

STATE OF SOUTH CAROLINA **RECEIVED**

IN THE SUPREME COURT

JAN 12 2015

Certiorari to Spartanburg County **S.C. SUPREME COURT**

J. Derham Cole, Circuit Court Judge

DAVID STEWART,

PETITIONER,

V.

STATE OF SOUTH CAROLINA

RESPONDENT,

APPELLATE CASE NO. 2014-001138

Mr. David Anthony Stewart #344762

Turbeville Correctional Institution

P.O. Box 252

Turbeville, SC 29162

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ISSUE PRESENTED

Trial counsel erred in failing to investigate into a Fourth Amendment violation from petitioner's case where police made contact with petitioner at his hotel room without a warrant and had him to walk from his hotel room to the hotel parking lot where his vehicle, which canines had already sniffed, was parked because under Stoner V. California, 376 U.S. 483 (1964), this constituted an unreasonable search and seizure in the case.

The court lacked subject matter jurisdiction to impose punishment whereas the state failed to meet the demands of 44-53-375(e) trafficking in cocaine 400 or more grams when failing to have the controlled substance analyzed to be proven in fact to be what was stated as a required element to constitute a violation of said statute.

Statement

Petitioner David Stewart pled guilty to trafficking in cocaine (23-100 grams) during the February 2011 term of the Spartanburg County General Sessions Court before Judge J. Mark Hayes II, and was sentenced to imprisonment for a period of seven years. App. 1-17. Albert V. Smith represented petitioner at the plea proceeding Assistant Solicitor Travis A. Moore appeared on behalf of the state. Petitioner did not enjoy the benefit of a direct appeal of his conviction and sentence.

On December 5, 2011, petitioner filed a PCR application with the Spartanburg County Office of the Clerk of court alleging an insufficient evidence claim and subject matter jurisdiction and indictment claims. App. 19-42. The respondent filed a Return and Motion to dismiss on the ground that the respondent failed to state a cognizable PCR claim under S.C. code Ann. § 17-27-70(c).

On September 23, 2012, Judge Robert L. Couch

issued a Conditional Order of Dismissal echoing the grounds for dismissal outlined in the respondent's return to the extent that there was no genuine issue of material fact to support petitioner's PCR claims. App. 50-53.

On January 29, 2013, petitioner submitted paperwork titled of "Supplemental Amendment for PCR Hearing Relief" in response to the Conditional Order of Dismissal. Supp. App. 37-41.

A PCR hearing was held on September 30, 2013, at the Spartanburg County Courthouse before Judge J. Derham Cole in the case. Petitioner was present at the hearing and represented by Lara P. Harrell and Jordan C. Callaway, and Assistant Attorney General Suzanne H. White appeared on behalf of the state. On February 20, 2014, Judge Cole issued an Order of Dismissal denying PCR relief to petitioner.

Petitioner appealed Judge Derham's order of dismissal and raised a new issue of subject matter

ARGUMENT

Trial counsel erred in failing to investigate into a Fourth Amendment violation from petitioner's case where police made contact with petitioner at his hotel room without a warrant and had him to walk from his hotel room to the parking lot where his vehicle, which canines had already sniffed, was parked because under Stoner v. California, 376 U.S. 483 (1964), this constituted an unreasonable search and seizure in the case.

During the plea proceeding, the solicitor apprised the plea judge of the facts of the case. Police Officer Caraway observed the driver of a particular vehicle, which contained petitioner as a passenger, commit certain traffic violations on I-85 in Spartanburg County and followed the vehicle to the Best Western Hotel parking lot nearby. Then, Officer Caraway brought in the canine unit to the

hotel parking lot where they sniffed this vehicle. The alert to drug led the officer to make contact with petitioner at his hotel room. Thereafter, petitioner was led from his hotel room to the hotel parking lot where the vehicle he rode in was searched. Powder cocaine was found inside the vehicle. App. 8, 1.3 - p. 9, 1.3.

During the PCR hearing, petitioner testified in effect that trial counsel failed to investigate into the legality of the officer's warrantless search and seizure of the vehicle and arguably him as well. App. 57, 1.1 - p. 58, 1.1. Petitioner stated that trial counsel "never looked into the Fourth Amendment issue." App. 58, 1.1-2.

Counsel testified at the PCR hearing and explained the case as follows:

Q Did you discuss with Mr. Stewart the circumstances under which the officers searched their hotel room?

A I think it was a pretextual stop and they thought there was drugs in that car.

I really do.

App. 76, lines 7-14.

Note that prior to the plea, a pretrial hearing was held requesting the dismissal of the indictment based on the ground that the stop was pretextual in nature. App. 74, lines 1-6.

The PCR judge ruled that petitioner's allegation that counsel did not conduct adequate investigations in the case was without merit as counsel discussed defenses and options available in the case. App. 83.

In Stoner v. California, 376 U.S. 483 (1964), the United States held that the search of a defendant's hotel room without a warrant and without the defendant's consent was unlawful despite the hotel clerk's consent for the police to do so because a guest in a hotel room has a right to be free of unreasonable searches and seizures. In Goin v. State, 726 S.E. 2d 397 S.C. 568

(2012), the Court held that the police officers' warrantless search of the defendant's hotel room upon suspicion that he sold drugs was illegal in violation of the Fourth Amendment, and that trial counsel was ineffective in failing to advise the defendant of the law in this regard before he pled guilty to the state's charges in that case.

In the case at bar, the hotel parking lot represents the curtilage of the hotel where petitioner, who was a registered guest at that time, had a right to be free of unreasonable warrantless searches and seizures. Thus, the seizure of petitioner at the hotel and the search of his vehicle at the hotel parking lot constituted a Fourth Amendment violation in the case. A successful challenge to the drugs found in the vehicle upon this ground would have resulted a suppression of the tainted fruit of the poisonous tree. Wong Sun v. United States, 371 U.S. 471 (1963).

Counsel has a duty to conduct reasonable investigations in criminal cases. Strickland v. Washington, 466 U.S. 668 (1984). Here, counsel's error in failing to investigate and develop a Fourth Amendment claim in petitioner's case before the plea proceeding constituted legal representation that fell below the standard of competence required of criminal attorneys in violation of the Sixth Amendment to the United States Constitution. See also Hill v. Lockhart, 484 U.S. 52 (1985). But for counsel's error, a reasonable probability exists that petitioner would have rejected a plea deal and exercised his right to a trial by jury in the case.

It is well established that to constitute a violation of 44-53-375(e) that the legislation has demanded of the state an element of the said statute that the substance be analyzed and proven as a fact to be what is stated.

In meeting this demand, the legislation

also enacted 44-53-120(5) giving State Law Enforcement Division the authority to promulgate regulations in regards to the matter. As well South Carolina Rule of Crim. Proc. Rule 6(a) prescribes rules which purpose is to establish the physical evidence of a controlled substance as stated in its language. The state never provided as part of the rule 5 evidence the required chemist report needed to meet the demands of the statute. A check of the State Law Enforcement Division records indicate that a test had never been performed (See Attachment)

The law is very clear that when there is a statute dealing with a subject in a general manner, and another statute that deals with a part of the same statute in a more minute, and definite way that the special statute will be given effect and considered an exception to or a qualifying statute of the general statute. Wylder v. South Carolina State Highway Department 90 S.E. 2d. 635, 228 S.C. 448

This is in keeping with the rule that separate statutes relating to the same subject matter must be construed together State v. Morgan 574 S.E. 2d 203 (S.C. App. 2002); as well as Law pertaining to the same subject must be harmonized

When the state failed to have the substance analyzed as required by Law in harmony with S.C. statute 44-53-120(5), and S.C. Rule of Crim. Proc. Rule 6 the state failed to qualify the statute in order to constitute a violation of 44-53-375(e), thereby depriving the court of jurisdiction to impose punishment

In cases of similar circumstances, the court has ruled that when the evidence fails to meet the statutory requirement to prove in fact that the subject in question is what was stated; that the courts lacked jurisdiction to impose punishment Williams v. State of South Carolina 306 S.C. 89, 91 410 S.E. 2d 563, 564 (1991); State of South Carolina v. Blackmon, 304 S.C. 270, 273 403 S.E. 2d 660, 662

(1991). In these cases, The Court relied on the plain definitions in determining the facts of the matter in relation to the subject whereas there were no laws to determine the issue.

In the present case, the laws and rules are very clear when reviewing South Carolina Statue 44-53-120(5), State Law Enforcement regulations, and The South Carolina Rules of Crim. Proc. Rule 6(9)

When relying on the legally prescribed method, it is very clear that the state failed to meet the requirements of the legislation in meeting the statutorial demand of proving for a fact that the substance was what it was stated to be.

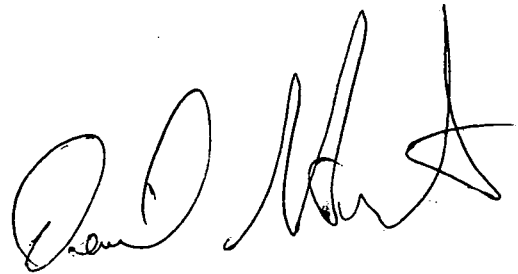
Subject Matter Jurisdiction is an issue that may be raised at any time, Carter v. State of South Carolina S.C. 355, 495 S.E. 2d 773 (1993): and may not be waived even by consent of the parties Anderson v. Anderson, 299 S.C. 110, 115, 382 S.E. 2d 897, 900 (1989).

It is also noted that penal statues must

be construed against the state and in favor of the
defendant William V. State Supra.

CONCLUSION

Based on the argument above, petitioner requests that this court grant the petition and allow full briefing on this issue.



SWORN to and subscribed before me this
17th day of Jan 2015.
Emily [Signature] (L.S.)
Notary Public for South Carolina

My Commission Expires: 4-27-2016

SOUTH CAROLINA LAW ENFORCEMENT DIVISION

NIKKI R. HALEY
Governor



MARK A. KEEL
Chief

December 15, 2014

RECEIVED

JAN 12 2015

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Turbeville, SC 29162

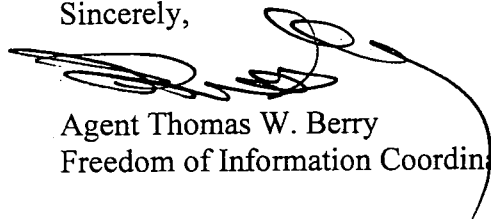
S.C. SUPREME COURT

RE: Freedom of Information Act Request #2014-948

Dear Mr. Stewart:

A thorough search of our database using the information provided in your letter dated December 1, 2014, revealed nothing found under your name for the time period and type of investigation indicated.

Sincerely,



Agent Thomas W. Berry
Freedom of Information Coordinator

TWB/mcp



An Accredited Law Enforcement Agency

P.O. Box 21398 / Columbia, South Carolina 29221-1398 / (803) 737-9000 / Fax (803) 896-7588

WITNESSES

SPTG CO SHERIFF'S OFFICE

T.K. Tillotson

1. SENTENCE MADE

2. REPORT ENTERED

3. CARD PULLED

4. INDEXED

ARREST WARRANT NUMBER

6. CHECKED SIGNATURE

M088094 7. ASSESSMENT FINE CARD MADE

8. TRAFFIC VIOLATION COPY

ACTION OF GRAND JURY

Blindy
Foreperson of Grand Jury
Date: 11/29/09

VERDICT

Foreperson of Petit Jury
Date:

09-GS-42-6024

The State of South Carolina

County of Spartanburg

Trey Gowdy, Solicitor

COURT OF GENERAL SESSIONS

NOV 30 2009

TERM

THE STATE
vs.

DAVID ANTHONY STEWART

Indictment for
TRAFFICKING IN COCAINE

SC Code: 44-53-370

FILED
CLERK OF COURT
SPARTANBURG COUNTY

2009 DEC 10 PM 12:37

MARC KITCHENS

12-10-09