ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Greenville County

D. Garrison Hill, Circuit Court Judge

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SC SUPREME COURT

Opinion No. 2015-UP-474 (S.C. Ct. App. filed Oct. 7, 2015)

10-CP-23-06408

EDWARD ANDRELL WHITNER,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

Appellate Case No. 2016-000091

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

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CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies that the petition for rehearing was made and finally ruled on by the Court of Appeals on December 18, 2015. Second Supp. App. 18.

QUESTION PRESENTED

Did trial counsel provide ineffective assistance where his mistake of law concerning Petitioner's standing to challenge an invalid search warrant resulted in trial counsel failing to move to suppress illegally seized drug evidence?

STATEMENT OF THE CASE

During its January 2004 term, a Greenville County Grand Jury indicted Petitioner for possession with intent to distribute marijuana within close proximity of a school (2004-GS-23-0081), possession of crack cocaine with intent to distribute within close proximity of a school (2004-GS-23-0082), possession with intent to distribute marijuana (2004-GS-23-0083), and trafficking crack cocaine (2004-GS-23-0084). App. 342-343; App. 345-346; App. 348-349; App. 351-352. The prosecution, represented by John D. Newkirk, called Petitioner to trial on March 8, 2006 before the Honorable C. Victor Pyle, Jr., and a jury. Christopher D. Scalzo represented Petitioner. App. 1. The jury found Petitioner guilty of all charges. App. 241, lines 8-22. Judge Pyle sentenced Petitioner to twenty-five years' imprisonment and a fine of $50,000 on the trafficking charge. He sentenced Petitioner to ten years' imprisonment on each of the other charges, and ordered all sentences to be served concurrently. App. 245, lines 16-23; App. 337; App. 340; App. 343; App. 346.

Petitioner filed a timely notice of appeal, which was perfected by Eleanor Duffy Cleary, formerly an attorney at the Office of Appellate Defense. App. 247-262. The Court of Appeals affirmed Petitioner's convictions. App. 275-281. Subsequently, Kathrine H. Hudgins filed a petition for writ of certiorari on Petitioner's behalf. App. 282-293. On November 4, 2009, this Court denied the petition for writ. App. 294-295.

On August 5, 2010, Petitioner filed an application for post-conviction relief (PCR). App. 296-302. The matter proceeded to an evidentiary hearing on February 29, 2012 before the Honorable D. Garrison Hill. Matthew P. Head represented Petitioner, and Karen C. Ratigan represented the state. App. 308. By an order filed June 25, 2012, Judge Hill denied Petitioner relief from his convictions and sentences. App. 334-340.

Petitioner filed a timely notice of appeal. On March 5, 2013, Petitioner filed a petition for writ of certiorari in this Court. On May 20, 2013, Respondent filed its return. On July 29, 2013, this Court transferred the petition to the Court of Appeals pursuant to Rule 243(l), SCACR. On June 17, 2014, the Court of Appeals granted the petition for writ of certiorari. Briefing followed, and on May 4, 2015, the Court of Appeals heard oral arguments. On October 7, 2015, a three-judge panel of the Court of Appeals, consisting of the Honorable Paul E. Short, Jr., the Honorable James E. Lockemy, and the Honorable Stephanie P. McDonald, issued affirmed the PCR court's decision in an unpublished opinion. Whitner v. State, 2015-UP-474 (S.C. Ct. App. filed Oct. 7, 2015); Second Supp. App. 1-2. On October 22, 2015, Petitioner filed a petition for rehearing. Second Supp. App. 3-17. On December 18, 2015, the Court of Appeals denied rehearing. Second Supp. App. 18.

This petition for writ of certiorari follows.

ARGUMENT

Trial counsel provided ineffective assistance where his mistake of law concerning Petitioner's standing to challenge an invalid search warrant resulted in trial counsel failing to move to suppress illegally seized drug evidence.

Relevant facts

Evidence presented at trial

On August 2, 2003, Torrence White, an employee of the Greenville County Sheriff's Office, obtained a search warrant for a residence in Greenville County.[1] White described the residence as "the second house ... on the corner of Mack and Walcott, if you came from Walcott Street." App. 24, line 21 – App. 25, line 22; see also Supp. App. 11. After a briefing, White and other deputies executed the search warrant on the residence. App. 26, lines 5-9. White found Teresa Smiley standing in the doorway of the back bedroom in the hallway. He detained her and moved her to the front room of the residence where two other individuals - Aaron Garrison and Petitioner - were located. App. 26, line 19 – App. 27, line 4. White claimed that Smiley informed him that the residence belonged to her and Petitioner. He further claimed that Petitioner admitted to living there. App. 27, lines 7-13; App. 31, lines 10-19. During the search, officers found drugs in the home. App. 27, line 21 – App. 28, line 1; App. 29, lines 2-5; App. 49, line 12 – App. 50, line 20; App. 61, line 22 – App. 62, line 8. Officers found a handgun under a mattress in a bedroom as well. App. 67, lines 5-9.

Anticipating Petitioner's defense would be that he did not reside at the location were the drugs and handgun were found, the prosecution introduced Petitioner's booking report showing his

[1] Trial counsel did not challenge the search warrant or move to suppress the evidence obtained in the execution of the search warrant.

address as the same as the address for the location searched. App. 92, line 14 – App. 93, line 16. The prosecution also introduced Petitioner's bond form showing his address as the same as the address for the location searched. App. 97, line 10 – App. 98, line 6.

Teresa Smiley, Petitioner's co-defendant, testified on behalf of the state. She claimed that she and Petitioner were romantically involved and that Petitioner and she lived together at the residence in question. According to Smiley, at the time of the execution of the search warrant, Petitioner had lived there approximately one year. App. 117, line 9 – App. 118, line 6. Smiley testified Petitioner had a key, slept in the bedroom, and had control over the house. App. 118, lines 5-14.

Petitioner countered Smiley's testimony in multiple ways, including his own testimony. Petitioner denied ever living at the residence searched. App. 179, lines 6-7; App. 181, lines 13-14. However, Petitioner admitted to spending a lot of time at the residence because it was a "local hangout." App. 181, lines 17-22. In fact, Petitioner testified, "Every day, I'm out there." App. 190, line 15. On the night the police searched the house, Petitioner was present as a guest. App. 182, lines 2-15. Lakeisha Gordon, the mother of Petitioner's child, recalled that Smiley had a romantic relationship with Petitioner's older brother. App. 173, lines 14-23. Aaron Garrison, who was present when the police arrived, explained that a party took place earlier in the evening at the residence. Petitioner was present for the party at least as early as 6:00 p.m. or 7:00 p.m. App. 147, line 22 – App. 148, line 12. Garrison did not stay at the house during the party, but he returned at 1:00 a.m. or 1:30 a.m. to assist in cleaning up. App. 148, lines 17-22. Petitioner was still present even though the party had ended. App. 151, lines 3-8. Although Garrison claimed Petitioner did not live at the residence searched, he was impeached with a letter written on his behalf to law

enforcement in which he referred to the home as belonging to Petitioner and Smiley. App. 151, line 22; App. 154, lines 16-22.

Evidence presented at the PCR hearing

Petitioner testified that while he was in prison,[2] he learned the search warrant used by the police to search the house where the drugs were found had been based upon a statement by Donald Hollingsworth. Petitioner was unaware of the basis for the search warrant and had not discussed this aspect of the case with trial counsel prior to trial. App. 312, line 22 – App. 313, lines 17. As testified to by Petitioner and borne out by the record, trial counsel failed to question the validity of the underlying warrant. Petitioner indicated that Hollingsworth stated he bought drugs from a house on the corner of Old Paris Mountain Road and Attu Street.[3] The address for the residence of the house searched was **not** on the corner of Old Paris Mountain Road and Attu Street. App. 314, lines 5-11.[4] The undated statement by Hollingsworth used to support the search warrant clearly indicated Hollingsworth bought a crack rock for $13 on some unknown date from a house at the corner of Old Paris Mountain Road and Attu Street. App. 302; Supp. App. 13.

Trial counsel testified that he reviewed the search warrant in the case and was aware of Hollingsworth's statement. App. 319, line 23 – App. 320, line 3. According to trial counsel, the defense theory of the case was Petitioner did not live at the location searched. As a result, the

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[2] Trial counsel acknowledged that Petitioner filed a complaint with the Commission on Lawyer Conduct alleging trial counsel had not responded to Petitioner's requests for his discovery. App. 319, lines 11-19.

[3] In the handwritten statement, Hollingsworth told "T. White and C.J. Todd" that he purchased crack cocaine from "the house at the corner of Old Paris Mtn. Rd. and Attu St." Supp. App. 13.

[4] The search warrant described the premises to be searched as "202 Mack St" and further provided that it was "the 2nd residence on the left on Mack St. from Walcott St." Supp. App. 11; see also Supp. App. 12.

discussions between Petitioner and trial counsel centered on proving Petitioner did not reside at that location. When asked specifically if he discussed attacking the validity of the search warrant, trial counsel responded "I don't have a specific recollection of whether nor not we talked about that. But I can't imagine we didn't. It was the basis of our defense."[5] He elaborated "For us to come into court and make a motion to say the - - challenge the validity of the warrant, we would have been talking out of two sides of our mouth and we would have had a standing issue from a legal standpoint." App. 320, line 20 – App. 321, line 5. According to trial counsel, he had to decide whether to challenge the warrant and "concede that he lived there, or challenge the fact that he lived there." App. 321, lines 6-10. In trial counsel's opinion, challenging Petitioner's residency at the Mack Street house and challenging the validity of the warrant based upon its identification of the property were "mutually exclusive." App. 321, lines 11-15.

Order Denying Relief

The order explained that Petitioner's claim for relief concerned trial counsel's failure to "challenge[] the validity of the search warrant." App. 336-337. The order further explained that trial counsel "testified he had reviewed the search warrant and that the central issue in this case was that the address in the warrant was not [Petitioner]'s residence." App. 337. According to the order, trial counsel was aware of Hollingsworth and his statement but had no independent recollection of Hollingsworth's involvement in the case. App. 337. The PCR judge found Petitioner's testimony not credible, but found counsel's testimony credible even when the testimony was not conflicting. App. 337. The PCR judge found Petitioner failed to meet his burden of proving trial counsel did not challenge the search warrant properly. The judge credited trial counsel's testimony that the defense

[5] Trial counsel testified that he may not have read the search warrant verbatim to Petitioner, and would have reviewed it just simply flipping the pages. App. 329, lines 10-16.

theory was that Petitioner did not live at the residence searched. The court found that Petitioner "failed to produce any evidence to corroborate his argument that investigation [of] this aspect of the case would have resulted in a different outcome at trial." App. 337-338.

Court of Appeals' Decision

After citing several cases expressing a PCR applicant's burden of proof in order to receive relief, the South Carolina Court of Appeals cited Kimmelman v. Morrison, 477 U.S. 365, 375 (1986) for the proposition that "'[w]here defense counsel's failure to litigate a Fourth Amendment claim competently is the principal allegation of ineffectiveness, the defendant must also prove that his Fourth Amendment claim is meritorious and that there is a reasonable probability that the verdict would have been different absent the excludable evidence in order to demonstrate actual prejudice.'" Second Supp. App. 2. Additionally, the Court cited Underwood v. State, 309 S.C. 560, 562, 405 S.E.2d 20, 22 (1992) for the proposition that "where trial counsel articulates a valid reason for employing a certain trial strategy, such conduct will not be deemed ineffective assistance." Second Supp. App. 2. Thus, it appeared the Court held Petitioner had not shown his Fourth Amendment claim was meritorious and/or that trial counsel articulated a valid reason for employing a certain trial strategy.

Discussion

To prove ineffective assistance of counsel, Petitioner must establish that counsel's performance was unreasonable under prevailing professional norms, and that counsel's deficient performance prejudiced his defense. Strickland v. Washington, 466 U.S. 668 (1984). A two pronged test is used in evaluating allegations of ineffective assistance of counsel. Petitioner must prove that counsel's performance was deficient and fell below reasonable professional norms; and there is a reasonable probability that, but for counsel's unprofessional errors, the result would have

been different. Cherry v. State, 300 S.C. 115, 117-118, 386 S.E.2d 624, 625 (1989). "Where defense counsel's failure to litigate a Fourth Amendment claim competently is the principal allegation of ineffectiveness, the defendant must also prove that his Fourth Amendment claim is meritorious and that there is a reasonable probability that the verdict would have been different absent the excludable evidence in order to demonstrate actual prejudice." Kimmelman v. Morrison, 477 U.S. 365, 375 (1986). Thus, analysis of Petitioner's claim that counsel provided ineffective assistance must begin with an understanding of his rights to be free from unreasonable searches and seizures contained within the federal and state constitutions.

Reasonable Expectation of Privacy

The Fourth Amendment guarantees individuals the right to be free from unreasonable searches and seizures. U.S. Const. amend. IV. South Carolina's Constitution guards against unreasonable searches and seizures as well as unreasonable invasions of privacy. S.C. Const. art. I, § 10. "[T]he Fourth Amendment protects people, not places." Katz v. United States, 389 U.S. 347, 351, (1967). Protection under the Fourth Amendment is afforded to those who have a legitimate expectation of privacy in the place searched. Rakas v. Illinois, 439 U.S. 128, 143 (1978). To demonstrate an expectation of privacy, the defendant must show he had a subjective expectation of not being discovered and the expectation was one that society recognized as reasonable. Oliver v. United States, 466 U.S. 170, 177 (1984).

The essence of the Fourth Amendment is to protect a person's right to be free from unreasonable government intrusions in his own home. Kyllo v. United States, 533 U.S. 27, 31 (2001). The Fourth Amendment is a personal right and an individual must invoke its protections. Minnesota v. Carter, 525 U.S. 83, 88 (1998).

> [I]n order to claim the protection of the Fourth amendment, a defendant must demonstrate that he personally has an expectation of privacy in the place searched, and that his expectation is reasonable; i.e., one that has 'a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society.'

Id. (quoting Rakas, 439 U.S. at 143-144, and n.12). The contours of the Fourth Amendment's protections depend upon "whether the person who claims the protection of the Amendment has a legitimate expectation of privacy in the invaded place." Katz, 389 U.S. at 351; Rakas, 439 U.S. at 143. A subjective expectation of privacy is legitimate if it is "one that society is prepared to recognize as reasonable." Rakas, 439 U.S. at 143-144.

In Minnesota v. Olson, 495 U.S. 91, 94 (1990), the United States Supreme Court held that an overnight guest had a reasonable expectation of privacy in another's home. Olson's status as an overnight guest was enough to show he had a legitimate expectation of privacy that society recognized as reasonable. Id. at 96. Therefore, Olson was permitted to challenge the search. Id. at 100.

> To hold that an overnight guest has a legitimate expectation of privacy in his hosts' home merely recognizes the everyday expectations of privacy that we all share. Staying overnight in another's home is a longstanding social custom that serves functions recognized as valuable by society. We stay in others' homes when we travel to a strange city for business or pleasure, when we visit our parents, children, or more distant relatives out of town, when we are in between jobs or homes, or when we house-sit for a friend. We will all be hosts and we will all be guests many times in our lives. From either perspective, we think that society recognizes that a houseguest has a legitimate expectation of privacy in his host's home.

Id. at 98. The fact that "the guest has a host who has ultimate control of the house is not inconsistent with the guest having a legitimate expectation of privacy." Id. at 99. Guests "are entitled to a legitimate expectation of privacy despite the fact that they have no legal interest in the premises and do not have the legal authority to determine who may or may not enter the household." Id.

This Court found an individual had a reasonable expectation of privacy in an apartment where he was a guest. State v. Missouri, 361 S.C. 107, 603 S.E.2d 594 (2004). This Court was persuaded that Missouri expected privacy in the apartment of his "good friend," with whom he had grown up and frequently visited. In the past, Missouri had spent the night occasionally. Missouri explained he felt comfort at the apartment. He had a key and kept a change of clothes there. He was present in the apartment as a social guest and had been there for at least seven hours prior to the execution of the search. Id. at 115, 603 S.E.2d at 597. This Court held "[b]y choosing to share the privacy of their home with [defendant] on several occasions in the past and on the occasion in question, both the [homeowners] and [defendant] demonstrated a subjective expectation of privacy, and that expectation, we hold is one that society is prepared to recognize as reasonable." Id. at 115, 603 S.E.2d at 597-598. In Kolle v. State, 386 S.C. 578, 590, 690 S.E.2d 73,79 (2010), this Court re-affirmed its holding in Missouri, supra, that an overnight guest has a reasonable expectation of privacy and is afforded protections pursuant to the Fourth Amendment as a result.

However, in Carter, supra, the United States Supreme Court found defendants who were not overnight guests and were in the home for a few short hours for a business transaction had no reasonable expectation of privacy. Carter, 525 U.S. at 90. Citing O'Connor v. Ortega, 480 U.S. 709 (1987) to recognize that property used for commercial purposes is treated differently for Fourth Amendment purposes and that in some circumstances a worker can claim Fourth Amendment protection over his workplace, the Court found no indication the defendants had "nearly as significant a connection to [the home searched] as the worker in O'Connor had to his own private office." Id. The Court then discussed the continuum of privacy rights for individuals in others' homes explaining that an overnight guest "typif[ies] those who may claim the protection of the Fourth Amendment in the home of another, and one merely 'legitimately on the premises' [typifies]

those who may not do so." Id. at 91. The Court determined the case before it was "obviously somewhere in between." Due to the "purely commercial nature of the transaction engaged in here, the relatively short period of time on the premises, and the lack of any previous connection between [the defendants] and the householder," the Court held the "situation is closer to that of one simply permitted on the premises." Id.

In his concurrence in Carter, Justice Kennedy wrote that in his view "almost all social guests have a legitimate expectation of privacy, and hence protection against unreasonable searches, in their host's home." Carter, 525, U.S. at 99 (Kennedy, J. concurring). According to Kennedy, "Fourth Amendment rights are personal, and when a person objects to the search of a place and invokes the exclusionary rule, he or she must have the requisite connection to that place." Id. This "requisite connection is an expectation of privacy that society recognizes as reasonable." Id. at 101. Kennedy explained that "application of that rule involves consideration of the kind of place in which the individual claims the privacy interest and what expectations of privacy are traditional and well recognized." Id. Thus, "most, if not all, social guests legitimately expect that, in accordance with social custom, the homeowner will exercise her discretion to include or exclude others for the guests' benefit." Id. "[A]s a general rule, social guests will have an expectation of privacy in their host's home." Id. at 102.

Although five justices held the defendants, who were in the apartment of another for a short time and solely for the purpose of packaging cocaine did not have a legitimate expectation of privacy in the apartment, four justices concluded the defendants were protected by the Fourth Amendment. Carter, 525 U.S. at 103 (1998)(Breyer, J. concurring); Id. at 106-107 (Ginsburg, J. dissenting)(stating that "when a homeowner or lessee personally invites a guest into her home to share in a common endeavor, whether it be for conversation, to engage in leisure activities, or for

business purposes licit or illicit, that guest should share his host's shelter against unreasonable searches and seizures"). In light of Justice Kennedy's concurrence that almost all social guests have a legitimate expectation of privacy in their host's home, it appears that at least five justices of the United States Supreme Court would hold that all social guests are protected by the Fourth Amendment with the only quibble being what defines a social guest.

Accordingly, several courts throughout the United States have concluded that individuals who were guests, even if not overnight guests, in a person's home had a reasonable expectation of privacy. United States v. Gray, 491 F.3d 138, 144-146 (4th Cir. 2007)(detailing the distinctions between business and social guests for purposes of Fourth Amendment protections); United States v. Paradis, 351 F.3d 21, 27 (1st Cir. 2003)(finding Paradis was entitled to Fourth Amendment protection in his girlfriend's home because Paradis lived there when the two were not fighting and he kept possessions there); United States v. Rhiger, 315 F.3d 1283, 1286-1287 (10th Cir. 2003)(holding that a social guest has a sufficient expectation of privacy to challenge unreasonable searches of his host's home); United States v. Fields, 113 F.3d 313, 320-321 (2d Cir. 1997)(holding Fields had a reasonable expectation of privacy in the place searched where he had a key, paid the owner weekly to use the apartment, had used the apartment forty or fifty times, could bring guests, and could come and go as he pleased with minor restrictions despite the fact that Fields did not sleep at the place and used it for illegal activity); Bonner v. Anderson, 81 F.3d 472, 475 (4th Cir. 1996)(holding that Bonner, who was not an overnight guest, had an expectation of privacy in the home of a neighbor because Bonner was a frequent visitor who ran errands for her elderly neighbor); United States v. Foster, 654 F.Supp.2d 389, 395 (E.D.N.C. 2009)(holding the defendant had standing to challenge the search of his fiancé's apartment where the record suggested that he had moved into the apartment or was, at a minimum, a frequent visitor); Nieves v. New York City

Police Dept., 716 F.Supp.2d 299, 307 (S.D.N.Y. 2010)(finding Nieves had a legitimate expectation of privacy in his friend's apartment where Nieves had been friends with the owner for several years, spent the night in the apartment about five times a month, had a key to the apartment, kept personal items there, and was the sole occupant when the police arrived to search); State v. Cuntapay, 85 P.3d 634, 641-642 (Hawai'i 2004)(holding that a guest had a reasonable expectation of privacy in his friend's home where the guest visited once or twice a week to play cards and darts under the state's constitution); In re Welfare of B.R.K., 658 N.W.2d 565, 578 (Minn. 2003)(holding that a juvenile remaining at the home of another minor after a party without adult supervision or authorization – a short term social guest – had a reasonable expectation of privacy in the other minor's home and was afforded the Fourth Amendment's protections); United State v. Tullous, 692 N.W.2d 790, 794 (S.D. 2005)(holding that the defendant had a reasonable expectation of privacy in the home of another where the defendant was a regular social guest at the home, who occasionally babysat for the homeowner and knew the location of the hidden key); State v. Trecroci, 630 N.W.2d 555, 569-570 (Wis. Ct. App. 2001)(holding that a defendant had a reasonable expectation of privacy in the attic space of her fiancée's apartment building even though the attic was not used as an attic and the defendant was not an overnight guest).

Probable Cause

The Fourth Amendment requires an oath or affirmation before probable cause can be found by an officer of the court, and a search warrant issued. U.S. Const. amend. IV. The South Carolina Code mandates that a search warrant "shall be issued only upon affidavit sworn to before the magistrate, municipal judicial officer, or judge of a court of record." S.C. Code Ann. § 17-13-140 (1985). "The affidavit must contain sufficient underlying facts and information upon which the magistrate may make a determination of probable cause. State v.

Dupree, 354 S.C. 676, 684, 583 S.E.2d 437, 441 (Ct. App. 2003) (citing State v. Philpot, 317 S.C. 458, 454 S.E.2d 905 (Ct. App. 1995)). A magistrate may issue a search warrant only upon a finding of probable cause. State v. Bellamy, 336 S.C. 140, 143, 519 S.E.2d 347, 348 (1999). "The magistrate should determine probable cause based on all of the information available to the magistrate at the time the warrant was issued." Dupree, 354 S.C. at 684, 583 S.E.2d at 441 (citations omitted). Oral testimony may also be used in to supplement search warrant affidavits which are facially insufficient to establish probable cause. See State v. Weston, 329 S.C. 287, 494 S.E.2d 801 (1997). However, "sworn oral testimony, standing alone, does not satisfy the statute." State v. Jones, 342 S.C. 121, 128, 536 S.E.2d 675, 678-79 (2000) (citing State v. McKnight, 291 S.C. 110, 352 S.E.2d 471 (1987)).

In terms of a court's review of the magistrate's decision, "[t]he duty of the reviewing court is to ensure the issuing magistrate had a substantial basis upon which to conclude that probable cause existed." State v. Baccus, 367 S.C. 41, 50, 625 S.E.2d 216, 221 (2006). In determining whether a substantial basis exists, the crucial element is not whether the target of the search is suspected of a crime, but whether it is reasonable to believe that the items to be seized will be found in the place to be searched. Zurcher v. Stanford Daily, 436 U.S. 547, 556 & n. 6 (1978). "This determination requires the magistrate to make a practical, common-sense decision of whether, given the totality of the circumstances set forth in the affidavit, including the veracity and basis of knowledge of persons supplying the information, there is a fair probability that contraband or evidence of a crime will be found in a particular place." State v. King, 349 S.C. 142, 150, 561 S.E.2d 640, 644 (Ct. App. 2002).

Exclusionary rule

The exclusionary rule prohibits the use of evidence obtained through an unlawful search and/or seizure. Wong Sun v. United States, 371 U.S. 471, 484-485 (1963); State v. Forrester, 343 S.C. 637, 643, 541 S.E.2d 837, 840 (2001); State v. Nelson, 336 S.C. 186, 192 n.3, 519 S.E.2d 786, 789 n.3 (1999); State v. Copeland, 321 S.C. 318, 323, 468 S.E.2d 620, 624 (1996).

Deficient Performance

Trial counsel's mistake of the law was unreasonable under prevailing professional norms. Trial counsel believed he could not contest the validity of the search warrant because Petitioner had no expectation of privacy unless he lived there, and the defense theory was that Petitioner did not reside at the house searched. According to trial counsel, he had to decide whether to challenge the warrant and "concede that he lived there, or challenge the fact that he lived there." App. 321, lines 6-10. In trial counsel's opinion, challenging Petitioner's residency at the Mack Street house and challenging the validity of the warrant based upon its identification of the property were "mutually exclusive." App. 321, lines 11-15. Trial counsel's analysis is flawed. The evidence presented an obvious opportunity for trial counsel to challenge the validity of the search warrant while remaining consistent with the defense theory that Petitioner did not reside there, but had an expectation of privacy as a social guest. As explained supra, the Fourth Amendment affords an expectation of privacy to social guests. Trial counsel's "strategy" was based upon an incomplete understanding of the governing law, and his misapprehension of the law was unreasonable under prevailing professional norms.

Ample evidence in the record supported that Petitioner was a social guest entitled to an expectation of privacy. See State v. Robinson, 410 S.C. 519, 529-530, 765 S.E.2d 564, 569-570 (2014)(delineating factors for courts to consider when determining whether a person had an

expectation of privacy in the place searched, including whether the person was an overnight guest, how long the person had been at the home, and whether the person engaged in typical domestic activities at the home). Petitioner admitted to spending a lot of time at the home because it was a "local hangout," explaining he was there "[e]very day." App. 181, lines 17-22; App. 190, line 15. On the night the police searched the house, Petitioner and Garrison testified that Petitioner was present as a guest. App. 182, lines 2-15. Garrison, who was present when the police arrived, explained that a party took place earlier in the evening at the home, that Petitioner was present for the party at least as early as 6:00 p.m. or 7:00 p.m., and was still present at 1:00 a.m. or 1:30 a.m. when Garrison returned despite the party having ended. App. 147, line 22 – App. 148, line 12; App. 148, lines 17-22; App. 151, lines 3-8.

Further, trial counsel believed that he could not argue at trial that Petitioner did not reside at the home during the trial if he used the state's evidence during the pre-trial hearing, which indicated Petitioner lived at the home, in order to suppress the evidence. Although trial counsel would not have been presenting testimony by Petitioner to admit that he lived there during the pre-trial hearing, this Court recognized that factors to consider in determining whether a person had an expectation of privacy in the premises search included whether the person "alleged a proprietary or possessory interest in the premises and property seized (*even if only at a motion to suppress, where that admission cannot be used against him to determine his guilt*)." Robinson, 410 S.C. at 529, 765 S.E.2d at 570 (emphasis added).

Ample evidence – presented by the state – supported a claim that Petitioner lived at the residence. See Id. (delineating factors for courts to consider when determining whether a person had an expectation of privacy in the place searched, including whether the person had a key, how long the person had known the homeowner and whether the person engaged in typical domestic

activities at the home). The prosecution introduced Petitioner's booking report showing his address as the same as the address for the location searched. App. 92, line 14 – App. 93, line 16. The prosecution also introduced Petitioner's bond form showing his address as the same as the address for the location searched. App. 97, line 10 – App. 98, line 6. Smiley claimed that she and Petitioner were romantically involved and that Petitioner and she lived together at the residence in question. App. 117, line 9 – App. 118, line 6. According to Smiley, Petitioner had a key, slept in the bedroom, and had control over the house. App. 118, lines 5-14. Thus, the evidence presented by the state would have permitted trial counsel to argue for suppression based upon the state's contention that Petitioner was a resident.

Without doubt, the Fourth Amendment jurisprudence permits individuals to challenge search warrants where individuals have an expectation of privacy. Without doubt, a guest in a home has an expectation of privacy in the home and may contest the validity of the search. Trial counsel's stated strategic reason for not challenging the validity of the search warrant was his belief that Petitioner did not have an expectation of privacy in the place searched because he did not live there. Further, counsel testified that he believed he could not use the state's evidence that Petitioner resided in the place searched during the pre-trial hearing if his theory at trial would be that Petitioner was not a resident of the house on Mack Street. The case law conclusively demonstrated trial counsel's beliefs were false and his reliance upon that mistaken belief was deficient performance.

Prejudice

According to the affidavit to support the search warrant, Deputy White "observed a white male drive up to the residence of 202 Mack Street" on a black moped. Supp. App. 12. Deputy White saw a "black male subject exit the residence" and walk over to the white male subject riding the moped. Supp. App. 12. "The black male took a quantity of cash from the white male subject

riding the moped and handed him an unknown substance." Supp. App. 12. The black male returned to the residence. Supp. App. 12. The white male drove off in the direction of Poinsett Highway. Supp. App. 12. Deputy White conducted a traffic stop of the white male and discovered he was in possession of crack cocaine. Supp. App. 12. The white male then gave a statement saying he had purchased the cocaine from the residence on Mack Street where Deputy White had observed him. In fact, the white male said he had purchased crack at the residence four or five times. Supp. App. 12.

Although the statement by Hollingsworth was undated, the similarities between Hollingsworth's statement and White's recitation in the affidavit are undeniable.[6] Hollingsworth's statement matched White's affidavit in almost every respect, except in the most critical area – the location of the house where he purchased the drugs. Hollingsworth's statement aligned with White's in multiple ways, including (1) he said he had purchased crack at the residence "four or five times in the past," (2) he purchased crack from a black male; (3) the black male exited the home to make the sale; (4) Hollingsworth gave the black male money and the black male gave him crack; (5) White made the traffic stop on Poinsett; (6) White advised him of his rights and he waived them; and (7) he told White he had just purchased the crack and the location of where he purchased the crack. Supp. App. 13. However, according to Hollingsworth, he "went by the house at the corner of Old Paris Mtn. Rd. and Attu Street" where he purchased crack cocaine. Supp. App. 13. This was in sharp contrast to White's sworn statement that the purchase occurred at 202 Mack Street.

[6] The lack of the date on Hollingsworth's statement would have provided trial counsel additional ammunition to challenge the warrant. In light of the uncertainty of the date on the statement, there was no indication from the document itself that Hollingsworth had purchased crack from a particular residence on the same date or even in close temporal proximity to the date of the execution of the search warrant.

Hollingsworth's statement clearly explained that he purchased crack cocaine from a house on the corner of Old Paris Mountain Road and Attu Street. The record, including White's testimony and the search warrant, showed the house search was not at the place described by Hollingsworth. White described the house search as "the second house ... on the corner of Mack and Walcott, if you came from Walcott Street." There is simply no way the house search could be both on the corner of Mack and Walcott and the corner of Old Paris Mountain Road and Attu Street. Had trial counsel challenged the validity of the search warrant, he would have been successful and the evidence secured by the search warrant would have been suppressed. See Sikes v. State, 323 S.C. 28, 448 S.E.2d 560 (1994)(finding prejudice where trial counsel failed to challenge the legality of a traffic stop resulting in a search and the finding of drugs, which was the only evidence that Sikes possessed drugs). Prejudice is clear because the prosecution would have been forced the drop the charges against Petitioner if the drugs obtained during the search warrant were suppressed.

CONCLUSION

Petitioner respectfully requests this Court grant the petition for writ of certiorari and order full briefing on the issue presented. In the event this Court grants the petition and dispenses with further briefing, Petitioner respectfully requests this Court reverse the decision of the lower court and hold that trial counsel provided ineffective assistance, thus, entitling Petitioner to a new trial.

Respectfully submitted,

Susan B. Hackett

Susan B. Hackett
Appellate Defender

ATTORNEY FOR PETITIONER.

This 29th day of January, 2016

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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SC SUPREME COURT

Certiorari to Greenville County

D. Garrison Hill, Circuit Court Judge

Opinion No. 2015-UP-474 (S.C. Ct. App. filed Oct. 7, 2015)
10-CP-23-06408

EDWARD ANDRELL WHITNER,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

I certify that a true copy of the petition for writ of certiorari and a copy of the second supplemental appendix, in this case has been served on Karen Ratigan, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, Mr. Edward Andrell Whitner #214145, at McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29899, and the S.C. Court of Appeals this 29th day of January, 2016.

Susan B. Hackett

Susan B. Hackett
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 29th day
of January, 2016.

_____(L.S.)
Notary Public for South Carolina
My Commission Expires: October 30, 2022