STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO AIKEN COUNTY
Court of Common Pleas

The Honorable W. Jeffrey Young, Circuit Court Judge
Appellate Case No. 2013-001053

JAMES PRATHER,..... 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

Does evidence support the PCR court's ruling that appellate counsel was not ineffective?

STATEMENT OF THE CASE

Petitioner was indicted for Possession with Intent to Distribute within Proximity of Park (2006-GS-02-0256) and Trafficking in Cocaine (2006-GS-02-0257). He was represented by Wallis Alves, Esquire. Applicant proceeded to a jury trial before the Honorable Doyet A. Early, III, and was found guilty of both counts. On May 26, 2006, Petitioner was sentenced to fifteen (15) years imprisonment for Possession with Intent to Distribute within Proximity of Park and to twenty (20) years imprisonment for Trafficking in Cocaine. Petitioner was serving a probationary sentence (2004-GS-02-0039) at the time of his conviction, and two (2) years of the suspended sentence were revoked and probation terminated.

A notice of appeal was filed and an appeal perfected. An Anders[1] brief was submitted on Petitioner's behalf, and Petitioner submitted a *pro se* brief. (App. pp. 203-240.) The appeal was dismissed. State v. Prather, Op. No. 2008-UP-554 (S.C. Ct. App. filed October 9, 2008). (App. pp. 241-242.) Petitioner's *pro se* petition for rehearing was denied on December 19, 2008. (App. pp. 243-257.) The remittitur was sent on January 26, 2009. (App. p. 258.)

Petitioner filed his application for post-conviction relief (PCR) on June 19, 2009, setting forth the following grounds for relief:

1. "Ineffective assistance of counsel."
2. "Ineffective appeal counsel."

(App. p. 261.) An evidentiary hearing into the matter was convened on July 15, 2010, at the Aiken County Courthouse before the Honorable W. Jeffrey Young. The Applicant was present at the hearing and was represented by Aaron Walsh, Esquire. At the conclusion of the July 15 hearing, the record was left open for supplementation of a post-trial hearing transcript. Upon

[1] Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967).

submission of the transcript, the court directed briefing of issues by both parties. (App. pp. 345-358.) In his memorandum, Petitioner framed his issues as:

1. Ineffective assistance of appellate counsel.
    a. Appellate counsel was deficient in failing to raise and argue the legal issues created by the trial court's ruling(s) as to the search warrant and affidavit.
    b. Appellate counsel was deficient in failing to raise and argue the legal issues created by the trial court's ruling(s) as to the search of the Petitioner's person.
    c. Appellate counsel was deficient in failing to raise and argue error in the introduction of testimony to the jury about drugs and guns not relevant to the charge being tried.
    d. Appellate counsel was deficient in failing to raise and argue error in the introduction of photo evidence that did not accurately reflect the crime scene.

(App. pp. 345-353.)

Thereafter, Judge Young dismissed the application with prejudice in a written order dated December 28, 2011, and filed January 9, 2012. (App. pp. 359-363.) Petitioner filed a Motion to Alter or Amend *pro se* dated January 30, 2012, and filed January 31, 2012. (App. pp. 363-365.) The State responded by letter dated February 2, 2012, noting objections based on Rule 11, SCRCP. (App. p. 366.) Petitioner's PCR counsel also filed the pro se motion on Petitioner's behalf on February 2, 2012. (App. p. 375, lines 5-9; p. 379, lines 9-13.) On September 20, 2012, Judge Young convened a hearing on the motion. (App. pp. 372-382.) At that hearing, Petitioner elected to relieve PCR counsel and proceed *pro se*. (App. p. 375, line 15 – p. 376, line 11.) Judge Young denied the motion by written order dated April 11, 2013, and filed April 18, 2013. (App. pp. 383-385.)

STANDARD OF REVIEW

A defendant is constitutionally entitled to the effective assistance of appellate counsel. Evitts v. Lucey, 469 U.S. 387, 105 S.Ct. 830 (1985). Where ineffective assistance of appellate counsel is alleged, the Applicant must show that appellate counsel's performance was (1) deficient; and (2) that there was prejudice from the appellate counsel's deficiency. Southerland v. State, 337 S.C. 610, 524 S.E.2d 833 (1999); Strickland v. Washington, 466 U.S. 668 (1984). Appellate counsel must give assistance of such quality as to make appellate proceedings fair. Id. Appellate counsel need not raise every non-frivolous issue presented by the record. Id. Appellate counsel has a professional duty to choose among potential issues according to their merit. Jones v. Barnes, 463 U.S. 745, 103 S.Ct. 3308 (1983). Where the strategic decision to exclude certain issues on appeal is based on reasonable professional judgment, the failure to appeal all trial errors is not ineffective assistance of counsel. Griffin v. Aiken, 775 F.2d 1226 (4th Cir. 1985).

When a claim of ineffective assistance of appellate counsel is based upon failure to raise viable issues, the court must examine the record to determine "whether appellate counsel failed to present significant and obvious issues on appeal." Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1986). Generally, the presumption of effective assistance of counsel will be overcome only when the alleged ignored issues are clearly stronger than those actually raised on appeal. Id.

ARGUMENT

Evidence supports the PCR court's ruling that appellate counsel was not ineffective.

The allegation that appellate counsel was ineffective is without merit. Respondent contends that the Applicant's appellate counsel rendered adequate assistance and provided representation within the range of competence required by appellate attorneys. Petitioner asserts that appellate counsel was ineffective in failing to submit a merits brief in his case arguing the trial court erred in failing to hold an *in camera* hearing on his motion to suppress evidence collected as the result of a purportedly illegal search of his person.

In this case, appellate counsel filed an Anders brief. Pursuant to Anders v. California, "if appellate counsel finds his case to be wholly frivolous, after a conscientious examination of it, he should so advise the court and request permission to withdraw." 386 U.S. 738, 744, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967). In the Anders brief, appellate counsel argued, "the trial court erred by failing to grant Appellant's motion to suppress the evidence found on Appellant as the result of an unlawful search of Appellant." (App. p. 208.) She argued that the search of Petitioner violated the Fourth Amendment prohibition on unreasonable searches and seizures. Appellate counsel noted that Petitioner was not named in the search warrant, and "officers did not see drugs or a gun on his person in plain view." (App. p. 209.) In his *pro se* filing, Petitioner also stated his first issue on appeal as, "the trial court erred by failing to grant Appellant's motion to suppress the evidence found on Appellant as the result of an unlawful search of Appellant." (App. p. 219.) Appellant also submitted a second issue, "did the trial court err failing to grant appellant's motion to suppress all evidence found because the State didn't comply with warrant statute?" (App. p. 230.)

Today, Petitioner raises the issue of whether appellate counsel was ineffective in failing to argue that the trial court erred in failing to hold an evidentiary hearing outside the presence of the jury on the defense motion to suppress. This issue was not among those raised to and ruled upon by the PCR court.[2] (App. p. 280, line 22 – p. 281, line 16; pp. 345-353.) Respondent further submits Petitioner failed to file a Rule 59(e), South Carolina Rules of Civil Procedure, motion requesting a ruling on this issue. Accordingly, Petitioner's arguments regarding ineffective assistance of appellate counsel for failing to raise the issue regarding an *in camera* hearing on suppression are not preserved for review. Pruitt v. State, 310 S.C. 254, 423 S.E.2d 127 (1992); see also, Humbert v. State, 345 S.C. 332, 548 S.E.2d 862 (2001).

In the alternative, if this Court finds this issue is properly preserved for appellate review, Respondent submits that the issue would be without merit. Appellate counsel's failure to raise this issue does not fall outside reasonable professional norms, and the outcome of the proceeding would have been no different had the issue been raised.

At trial, Counsel raised the issue of whether there was probable cause to search Petitioner prior to trial, and the court took a break to allow the parties to bring relevant case law on the matter. (App. p. 18, line 13 – p. 19, line 9; p. 21, line 13 – p. 24, line 21.) Following the break, the trial judge placed on the record that he had reviewed case law and met with the attorneys in chambers on the issue of the search. (App. p. 25, line 19 – p. 26, line 8.) Counsel then expressed "concerns about allowing the state to go forward without a ruling on the motions." (App. p. 27, lines 14-18.) The trial judge then noted that if he found the search to be improper, "at that point I

[2] The only reference made by Petitioner to a pre-trial hearing was testimony that counsel should have requested a pre-trial hearing regarding the search warrant pursuant to Franks v. Delaware, 438 U.S. 154 (1978) (dealing with defendants' rights to challenge evidence collected as a result of warrant based on false information). (App. p. 286, lines 20-24.) Applicant points to this testimony to show the issue now raised was before the PCR court. However, Applicant's claim that there should have been a Franks hearing prior to trial is a separate issue from whether the court should have held an *in camera* hearing on his motion to suppress based on whether the Terry frisk was legal.

am going to suppress it and that's the end of the case." (App. p. 27, lines 21-22.) Counsel did not object to all of the evidence needed to establish the legality of the search was admitted.[3] The failure to object when evidence is offered constitutes a waiver of the right to raise the issue on appeal. State v. Simpson, 325 S.C. 37, 42, 479 S.E.2d 57, 60 (1996). See also State v. Griffin, 339 S.C. 74, 528 S.E.2d 668 (2000) (a ruling *in limine* is not a final ruling on the admissibility of evidence). Appellate counsel was not ineffective for failing to raise an issue not preserved for the appellate court's review. Legge v. State, 349 S.C. 222, 225, 562 S.E.2d 618, 620 (2002).

Petitioner's argument that the court's failure to conduct an *in camera* hearing prejudiced him is also without merit; therefore, he would not have been successful on appeal. Even if the motion had been made pre-trial, the outcome of trial would have been no different. The search of Petitioner was legal, and the cocaine would not have been suppressed. The officers certainly had ample evidence upon which to base their Terry[4] frisk of Petitioner. Officers' concern that weapons may be present developed before execution of the warrant, and a SWAT team was requested. (App. p. 49, lines 6-12.) When police entered the residence, guns and drugs were immediately visible. (App. p. 49, line 23 – p. 50, line 2; p. 51, line 12; p. 78, lines 4-5; p. 79, line 7 – p. 80, line 3.) Petitioner, along with others in the home, ran toward the back of the trailer, toward the bathroom, bedroom, and hallway. (App. p. 57, line 18 – p. 58, line 5.) Petitioner was stopped in the hallway, and other individuals hid in the bedroom and bathroom. Given the weapons found in plain sight around the individuals in the small trailer, police were justified in their pat down search due to safety concerns. (App. p. 59, lines 2-20.) When marijuana was found in the hood area of Petitioner's jacket, justification existed for his arrest. (App. p. 52, line 2 – p. 53, line 1.) After finding marijuana, the officer noticed another bag protruding from

[3] While Counsel offered objections to the marijuana, Counsel did not object to testimony regarding the presence of drugs and guns in the house.

[4] Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed. 889 (1968).

Petitioner's jacket pocket. (Tr. p. 53, lines 2-19; p. 63, line 17 – p. 64, line 12; p. 78, lines 6-14.) The cocaine was properly found as a result of the pat down search or as part of a search incident to arrest. Additionally, based on the officer's testimony that he saw the bag sticking out of Petitioner's pocket, there was even more reason for a search. When Petitioner moved, a pistol lay on the floor beneath him. (App. p. 56, line 15 – p. 57, line 17; p. 80, line 23 – p. 81, line 3; p. 84, lines 8-10.)

This case is immediately distinguishable from Ybarra v. Illinois, 444 U.S. 85, 100 S.Ct. 338 (1079). In Ybarra, officers had no articulable suspicion that patrons in a bar posed any threat or were participating in illegal activity when they executed a warrant for the bartender due to suspicion of drug activity. Unlike the apparently innocent patrons in Ybarra, here Petitioner was a visitor in a home replete with drugs and guns immediately visible and accessible to all in the home. Petitioner attempted to flee when police entered. These factors stand in contrast to Ybarra where the defendant appeared to be a normal patron of the bar and gave no indications of threat or being involved in illegal activity.

Moreover, Petitioner's defense was that the drugs were not his own. Petitioner claimed that he was at the trailer just "hanging out" when the police entered. (App. p. 99, lines 20-25.) Petitioner stated that he ran when everybody else did, "just instinct." (App. p. 100, lines 13-14.) When everyone was running, Petitioner admitted, "everybody was throwing guns everywhere." (App. p. 100, lines 15-17.) Petitioner denied that he had any drugs in his possession. (App. p. 101, lines 19-20; p. 103, lines 1-3.) Petitioner claimed that officers had taken him, "laid [him] right beside the drugs," and said the drugs were his. (App. p. 101, line 22 – p. 102, line 19; 112, line 7 – p. 113, line 13.) Petitioner elected to place evidence photos where it appeared the police had posed him with marijuana and cocaine, photos he had previously objected to. (App. p. 103,

line 9 – p. 104, line 3.) On cross-examination, Petitioner admitted that there were drugs in the house, though he was just "freeloading" and using everyone else's. (App. p. 107, line 18 – p. 108, line 14; p. 115, lines 22-24.) Petitioner cannot later complain of evidence which he ultimately admitted on his own. See State v. Stroman, 281 S.C. 508, 316 S.E.2d 395 (1984) (A party cannot complain of court error created by his own conduct); State v. Brown, 344 S.C. 70, 543 S.E.2d 552 (2001)(An appellant cannot complain of prejudice from evidence he has brought before the jury).

In sum, even if appellate counsel had briefed the issue of whether the trial court erred in failing to hold an *in camera* hearing on the search of Petitioner, the outcome of the proceeding would have been no different. Therefore, the PCR court's order should not be reversed.

CONCLUSION

For the reasons stated above, this Court should deny the Petition for Writ of Certiorari and affirm the PCR Court's Final Order of Dismissal. However, if this Court grants certiorari, the Respondent asks permission under the rules to fully brief the issue discussed above.

Respectfully submitted,

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ATTORNEYS FOR THE RESPONDENT

June 13, 2014

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Aiken County
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The Honorable W. Jeffrey Young, Circuit Court Judge
Appellate Case No. 2013-001053

JAMES PRATHER,

PETITIONER,

v.

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:

Appellate Defender Susan B. Hackett
Division of Appellate Defense
Post Office Box 11589
Columbia, SC 29211

This 13th day of June, 2014

CAROLINE KAISER
LEGAL ASSISTANT

ALAN WILSON
ATTORNEY GENERAL

June 13, 2014

The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

RE: **James Prather v. State of South Carolina**
Lower Court Case No: 2009-CP-02-1417
Appellate Case No. 2013-001053

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 opposing counsel today.

Sincerely,

Mary S. Williams
Assistant Attorney General
SC Bar No. 76192

MSW/ck
Enclosure

cc: Appellate Defender Susan B. Hackett (2 copies)
Trisha Allen. Victim Services (1 copy)