

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Greenville County

Eugene C. Griffith, Jr., Circuit Court Judge

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FEB 18 2016

SC SUPREME COURT

EDWARD RORECUSE YOUNG,

RESPONDENT,

V.

STATE OF SOUTH CAROLINA,

PETITIONER

APPELLATE CASE NO. 2015-000785

RETURN TO PETITION FOR WRIT OF CERTIORARI

ROBERT M. DUDEK
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ATTORNEY FOR RESPONDENT

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QUESTION PRESENTED

Did the PCR judge err in finding respondent met his burden of proving counsel was deficient in explaining actual and constructive possession and that he suffered prejudice as a result?

COUNTER-QUESTION PRESENTED

Was there evidence to support the PCR judge's ruling that counsel was ineffective for moving to suppress the drugs on the grounds that respondent did not have constructive possession of them, and then advising respondent to plead guilty when the judge naturally did not suppress the drugs on that basis, since not having constructive possession over the drugs was a legal defense and not a constitutional basis to suppress the drugs?

STATEMENT OF THE CASE

Respondent agrees with the state's procedural statement of the case.

Relevant facts

Scott Robinson represented respondent during the suppression hearing and the guilty plea that would follow. Robinson told the judge that the drugs were found in an old paint can in the woods. Respondent was only in those woods to "relieve himself." App. 3, ll. 2-15.

After hearing testimony during the suppression hearing, Robinson argued that the drugs should be suppressed because the state had failed to prove respondent had: "Dominion and control over these drugs where the pill bottle that was found in this paint can. The first officer testified that he did not know how long the paint can had been there [in the woods]. He also said that he had not inspected the property prior to this time to see if anyone had been there or around the paint can. . . . Just because he's present in the area mere presence is not enough to get the state pass this dominion and control they need in this matter." App. 71, l. 15 - 72, l. 17.

The assistant solicitor, Mr. Steinberg, told the judge that "lack of dominion and control" over the drugs was not a suppression issue. It was properly a directed verdict issue or a jury argument following a trial. App. 73, ll. 16 - 21.; 74, ll. 16-19. Assistant solicitor Steinberg nonetheless observed: "he [Counsel Robinson] wanted a separate suppression hearing. I have given him a suppression hearing." Steinberg offered that other evidence would be offered during a trial attempting to link respondent to having control over the drugs. App. 75, ll. 2-8.

After the suppression hearing, the parties took a break, and it was announced to Judge Seals that respondent was pleading guilty to trafficking in Ice, second offense. App. 76, ll. 20-23. Respondent would later testify that after the judge refused to suppress the drug evidence that

Robinson advised him to plead guilty. As will be seen infra, Robinson agreed that once the drug evidence was not suppressed that respondent should plead guilty.

Steinberg then told the judge that respondent got out of an automobile while an off-duty deputy was mowing his lawn next door. Respondent “was simply relieving himself in the woods. He appeared to be nervous and then left. The deputy then searched in the area and found 100 grams of crack in a pill bottle near where the suspect was standing stooped over. Deputies then stopped this defendant approximately an hour later who had first continued to state he was just relieving himself. . . . He then stated that he was going to pick up an unknown item in exchange for \$50 but that story was later disproved.” App. 80, l. 1 – 81, l. 1. The judge told the parties that he would accept this plea as an Alford¹ plea. App. 81, l. 2 – 82, l. 21. Judge Seals then sentenced respondent to seven years in prison. App. 82, ll. 2 – 24.

Petitioner alleged in his PCR application that his attorney used an “invalid strategic reasoning,” and was ineffective in explaining constructive possession of drugs. App. 87.

During the PCR hearing defense counsel Scott Robinson explained that this case was “really bad luck” on respondent’s part. Robinson testified a police officer was mowing his lawn and he saw respondent go into the woods and relieve himself. Robinson said the goal of the suppression hearing was with trying to keep “the drugs out” because respondent was not in constructive possession of them. App. 100, l. 20 – 101 l. 13.; 103, l. 1 – 104, l. 20.

Robinson said he did not know if the drugs would be suppressed by the trial judge. Robinson added that “if the drugs were allowed in, I think it would have been prudent to consider a guilty plea.” App. 106, ll. 2 – 22.

¹ North Carolina v. Alford, 400 U.S. 25 (1970).

Respondent Young testified that he did not have any control over the drugs. He said that if he would have understood from Robinson the constructive possession concept at the time -- meaning that a jury would have to find him guilty by concluding that he had constructive possession over the drugs -- "that really would have brought reasonable doubt to the jury." App. 120 – 121, l. 23.

Respondent told the PCR judge that he now understood constructive possession was "a legal argument . . . I don't think it constitutes the grounds of a suppression hearing though . . . there's no reason to suppress those drugs." App. 121, l. 24 – 122, l. 21. Respondent testified that he should not have plead guilty, and he would have gone to trial with his present understanding that all the state had against him was "mere presence in the area of the drugs." App. 124, l. 18 – 125, l. 16.

Respondent's brother, Adidas Glenn, was the driver of the automobile when respondent got out of the car to relieve himself. He corroborated what was largely undisputed about respondent relieving himself in the woods, and the paint can with the drugs being found in the area. Adidas said he would have testified in respondent's defense if he had been called as a witness at trial. App. 131, l. 3 – 139, l. 7.

PCR counsel then argued that constructive possession was not a constitutional or other legal basis for suppression of the drug evidence. Counsel said it was abundantly clear from the record that respondent was misled into thinking that constructive possession was a grounds for suppression rather than a legal argument to be made to the trier of fact. App. 143, l. 2 – 146, l. 9.

Judge Griffith then asked if respondent understood that if he ordered the guilty plea set aside that he was still facing a trial, and a longer sentence if convicted. Respondent told the judge that he understood the situation if his plea was set aside. App. 146 l. 10 – 148, l. 7.

An order granting post-conviction relief was filed on March 19, 2015. App. 150 – 154. The order stated the record reflected that plea counsel argued to the court that the drugs should be suppressed because respondent did not have dominion and control over the drugs. Respondent was advised by counsel after the judge denied the motion to suppress that he should plead guilty. Respondent learned about constructive possession after his guilty plea, and he then realized that he had been misadvised about this legal defense of not having constructive possession (mere presence), and that it was a legal argument and not a basis for suppression. App. 152 – 153. The judge therefore granted respondent post-conviction relief.

The state now seeks certiorari apparently asserting there is no evidence to support the judge's ruling. This order follows.

ARGUMENT

There was evidence to support the PCR judge's ruling that counsel was ineffective for moving to suppress the drugs on the grounds that respondent did not have constructive possession of them, and then advising respondent to plead guilty when the judge naturally did not suppress the drugs on that basis, since not having constructive possession over the drugs was a legal defense and not a constitutional basis to suppress the drugs.

It is readily apparent that trial counsel bungled this case. He moved to suppress the drugs prior to trial on the grounds that respondent did not have constructive possession over the drugs. However, constructive possession was not a constitutional unlawful search or seizure issue upon which the drugs could be suppressed. Rather, constructive possession was, as both assistant solicitor Steinberg and PCR counsel argued, a legal defense at trial. The legal defense was that respondent never had constructive possession over the drugs, and that he was merely present.

There was certainly evidence to support the PCR judge's finding that respondent was misadvised about the law and procedure in this case, and that he would not have plead guilty had he been properly advised. See Hill v. Lockhart, 474 U.S. 52, 58 (1985). Here, trial counsel argued that the trial court should have suppressed the judge because respondent did not have dominion and control over the drugs. When the trial court inevitably denied the motion to suppress on that basis, defense counsel recommended that respondent plead guilty.

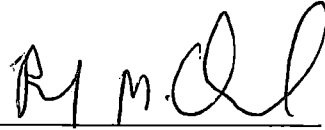
It is apparent from this record that respondent had a very viable defense. Defense counsel called respondent's fate "bad luck". It is much more than that -- and the present record screams out that was a case that should have been tried. Regardless, the standard of review of Judge Griffith's order in this case is "any evidence" in support of that ruling. See Cherry v. State, 300 S.C. 115, 386

S.E.2d 624 (1999). There is ample evidence in this case to support the PCR judge's well-reasoned grant of post-conviction relief in this case.

CONCLUSION

By reason of the foregoing arguments, the petition for writ of certiorari should be denied.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "R. M. Dudek", written over a horizontal line.

Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR RESPONDENT.

This 18th day of February, 2016

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Greenville County

Eugene C. Griffith, Jr., Circuit Court Judge

EDWARD RORECUSE YOUNG,

RESPONDENT,

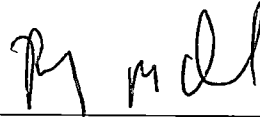
V.

STATE OF SOUTH CAROLINA,

PETITIONER

CERTIFICATE OF SERVICE

I certify that a true copy of the return to petition for writ of certiorari in this case have been served on Karen Ratigan, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Edward Rorecuse Young, #314830, at Evans Correctional Institution, 610 Hwy. 9 West, Bennettsville, SC 29512, this 18th day of February, 2016.



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR RESPONDENT

SWORN TO BEFORE ME this 18th day
of February, 2016.

Wanda Hendock (L.S.)

Notary Public for South Carolina
My Commission Expires: July, 3, 2023.