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STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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S.C. Supreme Court

Certiorari to Florence County

William H. Seals, Jr., Circuit Court Judge

DONTE L. CAPERS,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-000097

JOHNSON PETITION FOR WRIT OF CERTIORARI

BENJAMIN JOHN TRIPP
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

ATTORNEY FOR PETITIONER

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ISSUE PRESENTED

Whether the record supports the PCR court's finding that Counsel gave effective assistance by advising Petitioner his Fourth Amendment challenges would not be successful due to lack of standing and law enforcement officer's right to seize incriminating evidence in plain view where officers entered the apartment in which Petitioner lived with his girlfriend to search pursuant to a warrant; where the officers seized numerous items not listed in the warrant and no items listed in the warrant; and where the officers seized all of the extraneous items because one investigator saw "kind of a different looking lamp from one of the victims or a victim in a burglary."

STATEMENT

On January 13, 2011, the Florence County Grand Jury indicted Petitioner Donte Capers on charges including three counts of burglary in the first degree. App. 3, lines 1-15; App. 108-113. The charges stemmed from law enforcement officers' search of the apartment in which Appellant and his girlfriend, Gloria Carrigan, resided. The officers had a warrant authorizing a search for seven specific items, including a jewelry box, a necklace, and a ring, that were suspected stolen. The officers ultimately seized seventy-eight items, none of which were one of the original seven items. App. 66, line 5—App. 67, line 22; App. 86, lines 6-16.

On June 16, 2011, Petitioner appeared at a plea hearing before The Honorable Michael G. Nettles and a jury. Scott P. Floyd represented Petitioner and Steven H. Deberry represented the State. App. 1. Petitioner pled guilty to the three counts of burglary in the first degree. In exchange for the plea, the State nol prossed a number of other indictments with charges for safe-cracking, presenting a firearm, and additional first-degree burglaries. App. 3, lines 1-15. After a routine plea colloquy, the court accepted the plea. App. 16, line 4—App. 18, line 25. The court handed down three concurrent sentences of twenty-five years. App. 34, line 19—App. 35, line 10.

On April 11, 2012, Petitioner filed an application for post-conviction relief, alleging ineffective assistance of counsel. App. 37-App. 44. The State filed a return on June 13, 2012. App. 52-App. 55. Petitioner filed an amended application on September 16, 2013. App. 45-App. 51. On October 8, 2013, Petitioner appeared at an evidentiary hearing before The Honorable William H. Seals, Jr. Joshua A. Bailey represented Petitioner and Joshua Thomas represented the State. App. 56. Plea counsel testified that he discussed the validity of the officers' search with Petitioner and told him he was unsure about Petitioner's standing to challenge the search because Carrigan signed the lease for the apartment. He also was unsure about challenging the seizures

because officers found the seized items in plain view. App. 82, lines 9-21. Plea counsel admitted he never fully researched the standing issue. App. 87, line 25-App. 88, line 6. When asked whether the items seized related to any of the then-outstanding warrants against Petitioner, plea counsel was again uncertain: "I think some of the indictments that he was charged under, I believe that some of this property could have belonged to some of those victims." He elaborated that he talked to an investigator who claimed to have a picture of "kind of a different looking lamp from one of the victims or a victim in a burglary," and when he entered the apartment, "saw this very distinct lamp . . . and then he started looking at the other items that were . . . there because of that." App. 91, line 19—App. 92, line 20. Plea counsel testified he never filed a motion to suppress the seized evidence because Petitioner pled guilty first. App. 82, line 22—App. 83, line 9.

On November 25, 2013, the PCR court issued its order of dismissal. App. 98-App. 107. The order stated Petitioner failed to establish ineffective assistance based on plea counsel's failure to move to suppress the evidence seized from the codefendant's apartment because plea counsel investigated the circumstances surrounding the search warrant and advised Petitioner the motion would likely be denied based on lack of standing or the plain view exception. App. 103-104.

ARGUMENT

The PCR court's conclusion that Counsel adequately advised Petitioner about his Fourth Amendment challenges was unsupported because the record shows officers wrongly seized evidence from his residence.

The PCR court's conclusion that Counsel gave effective assistance by adequately advising Petitioner about the search and seizure issues was unsupported because the record shows officers wrongly seized the incriminating evidence from his residence. The Sixth Amendment to the United States Constitution guarantees a defendant the right to effective assistance of counsel. U.S. Const. amend. VI; *Strickland v. Washington,* 466 U.S. 668 (1984). The United States

Supreme Court has created a two-pronged test to establish ineffective assistance of counsel by which a PCR applicant must show (1) counsel's performance was deficient, and (2) the deficient performance prejudiced the defendant. *Id.* at 687.

The two-part test adopted in *Strickland* "applies to challenges to guilty pleas based on ineffective assistance of counsel." *Hill v. Lockhart,* 474 U.S. 52, 58 (1985); *see generally Brady v. United States*, 397 U.S. 742, 758 (1970) ("Guilty pleas are no more foolproof than full trials to the court or jury. . . . Accordingly, we take great precautions against unsound results."). Specifically, by showing that "counsel's representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's errors, the defendant would not have pled guilty," a defendant sufficiently undermines the required voluntary and intelligent character of a plea. *Rolen v. State*, 384 S.C. 409, 413, 683 S.E.2d 471, 474 (2009); *accord State v. Hazel*, 275 S.C. 392, 271 S.E.2d 602 (1980) (holding record must reflect that defendant freely and intelligently waived constitutional trial rights and had full understanding of the consequences of the plea); *Berry v. State*, 381 S.C. 630, 635, 675 S.E.2d 425, 427 (2009) (holding the difference "between a valid guilty plea and an invalid guilty plea lies in the knowing and voluntary nature of the plea"). Of course, representation is deficient and unreasonable when counsel fails to advise or incorrectly advises a defendant on a material evidentiary issue:

> [W]e recognize that a defendant, for a host of legitimate reasons, may plead guilty to an offense for which a valid legal challenge may exist. . . . The difference . . . between a valid guilty plea and an invalid guilty plea lies in the knowing and voluntary nature of the plea. Here, counsel never informed [the defendant] of the potential challenge to the use of the drug paraphernalia conviction for enhancement.

Berry at 635, 675 S.E.2d at 427 (citations omitted). *See also Shirley v. State*, 306 S.C. 241, 411 S.E.2d 215 (S.C. 1991) (counsel ineffective for failing to inform defendant prior to guilty plea that

he may have made statements involuntarily, in which case they would be inadmissible); *Segura v. State*, 749 N.E.2d 496, 502 (Ind. 2001) (addressing "prejudice from an error or omission of counsel that has the effect of overlooking or impairing a defense"). It follows that incorrect or omitted advice may deprive a defendant of his Constitutional right "to make certain fundamental decisions regarding the case, as to whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal." *Jones v. Barnes*, 463 U.S. 745, 751 (1983).

"In determining guilty plea issues, it is proper to consider the guilty plea transcript as well as evidence at the PCR hearing." *Suber v. State,* 371 S.C. 554, 558, 640 S.E.2d 884, 886 (2007). "Specifically, the voluntariness of a guilty plea is not determined by an examination of a specific inquiry made by the sentencing judge alone, but is determined from both the record made at the time of the entry of the guilty plea, and also from the record of the PCR hearing." *Roddy v. State*, 339 S.C. 29, 33, 528 S.E.2d 418, 420 (2000).

In this case, the record shows officers wrongly seized the incriminating evidence from Petitioner's apartment. Law enforcement officers searched the residence with a warrant authorizing the seizure of seven specific items, including a jewelry box, a necklace, and a ring, that were suspected stolen. The officers did not seize any of those items, and instead they seized numerous items not listed in the warrant. Plea counsel testified he was unsure about challenging these seizures because the officers found the seized items in plain view. However, under settled law of the "plain view" exception, evidence is subject to a warrantless seizure if "the initial intrusion which afford the authorities the plain view was lawful and . . . the incriminating nature of the evidence was immediately apparent to the seizing authorities." *State v. Wright*, 391 S.C. 436, 443, 706 S.E.2d 324, 327 (2011). The requirement that an item's incriminating nature be immediately apparent is satisfied by probable cause. *Horton v. California*, 496 U.S. 128, 142

(1990). "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." *State v. Bultron,* 318 S.C. 323, 332, 457 S.E.2d 616, 621 (Ct. App. 1995). The only evidence in the record supporting probable cause to seize any extraneous items was plea counsel's recollection about one of the seized items—he talked to an investigator who claimed to have a picture of "kind of a different looking lamp from one of the victims or a victim in a burglary," and when he entered the apartment, "saw this very distinct lamp . . . and then he started looking at the other items that were . . . there because of that." Based on the State's burden to establish probable cause to seize all of the items outside of the warrant, the record does not support plea counsel's belief that Petitioner had no valid Fourth Amendment challenge to the seizure of the remaining items.

Further, the record contravenes plea counsel's belief that Petitioner did not have standing to challenge the seizure of the extraneous items. Petitioner testified that he lived at the apartment with his girlfriend. Thus, the apartment was his residence, and he a had a recognizable privacy interest sufficient to support a Fourth Amendment challenge. *See generally State v. Missouri*, 361 S.C. 107, 603 S.E.2d 594 (2004) (holding evidence supported defendant's standing to challenge search of apartment to which he had a key and could "come and go as he pleased" and periodically stayed the night) (quoting *Kyllo v. U.S.*, 533 U.S. 27, 31 (2001) ("At the 'very core' of the Fourth Amendment is a person's right 'to retreat into his own home and there be free from unreasonable government intrusions.") and citing *Minnesota v. Olson*, 495 U.S. 91 (1990) (holding overnight guest has reasonable expectation of privacy in another's home)).

Plea counsel's testimony at the PCR hearing bolsters the conclusion that his legal advice was inadequate. He admitted he never fully researched the standing issue, and his justification for

not pursuing suppression–that Petitioner pled first—was simply irrational. Thus, the PCR court's order of dismissal concluding plea counsel adequately investigated the circumstances surrounding the search warrant and advised Petitioner the motion would likely be denied based on lack of standing or the plain view exception was unsupported. His advice concerning material evidentiary issues was deficient and unreasonable, and it undermined the required voluntary and intelligent character of Petitioner's plea. Accordingly, the PCR court should have granted Petitioner's claim for ineffective assistance of counsel.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Court grant his petition for writ of certiorari to allow full briefing on the issue.

Respectfully submitted,

Benjamin John Tripp
Appellate Defender

ATTORNEY FOR PETITIONER

This 9th day of September, 2014.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO FLORENCE COUNTY
WILLIAM H. SEALS, JR., CIRCUIT COURT JUDGE

DONTE L. CAPERS,

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STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-000097

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Donte L. Capers states:

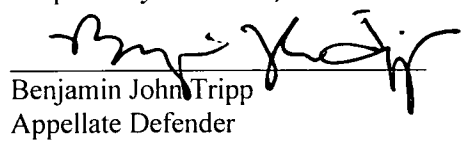
1. He is an Appellate Defender for the South Carolina Office of Appellate Defense and was appointed to represent petitioner.

2. He has reviewed the records and transcript of petitioner's post-conviction relief hearing which was held on October 8, 2013. In his opinion seeking certiorari from the order of dismissal is without merit.

3. He has, pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), briefed the one arguable legal issue which arose during the post-conviction relief process.

Therefore, counsel requests that the Court relieve him as counsel for Donte L. Capers.

Respectfully submitted,



Benjamin John Tripp
Appellate Defender
ATTORNEY FOR PETITIONER

This 9th day of September, 2014

STATE OF SOUTH CAROLINA
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CERTIFICATE OF SERVICE

I certify that a true copy of the Johnson petition for writ of certiorari and a copy of the appendix in this case have been served on Joshua L. Thomas, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Donte L. Capers, #296357, at McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29899, this 9th day of September, 2014.

Benjamin John Tripp
Appellate Defender

ATTORNEY FOR PETITIONER

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

(L.S.)
Notary Public for South Carolina
My Commission Expires: July 24, 2022 .