cocaine of one hundred grams or more; (2) possession with intent to distribute crack cocaine within proximity of a public park or playground; (3) possession of marijuana with intent to distribute; (4) possession of marijuana with intent to distribute within proximity of a public park or playground; (5) trafficking cocaine in an amount more than twenty-eight grams; and (6) possession with intent to distribute cocaine within proximity of a public park or playground. App. 67-89.

Guilty Plea

On April 24, 2012, Petitioner appeared before the Honorable Lee S. Alford to plead guilty to the charges of (1) trafficking crack cocaine of more than twenty-eight grams but less than one hundred grams, second offense as a lesser included offense to the indicted charge; (2) trafficking cocaine of more than twenty-eight grams but less than one hundred grams, second offense; and (3) possession with intent to distribute marijuana, third offense. Petitioner also pled guilty to the accompanying proximity charges. App. 1-18. Petitioner was represented by Mark T. McKinnon, and the State was represented by Assistant Solicitor Jennifer Colton. App. 1.

The State presented the factual basis for the plea. On July 27, 2011 at approximately 3:00 a.m., an officer of the Rock Hill city police department was dispatched to investigate a female's hang-up call. The officer attempted to call the number back and received no answer, so two officers went to the apartment building where the call originated. They first went to one apartment but no one was there. The officers then went to Petitioner's

apartment and asked if there were any females in the apartment. Petitioner responded that his girlfriend was there. The officers asked to check on the status of the girlfriend and were allowed into the apartment. App. 12, ll. 9-23.

The officers immediately smelled the odor of burnt and fresh marijuana and observed marijuana in plain view. The officers then noticed a backpack and asked for consent to the search the backpack. Petitioner granted the officers consent to search that particular backpack. There was nothing found in that backpack. App. 12, l. 24 – 13, l. 4.

The officers then searched a different backpack without Petitioner's consent and saw marijuana in it. The officers immediately called the drug enforcement unit ("DEU") to come to the apartment. The DEU responded and were going to obtain a search warrant, but they spoke with Petitioner and according to DEU, he gave them written consent to search the apartment. App. 13, ll. 4-10.

After the DEU received written consent to search the apartment, they discovered various packages of marijuana, a package of cocaine, and a couple packages of crack cocaine. The officers found a little over 1,500 grams of marijuana, 109 grams of crack cocaine, and 46 grams of power cocaine. App. 13, ll. 18-24.

Judge Alford accepted Petitioner's guilty pleas, and upon the State's recommendation, Judge Alford sentenced Petitioner to ten years on each count, with all sentences to run concurrently. App. 10, ll. 14-19; 15, ll. 20-23; 17, l. 14 – 18, l. 20.

Petitioner did not file a direct appeal of his guilty plea.

PCR Application and Evidentiary Hearing

On September 17, 2012, Petitioner filed an application for post-conviction relief ("PCR") asserting, among other things, that his plea counsel was ineffective for misadvising

him that he would not have been successful on a motion to suppress the drug evidence and that but for plea counsel's deficient advice, Petitioner would not have pled guilty and instead would have asked for a trial. App. 20-27. The State filed its Return on December 6, 2012. App. 28-32.

An evidentiary hearing was held before the Honorable John C. Hayes, III on May 16, 2013. App. 33-59. Petitioner was represented by Charles T. Brooks, III, and the State was represented by Assistant Attorney General J. Rutledge Johnson. App. 33. Both Petitioner and his plea counsel testified at the hearing. App. 37-59.

Petitioner testified that he felt coerced by his plea counsel to plead guilty and that he was led to believe that he did not have any defense to the State's allegations. App. 43, ll. 4-14. Petitioner testified that his plea counsel did mention the possibility of asking for a suppression hearing of the drug evidence prior to a trial, but that his plea counsel told him a trial judge would likely "side with the solicitor and the officers." App. 43, ll. 19-21. Petitioner said his plea counsel further advised him that if he lost the suppression hearing and appealed the trial court's ruling, that by the time the appeal ran, Petitioner would have already served the amount of time that he would serve by taking the plea so that he might as well accept the State's plea offer. App. 43, l. 22 – 44, l. 7.

Petitioner now believed that the drug evidence would have been suppressed during a suppression hearing and the case would have been dismissed. App. 44, ll. 11-18; 45, ll. 19-21. Petitioner said he did not sign a consent form until after the officers had already searched his apartment. App. 49, ll. 22-25. Petitioner explained that he only gave the officers consent to search his apartment because the officers told him that he if he made them wait on a search warrant, "they was going to make it hard for me to bond out and make

it impossible for me to get a bond and all these other extra additives to that." App. 50, ll. 5-14.

Petitioner testified that had he had proper information from his plea counsel about the likelihood of prevailing on a motion to suppress, he would have been able to make a better decision on whether to proceed to trial or not. App. 44, l. 21 – 45, l. 3.

At the hearing, plea counsel remembered discussing a possible motion to suppress the drug evidence with Petitioner. App. 53, l. 11 – 54, l. 7. Plea counsel recalled that the officers were sent to a four unit apartment building to investigate the hang-up call from a female. Dispatch could only tell that the call originated from the apartment building but could not tell the officers from which of those four units the call actually originated. App. 54, ll. 9-15.

The officers knocked on the door of one unit and either no one was home or no females were present. The officers then went to the next residence which was Petitioner's apartment. The officers asked Petitioner if there were any females present and he yes but she is fine. The officers asked Petitioner if they could check on the female. Petitioner apparently contended that the officers "just kind of walked in," but the officers said they had consent to enter the apartment. App. 54, ll. 15-22.

After the officers found marijuana in plain view, they then asked Petitioner for consent to search one particular bag to which Petitioner agreed. The officers opened the bag and found nothing illegal in the bag. App. 55, ll. 1-4.

The officers then, without Petitioner's consent, opened up a second bag and discovered a large amount of narcotics. App. 55, ll. 5-7. Plea counsel testified that he felt the problematic issue with moving to suppress the search was that Petitioner eventually

consented to a search of the apartment. Plea counsel testified that by what the officers had already seen in the apartment, they would have sought a search warrant if they had not had Petitioner's consent and would inevitably have found the drug evidence. App. 55, ll. 8-17.

Plea counsel contended that he discussed the risks of the suppression hearing with Petitioner and that if Petitioner lost the suppression hearing, "we're stuck with virtually no factual defense and he's facing mandatory minimum of twenty-five at least on that one charge." App. 55, ll. 18-24. Plea counsel testified that he recommended to Petitioner that he should certainly accept the State's plea offer. App. 56, ll. 19-20.

Order of Dismissal

Judge Alford filed his Order of Dismissal on May 22, 2013 which denied and dismissed with prejudice Petitioner's PCR application. App. 61-66. Judge Alford ruled that Petitioner entered his guilty pleas upon the advice of competent counsel. App. 65.

This petition for writ of certiorari follows.

ARGUMENT

The PCR court erred in finding that plea counsel rendered effective assistance of counsel where plea counsel erroneously advised Petitioner to accept the plea offer when a suppression hearing would have resulted in the drug charges being dismissed because the officers exceeded the scope of Petitioner's consent to search a particular bag when the officers then opened a second bag that contained drugs without obtaining Petitioner's consent and thereafter conducted a full search of Petitioner's apartment based on evidence discovered during the illegal search.

The record in this case reveals that there is no dispute that Petitioner only gave the officers consent to search one particular bag and that the officers then, without Petitioner's consent, opened a second bag containing marijuana which then led the officers to conduct a wider search of Petitioner's apartment, leading to the discovery of crack cocaine, powder cocaine, and more marijuana. App. 13, ll. 2 – 24; 55, l. 2-7. Even though the officers clearly violated Petitioner's Fourth Amendment rights, plea counsel advised Petitioner that the trial judge would just "side with the solicitor and the officers" in any suppression hearing and urged Petitioner to plead guilty to the drug charges against him. App. 43, ll. 19-22; 44, ll. 5-6; 65, ll. 19-20. Plea counsel's advice to Petitioner that he should accept the plea because he would likely not have been successful during a suppression hearing constituted deficient performance, and Petitioner is therefore entitled to post-conviction relief.

"A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction ... has two components." Strickland v. Washington, 466 U.S. 668, 687 (1984). The defendant must first demonstrate that counsel was deficient and then must also show this deficiency resulted in prejudice. Id. To satisfy the first prong, a defendant must show counsel's performance "fell below an objective standard of reasonableness." Franklin v. Catoe, 346 S.C. 563, 570–71, 552 S.E.2d 718, 722 (2001). "However, there is a strong presumption that counsel rendered adequate assistance and

exercised reasonable professional judgment in making all significant decisions in the case." Edwards v. State, 392 S.C. 449, 456, 710 S.E.2d 60, 64 (2011) (internal quotation omitted).

To satisfy the second prong of the analysis in the context of an allegation that a guilty plea was improvidently accepted, the "'defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.'" Stalk v. State, 383 S.C. 559, 562, 681 S.E.2d 592, 594 (2009) (quoting Hill v. Lockhart, 474 U.S. 52, 59 (1985)).

The applicant in a PCR hearing bears the burden of establishing he is entitled to relief. Lomax v. State, 379 S.C. 93, 100, 665 S.E.2d 164, 168 (2008). "This Court will uphold the findings of the PCR court when there is any evidence of probative value to support them, and will reverse the decision of the PCR court when it is controlled by an error of law." Id. at 101, 665 S.E.2d at 168. The PCR court's findings on matters of credibility are given great deference by this Court. Simuel v. State, 390 S.C. 267, 270, 701 S.E.2d 738, 739 (2010).

Deficient Performance

The Fourth Amendment, made applicable to the States by way of the Fourteenth 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; Mapp v. Ohio, 367 U.S. 643 (1961). The United States Supreme Court has observed time and time again that "searches and seizures 'conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment – subject only to a few specifically established and well delineated exceptions.'" Minnesota v. Dickerson, 508 U.S. 366, 372 (1993) (emphasis in original) (internal citations omitted).

One recognized exception to warrantless searches and seizures is consent. State v .Brown, 401 S.C. 82, 89, 736, S.E.2d 263, 266 (2012).

When, however, an official search is properly authorized by consent, "the scope of the search is limited by the terms of its authorization." Walter v. United States, 447 U.S. 649, 656 (1980). The Supreme Court of the United States has explained:

> Consent to search a garage would not implicitly authorize a search of an adjoining house; a warrant to search for a stolen refrigerator would not authorize the opening of desk drawers.

Id. at 656-57.

A suspect may delimit as he chooses the scope of the search to which he consents. Florida v. Jimeno, 500 U.S. 248, 252 (1991). The scope of a consent search may not then exceed the scope of the consent given to law enforcement. United States v. Felix, 134 F. Supp.2d 162, 172 (D. Mass. 2001).

In this case, both the State and plea counsel agree that Petitioner only granted the officers permission to search the first bag and not the second bag in which the marijuana was found. App. 13, ll. 2 – 24; 55, l. 2-7. By searching the second bag without Petitioner's consent, the officers exceeded the scope of the consent given by Petitioner to the officers. The search of the second bag plainly violated the Fourth Amendment and this evidence and any evidence discovered as a result of this illegal search should have been suppressed as fruit of the poisonous tree. Wong Sun v. United States, 371 U.S. 471 (1963).

At the PCR evidentiary hearing, plea counsel believed a motion to suppress would not have been successful because the officers would have inevitably found the crack cocaine, powder cocaine, and additional marijuana after Petitioner consented to a search of the entire apartment. App. 55, ll. 8-17. However, but for the officers' illegal search of the

second bag and subsequent request for consent from Petitioner to search the rest of his apartment after marijuana was found in the second bag, the officers would not have discovered the additional drug evidence.

The exclusionary rule exists to deter police misconduct and constitutional violations. See Nix v. Williams, 467 U.S. 431, 442-43 (1984) Despite the illegality of an original search, "[I]f the prosecution can establish by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means ... then the deterrence rationale has so little basis that the evidence should be received." Id. at 444. Therefore, once it is determined that the evidence was illegally seized, the burden shifts to the State to prove that an exception to the exclusionary rule applies. If the State fails to meet its evidentiary burden then the evidence must be suppressed.

The inevitable discovery doctrine applies "where the government proves that there is a *high probability* that the evidence would have been discovered by some independent, lawful means. Felix, 134 F. Supp.2d at 174 (internal citations omitted) (emphasis added). Therefore, in this case, the question is whether the officers would have asked Petitioner for consent to search his apartment and threatened him that they were going to obtain a search warrant if he did not consent had the officers not illegally opened and searched the second bag containing marijuana.

The State cannot meet its burden that the drug evidence would have been inevitably found even if the officers had not illegally searched the second bag. While the officers smelled the odor of marijuana and saw some marijuana in plain view, this was not what prompted the officers to seek to search Petitioner's entire apartment. App. 12, l. 24 – 13, l. 1. Rather, the officers did not contact the drug enforcement unit and seek to search the

entire apartment until after the officers illegally searched the second bag and found it contained marijuana. App. 13, ll. 4-10. Until the officers illegally opened and searched the second bag, they saw no need or reason to search Petitioner's apartment.

Petitioner's consent to allow the officers to search his apartment after the officers illegally searched the bag containing marijuana was not valid because it derived from a prior violation of Petitioner's constitutional rights. See State v. Shirk, 273 P.3d 254, 259 (Or. Ct. App. 2012). Defendant's consent was obtained while illegality was ongoing. Id. at 261; see also People v. Davis, 924 N.E.2d 67, 82 (Ill. App. Ct. 2010); United States v. Carson, 614 F. Supp. 507, 514 (D. Kan. 1985) (finding "[defendant's] consent was not independent of the illegality because the officers would not have requested consent but for the first illegal search; and defendant's consent, however voluntary, did not break the casual connection between the first illegal search and the challenged evidence discovered in the second search").

Plea counsel's advice to Petitioner that he would most likely not have been successful on a motion to suppress the drug evidence was therefore deficient because the challenged evidence was only discovered by the officers after they sought to search Petitioner's apartment following the discovery of marijuana during an illegal search.

Prejudice

Petitioner was prejudiced because he asserted in his PCR application and at the evidentiary hearing that would have proceeded with trial and a motion to suppress had he been correctly advised as to the legality of the search. App. 23; 40, ll. 21-23; 44, ll. 11-18; 44, l. 21 – 45, l. 3; 45, ll. 19-21; 46, ll. 4-7; 48, ll. 8-22. See Berry v. State, 381 S.C. 630, 636, 675 S.E.2d 425, 427-28 (2009) (finding petitioner established the prejudice

prong of Strickland where petitioner said that he would have gone to trial had he been advised correctly by his plea counsel).

Moreover, a motion to suppress would have resulted in the dismissal of the drug charges against Petitioner where a trial judge would have been required to suppress the drug evidence forming the basis of those charges.

Accordingly, this Court should grant Petitioner post-conviction relief and return him to his pre-guilty plea position.

CONCLUSION

Based on the foregoing reasons, Petitioner Richard James Coleman requests this Court to grant his Petition for Writ of Certiorari and allow full briefing on the issue.

Respectfully submitted,

Carmen V. Ganjehsani
Appellate Defender

ATTORNEY FOR PETITIONER

This 9th day of January, 2014.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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John C. Hayes, III, Circuit Court Judge

RICHARD JAMES COLEMAN,

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CERTIFICATE OF SERVICE

I certify that a true copy of the petition for writ of certiorari and a copy of the appendix in this case have been served on J. Rutledge Johnson, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Richard J. Coleman, #350680, at Wateree River Correctional Institution, PO Box 189, Rembert, SC 29128-0189, this 9th day of January, 2014.

Carmen V. Ganjehsani
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 9th day
of January, 2014.

(L.S.)
Notary Public for South Carolina
My Commission Expires: July 3, 2023.