STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Beaufort County

Deadra L. Jefferson, Circuit Court Judge

TURUK SAUNDERS,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-001240

PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Did the PCR court erroneously rule that defense counsel had a valid "strategy" not to challenge the sufficiency of the search warrant where counsel misunderstood the concept of "standing" to challenge the warrant, and counsel erroneously decided that if he was going to assert "mere presence" as a defense, that he had to accept the judge's erroneous ruling that he could not challenge the search warrant pre-trial?

STATEMENT OF FACTS

Petitioner was indicted by the Beaufort County Grand Jury for the offenses of possession with intent to distribute cocaine, possession with intent to distribute ecstasy, trafficking in crack cocaine, possession with intent to distribute marijuana, and use of a firearm during the commission of a violent crime. App. 595–604.

His case was called to trial on May 24, 2010 before the Honorable J. Ernest Kinard, Jr., and a jury. Cory Fleming and Kimberly Smith represented petitioner. Angela McCall-Tanner and Meredith Bannon were the assistant solicitors. App. 2.

At the conclusion of the trial on May 26, 2010, the jury found appellant guilty of trafficking in crack cocaine, possession with intent to distribute cocaine, possession with intent to distribute ecstasy, possession with intent to distribute marijuana, and it found him not guilty of use of firearm during a violent crime. App. 328, l. 5 – 329, l. 10. Judge Kinard sentenced petitioner to concurrent terms totaling twenty-seven years imprisonment. App. 341, l. 23 – 342, l. 4.

His convictions were affirmed on direct appeal. Nicole Mace was appellate counsel. App. 560.

Petitioner filed an application for post-conviction relief, attaching various exhibits, dated November 27, 2012. App. 344–379. The state filed a return to this application dated February 25, 2013. App. 383–388. Petitioner then filed an amended application for post-conviction relief dated August 26, 2013 through PCR counsel, Scott Lee. App. 380–382.

An evidentiary hearing was convened on August 27, 2013 before the Honorable Deadra L. Jefferson. Scott W. Lee represented petitioner. Ashleigh Wilson was the Assistant Attorney General. App. 389 – 390.

Trial counsel Corey Fleming testified at the PCR hearing that he considered this "a classic drug investigation" conducted by the Beaufort County "drug task force." App. 398, l. 16 – 399, l. 5. Fleming testified the drug task force believed someone was "selling dope out of a particular trailer," and they set up surveillance of the trailer. They stopped a vehicle leaving the trailer and "they gathered [information] from the occupants [witness Reeves] of that car." Fleming confirmed that witness Reeves was the person that allegedly gave the police the "information." App. 398, l. 22 – 399, l. 12. As a result of "that information," and "statements given," they obtained a search warrant from the magistrate. App. 399, ll. 13-19.

Fleming testified that the police claimed petitioner "threw down a bag of marijuana" when the search warrant was executed. Fleming was not aware of any other drugs being found on petitioner. App. 399, l. 6 – 400, l. 6.

Fleming said it was clear to him "that Turuk [Petitioner] didn't live there. Although he was there, it was fairly clear he didn't live there." App. 400, ll. 16-22. Fleming maintained he had to make a decision on "how to defend the case." Fleming reasoned that one witness was going to identify petitioner as the person who was selling the drugs and that would have meant petitioner had "dominion and control" over the premises. App. 400, l. 23 – 401, l. 4. Fleming said he wanted to present a "mere presence" defense despite what the informant, Reeves, allegedly claimed when he was pulled over by the drug task force leaving the trailer. App. 401, l. 5 – 402, l. 19.

Fleming said there was no doubt that Reeves reportedly presented the probable cause for getting this search warrant. Reeves claimed he bought a dime bag of marijuana from "Big-T," purportedly the petitioner. App. 402, l. 20 – 403, l. 3. Fleming admitted he ultimately did not make

any suppression challenge to the search warrant for the very strange reasons that will be shown infra. App. 403, ll. 9-14.

Fleming said he explained to Judge Kinard that the defense in this case was that petitioner did not have dominion and control over the trailer, that he was only a visitor. The issue of "standing" to object to the search of the premises then became a major issue. The judge told counsel he could not "have my cake and eat it too." In other words, Fleming said that the trial judge told him he was "jeopardizing my entire trial strategy" if Fleming sought to challenge the sufficiency of the search warrant. Fleming testified he made his decision to forego challenging the search warrant, in part apparently, based on his belief that key witness, Reeves, "was not going to show up." App. 403, l. 4 – 405, l. 15.

Fleming agreed that some of the discussion with the judge on this issue did not make it onto the record. However, he said: "I felt like he [petitioner] had the right to challenge it [the search warrant] anyway, because they were going to argue that he had control [over the trailer]" App. 406, l. 5 – 407, l. 5. Fleming said he thought he was presented with a "Hobson's choice" whether to assert he had "standing" because petitioner had some "control, ownership, dominion, something, over the property," or to present his mere presence defense. App. 406, l. 5 – 409, l. 1.

Fleming said he believed he had the right to challenge the search warrant but he admitted that he acquiesced in the judge's false dilemma presented to him. That is, whether to present a mere presence defense, or challenge the search warrant because petitioner had an expectation of privacy in the trailer. Fleming admitted this was an improper choice presented to him by the judge. Nonetheless, he decided not challenge the search warrant. App. 409, l. 2- 423, l. 19.

Fleming admitted there was no evidence that he was aware of that Reeves had ever been an informant for the police before. Fleming did not think there was any assertion that the police vouched for Reeves' veracity, and Fleming acknowledged that Reeves had even given the police **false information**. App. 418, l. 13 – 421, l. 2. Fleming admitted he knew Reeves had lied twice to the police, yet failed to challenge the warrant which was based on Reeves' information. App. 423, ll. 8-19.

Fleming remembered that Judge Kinard told him he had a very good directed verdict motion, until Reeves testified. Reeves' testimony provided the state with evidence that petitioner allegedly owned or controlled the trailer where the drugs were being sold. App. 424, l. 20 – 425, l. 18. Fleming remembered the trial judge's telling him in "your heart of hearts [you] know" that if the jury believed Reeves that they could convict petitioner. App. 266, ll. 1-9.

Reeves testifies

Reeves testified at trial that he went to the trailer on February 22, 2007 because his brother-in-law wanted to buy cocaine. App. 245, l. 12 – 246, l. 24. Reeves said he knew petitioner as Big-T. He identified petitioner in the courtroom as Big T. App. 246, l. 11 – 248, l. 5.

Reeves claimed that petitioner went inside the trailer with his brother-in-law, and that Reeves had a quarter of cocaine with him after he left the trailer. App. 247, l. 17 – 249, l. 6. Reeves maintained when the police stopped and arrested them: "I had a little bit of marijuana that **I already had on me.**" App. 248, l. 6 – 250, l. 7.

On cross-examination Fleming proceeded to impeach Reeves with his statement in which he told the told the police: "I bought a dime of weed from Turuk." App. 254, ll. 16-19. Reeves testified his memory was he had never given anybody money to buy drugs from inside the trailer.

Reeves reversed himself, and added that he may have given his brother-in-law money to buy marijuana even though the brother-in-law wanted to buy cocaine. App. 256, l. 3 – 257, l. 14.

Reeves testified that he wanted to apologize to the court for the confusion, and his purported lack of a good memory. Reeves offered that he now remembered that he gave his brother-in-law money to buy marijuana, and that his brother-in-law instead showed him the cocaine when he got back in the car after leaving the trailer. Reeves denied he was trying to protect himself when he gave the police his statement after his arrest. App. 256, l. 3 – 257, l. 14.

The warrant

In the affidavit to the search warrant it was averred that on February 22, 2007 Lt. Woodward observed a Ford Crown Victoria four-door vehicle pull into the driveway of "the residence." Two black males entered the residence for a short time, and then returned to the automobile. The automobile was then pulled over and the drugs were discovered. App. 617.

Reeves *then told the police that he purchased a "dime bag" of marijuana from "Big-Tee."* App. 618. (emphasis added). The affidavit stated that based on this information it was believed a continuing criminal enterprise involving drugs was being run from this "home." App. 618 – 619. The home was described as a double wide mobile home. App. 617. The affidavit otherwise contained no specific information related to the case. App. 614. The description of the property sought was drugs and any records regarding the sale of drugs. App. 615.

ARGUMENT

The PCR court erroneously rule that defense counsel had a valid "strategy" not to challenge the sufficiency of the search warrant where counsel misunderstood the concept of "standing" to challenge the warrant, and counsel erroneously decided that if he was going to assert "mere presence" as a defense, that he had to accept the judge's erroneous ruling that he could not challenge the search warrant pre-trial.

In State v. Missouri, 361 S.C. 107, 603 S.E.2d 594 (2004), the Supreme Court reversed a panel of this Court, and found that the defendant did have "standing" to challenge the search. The court rejected the analysis that the defendant was merely a guest conducting business, and was not at least an overnight guest entitled to Fourth Amendment protection.

The Supreme Court noted that the United States Supreme Court had rejected the application of such an analysis based on the "Standing Doctrine." That Court held that the term "standing" had led to confusion, and that it was no longer proper to confuse "standing" with "the legitimate expectation of privacy in the evidence seized or the premises searched." State v. Missouri, 361 S.C. at 111, 503 S.E.2d at 595 *citing* Rakas v. Illinois, 439 U.S. 128, 140 (1978); United States v. Bouffard, 917 Fed.2d 673, 675 (1st Cir. 1990).

The Supreme Court in Missouri held that the defendant had a reasonable expectation of privacy in another person's apartment where he was there at the time the police searched the apartment. The court noted that this expectation of privacy was both subjective and objective in nature. The defendant had: (1) the subjective expectation of not being discovered; and (2) the expectation of privacy is one that society recognizes as reasonable. Oliver v. United States, 466 U.S. 170, 177 (1984) *citing* Katz v. United States, 389 U.S. 347, 361 (1967).

The critical trial exchange

As in Missouri, petitioner in this case, at a minimum, had been on the property in the past, and he was there and on the day the search warrant was executed. Defense counsel correctly asserted at trial that he was entitled to challenge the search warrant, but he **incorrectly asserted "even though I don't think my client has standing."** App. 33, l. 8 – 34, l. 16. (emphasis added).

The judge then asserted: "Well, unfortunately, you can't have it both ways." App. 34, ll. 22-23. Based on his erroneous understanding of the law of "standing" defense counsel Fleming then decided: "Well, then, I will not choose to have it both ways. I will not challenge, then, the validity of the search warrant . . ." App. 35 – ll. 3-13.

As seen, there was testimony at the PCR hearing that Fleming knew that Reeves, the alleged star "informant" against petitioner, had lied to the police on at least two occasions. The police could not, and did not, vouch for the veracity or reliability of Reeves even though he was a critical witness. The search warrant affidavit otherwise just stated in general fashion that the drug task force allegedly involved seasoned narcotics officers. App. 615-619.

Counsel's representation was deficient in this case because it was based on his erroneous understanding of the law of "standing." Further, counsel inserted confusion into this case by asserting he was entitled to challenge the search warrant even though his client "did not have standing." App. 34, ll. 10-21.

Defense counsel's PCR testimony that he was presented with a "Hobson's choice" was incorrect. Further, as seen above, counsel contributed to the confusion about the challenge to the search warrant.

There was a reasonable result the outcome of this drug trial would have been different had defense counsel understood that petitioner did have an expectation of privacy in the mobile home, and had he challenged the search warrant for the trailer. Defense counsel added to the confusion in this case by not realizing his client would have had "standing" under State v. McKnight, 291 S.C. 110, 352 S.E.2d 471 (1987) (holding all defendants against whom the state seeks to admit evidence have standing to challenge the legality of the search warrant), and he also could have challenged the warrant under the State v. Missouri (the legitimate expectation of privacy standard).

The search warrant was based on the unreliable assertions of Reeves who defense counsel acknowledged **he knew** had lied to the police on at least two occasions. Reeves did *not have any history of being a reliable informant* for the drug task force. He was merely stopped upon leaving the trailer in this car, and he made the self-serving assertion that "Big-T" sold him drugs from the trailer. This warrant did not establish probable cause for the issuance of the search warrant in this case. See, State v. Gentile, 373 S.C. 506, 646 S.E.2d 171 (Ct..App.,2007); State v. Baccus, 367 S.C. 41, 625 S.E.2d 216 (2006); State v. Dunbar, 361 S.C. 240, 603 S.E.2d 615 (Ct.App. 2004).

Further, while a deficiency in veracity may be compensated for by a strong showing of basis of knowledge or by some other indicia of reliability, there existed no such other indicia of reliability in this case. See Illinois v. Gates, 462 U.S. 213 (1983).

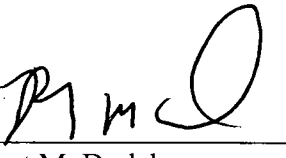
Defense counsel's performance in this case was deficient based on his failure to challenge the search warrant which was based in his failure to comprehend the applicable law, or to correct the trial judge's assertion that he "could not have it both ways" by challenging the search warrant, and offering a "mere presence" defense. Defense counsel's deficiency prejudiced petitioner given the unusual facts of this Fourth Amendment case. If the search warrant were found deficient, and

the drugs were suppressed, the state did not have a case. Petitioner should be granted a new trial. See Strickland v. Washington, 466 U.S. 668 (1984).

CONCLUSION

By reason of the foregoing arguments, a writ of certiorari should be issued to allow full briefing on this issue.

Respectfully submitted,



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR PETITIONER

This 21st day of January, 2015.

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APPELLATE CASE NO. 2014-001240

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 Ashleigh R Wilson, Esquire, Office of the Attorney General, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 this 21st day of January, 2015.

Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 21st day
of January, 2015.

Rhonda Denise Epworth (L.S.)
Notary Public for South Carolina
My Commission Expires: October 17, 2021.