ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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APR 15 2015
S.C. Supreme Court

Certiorari to Richland County

L. Casey Manning, Circuit Court Judge

DELEORN THOMPSON,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT,

APPELLATE CASE NO. 2014-001946

PETITION FOR WRIT OF CERTIORARI

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INDEX

ISSUE PRESENTED

Whether Petitioner's Sixth Amendment rights were violated when plea counsel failed to conduct a reasonable, independent investigation into the State's assertion that the plain view exception to the warrant requirement justified law enforcement's intrusion onto the curtilage of Petitioner's home to inspect a vehicle located there and for failing to investigate whether Petitioner's signed statement could be suppressed as the poisonous fruit of the warrantless intrusion onto Petitioner's property?

STATEMENT

On March 23, 2012, Raul Cruz-Vegas, his girlfriend, and their daughter met with an individual they believed wanted to purchase Cruz's truck. App. 9, ll. 15 – App. 10, 7. Once all four people were in the truck, the purported purchaser revealed what appeared to be a handgun and demanded the keys. *Id.* The individual then fled in the truck. *Id.*

Law enforcement obtained the phone number the purchaser used to contact Cruz about the truck. App. 10, ll. 8-22. The number belonged to Petitioner. *Id.* Police went to the registered address for Petitioner's home in a rural part of Richland County. *Id.* For unknown reasons, the arrest warrants issued after Petitioner made his statement, listed Petitioner's old address. App. 76 – App. 79. Petitioner had recently moved two months before his arrest and actually lived at a new residence down the road from his former address. App. 35, ll. 4-25. Unlike the old residence, Petitioner's new residence was a significant distance from a public road and the view from the road is heavily obscured by trees. *Id.*

At some point during their effort to make contact with Petitioner, police claimed to have seen, while on a public road, what appeared to be Cruz's truck in Petitioner's large, heavily wooded yard. *Id.* The police entered Petitioner's yard and examined the truck's VIN number, confirming that it was the stolen truck. *Id.* After his arrest, Petitioner signed a written statement implicating himself in the car theft. *Id.* Cruz also identified Petitioner in a photographic lineup. *Id.*

Indictments and Motion to Relieve Counsel

On August 15, 2012, Petitioner was indicted by the Charleston County Grand Jury on three counts of armed robbery from the single car theft.[1] App. 70 – App. 75. Courtney Gibbes was appointed to represent Petitioner.

Prior to consenting to plead guilty, Petitioner sought to relieve Gibbes. App. 32, ll. 5-23. Petitioner recalled at the PCR hearing that he requested a new attorney because he did not believe Gibbes had investigated his case and because she had not given him copies of discovery in a timely manner. *Id.* Petitioner only withdrew his motion to relieve Gibbes when Judge Hood informed him that another attorney would not be appointed if Gibbes was relieved as counsel and that Petitioner would have to represent himself at trial. App. 33, ll. 2-13.

Guilty Plea Hearing

On May 9, 2013, a plea hearing was held before the Honorable Robert E. Hood. App. 1. The State was represented by Assistant Solicitor Kathryn Ashton. As a result of a negotiated plea deal, Petitioner pled guilty to one count of armed robbery in exchange for the State recommending a ten year sentence. App. 3, ll. 4-12.

Judge Hood accepted the guilty plea after hearing the State's recitation of the alleged facts. App. 11, ll. 13-18. Arguing in favor of the State's recommendation, Gribbes highlighted Petitioner's cooperation, remorse, and minimal prior contact with the criminal justice system. App. 11, ll. 19 – App. 12, ll. 20.

[1] From the transcript of the plea hearing, the indictments, the arrest warrants, and the testimony taken at the PCR hearing; it appears that the three armed robbery charges all stem from the car theft and that nothing else was taken from Cruz, his girlfriend or their daughter during the incident. App. 70 – App. 82.

Pursuant to the negotiated guilty plea, Judge Hood sentenced Petitioner ten years imprisonment followed by two years of mandatory community supervision. App. 5, ll. 22 – App. 6, ll. 7; App. 8, ll. 22 – App. 9, ll. 7.

PCR Application and Evidentiary Hearing

On August 19, 2013, Petitioner filed a post-conviction relief application (PCR) alleging that his guilty plea was unknowingly and involuntarily entered into due to the ineffective assistance of counsel. App. 15 – App. 19. On February 26, 2014, the State filed a Return. App. 20 – App. 24.

On July 14, 2014, an evidentiary hearing was held before the Honorable L. Casey Manning. App. 25 – App. 61. Petitioner was represented by Anna Good and the State was represented by Assistant Attorney General J. Croom Hunter. Both Petitioner and Gibbes testified at the hearing.

Testimony of Petitioner

Petitioner testified that he agreed to pled guilty after he was informed by Judge Hood that he would have to proceed *pro se* if Gibbes was relieved. App. 37, ll. 15-25. Petitioner stated that Gibbes did not conduct an independent investigation into the warrantless entry onto his residence or into law enforcement's identification of the truck in Petitioner's yard. App. 35, ll. 4-15. Petitioner also testified that Gibbes failed to investigate whether the Petitioner's alleged signed statement was freely and voluntarily made. App. 30, ll. 1-18.

Petitioner stated that he wanted to stand trial because he thought he had a "valid defense." App. 37, ll. 11-14. However, he stated that Gibbes' was unwilling to challenge the State's claim that the stolen truck was in plain view and that she did not independently investigate possible defenses. App. 36, ll. 3-25. Petitioner stated that Gibbes constantly warned that he would be sentenced to ninety years if he was found guilty at trial; and that these admonitions along with her

refusal to investigate his case coerced him into accepting the negotiated guilty plea. App. 37, ll. 4 – App. 38, ll. 7.

Testimony of Courtney Gibbes

Gibbes testified that "I don't remember discussing the search and seizure issues that much because it's my recollection the truck was in plain view in the front yard." App. 49, ll. 22-25. She claimed that she went over the likelihood of suppressing the signed statement with Petitioner. App. 50, ll. 4 – App. 51, ll. 16. Gibbes recalled that Petitioner was "going back and forth about whether or not he wanted to plead guilty [or go to trial]. . . . I wanted him to understand that if he wanted to present defenses and things like that, it would be at trial and he would be facing three armed robberies at 10 to 30 years each." *Id.*

Gibbes averred Petitioner's driver's license was visible in the cab and that the police "already knew it was the stolen truck once they got [on Petitioner's residence]". App. 51, ll. 22 – App. 52, ll. 1. In actuality, the State claimed that they identified the truck through its VIN number. App. 10, ll. 8-15. Likewise, Gibbes appeared totally unmindful that the arrest warrants for Petitioner listed the wrong address. She believed that Petitioner's goal in moving to relieve her was to delay the resolution of his case. App. 55. ll. 14 – App. 56, ll. 3. She also recalled that Petitioner did not understand why his case was proceeding towards trial so quickly and wanted more time to decide whether to proceed to trial. *Id.*

When asked on cross-examination how she knew the car was parked in the front yard, Gibbes replied "I don't remember if it was from the preliminary hearing notes or discussing it with the solicitor, that was just always my understanding that it was parked in the front yard." App. 53, ll. 10-13. Gibbes also admitted on cross-examination that she never visited the crime scene or Petitioner's residence. App. 54, ll. 3-6. She also reaffirmed that she told Petitioner that if he went to

trial, he was unlikely to receive the minimum sentence and that he should expect to be sentenced up to ninety years. App. 56, ll. 7-13.

Order of Dismissal

The PCR court denied Petitioner's application in an Order of Dismissal filed on August 13, 2014. App. 62 – App. 69. The court summarily held that Petitioner had voluntarily, intelligently, and knowingly pled guilty and that Petitioner failed to show any deficiency in plea counsel's representation. App. 67. Finally, without elaboration, the court concluded that counsel's belief that there was no good basis for suppressing the search of the truck or the signed statement was reasonable. App. 66.

ARGUMENT

Petitioner's Sixth Amendment rights were violated when plea counsel failed to conduct a reasonable, independent investigation into the State's assertion that the plain view exception to the warrant requirement justified law enforcement's intrusion onto the curtilage of Petitioner's home to inspect a vehicle located there and for failing to investigate whether Petitioner's signed statement could be suppressed as the poisonous fruit of the warrantless intrusion onto Petitioner's property.

Discussion

Petitioner did not freely and intelligently plead guilty because plea counsel failed to conduct a reasonable, independent investigation into whether law enforcement's warrantless intrusion into the curtilage of Petitioner's home to allegedly inspect a vehicle was justified under the pain view doctrine. Plea counsel was also ineffective for failing to investigate whether Petitioner's signed statement, made after the warrantless entry onto his property and his arrest, could be suppressed as the poisonous fruit of the warrantless entry. App. 64 – App. 68. Absent plea counsel's failure to investigate Petitioner's case, Petitioner would have insisted on going to trial. App. 37, ll. 4-25; *see Hill v. Lockhart*, 474 U.S. 52 (1985) (applying the *Strickland v. Washington*, 466 U.S. 668 (1984) ineffective assistance of counsel standard to guilty plea challenges).

A criminal defendant is guaranteed the right to effective assistance of counsel under the Sixth Amendment to the United States Constitution. U.S. Const. amend. VI; Strickland, 466 U.S. at 686. "Where allegations of ineffective assistance of counsel are made, the question becomes, 'whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.' " *Butler v. State*, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (quoting *Strickland*, 466 U.S. at 686). As such, courts evaluate allegations of ineffective assistance of counsel using a two-pronged test. *Cherry v. State*, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989) (citing *Strickland*, 466 U.S. at 668).

First, the applicant must demonstrate counsel's representation was deficient, which is measured by an objective standard of reasonableness. *Strickland*, 466 U.S. at 687–88. "Under this prong, '[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms.'" *Cherry*, 300 S.C. at 117, 386 S.E.2d at 625 (quoting *Strickland*, 466 U.S. at 688). Second, the applicant must demonstrate he was prejudiced by counsel's performance in such a manner that, but for counsel's error, there is a reasonable probability the result of the proceedings would have been different. *Strickland*, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id.

The United States Supreme Court has held that "[g]uilty pleas are no more foolproof than full trials to the court or jury. . . . Accordingly, we take great precautions against unsound results." *Brady v. United States*, 397 U.S. 742, 758, 90 S.Ct. 1463, 1474 (1970). An "unsound result" occurs when a defendant does not knowingly, voluntarily, or intelligently plead guilty. *See Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709 (1969) (finding a guilty plea is voluntarily and knowingly entered into when the accused has a full understanding of the consequences of his plea and the charges against him); *see also Pittman v. State*, 337 S.C. 597, 524 S.E.2d 623 (1999) (finding a defendant must understand the sentencing consequences of his plea for it to be considered voluntarily given).

In a PCR proceeding, the applicant bears the burden of establishing that he or she is entitled to relief. *See Caprood v. State,* 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000). "In the context of a guilty plea, the court must determine whether 1) counsel's advice was within the range of competence demanded of attorneys in criminal cases, and 2) if there is a reasonable probability that, but for counsel's errors, the defendant would not have pled guilty." *Smith v. State,* 369 S.C. 135, 138, 631 S.E.2d 260, 261 (2006) (citing *Hill v. Lockhart,* 474 U.S. at 56–58). On review, a PCR

judge's findings will be upheld if there is evidence of probative value sufficient to support them. *Cherry v. State*, 300 S.C. 115, 386 S.E.2d 624 (1989).

"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). A criminal defense attorney has the duty to conduct a reasonable investigation to discover all reasonably available mitigation evidence and all reasonably available evidence tending to rebut any aggravating evidence introduced by the State. *Nance v. Ozmint,* 367 S.C. 547, 557 n. 8, 626 S.E.2d 878, 883 n. 8 (2006) (quoting *Wiggins,* 539 U.S. at 524-25, 123 S.Ct. 2527). At a minimum, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Walker v. State*, 407 S.C. 400, 406, 756 S.E.2d 144, 147 (2014) (*citing Strickland*, 466 U.S. at 691, 104 S.Ct. at 2052).

Deficient Performance

In this case, Petitioner did not freely and intelligently plead guilty because plea counsel failed to conduct a reasonable investigation into whether the plain view exception[2] to the warrant requirement justified law enforcement's warrantless entry into the curtilage of Petitioner's home to inspect a car located there. App. 64 – App. 68; *See Hill*, 474 U.S. at 52.

Moreover, plea counsel's deficient performance in failing to investigate the State's assertion of the plain view exception precluded determining whether Petitioner's signed statement was the "poisonous fruit" of law enforcement's warrantless entry onto Petitioner's property. *Wong Sun v. United States*, 371 U.S. 471 (1963) (evidence must be excluded if it would not have come to light but for the illegal actions of the police and the evidence has been obtained by the exploitation of that illegal); *see also State v. Tindall*, 388 S.C. 518, 524, 698 S.E.2d 203, 206 (2010) (drugs discovered during consent search should have been suppressed because the initial seizure of defendant was unlawful).

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[2] The United States Supreme Court has held that "searches [and seizures] conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment-subject only to a few specifically established and well-delineated exceptions." *Katz v. United States*, 389 U.S. 347, 357 (1967); *see also State v. Weaver*, 361 S.C. 73, 80–81, 602 S.E.2d 786, 790 (Ct. App. 2004).

As an exception to the warrant requirement, the plain view doctrine permits law enforcement to remove objects which can be identified and seen without a search. *State v. Thomas,* 248 S.C. 573, 151 S.E.2d 855 (1966) (a seizure of what is in plain view, without a search, is not prohibited by the search and seizure provisions of the South Carolina or United States Constitutions).

To assert the plain view doctrine the State must satisfy two requirements: (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) (*citing Horton v. California*, 496 U.S. 128, 110 (1990). The State carries the burden of proving that evidence seized was, in fact, in plain view, or risk its admissibility. *State v. Brown*, 289 S.C. 581, 347 S.E.2d 882 (1986) (suppression is required when the state puts forth no competent evidence that items seized were in plain view).

Petitioner enjoyed a reasonable expectation of privacy in the curtilage surrounding his residence as his yard was heavily wooded; preventing inspection from the public roadway. App. 35, ll. 4-25; *State v. Flowers*, 360 S.C. 1, 5, 598 S.E.2d 725, 728 (2004) (homeowner has a reasonable expectation of privacy in his home). Furthermore, the residence is located a substantial distance from the road. App. 35, ll. 4-25; *see Florida v. Jardines*, 569 U.S.--, 133 S.Ct. 1409, 1414-1415 (2013) (area immediately surrounding the home is subject to the same Fourth Amendment protections as the interior of the home itself); *cf. Katz v. United States*, 389 U.S. 347, 352 (1984) (what a person knowingly exposes to the public is not protected by the Fourth Amendment).

At the evidentiary hearing, plea counsel admitted that she did not conduct an independent investigation into whether the plain view exception claimed by the State was valid. *See Cobbs v. State*, 305 S.C. 299, 408 S.E.2d 223 (1991) (failure to investigate possible defenses constitutes ineffective assistance of counsel). Plea counsel claimed that upon reviewing the discovery materials provided by the State and speaking with the prosecuting solicitor, she did not believe there was a basis to challenge either the statement or the search of the truck. App. 53, ll. 10-13. Plea counsel recalled that she believed at the time of the plea hearing that law enforcement had seen Petitioner's ID in the cab of the truck. App. 51, ll. 22 – App. 52, ll. 1. In reality, law enforcement claimed they used the VIN number to confirm the truck's ownership. App. 10, ll. 8-15.

Plea counsel was also deficient for failing to investigate whether law enforcement could have actually observed the truck from a public vantage point with sufficient clarity that it would have immediately apparent that the truck was the vehicle they were looking for. App. 35, ll. 4-25; *Wright*, 391 S.C. at 444-446, 706 S.E.2d at 328-329 (police officer's observation from a public road of spotlights and a large number of vehicles in conjunction with anonymous tip that dogfighting was occurring on the residence was sufficient to develop exigent circumstances justifying intrusion).

Petitioner testified that he discussed with plea counsel how the yard was heavily wooded and that the arrest warrants issued listed the wrong address. App. 35, ll. 11-15. Consequently, plea counsel should have visited Petitioner's residence to assess whether the truck could actually be seen from a legal vantage point, especially as the incriminating nature of the truck would not be immediately apparent since law enforcement was unaware that Petitioner had moved. *Id.*; *Minnesota v. Dickerson*, 508 U.S. 366, 375 (1993) (plain view doctrine did not allow police officer to continue to manipulate a lump found in suspect's pocket during *Terry*[3] search; police may not conduct a further search if the object's incriminating character is not immediately apparent) *cf. State v. Robinson*, 407 S.C. 169, 186, 754 S.E.2d 862, 871 (2014) (incriminating nature of a handgun with serial number removed was immediately apparent).

Thus, plea counsel had a duty investigate whether the initial intrusion by law enforcement on to Petitioner's property was lawful and what impact the warrantless entry had upon Petitioner's signed statement. *State v. Cannon*, 248 S.C. 506, 512, 151 S.E.2d 752, 755 (1966) (statement by accused should be suppressed if it was induced by articles taken as a result of an invalid search) *overruled on other grounds by State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991).

[3] *Terry v. Ohio*, 392 U.S. 1 (1968).

Petitioner testified that he decided to plead guilty because of plea counsel's refusal to conduct an independent investigation into the circumstances of law enforcement's warrantless entry on to his property.[4] App. 36, ll. 12 – App. 38, ll. 7. Therefore, plea counsel's unreasonable objectively unreasonable decision to not conduct an independent investigation of Petitioner's case constituted deficient performance and resulted in Petitioner entering into an unknowing and involuntary guilty plea. App.64 – App. 68; *See Hill*, 474 U.S. at 57-59.

Prejudice

Petitioner was prejudiced by plea counsel's deficient performance because Petitioner was prevented from accurately comparing the risks of standing trial with the consequences of entering a guilty plea. App. 66 – App. 68; *see Boykin*, 395 U.S. 238. Plea counsel's advice exclusively relied on assurances by the State that the plain view exception sanctioned police conduct. App. 53, ll. 10-13. Plea counsel also repeatedly exhorted Petitioner that he could receive a ninety year prison sentence if he was convicted at trial, despite the State's significant over-indictment of Petitioner for the single car theft making consecutive sentences unlikely. App. 37, ll. 4 – App. 38, ll. 7; App. 70 – App. 75.

In contrast, Petitioner believed that he had a reasonable basis for seeking to suppress the State's evidence against him and wanted to stand trial. App. 37, ll. 4 – App. 38, ll. 7. Counsel's deficient performance presented Petitioner with a *fait accompli.* With his trial date rapidly approaching, Petitioner had to either accept the negotiated plea offer or stand trial facing up to ninety years in prison represented by an attorney who had refused to conduct an independent

[4] Petitioner's decision to plead guilty did not relieve plea counsel of her duty to conduct a reasonable and independent investigation into possible defenses. *See Praylow v. Martin*, 761 F.2d 179 (4th Cr. 1985).

investigation and unquestioningly believed the State's evidence. *Ard v. Catoe*, 372 S.C. 318, 642 S.E.2d 590 (2007) (counsel ineffective for failing to investigate and challenge State's evidence).

Accordingly, the PCR court erred in finding Petitioner knowingly, voluntarily, and intelligently pled guilty when "there is a reasonable probability that, but for counsel's errors, [Petitioner] would not have pled guilty and would have insisted on going to trial." App. 63 – App. 69; *Hill*, 474 U.S. at 57-59.

CONCLUSION

Based on the foregoing reason, Petitioner Eugene DeLeorn Thompson respectfully requests that his petition for writ of certiorari be granted to allow a full briefing on the issues.

Respectfully submitted,

By: JHS

John H. Strom
Appellate Defender

ATTORNEY FOR PETITIONER

This 15th day of April, 2015.

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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 Clay Mitchell, Esquire, Office of the Attorney General, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Mr. Deleorn Thompson, #275974, Manning Correctional Institution, 502 Beckman Drive, Columbia, SC 29203, this 15th day of April, 2015.

By: _____

John H. Strom
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 15th day
of April, 2015.

_____(L.S.)
Notary Public for South Carolina
My Commission Expires: July 3, 2023.