

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Aiken County
Court of Common Pleas
R. Ferrell Cothran, Jr., Circuit Court Judge

2012-CP-02-01421
Appellate Case No. 2014-000283

STEVEN BURTON,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

ALAN WILSON
Attorney General

DANIEL GOURLEY
Assistant Attorney General
Bar No. 100934

Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3737

ATTORNEYS FOR RESPONDENT

RECEIVED

FEB 02 2015

S.C. Supreme Court

INDEX

ISSUE PRESENTED.....	3
STATEMENT OF THE CASE.....	4
STANDARD OF REVIEW	5
ARGUMENT	6
CONCLUSION.....	12

ISSUE PRESENTED

Whether the PCR court erred in holding Petitioner did not establish ineffective assistance of counsel where Petitioner was found with incriminating evidence in a shed in his back yard; where a police investigator discovered the evidence after going to Petitioner's home without a warrant and proceeding directly into the backyard rather than knocking at the front door; and where trial counsel did not successfully argue a pretrial motion to suppress the evidence based on an unconstitutional search and did not renew the objection during trial.

STATEMENT OF THE CASE

Petitioner was indicted at the March 2010 term of the Aiken County Grand Jury for Receiving Stolen Goods (2010-GS-02-0485) and eight counts of Violation of Motor Vehicle Chop Shop Act (2010-GS-02-0539/-0540/-0541/-0542/-0543/-545-/-546-/-547). The Petitioner was represented by Michael Routzong, Esquire. The Petitioner proceeded to a jury trial before the Honorable Doyet A. Early, III, where he was convicted as indicted. On March 18, 2010, Judge Early sentenced Petitioner to ten years imprisonment for Receiving Stolen Goods and a consecutive five years imprisonment for one count of violation of Motor Vehicle Chop Shop Act. Judge Early sentenced Petitioner to five years imprisonment on each of the remaining seven counts of violation of Motor Vehicle Chop Shop Act with each to run concurrently.

A timely Notice of Appeal was filed on Petitioner's behalf and an appeal was perfected by Tristan Shaffer, Esquire. The South Carolina Court of Appeals affirmed the Petitioner's conviction and sentence. State v. Burton, 2012 –UP-138 (Ct. App. filed February 29, 2012). The Remittitur was sent on March 16, 2012.

Petitioner filed an application for post-conviction relief (PCR) on June 11, 2012, alleging that he was being held in custody unlawfully due to ineffective assistance of counsel. Respondent made its Return on October 8, 2012. An evidentiary hearing was convened on July 10, 2013, before the Honorable R. Ferrell Cothran, Jr. By order filed August 3, 2013, Judge Cothran denied and dismissed the application with prejudice. Petitioner filed for Writ of Certiorari on October 15, 2014. This Return follows.

STANDARD OF REVIEW

The proper standard of review of a post-conviction relief evidentiary hearing is whether “‘any evidence’ of probative value” exists to sustain the post-conviction relief court’s findings. Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989).

In a post-conviction relief action, the Petitioner bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where an application alleges ineffective assistance of counsel as a ground for relief, the Petitioner 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, 2064 (1984); Butler, 286 S.C. 441, 334 S.E.2d 813.

The proper measure of performance is whether Petitioner’s attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. 668, 104 S.Ct. 2052, 2064. The Petitioner must overcome this presumption in order to receive relief. Cherry, 300 S.C. 115, 386 S.E.2d 624.

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the Petitioner must prove that counsel's performance was deficient. Under this prong, the court measures an attorney’s performance by its “reasonableness under professional norms.” Cherry, 300 S.C. at 117, 386 S.E.2d at 625, *citing* Strickland. Second, counsel's deficient performance must have prejudiced the Petitioner such that “there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.” Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

ARGUMENT

Probative evidence supports the PCR court's finding that Counsel was not ineffective for failing to research, argue, and articulate an alleged Fourth Amendment violation.

Petitioner argues the post-conviction relief (PCR) court erred in finding Counsel was not ineffective for failing to research, articulate, and argue a Fourth Amendment violation. However, this allegation is meritless as ample evidence supports the PCR court's finding.

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 prejudice the defendant. Strickland, 466 U.S. at 687. Under the second prong of the analysis in Strickland, the PCR applicant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694, 104 S.Ct. 2052. "A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial." Id. In order to prove prejudice, applicant must show that the judge erred in denying his suppression motion. See generally Sikes v. State, 323 S.C. 28, 30, 448 S.E.2d 560, 562 (1994) ("When the defendant claims that counsel's failure to articulate a Fourth Amendment claim was ineffective assistance, [the] defendant must show that such claim is *meritorious* and that the verdict would have been different absent the evidence that should have been excluded." (emphasis added)).

"The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion." State v. Gaster, 349 S.C. 545, 564 S.E.2d 87, 93 (2002)

(citations omitted). “An abuse of discretion occurs when the trial court’s ruling is based on an error of law.” State v. McDonald, 343 S.C. 319, 540 S.E.2d 464, 467 (2000) (quoting Clark v. Cantrell, 339 S.C. 369, 529 S.E.2d 528, 539 [2000]); State v. Moore, 377 S.C. 299, 659 S.E.2d 256, 259 (Ct. App. 2008). On appeal from a motion to suppress evidence based on Fourth Amendment grounds, appellate court review is limited to determining whether any evidence supports the circuit court’s decision. State v. Bowman, 366 S.C. 485, 623 S.E.2d 378, 386 (2005); Moore, 659 S.E.2d at 259 260.

The Fourth Amendment protects against unreasonable searches and seizures. U.S. Const. amend. IV. For Fourth Amendment purposes, “[a] search compromises the individual interest in privacy; a seizure deprives the individual of dominion over his or her person or property.” Horton v. California, 496 U.S. 128, 133 (1990) (citing U.S. v. Jacobsen, 466 U.S. 109 [1984]); see also, Moore, 659 S.E.2d at 260.

Warrantless searches and seizures are *per se* unreasonable absent a recognized exception to the Fourth Amendment warrant requirement. Mincey v. Arizona, 437 U.S. 385, 390 (1978); State v. Abdullah, 357 S.C. 344, 592 S.E.2d 344, 348 (Ct. App. 2004). The seizure of items in plain view is a recognized exception to the warrant requirement. See State v. Dupree, 319 S.C. 454, 462 S.E.2d 279 (1995), *cert. denied*, 516 U.S. 1131(1996).

Petitioner relies on Carmen v. Carroll, 749 F.3d 192 (3rd Cir. 2014), for the proposition that an officer’s bypassing the front door of a home and proceeding directly to the back door exceeded the implied invitation supporting a “knock and talk” investigation.¹ However, the Second Circuit Court of Appeals has held that the officer did not violate the Fourth Amendment “because [the officer] approached a principal entrance to the home using a route that other

¹ Notably, the United States Supreme Court recently reversed the Third Circuit Court of Appeals finding that the issue of whether a police officer may conduct a “knock and talk” at any entrance that is open to visitors rather than only the front door was not beyond debate. Carroll v. Carmen, 135 S.Ct. 348, 190 L.Ed.2d. 311, (2014).

visitors could be expected to take.” United States v. Titemore, 437 F.3d 251 (2d Cir. 2006). In Titemore, a police officer approached a house that had two doors. The first was a traditional door that opened onto a driveway; the second was a sliding glass door that opened onto a small porch. The officer chose to knock on the latter. Id., at 253–254. On appeal, the defendant argued that the officer had unlawfully entered his property without a warrant in violation of the Fourth Amendment. Id., at 255–256. But the Second Circuit rejected that argument. As the court explained, the sliding glass door was “a primary entrance visible to and used by the public.” Id., at 259.

Similarly, the Seventh Circuit Court of Appeals held, in situations “where the back door of a residence is readily accessible to the general public...the Fourth Amendment is not implicated when police officers approach that door in the reasonable belief that it is a principal means of access to the dwelling.” United States v. James, 40 F.3d 850 (1994). In James, police officers approached a duplex with multiple entrances. Bypassing the front door, the officers “used a paved walkway along the side of the duplex leading to the rear side door.” Id. at 862. On appeal, the defendant argued that the officers violated his Fourth Amendment rights when they went to the rear side door. The Seventh Circuit rejected that argument, explaining that the rear side door was “accessible to the general public” and “was commonly used for entering the duplex from the nearby alley.” Id.

Furthermore, under the plain view exception, objects falling within the plain view of a law enforcement officer lawfully in a position to view them are subject to seizure and admissible as evidence. State v. Beckham, 334 S.C. 302, 513 S.E.2d 606 (1999). “[T]he two elements needed to satisfy the plain view exception are: (1) the initial intrusion which afforded the authorities the plain view was lawful and (2) 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), reh’g denied (Mar. 16, 2011).

The South Carolina Supreme Court has also explored the powers of an officer in conducting an investigation and where he may travel in order to investigate a complaint or a report of a crime. See Wright, 391 S.C. at 444, 706 S.E.2d at 328. The Court examined federal law related to the investigatory powers of police: “What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection.” Katz v. U.S., 389 U.S. 347, 351, 88 S.Ct. 507, 511, 19 L.Ed.2d 576 (1967) (citations omitted). “A policeman may lawfully go to a person’s home to interview him. . . . In doing so, he obviously can go up to the door. . . .” U.S. v. Daoust, 916 F.2d 757, 758 (1st Cir.1990) (citations omitted). “A police officer without a warrant is privileged to enter private property to investigate a complaint or a report of an ongoing crime.” 24 C.J.S. Criminal Law 2404 (2006); see also Clark v. City of Montgomery, 497 So.2d 1140, 1142 (Ala. Crim. App. 1986). Wright, 391 S.C. at 444, 706 S.E.2d at 327-328.

In the instant case, Investigator Prince approached Petitioner’s residence and went to the back door because it seemed to be the most used door. (App. p. 10 lines 18-19; p. 16 lines 16-17; p. 88 lines 12-21). Investigator Prince stated that there was no fence surrounding Petitioner’s house. (App. 10 lines 22-23). Investigator Prince stated that he did not receive an answer at the back. As a result, he took the path of least resistance to the fifth wheel camper sitting in the back yard hooked up to electrical and water. (App. p. 10 line 25—p. 11 line 5). As a result, Investigator Prince did not violate Petitioner’s Fourth Amendment rights by entering the property and proceeding to the principal entrance of the trailer.

Furthermore, the incriminating nature of the items seen by Investigator Prince was readily apparent. The motorcycle's VIN number was filed off, which makes its possession very incriminating. Further, Investigator Prince was able to see through an open shed door several items consistent with items missing from the recovered stolen M&W trailer which began the investigation. As a result this prong of the plain view doctrine has clearly been met.

Petitioner's main contention was Investigator Prince had no reason to be on Petitioner's property and had no justification for being where he could see the incriminating evidence. Investigator Prince was lawfully on Petitioner's property at the time the items were seen. Investigator Prince was investigating the possession of stolen goods. He approached the door of the mobile home which appeared to be the most frequently used door. He knocked and did not receive an answer. He subsequently went to the door of the trailer and did not receive an answer. It was in the process of this investigation that he saw the stolen goods later recovered under the search warrant.

Investigator Prince had every right to investigate the crime by going up to the doors of the mobile home and trailer. He was permitted to be on the property to investigate and he could proceed to what appeared to be the most used door in order to attempt to make contact with Petitioner. In doing so, any evidence out in plain view, such as the motorcycle and the tools in the open shed, was subject to seizure and certainly usable by Investigator Prince in preparing a search warrant for the property.

Investigator Prince was properly on Petitioner's property conducting an investigation based on the information he received from Detective Sherman. The items he referenced in the search warrant were in plain view and seen by the officer while he was conducting his investigation. The incriminating nature of the items, filed off VIN numbers and tools matching

those stolen from M&W, was readily apparent and Investigator Prince was where he lawfully had a right to be in order to conduct his investigation into the complaint. As a result, the items were in plain view and were subject to seizure or use as grounds for probable cause to obtain a warrant for the entire property to search for stolen goods. Accordingly the trial court did not err in admitting the evidence obtained as a result of the execution of a validly obtained search warrant.

Based on the foregoing, even if Counsel had renewed his motion in order to properly preserve the Fourth Amendment issue, Petitioner has not shown there is a reasonable probability that the outcome of the trial would have been different because his Fourth Amendment claim fails on the merits. Therefore, this Court should find Petitioner has failed to establish the requisite prejudice to support his claim of ineffective assistance of Counsel.

[Signature block on following page]

CONCLUSION

For the foregoing reasons, the State submits that the Petition should be denied. Should this Court grant the Petition for Writ of Certiorari, Respondent requests permission to more fully brief the issues herein.

Respectfully submitted,

ALAN WILSON
Attorney General

DANIEL GOURLEY
Assistant Attorney General
Bar No. 100934

By: 

ATTORNEYS FOR RESPONDENT

Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3737

February 2, 2015

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Aiken County
Court of Common Pleas
The Honorable R. Ferrell Cothran, Jr., Circuit Court Judge

STEVEN BURTON,

PETITIONER,

v.

THE STATE OF SOUTH CAROLINA,

RESPONDENT.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the **Return to Petition for Writ of Certiorari**, has been served upon opposing counsel by mailing two (2) copies in the United States mail, postage prepaid:

**Benjamin J. Tripp, Esquire
SC Commission of Indigent Defense
Post Office Box 11589
Columbia, SC 29201**

This 2nd day of February, 2015



CAROLINE COLLINS
LEGAL ASSISTANT



S.C. Supreme Court

FEB 02 2015

RECEIVED

ALAN WILSON
ATTORNEY GENERAL

February 2, 2015

The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

RE: Steven Burton v. State of South Carolina
Lower Court Case No.: 2012-CP-02-01421
Appellate Case No.: 2014-00283

Dear Mr. Shearouse:

Enclosed for filing are the original and six (6) copies of the Return to Petition for Writ of Certiorari in the above-referenced case. By copy of this letter we are serving opposing counsel today.

Sincerely,

Daniel Gourley
Assistant Attorney General
SC Bar No. 100934

DG/cc
Enclosures

cc: Appellate Defender Benjamin J. Tripp (2 copies)