

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Greenville County
Edward W. Miller Circuit Court Judge

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APR 29 2013

JAMES JERMAINE ABERCROMBIE

S.C. SUPREME COURT

V.

STATE OF SOUTH CAROLINA

RESPONDENT

APPELLATE CASE NO 2012-212149

PRO-SE PETITION FOR WRIT OF CERTIORARI

JAMES JERMAINE ABERCROMBIE
Defender

Lieber Correctional Institution
P.O. Box 205
Ridgeville SC, 29472

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S.C. SUPREME COURT

ISSUES PRESENTED

The PCR Judge erred in refusing to find Counsel ineffective for failing to determine if there was a Brady and Rule 5 violation, Due to the fact that the Petitioner Motion of Discovery was not with Deputy Weiner disposition and what he was going to testify to

The PCR Judge erred in refusing to find Counsel ineffective for Not Challenging Indictment Due to the insufficient or defect before trial. ANN Code §§ 17-19-90 (2003)

The PCR Judge erred in refusing to find Counsel ineffective for failing to conduct a Reasonable Investigation. were as Counsel should have made a reasonable Investigation for the crime scene

Did the state err by denial of Petitioner Direct Verdict were as the state failed to produce substantial circumstantial of the intent element

Did trial Judge error by Not granting suppression hearing, Due to a warrantless entry. Officer use speculation testimony to circumvent the Fourth Amendment.

STATEMENT

In October of 2006, the Greenville County Grand Jury indicted Petitioner for possession with intent to distribute crack cocaine, indictment # 2006-Gs-23-8683. On July 9, 2007 Petitioner proceeded to Jury trial before the Honorable Larry R. Patterson. Attorney William Godfrey represented Petitioner at trial. Attorney Joyce Monts prosecuted the case on behalf of the state. The Jury returned a verdict of guilty and Judge Patterson sentenced Petitioner to 18 years. A timely notice of intent to appeal was filed and the appeal perfected. Attorney Elizabeth A. Franklin-Best represented Petitioner for the direct appeal. The South Carolina Court of Appeals affirmed the sentence and conviction. State v. Abercrombie, Op. No. 2010-up-280 (S.C. Ct App. filed May 20, 2010).

On June 24, 2010, Petitioner filed an application for post conviction relief. The State filed a return on December 16, 2010. On April 4, 2012 an evidentiary hearing was held before the Honorable Edward W. Miller. In a written order filed April 17, 2012, Judge Miller denied relief and dismissed the application. A timely notice of intent of Appeal was served on April 20, 2012. This Pro-se petition for writ of certiorari follows.

ARGUMENT

The PCR Judge erred in refusing to find Counsel ineffective for failing to determine if there was a Brady and Rule 5 violation due to the fact that the Petitioner Motion of Discovery was without Deputy Weiner's disposition and what he was going to testify to.

The jury found Petitioner guilty of possession with intent to distribute crack cocaine. The Petitioner defense was denied exculpatory evidence by the solicitor's office, by the solicitor committed a non-disclosure violation which constituted a violation of petitioner's rights to due process and a fair trial. There was no discovery material that Deputy Weiner was a witness for the solicitor office and to what he was going to testify to. Besides Officer Fuller's report, there were no additional reports or statements from the solicitor's office to whom was going to be a witness for the state. The solicitor's office had from "March 2006" to "July 9-2007" to provide too the defense any part of Deputy Weiner's disposition and to their position that the house was vacant. There was "no" additional information about Deputy Weiner and what he was to testify too, so the defense relied on the belief that the discovery provided by the solicitor to be complete and its entirely. Subsection C of Rule 5 clearly explains about this issue. Officer Fuller's reports before and after arrest never mention anything about the house being vacant. Therefore, both officers committed perjury in order for the courts to deny defense suppression motion and circumvent the fourth Amendment violation by the officers. The vacant house "idea" did not come until after the court was leaning toward granting the defense's suppression motion (App. p. 23 line 1-4) Also this was a second chance for the solicitor to come up with another probable cause because the Anonymous tip was not enough to stop the suppression motion. (App. p. 20 line 13-16) This material about the house was vacant was so critical that it denied defense suppression motion and justified a fourth Amendment violation (App. p. 62 line 11-15). The court acknowledge in some words that the defense was denied some discovery. (App. p. 62 line 12-13) One or two things happen here (1) Solicitor wasn't aware to the "vacant" idea until it was mention or (2) the solicitor was well-aware of the non-discovery material and its sole purpose was to ambush the defense at trial. Keep in mind that neither officer testified that they went to see who own

the house (App. p. 6 Line 15-16) Either way this was a Brady and Rule 5 violation in that it denied petitioner's right to due process and a fair trial. Counsel was in form about the non-discovery material during the suppression hearing and before trial, but never made any attempt to make any pre-trial motion, motion for continuance, or objection to the non-discovery material during trial. This isolated error, deprived the petitioners rights to due process and a fair trial which is guaranteed by the fourteenth Amendment of the U.S Const. Also by counsels negligence in not making a pre-trial motion, and not objecting to the non-discovery material prejudiced petitioner ability to challenge the search and seizure violation. The sixth Amendment to the United States Constitution guarantees a defendant the right to effective assistance of counsel. U.S. Const. amend. VI; The PCR Judge erred in refusing to grant post conviction relief.

ARGUMENT

WAS THE PETITIONER Counsel Ineffective for not challenging Indictment Due to The Insufficiency or Defect before trial ANN §§ 17-19-90 (2003)

The Jury found Petitioner guilty of possession with intent to distribute crack cocaine. The indictment contained the offense, (see indictments) but this by itself was insufficient to apprise the petitioner of the nature of the charge so he could prepare a defense, nor did it satisfy the Fifth Amendment requirement that all elements of the offense must be considered and found by the grand jury. SEE Hooker Id 1230. Counsel should have known the insufficiency or defectiveness of the indictment after receiving the discovery material. Counsel should have made a challenge to the indictment before the jury was sworn and not afterwards. SEE S.C ANN Code 1976 § 17-19-20, 17-19-90 and by not doing so was a error in violation to Petitioner rights to Due process that protected by the fourth Amendment of the U.S. Const. As to State V Gentry; 610 S.E2d 494 (S.C.2005) and STATE V Means; (2006-032) states that a defendant has a constitutional and statutory right to demand that a properly constituted grand jury to consider Petitioner case and decide whether to issue a sufficient indictment. "The primary purpose of an indictment are to put the defendant on notice of what he is called upon to answer, i.e. Also to apprise him of the elements of the offense and to allow him to decide whether to plead guilty or stand trial, and to enable the circuit court to know what judgment to pronounce if

if the defendant is convicted "Evans 363 S.C at 508-13. 611 S.Ead 517-19 (Citing Gentry. 363 S.C at 102-03. 610 S.Ead at 500. and also citing case in which the court has emphasized the importance of the grand jury process) United State V Batchelder: 99 S.Ct 2198 (1979) states although the statutes create uncertainty as to which crime may be charged and therefore what penalties may be imposed, they do so to no greater extent that would a single statute authorizing alternative punishments. So long as overlapping criminal provision clearly define the conduct prohibited and the punishment authorized, the notice requirements of Due process clause are satisfied (D) Nor are the statutes unconstitutional under the equal protection component or Due Process clause of the fifth Amendment on the theory that they allow the prosecutor unfettered discretion in selecting which of the (2) two penalties to apply. A prosecutors discretion to choose between §§ 922(h) and 1202(a) is not "unfettered", selectivity in the enforcement of criminal laws is subject to constitutional rights to elect which of (2) two applicable state statutes shall be the basis of his indictment and prosecution. neither is he entitled to choose the penalty scheme under which he will be sentenced. Id 2203. Its a fundamental tenet of Due process that "No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes Lanzetta V New Jersey: 306 U.S 451, 453. 59 S.Ct 618. 619. 83 Led 888 (1939) A criminal statute

is therefore invalid if it "fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden. As to the Petitioners indictment have 44-53-375 only (SEE Indictment) and that along only enhance the punishment for violation of 44-53-370 involving certain substance and does not define a separate crime. Recemphasize the holding that section 44-53-375 is a penalty enhancement provision only. Carter V States: 329 S.C. 355, 363, 495 S.Ead 773, 777 (1998) and State V. Timmons: 349 S.C. 389, 392 S.Ead 657, 659 (2002) 44-53-375 by itself with No sentencing provision is a violation to Petitioners rights to Due Process with is protected by Petitioners fourth Amendment of the U.S. Const. by not afford fair notice of the penalty that applies to the forbidding. Therefore counsel was ineffective in deprived the Petitioners rights to Due Process of Law. By Counsel prejudiced and deficient performance hindered Petitioner ability to challenge the insufficient and defective indictment. Therefore this PCR should be granted.

ARGUMENT

The PCR Judge erred in refusing to find Counsel ineffective for Not Conducting a Reasonable Investigation, Counsel should have made a reasonable investigation of the crime scene.

The Jury found Petitioner guilty of possession with intent to distribute crack cocaine. The Petitioner told PCR Judge that his counsel did not investigate the scene at all. (App. p. 24 Line 23-25).

Petitioner argue that counsel should have made a reasonable investigation of the crime scene. Petitioner Sixth Amendment was violate when counsel failed in his duties to make a Reasonable pre-trial investigation of the crime scene and securing all information in the possession of the prosecution and law enforcement authorities. Counsel should have contacted all the occupants that was at the crime scene during the time of incident, also gather all witness statements. Counsel admitted he did not try to contact the other two (2) people that was at the scene during time of incident. (App. 227 Line 12-25) Petitioner states that counsel should have took the time to do a Reasonable investigation into Petitioner's case and would have not been suprised by the states position that the house was vacant which eliminate the fourth Amendment violation committed by the officers. Counsel deficient performance prejudiced Petitioner the ability to challenge the search and seizure Counsel error was ineffeative and denied Petitioner the right to an

effective assistance of counsel which is guaranteed by the Sixth Amendment of the U.S. and Federal Constitution and is safeguarded by the Due Process of Law of the Fifth and Fourteenth Amendments of the U.S. and Federal Constitution. As the Court recognized that a decision not to investigate can not be deemed reasonable if it is uninformed. Counsel decision not to investigate or to undertake a reasonable pre-trial investigation and instead to "investigate" the case during the trial was not only uninformed, it was patently unreasonable, nor can the actions be described to be considered part of a general trial strategy of pointing to holes in the state evidence to create a reasonable doubt. *Id.* in *Fisher v. Gibson*, 282 F.3d 1283 (10th Cir. 2002). Therefore counsel was ineffective. Counsel should have taken the time to investigate and not solely depended on the state discovery. Counsel could have presented witness on Petitioner's behalf and evidence that the house was rented at the time to impeach the officer's testimony. The state would not have had probable cause to enter the house without a search warrant and anything found during this warrantless search would have yielded fruits of a poisonous tree which should have been suppressed.

ARGUMENT

Did the STATE erred by denial of Petitioner Direct Verdict whereas the state failed to produce substantial circumstantial evidence of the intent element.

The Jury found Petitioner guilty of possession with intent to distribute crack cocaine. At trial, Petitioner counsel made a motion for a directed verdict. (App. p. 126 line 1-5) and again on (App. p. 126 Line 8). Then counsel renewed the motion on. (App. p. 162 Line 9-10). Now the trial Judge erred in denying Petitioner motion for a directed verdict (App. p. 126. Line 6, 10) also (App. p. 162 Line 11-13). given the state failed to produce substantial circumstantial of the intent element! By the state failure to direct a verdict violated Petitioner fourteenth Amendment right to Due process because the evidence was not sufficient to convince a rational trier of fact that Petitioner was guilty beyond a reasonable doubt. By trial counsel not properly preserve the directed verdict issue. Counsel was ineffective were as during either of the officers testimony stated the petitioner was engaged in any drug transaction or that he was under any kind of surveillance for dealing drugs. Also neither officers sized the money Petitioner was carrying or said it to be from previous drug transaction. (App. p. 83 Line 8-16). The evidence did not support petitioner conviction because it did not rise above the level of "mere suspicion" that he intended to distribute crack cocaine. The state recognise in STATE V. Cherry; 559 S. Ead 297 (ct. App 2001) and STATE V. Robinson; 543 S. Ead 249 (ct. App 2001) They use these two (2) cases to show the way to prove the intent part of the charge. After Analyzing the fact of the Petitioner's case conclude the indicia of intent relied upon by the state is considerably weaker than the presented in either Cherry or Roberson and, thus insufficient to support the charged offense. It is a fundamental concept of criminal law that the state must prove beyond a reasonable doubt all the elements of the offense charged against a defendant. when the state fails to present sufficient proof of all elements of the offense, a conviction must be reversed and a judgement for the defendant must be rendered. Burk v. United State; 437 U.S. 198. S. Ct. 2141. 57 LEdad 1 (1978) STATE V. Gregorie; 339. S.C. 2. 528 S. Ead 77 (2000)

(SOUTH CAROLINA). Due process requires the Government to prove EVERY element of a charged offense beyond a reasonable doubt. *BLAKELY V. WASHINGTON* - US:124, Sct. 2531, 159. LEad 403 (2004). The state relied solely on the South Carolina Code statute for possession more than one gram of Crack Cocaine which constitute possession with intent to distribute under Section 44-53-375(B) of the SOUTH CAROLINA Code "a permissive inference that possession of more than one gram of Crack Cocaine possession with intent to distribute does not hang upon the amount involved. Furthermore the statute does not mandate a reverse inference or presumption for amount less than one gram. *STATE V. ROBERSON* (Citation omitted) S.C. Ann § 44-53-375 (B) (2002). Possession of any amount of controlled substance coupled with sufficient indication of intent to distribute will support a conviction for possession with intent to distribute. *Matthews V. STATE* 300 S.C. 238, 239, 387 S.E.2d 258, 259 (1990) Therefore it was error for the trial Judge to not grant his motion for a directed verdict at the close of the state case, Respectfully, The Petitioner asks the Court to reverse his conviction.

ARGUMENT

Did trial Judge error by Not granting suppression hearing, Due to a warrantless entry. Officer use speculation testimony to circumvent the Fourth Amendment.

The Judge found Petitioner guilty of possession with intent to distribute crack cocaine. The officer did in fact made a warrantless entry without exigent circumstance. Petitioner defense did with facts prove during the suppression hearing that the officer did not have exigent circumstance and was in violation of a illegal warrantless entry. The facts is that officer came to the resident by a Anonymous tip and officer never attempt to verify was the tip was to be true (App. p. 20. Line 13-16) Officer came to resident to gain entry by using there position as Law enforcement, regardless of what Laws they was going to be break. Officer knot on front door, why if the house was vacant? Officer testified that he interpreted Kk movement as a invitation (App. p. 103 Line 6-25). That indication was never consensual are verbal. Officer ask what was going on in the resident and Kk simply Just. allowed Officer to look inside to see that nothing was going on and Not to let them

invite themselves to come on end. Officer was determine to come in to search resident regardless of the illegal warrantless entry and search and seizure they are about to commit. Petitioner defense argue that once the officer entry the resident there was no concern of any to officer safety and had all opportunity to get a search warrant. (App. p. 20. Line 18-23) The only reason for officer being at resident was because of the Anonymous tip. That along was never enough to justify a warrantless entry. As to what officer fuller testimony that he observe by trespass looking through a back window that petitioner took something out of his pocket (App. p. 72 Line 21-p. 73 Line 1-p. 74 line 1) This along did not give probable cause or creat exigent circumstance to justify officer warrantless entry into resident, as entry into resident was not reasonable necessary response to any perceived threat. Also moving to the side is no threatening move or gestures for officer to entry resident without a warrant. Neither officer testified that there safety was in jeopardy. Officer never saw what was taking out of Petitioner pocket. So Plain view of something he did not know what it was is never enough to justify a warrantless entry in a resident. Trial Judge should have granted suppressing hearing base on these facts of the

suppressing hearing (App. p. 23 Line 1-4) Now by Judge wanted to hear the testimony he allowed the state to have an opportunity to circumvent and justify why they had the right to entry a resident without a warrant of any kind. Deputy Weiner know how to testify at a trial and by his speculation about the house to be vacant would be enough for the Judge to deny Petitioner suppression hearing. Now officer never had any record to show the house was vacant beside his testimony. Now the testimony of an officer is not entitled to more weight than that of any other witness. SEE Reiser A comparison of the Federal Rules of Evidence with South Carolina Evidence of Law 42-43 (5th ed 1993). The officer never testified that they went to try to see who own the resident after Aug 05 and Petitioner accident didnt happen until January 06. Neither officer testified that either of the other two (2) people in the resident should be there or not and thats what we do know. (App. p. 61. Line 15-16) The officer should have shown some kind of record to show house was vacant in order to support there claim. Neither the Petitioner or the other two (2) occupant of the resident was charge with burglary or trespassing in order to support some claim to there testimony

about the house being vacant. (SEE Reports) As its a fact that ~~fruits~~ of a illegal warrantless entry and a warrantless search that precedes to arrest may Not be use to Justify arrest. Its also a underline fact manifesting probable cause must be found in the writting complant. The officer never in the begaining to the end had probable cause to entry the resident without checking to see that the tip was reliable and to see if resident was vacant or not. These facts stated here should be took into consideration and allow Petitioner Suppression hearing to be granted.

CONCLUSION

Based on the above argument, the Petitioner PRO-SE writ of certiorari should be granted to allow further-briefing on these issues.

Respectfully submitted

James Abercrombie
James Abercrombie
Petitioner

This 23th day of April, 2013

STATES OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Greenville County
Edward. W. Miller, Circuit Court Judge

JAMES JERMAINE ABERCROMBIE

PETITIONER

V

STATE OF SOUTH CAROLINA

RESPONDENT.

CERTIFICATE OF SERVICE

I certify that a true copy of the Pro-se Petition for writ of certiorari have been served to the South Carolina Supreme Court on this 23 day of April, 2013 by U.S MAIL

James J. Abercrombie

James JERMAINE ABERCROMBIE #236714
DEFENDER

SWORN TO BEFORE ME this 23 day
of April, 2013

Notary Public for South Carolina
My Commission Expires

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