STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO LAURENS COUNTY

The Honorable Eugene C. Griffith. Jr., Circuit Court Judge

Appellate Case No. 2013-002269

Davoris Smiley,.....Respondent,

v.

State of South Carolina,.....Petitioner.

BRIEF OF PETITIONER

ALAN WILSON
Attorney General

J. RUTLEDGE JOHNSON
Assistant Attorney General
SC Bar # 78871

P.O. Box 11549
Columbia, SC 29211
(803) 734-3737

ATTORNEYS FOR RESPONDENT

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II. Did the PCR Court err in finding Counsel ineffective for failing to object to the pictures seized from Respondent's cell phone when Det. Riggott properly obtained a valid search warrant for Respondent's cell phone?

III. Did the PCR Court err in finding Counsel ineffective for failing to investigate a co-defendant's plea transcript when Respondent offered no supporting evidence to show how he was prejudiced in this case?

IV. Did the PCR Court err in finding Counsel was ineffective for failing to investigate Diana Melendez prior to calling her as a witness in Respondent's trial as Counsel was able to show the inconsistencies in her statement to police and, in line with Counsel's trial strategy, show Melendez's mistaken identification of Respondent?

V. Did the PCR court erred in not finding overwhelming evidence of Respondent's guilt in this case?

STATEMENT OF THE CASE

Davoris Smiley ("Respondent") was indicted at the July 2011 term of the Laurens County Grand Jury for Armed Robbery (2011-GS-30-1062), Possession of a Weapon during the Commission of a Violent Crime (2011-GS-30-1063) and Criminal Conspiracy (2011-GS-30-1064). Respondent was represented by Chad Mitchell, Esquire. On February 28-March 1, 2012, Respondent underwent trial by jury and was convicted of all charges as indicted. The Honorable Roger L. Couch sentenced Respondent to imprisonment for fifteen (15) years for Armed Robbery, five (5) years, concurrent, for Possession of a Weapon during the Commission of a Violent Crime, and five (5) years, concurrent, for Criminal Conspiracy. Respondent did not appeal his conviction or sentence. Respondent filed an application for post-conviction relief on September 24, 2012. Petitioner made its Return on January 8, 2013. Respondent filed an amended application on March 20, 2013. An evidentiary hearing into the matter was convened on June 3, 2013 at the Laurens County Courthouse. Respondent was present at the hearing and represented by Josh S. Nasrollahi, Esquire. J. Rutledge Johnson, Esquire of the South Carolina Attorney General's Office represented the State. By Order filed on August 20, 2013, the Honorable Eugene C. Griffith, Jr., granted post-conviction relief.

Petitioner received written notice of the Order granting PCR on September 27, 2013. Petitioner filed a timely Notice of Appeal on October 22, 2013. Petitioner filed its Petition for Writ of Certiorari on May 1, 2014. Respondent filed its Return to Petition for Certiorari on July 1, 2014. This Court granted certiorari on October 8, 2014. This Brief of Petitioner follows.

ARGUMENTS

I. The PCR Court erred in finding Counsel ineffective for not objecting to the introduction of the clothing seized from Respondent as a result of his illegal arrest when the responding officers had probable cause to arrest Respondent without a warrant.

The PCR Court found Counsel ineffective for failing to object to the introduction of the clothing seized from Respondent during the booking procedure as "fruits of the poisonous tree" stemming from what the PCR court deemed an illegal arrest. As discussed below, the police officers had probable cause to arrest Respondent without a warrant based on reliable information that a felony had been committed and Respondent was the perpetrator. As such, Respondent's clothing was properly gathered as evidence during the booking process at the county jail.

"[A] warrantless arrest by a law officer is reasonable under the Fourth Amendment where there is probable cause to believe that a criminal offense has been or is being committed." Devenpeck v. Alford, 543 U.S. 146, 152, 125 S. Ct. 588, 593 (2004); see also State v. Jones, 273 S.C. 723, 727-28, 259 S.E.2d 120, 123 (1979) ("It is well settled that a police officer may conduct a warrantless arrest if, at the time of the arrest, the officer has reliable information or reasonable grounds that would justify his belief that a felony has been committed and that the arrestee is the perpetrator."); State v. Baccus, 367 S.C. 41, 49, 625 S.E.2d 216, 220 (2006) ("Probable cause for a warrantless arrest exists when the circumstances within the arresting officer's knowledge are sufficient to lead a reasonable person to believe that a crime has been committed by the person being arrested."). Courts must determine whether "at the moment the arrest was made, the officers had probable cause to make it—whether at that moment the facts and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the petitioner had

committed or was committing an offense." Beck v. State of Ohio, 379 U.S. 89, 91, 85 S. Ct. 223, 225 (1964).

In this case, officers responded to an armed robbery of the Guatemex convenience store in Laurens, SC on April 24, 2011 around 9:00 pm. (App. p. 137). Captain Cofield testified she met with the victims and owner of the store that informed her there was a surveillance video of the incident. (App. p. 140). Upon reviewing this video, Captain Cofield recognized Respondent's co-defendant, Jakevian Pulley (Pulley). (App. p. 141). Captain Cofield and Pulley are related by marriage. (App. p. 142). After viewing the video, Captain Cofield called out to other officers to be on the lookout for a black male with an orange emblem on his jeans. (App. p. 143). Later, Captain Cofield was advised by a co-defendant that Respondent was also involved in the armed robbery. (App. p. 150 lines13-17; p. 151 lines 14-16). Respondent was found about four miles from the scene of the armed robbery. (App. p. 151 lines 17-21).

Additionally, Co-defendant, Lakasion Robinson (Robinson), testified he heard Respondent and Pulley talking about committing the armed robbery prior to the incident. (App. p. 218). Robinson gave a statement to law enforcement a few hours after the incident, in which he explained the incident as well as the involvement of each co-defendant, including Respondent. (App. p. 228; 231; 238; 239). Officer Patrick Durkin testified he initiated a traffic stop a little after 9 pm after Captain Cofield instructed him to do so. (App. p. 273). Inside the car, he identified Pulley and Robinson. (App. p. 274 lines 8-13). Officer Robbie Haupfear testified when law enforcement stopped Pulley and Robinson, two females were in the car as well, one of which gave a statement. (App. p. 338 lines 6-11). Respondent was identified as a third suspect based on this information and officers learned that Respondent might be at the

Laurens Terrace Apartments. (App. p. 338 lines 11-13). Officer Haupfear also testified he proceeded to 905 Laurens Terrace. When Officer Haupfear arrived at 905 Laurens Terrace, Porsha Miller (Miller) opened the door and spoke with him for a few minutes. (App. p. 338 lines 15-21). During this time, Respondent walked down the stairs of the apartment and upon recognizing Respondent, Haupfear detained him. (App. p. 338 line 19- p. 339 line 4).

Moreover, Det. Riggott testified that she viewed the video with Captain Cofield. (App. pp. 361-362). She testified that when she viewed the video, one of the suspects on the video looked like Respondent. (App. p. 362 lines 23-25). Det. Riggott then testified she has known Respondent for years through interaction in the community and was familiar with his him, his walk, his appearance and his height. (App. p. 363 lines 7-17; p. 404 lines 5-8). She also testified she met with Robinson shortly after midnight and obtained a statement from him. (App. p. 366 lines 13-19). She further obtained information concerning Respondent and an anonymous tip concerning Respondent's location. (App. pp. 366-367). Once Captain Cofield relayed Respondent's location to other officers, the officers proceeded to 905 Laurens Terrace where they located Respondent. (App. p. 367). Respondent was apprehended and arrested shortly after 1 am on April 25, 2011, only a few hours after the armed robbery.

Under United States and South Carolina jurisprudence, a warrantless arrest may be effectuated when there is probable cause, at the time of the arrest, that a crime has been committed and the arrestee is likely the perpetrator. See Alford and Jones, *supra*. Clearly, in this case, officers had probable cause to arrest Respondent without a warrant. First, Captain Cofield viewed the video and immediately recognized Pulley's involvement. Later, Captain Cofield was advised by a co-defendant that Respondent was involved in the armed robbery. Second, Det.

Riggott testified she viewed the video and knew Respondent was involved as she has had prior involvement with Respondent and was familiar with his walk, his height and his appearance. Det. Riggott testified she interviewed Robinson shortly after midnight and obtained a statement from him. Coincidentally, Captain Cofield had obtained a tip that Respondent was located at the Laurens Terrance apartments. Det. Riggott then testified Captain Cofield relayed this information to Chief Morris who then proceeded to the 905 Laurens Terrace. Third, upon stopping the vehicle in which both Pulley and Robinson were riding, Officer Haupfear testified he was able to identify Respondent as a third suspect. Haupfear also was told that Respondent was located at Laurens Terrace Apartments. When Haupfear proceeded to 905 Laurens Terrace, Porsha Miller opened the door. A few minutes after speaking with Miller, Respondent walked down the stairs, and Haupfear immediately recognized him and took Respondent into custody. Undoubtedly, officers had probable cause to arrest Respondent without a warrant here, where officers had viewed the video, recognized and were familiar with Respondent, had interviewed co-defendant (Robinson) who identified Respondent as having participated in the armed robbery, received information concerning Respondent's location, proceeded to that specific location, and immediately recognized Respondent as a perpetrator of the armed robbery. The totality of these circumstances clearly established probable cause for a warrantless arrest of Respondent.

The PCR court's analyses of the "investigative detention" and whether Respondent was arrested upon a suspicion of a "freshly committed crime" are flawed. First, the State concedes Respondent was arrested when he was taken into custody at 905 Laurens Terrace on April 25, 2011. Thus, all of Counsel's testimony concerning the "investigative detention" is irrelevant. Clearly, Respondent was in custody and not free to leave. However, the PCR court relies upon

cases of "freshly committed crimes" to determine whether there was probable cause to arrest Respondent without a warrant. This is simply not the standard in either United States or South Carolina jurisprudence. In Beck, the United States Supreme court plainly set the standard as "at the moment the arrest was made, the officers had probable cause to make it—whether at that moment the facts and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the petitioner had committed or was committing an offense." 379 U.S. 89, 91, 85 S. Ct. 223, 225 (1964). This Court in Baccus, unequivocally stated, "[p] robable cause for a warrantless arrest exists when the circumstances within the arresting officer's knowledge are sufficient to lead a reasonable person to believe that a crime has been committed by the person being arrested." 367 S.C. 41, 49, 625 S.E.2d 216, 220 (2006). Neither of these standards contained any language of "freshly committed crime." The test is simply, at the time of arrest, did the arresting officer have reliable information such that a reasonable person would believe the arrestee had committed a crime. Therefore, the PCR court relied on the incorrect legal standard to judge whether a warrant was necessary in this case before Respondent was arrested. Based on the aforementioned information available to the arresting officers, clearly there was probable cause to arrest Respondent without a warrant, and as such, Counsel need not object because Respondent was taken into custody pursuant to a valid warrantless arrest.

Further, the PCR court erred by finding Counsel ineffective for failing to object to Respondent's clothing being introduced into evidence at Respondent's trial.

First, "both the person and the property in his immediate possession may be searched at the station house after the arrest has occurred at another place and if evidence of crime is

discovered, it may be seized and admitted in evidence." United States v. Edwards, 415 U.S. 800, 803, 94 S. Ct. 1234, 1237 (1974); see also State v. Muquit, 381 S.C. 114, 671 S.E.2d 643 (Ct. App. 2009). Second, "[w]hen it became apparent that the articles of clothing were evidence of the crime for which Edwards was being held, the police were entitled to take, examine, and preserve them for use as evidence, just as they are normally permitted to seize evidence of crime when it is lawfully encountered." Edwards at 806, 94 S. Ct. 1234 at 1238.

The PCR Court erroneously held Respondent was prejudiced by Counsel's failure to object to the introduction of Respondent's clothing that linked Respondent directly to the armed robbery. As stated above, Respondent's warrantless arrest was based properly on probable cause. As such, under Edwards, Respondent's clothing was appropriately taken from Respondent during the booking procedure and secured by law enforcement. Undoubtedly, through the testimony at trial of both Robinson and Det. Riggott, these clothes linked Respondent to the armed robbery. (App. pp. 221-227; pp. 362-369). Since these clothes were evidence of the armed robbery, law enforcement was allowed to take and preserve them for evidence and the State was allowed to admit them into evidence. Therefore, the PCR Court erred in holding Counsel ineffective for not objecting to their introduction as he had no proper grounds to do so. This Court should reverse the PCR court based on its erroneous legal analysis.

II. The PCR Court erred in finding Counsel ineffective for failing to object to the pictures seized from Respondent's cell phone when Det. Riggott properly obtained a valid search warrant for Respondent's cell phone.

The PCR court erred by finding Counsel ineffective for failing to object to the pictures seized from Respondent's cell phone and introduced at trial because law enforcement obtained a valid search warrant which specified with particularity what information was sought from

Respondent's cell phone. The PCR court's holding that the search warrant was overly broad is flawed.

In South Carolina:

> A search warrant may issue only upon a finding of probable cause The South Carolina General Assembly has enacted a requirement that search warrants may be issued "only upon affidavit sworn to before the magistrate ... establishing the grounds for the warrant." S.C.Code Ann. § 17-13-140 (1985). In *Illinois v. Gates*, 462 U.S. 213, 238, 103 S.Ct. 2317, 2332 (1983), the United States Supreme Court adopted a "totality-of-the-circumstances" test for probable cause determinations: The task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the "veracity" and "basis of knowledge" of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place.

State v. Bellamy, 336 S.C. 140, 143, 519 S.E.2d 347, 348 (1999); see also State v. Tench, 353 S.C. 531, 579 S.E.2d 314 (2003).

The search warrant issued by the magistrate on April 27, 2011 contained the following description on what items were to be searched: ... "Samsung T Moblie cell phone belonging to Davoris Tanyate Smiley." (App. p. 675). The search warrant also specified the description of the property: "Blue Samsung T Mobile cell phone to include all information on cell phone not limited to all calls (incoming and outgoing), **text messages** (incoming and outgoing), contacts and **photos**." (App. p. 675)(emphasis added). In her affidavit sworn for the search warrant, Det. Riggott sought information from Respondent's cell phone based on her belief that:

> On 4/24/2011. Davoris T. Smiley along with Jakevian Pulley and Lakasion Robinson conspired and did rob at gunpoint the Guatemex Store located at 1105 N. Harper St. in the city limits of Laurens, SC. The subjects touched items in the store and all three subjects had cell phones on their person at the time of arrest and it is believed that the three may have had conversations on their cell phones before and or after the robbery between themselves and or others.

(App. p. 676).

Det. Riggott also testified at trial that she secured Respondent's cell phone when he was brought to the police station. (App. p. 384-385). Det. Riggot testified she obtained a search warrant for the phone prior to sending it to the Secret Service for analysis. (App. p. 386). Det. Riggott further testified she obtained a statement from Robinson indicating that Respondent and Pulley were sending each other text messages around 2:30am on the morning of the robbery. (App. p. 415). Mike Rainey testified he performed the analysis on Respondent's cell phone and created a report in which information from the data in the phone indicated the pictures, which were introduced at trial, were taken around 7:05 am on the day of the robbery. These pictures showed Respondent wearing the yellow Pittsburgh Pirates hat that Robinson testified Respondent was wearing during the robbery.

Clearly, Det. Riggott provided ample basis in her affidavit based on her investigation of the case and knowledge of Respondent for the issuance of the search warrant. She properly stated the item to be searched, Respondent's cell phone, and described with particularity what information was sought: all information including text messages and photos. See State v. Williams, 297 S.C. 404, 377 S.E.2d 308 (1989) (holding the term "any illegal drugs" was not such a generic term that it allowed an unbridled and general search, thus satisfying the particularity prong). She also provided the nexus for the search into the cell phone; that she believed the co-defendants were having conversation before and after the robbery occurred. The pictures found undoubtedly show Respondent wearing the clothing he used in the robbery on the same day.

As Det. Riggott properly sought and obtained a search warrant for Respondent's cell phone, Counsel would have no reasonable basis on which to object to the introduction of the

photographs taken from Respondent's cell phone. It should be noted, however, that Counsel moved to suppress these photographs pre-trial on the basis that they were unduly prejudicial. SCRE 403. The trial court denied this motion. Nevertheless, the PCR court erred in finding Counsel ineffective because he had no reasonable basis on which to object and therefore, this Court should reverse the PCR court's ruling.

III. The PCR Court erred by finding Counsel ineffective for failing to investigate a co-defendant's plea transcript when Respondent offered no supporting evidence to show how he was prejudiced in this case.

The PCR Court held Counsel was ineffective for not obtaining a transcript of Robinson's guilty plea transcript prior to Respondent's trial. The PCR court reasoned that because Respondent "was deprived of potentially valuable impeachment material," he was prejudiced. (App. p. 695). This reasoning is flawed and not based on evidence presented at the PCR hearing.

Prejudice from trial counsel's failure to interview or call witnesses cannot be shown where the witnesses do not testify at post-conviction relief. Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992); Bassette v. Thompson, 915 F.2d 932 (4th Cir. 1990), cert. denied, 499 U.S. 982 (1991). Respondent's mere speculation as to what a witnesses' testimony would have been cannot, by itself, satisfy his burden of showing prejudice. Clark v. State, 315 S.C. 385, 434 S.E.2d 266 (1993); Glover v. State, 318 S.C. 496, 458 S.E.2d 538 (1995).

In this case, Respondent offered no evidence to show how he was prejudiced by Counsel's failure to order Robinson's guilty plea transcript. Respondent neither provided a copy of the transcript nor testimony from Robinson or any other witnesses to show exactly how not obtaining a copy of Robinson's transcript prejudiced Respondent. Additionally, Counsel, through cross-examination of Robinson, was able to show the jury that Robinson entered into a

plea agreement with the State in which he received a probationary sentence in exchange for his cooperation and testimony. See (App. p. 249). This is the same information the PCR court claims would have aided Respondent had Counsel obtained a copy of Robinson's guilty plea. Any impeachment value from this plea transcript was clearly available to the jury through Counsel's cross-examination of Robinson.

As Respondent provided no evidence to show the prejudicial value of Counsel's failure to obtain a copy of Robinson's guilty plea transcript along with Counsel's cross-examination of Robinson that exposed Robinson's deal with the State for lesser charges in exchange for his testimony, the PCR court clearly erred in finding Respondent was prejudiced in this case. Therefore, this Court should reverse the PCR court's ruling.

IV. The PCR Court erred by finding Counsel was ineffective for failing to investigate Diana Melendez prior to calling her as a witness in Respondent's trial as Counsel was able to show the inconsistencies in her statement to police and, in line with Counsel's trial strategy, show Melendez's mistaken identification of Respondent.

The PCR Court held Counsel was ineffective for not interviewing Ms. Melendez prior to calling her as a witness during Respondent's trial. The PCR Court reasoned that Ms. Melendez testified against Respondent on cross-examination and thus, this decision constituted ineffective assistance of counsel and prejudice. This analysis is flawed.

At trial, Ms. Melendez testified that she gave statement to police on the night of the incident in which she identified the tall robber as the person possessing the gun. (App. p. 481 lines14-24 "Yes, sir, one was tall or the other was short. The tall guy had the gun, the gun." lines 21-22). While Counsel admitted he did not interview Ms. Melendez, an eyewitness in the case, prior to calling her as a witness at Respondent's trial, Counsel testified at the PCR hearing as to the

purpose for which he called Ms. Melendez as a witness. Counsel stated, "the only thing that I wanted her as a witness for is to say, to confirm that she said at the very beginning of all of this that the tall one had the gun." (App. p. 666).[1]

Our courts are understandably wary of second-guessing defense counsel's trial tactics. Where counsel articulates valid reasons for employing a certain strategy, counsel's choice of tactics will not be deemed ineffective assistance. Whitehead v. State, 308 S.C. 119, 417 S.E.2d 530 (1992). See also Dempsey v. State, 363 S.C. 365, 610 S.E.2d 812 (2005); McLaughlin v. State, 352 S.C. 476, 575 S.E.2d 841 (2003).

Counsel articulated valid strategic reasons for calling Ms. Melendez as a witness at Respondent's trial. Counsel stated the reason he called Ms. Melendez was to show that Mr. Pulley was the gunman in this case and not Respondent. Counsel was simply showing the jury that even an eyewitness could not identify Respondent during the robbery as the gunman. Clearly, this is considered a sound trial strategy. Respondent has not shown that Counsel was deficient in that choice of tactics. Further, as there was overwhelming evidence of Respondent's guilty, as discussed below, no prejudice can be shown by Counsel's failure to interview Ms. Melendez prior to calling her as a witness.

V. The PCR court erred in not finding overwhelming evidence of Respondent's guilt in this case.

Respondent was not prejudiced by any alleged deficient representation because there was overwhelming evidence of Respondent's guilt. Where there is overwhelming evidence of guilt, a trial counsel's deficient representation will not be prejudicial. Ford v. State, 314 S.C. 245, 442

[1] It should be noted that Respondent is listed as 5'4" on the South Carolina Department of Corrections website. Mr. Pulley is listed as 5'6" on the website.

S.E.2d 604 (1994); See also Humbert v. State, 345 S.C. 332, 548 S.E.2d 862 (2001); Geter v. State, 305 S.C. 365, 409 S.E.2d 344 (1991).

In this case, at least two witnesses identified Respondent for his participation in this armed robbery. Det. Riggott testified she knew Respondent from prior interactions in the community and was able to identify him on the video recording based on his body type and clothing. When Respondent was apprehended, he was wearing the same clothing as was viewed in the video recording. He was also wearing the same hat as he was in the cell phone photographs taken on the morning of the robbery. Additionally, when co-defendants Pulley and Robinson were apprehended riding in the vehicle, Respondent became a suspect at that time based on information supplied by someone in the car. Moreover, when Respondent was arrested and Miller gave her consent to search her apartment, $705 dollars was found upstairs in a bedroom; Miller testified only Respondent could have put it there. Further, and most importantly, Robinson not only signed a statement for law enforcement, explain Respondent's involvement and planning of the armed robbery, but also testified at trial that Respondent planned and executed the robbery with Pulley. Robinson detailed Respondent's clothing, the type of gun Respondent possessed, the conversations Respondent conducted in preparation for the robbery, and step-by-step testified about what was viewed on the video recording. Clearly, there is overwhelming evidence of Respondent's guilt in this case. As such, Respondent can prove no resulting prejudice by any alleged errors of Counsel. Therefore, this Court should reverse the PCR court ruling.

CONCLUSION

For the reasons stated above, this Court should grant certiorari and reverse the PCR Court as not only was Counsel effective in his representation of Respondent, but also because Respondent can prove no resulting prejudice from Counsel's alleged errors due to the overwhelming evidence of Respondent's guilt in this case.

Respectfully submitted,

ALAN WILSON
Attorney General

J. RUTLEDGE JOHNSON
Assistant Attorney General
S.C. Bar #78871

By: _____
ATTORNEYS FOR RESPONDENT

P.O. Box 11549
Columbia, S.C. 29211
(803) 734-3737

December 5, 2014

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to York County

The Honorable Eugene C. Griffith, Jr., Circuit Court Judge

DAVORIS SMILEY,

Respondent,

STATE OF SOUTH CAROLINA

Petitioner.

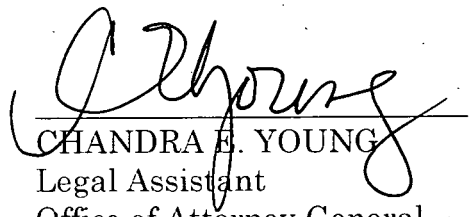
PROOF OF SERVICE

I, CHANDRA E. YOUNG, certify that I have served the Brief of Petitioner and Appendix on opposing counsel by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Joshua S. Nasrollahi
201-B Waller Avenue
Greenwood, South Carolina 29649

I further certify that all parties required by Rule to be served have been served.

This 5th day of December, 2014.



CHANDRA E. YOUNG
Legal Assistant
Office of Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3737