STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to York County

Edgar W. Dickson, Circuit Court Judge

CHRISTOPHER ROBINSON,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-000152

PETITION FOR WRIT OF CERTIORARI

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INDEX

ISSUE PRESENTED

Did the PCR court err in not finding trial counsel ineffective for failing to move for a suppression hearing to suppress the crack cocaine which was found on the sidewalk near Petitioner Robinson in a high crime area?

STATEMENT

In August 2007, the York County Grand Jury indicted Christopher A. Robinson on the charges of possession with intent to distribute (PWID) crack cocaine and possession of marijuana. On October 4, 2007, Robinson proceeded to trial before the Honorable John C. Hayes, III, and a jury. Robinson was represented by Melissa Inzerillo, and the state was represented by E. Ashley Anderson and E.B. Springs, IV. The jury returned a verdict of guilty on both charges. Judge Hayes sentenced Robinson to twenty years for the PWID crack cocaine third offense, and one year for the possession of marijuana second offense to run concurrent to the PWID sentence. App. 227, ll. 13 – 18. Robinson's attorney filed a notice of appeal, and the appeal was perfected by the Division of Appellate Defense. The South Carolina Court of Appeals affirmed Robinson's convictions and sentences on June 23, 2010. State v. Robinson, 2010-UP-324 (Ct. App. filed June 23, 2010).

On May 16, 2011, Robinson filed an application for post-conviction relief (PCR). The state filed a return on September 15, 2011. An evidentiary hearing was held on October 12, 2012 before the Honorable Edgar W. Dickson. Robinson was represented by Eleanor Cleary, and the state was represented by J. Rutledge Johnson. App. 242. On February 14, 2013, Judge Dickson issued an order denying Robinson's PCR application and dismissing it with prejudice. App. 293- App. 305. Robinson's attorney filed an appeal. This petition follows.

ARGUMENT

The PCR court erred in not finding trial counsel ineffective for failing to move for a suppression hearing to suppress the crack cocaine which was found on the sidewalk near Petitioner Robinson in a high crime area.

At Robinson's jury trial, Officer Anthony Breeden testified that on June 1, 2007, he was supervisor with the street crimes unit in Rock Hill. They were patrolling the Market Place Apartments due to the numerous complaints received about drugs or other crimes such as assaults. They were responding to a group of "subjects" standing around a gold Cadillac in the Market Place area that night. App.49, ll. 10 – App. 50, ll. 25; App. 56, ll. 1 – 23.

Officer Breeden's testimony was that they arrived at Market Place about 9 or 9:30 at night. It was "actually dark" but there were two lights in the parking lot on the other side but it was "well lit enough" that you could see people and things on the sidewalk. App. 51, ll. 1 – 14; App. 53, ll. 17 – 25.

As they pulled in, Officer Breeden noticed one person immediately walked away from the group around the Cadillac, and proceeded down a sidewalk parallel to the building. App. 53, ll. 6-16. Officer Breeden called to the person to stop and come back which the person did. Officer Chavis had gotten out of his car at the same time, and was following behind them. When the person stopped and turned around to come back to Officer Breeden, Officer Chavis continued to walk past the person because, he stated, something was dropped. Officer Chavis told Officer Breeden that he found drugs on the sidewalk. Officer Breeden then arrested the person and began a search incident to arrest. He identified Robinson in the courtroom as the person he arrested. App. 54, ll. 1 – App. 55, ll. 7.

Officer Michael Chavis was working with the street crime suit on June 1, 2007, and went with Officer Breeden to the Market Place Apartments due to the complaints. App. 77, ll. 11 – App. 79, ll. 2. When they saw the person walk away from the group, Officer Chavis jumped from the unmarked police car, and followed the person down the sidewalk. Officer Chavis was using his flashlight and illuminated the person. He then told the person to hold on as Officer Chavis needed to talk to him. Officer Chavis then saw the person with his right hand, make "a tossing motion back behind him, and Officer Chavis saw what appeared to be a white bag fall to the sidewalk. He yelled to Officer Breeden that something was dropped so Officer Breeden called the person to come to him. When Officer Chavis retrieved the bag, it was a clear plastic baggy containing a white substance that Officer Chavis believed to be crack. When he told Officer Breeden it was crack, Officer Breeden then arrested the person and handcuffed him. Officer Chavis said he was only about ten feet behind the person. He identified Robinson in the court room as the person. App. 78, ll.16 – App.81, ll. 16.

The baggy was checked for fingerprints but no fingerprints were found. App. 190, ll. 4 – 10. When Officer Breeden arrested Robinson, he then searched his person incident to arrest. He found marijuana in Robinson's pocket. Robinson then told Officer Breeden that the marijuana was his but the crack was not. App. 54, ll. 21 – App. 55, ll. 14.

After the verdict and at sentencing, Robinson told the trial court that he had a problem with marijuana and the marijuana was his. However, he denied any possession of the crack. App. 225, ll. 3 – App. 227, ll. 12.

At his PCR hearing, Robinson's attorney told the court that Robinson's claim was that his trial attorney was ineffective for not asking for a suppression hearing for the crack. App. 245, ll. 1 – App. 247, ll. 8. Robinson then testified that he told his attorney what happened when he was

arrested. He had just arrived at Market Place and had gone down the alley as he was in the process of leaving. The police officers arrived, and one stopped him for questioning. Robinson gave the officer his name and the officer ran a check on him. When dispatch revealed that Robinson had no warrants against him, the officer said Robinson he was free to go. As he was leaving, Robinson was approached by a second officer who detained him. One officer said he had crack and took Robinson to the car and handcuffed him. Then the officer searched Robinson and found the marijuana. Robinson told the officers that he had the marijuana but the crack was not his. App. 250, ll. 5 – App. 253, ll. 14.

Robinson wanted to testify to tell his side of the story, but his attorney advised that if he did, his juvenile record for trafficking drugs would come in. App. 254, ll. 19 – App. 255, ll. 5.

Robinson's trial counsel testified that the trial court decided that the juvenile convictions could not be used to impeach Robinson. App. 260, ll. 5 – 25; App. 264,ll. 2 – 5. She did not ask for a suppression hearing because Robinson never told her the version he just told the PCR court. He gave her two conflicting statements. One, he said the crack was found under the car. Then he later indicated that he could not remember where the drugs were found because he never saw them. Robinson adamantly claimed that he did not throw the crack, and she honestly did not feel that he had thrown it. App. 265, ll. 16 – App. 267, ll. 3.

On cross examination, trial counsel admitted that most drug cases have a suppression hearing if there was a basis. She felt there was not a basis to suppress. However, she also admitted that a suppression hearing could be helpful in "pinning down" the officers' testimony, and could go up on appeal. App. 283, ll. 16 – App. 286, ll. 2.

The PCR judge ruled that he found the testimony of Robinson concerning ineffective assistance of Robinson's trial counsel to not be credible while finding the testimony of trial counsel

to be very credible. App. 298. The court ruled that trial counsel was not ineffective for not requesting a suppression hearing because if she did not have a good faith basis to do so as she believed, then her requesting a hearing could have been construed a attempting to commit a fraud on the court. The judge also wrote that Robinson provided no evidence that the crack would have been excluded if there had been a suppression hearing. The order provided that Robinson failed to prove ineffective assistance of counsel and filed to prove any prejudice. App. 304.

Robinson's attorney timely filed a Motion to Alter/Amend the Judgment Pursuant to Rule 59(e), SCRCP. App. 306. Counsel argued that trial counsel was ineffective for failing to move before trial to suppress the crack cocaine as Robinson was prejudiced by counsel's ineffectiveness. App. 306.

PCR counsel argued that the entire basis for the case was the credibility of the police officer's testimony and his version of the facts. The 59(e) motion noted that trial counsel did have a good faith basis for a suppression hearing because Robinson was unlawfully detained by the officers because a person cannot be detained unless the officer has a reasonable suspicion that the person is involved in criminal activity. The police did not provide reasonable suspicion in this case. App. 308. Absent reasonable suspicion or probable cause. A person can lawfully ignore the officer. Counsel cited Illinois v. Wardlaw, 529 U.S. 119 (2000). App. 309.

Counsel argued that it was a high crime area and the officer said only that he saw Robinson throw "something." Then the officer found a baggy of crack on the sidewalk in this high crime area. Ap. 309. Trial counsel said she did not file the motion because Robinson gave conflicting statements to her. These conflicting statements would be irrelevant since Robinson did not have to testify and chose not to. App. 308.

On January 13, 2014, Judge Dickson filed an order denying Robinson's Rule 59(e) Motion to Alter. App. 315 – App. 316.

Where ineffective assistance of counsel is alleged as a ground for relief, the applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984).

A two pronged test is used in evaluating allegations of ineffective assistance of counsel. The applicant must prove that counsel's performance was deficient and fell below reasonable professional norms; and there is a reasonable probability that, but for counsel's unprofessional errors, the result would have been different. Cherry v. State, 300 S.C. 117-118, 386 S.E.2d 624 (1989). A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997).

In Jackson v. Denno, 378 U.S. 368 (1964), the United States Supreme Court ruled that whenever evidence is introduced that was allegedly obtained by conduct violative of the defendant's constitutional rights, the defendant is entitled to have the trial judge conduct an evidentiary hearing outside the presence of the jury at this threshold point to establish the circumstances under which it was seized. The South Carolina Supreme Court in State v. Patton, 322 S.C. 408, 472 S.E.2d 245 (1996), cited this standard from Jackson v. Denno, *supra,* to apply equally to other evidence as in Patton.

In State v. Patton, *supra,* the Court modified its previous ruling in State v. Blassingame, 271 S.C. 44, 244 S.E.2d 528 (1978) which held that a defendant did not need specific grounds as to why a suppression hearing was necessary. In Patton, the court ruled that the trial court in its discretion, could grant a suppression hearing if the defendant's grounds are sufficiently definite, detailed, and nonconjectural to enable the court to conclude that contested issues of fact going to the validity of the search are in question.

Trial counsel was ineffective for not requesting a suppression hearing to suppress the crack cocaine. The officers needed to present evidence of reasonable suspicion that Robinson was involved in criminal activity. As the United States Supreme Court held in Illinois v. Wardlow, 528 U.S. 119 (2000), a person's presence in an area of expected criminal activity, standing alone, is not enough to support reasonable suspicion that the person is committing a crime. Robinson did not run from the police but was simply walking away down the sidewalk.

Trial attorney used the fact that Robinson gave her conflicting stories as a reason not to request a suppression hearing. This is totally irrelevant to holding a suppression hearing because Robinson did not have to testify at the hearing.

This was a high crime area. Anyone could have dropped the baggy which did not have Robinson's fingerprints. Crack cocaine was not found on Robinson's person-only the marijuana. Robinson did not give a confession of any kind to the crack cocaine. Although the officers said the area was well lit, the two lights for the parking area were on the other side according to Officer Breeden. Officer Chavis still had to use a flashlight which cast doubt on what he actually saw thrown.

The PCR court should have trial counsel ineffective for not requesting a suppression hearing and making the effort to suppress the crack. Robinson was prejudiced because the sentence for a third offense PWID crack was a minimum of fifteen to thirty years.

In Sikes v. State, 323 S.C. 28, 448 S.E.2d 560 (1994), the Supreme Court reversed the case because trial counsel was ineffective for failing to raise a Fourth Amendment claim where counsel failed to make a motion to suppress evidence because he thought the officers' actions were justified. The Court found that police officers did not have suspicion to detain the defendant, who was a passenger in the vehicle the officers stopped for 20 minutes while they conducted an investigation; officers stopped the vehicle in a high crime area only because it had paper tags and vehicles with paper tags are often stolen or uninsured; and neither of those suspicions extended to the passenger in the vehicle. Cocaine was found in the back of the patrol car that transported the defendant to jail. The cocaine should have been suppressed due to the unlawful stop.

Robinson's case is similar because he was stopped primarily because he was in a high crime area.

CONCLUSION

Based on the above, certiorari should be granted, and the convictions and sentences reversed, and the case remanded for anew trial with a full suppression hearing on the crack cocaine.

Respectfully submitted,

LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR PETITIONER

This 26th day of August, 2014.

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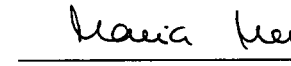
CERTIFICATE OF SERVICE

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 Mr. Christopher Robinson #265006, Lee Correctional Institution, 990 Wisacky Hwy., Bishopville, SC 29010, this 26th day of August, 2014.

LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 26th day
of August, 2014.


(L.S.)

Notary Public for South Carolina
My Commission Expires: July 3, 2023.