

STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO THE COURT OF APPEALS
Appeal from Greenville County

The Honorable C. Victor Pyle, Jr., Trial Judge
The Honorable D. Garrison Hill, Post-Conviction Relief Judge

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SS SUPREME COURT

Appellate Case No. 2016-000091

Edward Andrell Whitner,.....Petitioner,

v.

State of South Carolina,.....Respondent.

**RETURN TO PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS**

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CERTIFICATION OF COUNSEL

Counsel for Respondent hereby certifies a Petition for Rehearing was filed in the South Carolina Court of Appeals and denied by Order filed December 18, 2015.

QUESTION PRESENTED

1. 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

The Greenville County Grand Jury indicted Petitioner at the January 2004 term of General Sessions for possession with intent to distribute (PWID) marijuana within proximity of a school (2004-GS-23-0081), PWID crack cocaine within proximity of a school (2004-GS-23-0082), PWID marijuana (2004-GS-23-0083), and trafficking crack cocaine (2004-GS-23-0084). (App.pp.342-43; pp.345-46; pp.348-49; pp.351-52). Christopher D. Scalzo, Esquire represented Petitioner.

After the State called the case to trial, Petitioner was found guilty. On March 9, 2006, the Honorable C. Victor Pyle, Jr. sentenced Petitioner to concurrent terms of 10 years for PWID marijuana within proximity of a school, 10 years for PWID crack cocaine within proximity of a school, 10 years for PWID marijuana, third offense, and 25 years for trafficking crack cocaine, third offense. (App.p.344; p.347; p.350; p.353).

A notice of appeal was filed at the South Carolina Court of Appeals. Eleanor Duffy Cleary, Esquire of the South Carolina Office of Appellate Defense perfected the appeal. (App.pp.247-62). The Court of Appeals affirmed Petitioner's convictions and sentences on September 24, 2008. State v. Whitner, 380 S.C. 513, 670 S.E.2d 655 (Ct. App. 2008). (App.pp.275-81). Kathrine H. Hudgins, Esquire of the South Carolina Commission on Indigent Defense, Division of Appellate Defense filed a petition for writ of certiorari at the South Carolina Supreme Court. (App.pp.282-93). The Supreme Court denied the petition by order dated November 4, 2009. (App.pp.294-95).

Petitioner filed an application for post-conviction relief (PCR) on August 5, 2010 (2010-CP-23-6408). (Supp. App.pp.1-13). A hearing was held at the Greenville County

Courthouse on February 29, 2012. (App.pp.308-32). Petitioner was present and represented by Matthew P. Head, Esquire. Karen C. Ratigan, Esquire of the South Carolina Attorney General's Office represented Respondent. The Honorable D. Garrison Hill denied relief in an order filed June 25, 2012. (App.pp.334-40).

A notice of appeal was filed at this Court. Susan B. Hackett, Esquire of the South Carolina Commission on Indigent Defense, Division of Appellate Defense represented Petitioner. After a petition for writ of certiorari and return to petition for writ of certiorari were filed, the case was transferred to the South Carolina Court of Appeals. The court of appeals granted the petition for writ of certiorari and the parties submitted briefs. After oral argument, the court of appeals affirmed the PCR judge's denial of relief. Whitner v. State, Op. No. 2015-UP-474 (S.C. Ct. App. filed Oct. 7, 2015). (Second Supp. App.pp.2-3). Petitioner filed a Petition for Rehearing, which the court of appeals denied by order filed December 18, 2015. (Second Supp. App.pp.3-17; p.18).

Petitioner filed a petition for writ of certiorari with this Court on January 29, 2016.

ARGUMENT

The court of appeals properly affirmed the PCR judge's order of dismissal wherein he found Petitioner failed to meet his burden of proving trial counsel was ineffective.

Certiorari is not warranted in this case because the court of appeals was correct in affirming the PCR judge's order of dismissal in this case, which included the finding that Petitioner failed to meet his burden of proof.

A.

At trial, Deputy Torrence White testified she obtained a search warrant¹ for a residence and was present when the warrant was executed. (App.pp.25-26). Deputy White testified Petitioner, Teresa Smiley, and another individual were detained inside the house. (App.p.27). Deputy White testified she "explained to all parties inside the residence that we had a legal search warrant to search the residence for narcotics. At that time, I asked whose residence it was. Ms. Smiley stated it was hers and [Petitioner]'s." (App.p.27). Deputy White testified narcotics were found in the both the front room and back bedroom of the residence. (App.pp.27-29). Deputy White testified \$455 in cash was found in Petitioner's pocket. (App.p.29). Over trial counsel's objection, the State asked Deputy White if Petitioner provided his address, and she replied he stated this residence was his address. (App.pp.30-31).

Deputy James Proctor, James Carmen, and Deputy Kerry Avery testified they assisted in the execution of the search warrant. Deputy Proctor testified he found marijuana and rock cocaine in the back bedroom. (App.pp.49-51). Carmen testified he

¹ The warrant was attached to the PCR application. (App.p.301).

found marijuana and rock cocaine in the living room. (App.pp.60-62). Deputy Avery testified he was the scribe in this case, but also located a pistol and observed Deputy Proctor find the marijuana. (App.pp.66-67). Deputy Avery transported all of the items recovered to property and evidence. (App.p.72). The search of the residence yielded 27.51 grams of crack cocaine and 158.43 grams of marijuana. (App.pp.85-86).

Petitioner's booking form at the detention center and a subsequent bond form both listed the searched residence as Petitioner's residence. (App.pp.92-93; pp.97-98). Teresa Smiley testified Petitioner lived at the residence with her and had done so for almost one year. (App.pp.117-18). Smiley testified Petitioner slept in the back bedroom with her. (App.p.117). Smiley testified the drugs found in the residence belonged to Petitioner. (App.p.120).

As will be noted more specifically infra, the defense put up several witnesses in an attempt to demonstrate Petitioner did not live at the residence in question. In addition, Petitioner stated he did not live at the residence in question and that he used this address on his booking form because he did not have another address to provide. (App.pp.179-80). Petitioner stated he used the residence as his address on the bond form because "it was the first thing that came to mind." (App.pp.188-89).

B.

At the PCR hearing, Petitioner argued Hollingsworth was "the guy that they pulled over on the moped. They say they got the search warrant from using his statement." (App.p.312). Petitioner argued he did not know Hollingsworth and never discussed him with trial counsel. (App.p.313). Petitioner argued that, while trial counsel

challenged whether he lived at the residence in question, he should have questioned the validity of the search warrant. (App.pp.313-14).

Trial counsel testified he had reviewed the search warrant and Hollingsworth's statement. (App.pp.319-20). Trial counsel testified he would have also reviewed these items – as well as the other discovery materials – with Petitioner. (App.pp.328-29). Trial counsel testified that, while he did not have a specific recollection about the Hollingsworth statement, the “prime issue” at trial was arguing Petitioner did not live at the residence. (App.p.320). Trial counsel testified they had to decide whether to challenge the validity of the search warrant and concede Petitioner lived there or challenge that he did in fact live at this residence. Trial counsel testified they went forward with the latter defense strategy at trial. (App.pp.320-21).

In denying Petitioner's application for post-conviction relief, the PCR judge found Petitioner “failed to meet his burden of proving trial counsel did not properly challenge the search warrant in this case.” The PCR judge noted trial counsel pursued a defense theory at trial of arguing Petitioner did not live at the residence in question. The PCR judge found Petitioner “failed to produce any evidence to corroborate his argument that investigation [of Hollingsworth's statement] would have resulted in a different outcome at trial.” (App.pp.337-38).

C.

The court of appeals affirmed the PCR judge's order of dismissal in an unpublished, per curiam opinion issued pursuant to Rule 220(b), SCACR. Whitner v. State, Op. No. 2015-UP-474 (S.C. Ct. App. filed Oct. 7, 2015). (Second Supp. App.pp.2-

3). The court of appeals relied upon the following authorities: Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984); Bagwell v. State, 410 S.C. 259, 763 S.E.2d 630 (Ct. App. 2014), cert. denied (Feb. 27, 2015); Kimmelman v. Morrison, 477 U.S. 365, 106 S. Ct. 2574 (1986); and Underwood v. State, 309 S.C. 560, 405 S.E.2d 20 (1992).

D.

For an applicant to be granted PCR as a result of ineffective assistance of counsel, he must show both: (1) that his counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that he was prejudiced by his counsel's ineffective performance. See Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984); Porter v. State, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006). In order to prove prejudice, an applicant must show "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry v. State, 300 S.C. at 117-18, 386 S.E.2d at 625. "A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997).

An applicant must prove that "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." Strickland v. Washington, 466 U.S. at 686, 104 S. Ct. at 2064. The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume counsel "rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Id. at 690, 104 S. Ct. at 2066. An applicant must overcome this

presumption in order to receive relief. See Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

The proper standard for review of a PCR evidentiary hearing is whether “any evidence of probative value” exists to sustain the post-conviction relief judge’s findings. Id. at 119, 386 S.E.2d at 626. In a post-conviction relief proceeding, the applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985).

E.

The PCR judge did not err in finding Petitioner failed to meet his burden of proving trial counsel’s representation was deficient. Petitioner failed to demonstrate trial counsel did not render reasonably assistance under prevailing professional norms. See Strickland v. Washington, 466 U.S. at 688, 104 S. Ct. at 2064.

Petitioner’s entire argument rests upon the assumption that trial counsel was deficient because he could have successfully challenged the validity of the search warrant in this case by questioning Hollingsworth’s statement. There is no evidence, however, that Hollingsworth’s statement provided the basis for the search warrant. Deputy White testified she obtained the search warrant but this Court cannot speculate on the basis for that warrant, as she was not questioned at trial on the matter and Petitioner did not present her, another officer, or the magistrate judge as a witness at the PCR hearing in order to determine the basis for the search warrant. Cf. Bannister v. State, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998) (“a PCR applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the

PCR hearing in order to establish prejudice from the witness' failure to testify at trial.”). There is no indication on the search warrant that it was obtained in reliance upon Hollingsworth's statement and the search warrant affidavit was not admitted into evidence at the trial or PCR hearing. See Palacio v. State, 333 S.C. 506, 513, 511 S.E.2d 62, 66 (1999) (holding that, since the contents of challenged documents were not presented at the PCR hearing, the applicant could not demonstrate how the failure of counsel to obtain these documents prejudiced the defense). As such, this Court cannot speculate as to the potential impact Hollingsworth's statement may or may not have had upon the issuance of the search warrant.

Further, trial counsel testified he believed the key issue in Petitioner's case was whether the State could demonstrate Petitioner lived on the residence where the search warrant was executed. (App.p.320). Trial counsel developed the defense strategy that the drugs could not have been Petitioner's as they were found hidden in a home he was merely visiting. At trial, four witnesses testified Petitioner did not live at this residence. (App.pp.149-51; p.161; pp.165-66; pp.172-74). Trial counsel also presented evidence that Smiley's name was on the lease, electric bill, and water application for the residence. (App.pp.102-06; pp.108-11; p.143). The Strickland court held:

A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.

Strickland v. Washington, 466 U.S. at 689, 104 S. Ct. at 2065. Given the information,

evidence, and witnesses available to trial counsel at the time, it is clear his decision to challenge residency instead of the search warrant fell “within the wide range of reasonable professional assistance.” Id.

Therefore Petitioner has failed to meet his burden of proving trial counsel was deficient in not challenging the validity of the search warrant. See Butler v. State, 286 S.C. at 442, 334 S.E.2d at 814.²

F.

Regardless, the PCR judge was correct in finding Petitioner also failed to meet his burden of proving prejudice. See Strickland v. Washington, 466 U.S. at 694, 104 S. Ct. at 2068. Petitioner failed to demonstrate that, but for trial counsel’s performance, there was a reasonable probability the outcome of his trial would have been different. Cherry v. State, 300 S.C. at 117-18, 386 S.E.2d at 625.

As noted supra, trial counsel testified the defense strategy was to argue Petitioner did not live at the residence searched. In support of the defense theory, the following evidence was offered at trial: (1) Petitioner testified he did not live at the residence and explained why he provided this address for his booking and bond forms (App.pp.179-81); (2) four witnesses testified Petitioner did not live at the residence (App.pp.149-51; p.161;

² To the extent Petitioner has argued trial counsel should have challenged inconsistencies between the address in Hollingsworth’s statement and the address of the residence searched, this issue was not addressed in the order of dismissal. As such, it is not preserved for appellate review. See Staubes v. City of Folly Beach, 339 S.C. 406, 412, 529 S.E.2d 543, 546 (2000) (“It is well-settled that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial court to be preserved for appellate review.”); see also Noisette v. Ismail, 304 S.C. 56, 58, 403 S.E.2d 122, 124 (1991) (holding that where a trial court does not explicitly rule on an argument raised, and appellant makes no Rule 59(e) motion to obtain a ruling, the appellate court may not address the issue).

pp.165-66; pp.172-74); (3) the lease and electric bill for the residence were in Smiley's name (App.pp.102-06; pp.108-11); (4) the application for water service at the residence was made by Smiley (App.p.143); and (5) the fingerprints lifted from the pistol Deputy Avery found at the residence did not match Petitioner (App.pp.135-36). Based upon this evidence, trial counsel formulated a valid trial strategy in this case and cannot be found to have rendered deficient representation. See Roseboro v. State, 317 S.C. 292, 294, 454 S.E.2d 312, 313 (1995) (finding where trial counsel articulates a valid reason for employing a certain strategy, such conduct should not be deemed ineffective assistance of counsel); see also Huggler v. State, 360 S.C. 627, 633, 602 S.E.2d 753, 756 (2004) ("Counsel's strategy will be reviewed under an objective standard of reasonableness.") (internal citation omitted). Regardless of the strong defense case presented by trial counsel, however, the jury simply did not accept Petitioner's version of events. See Craven v. Cunningham, 292 S.C. 441, 443, 357 S.E.2d 23, 25 (1987) ("The credibility of witnesses is for the triers of fact."); see also Bruno v. State, 347 S.C. 446, 556 S.E.2d 393 (2001) (noting that, by its verdict, the jury clearly rejected the defendant's account of what transpired). This Court must "eliminate the distorting effects of hindsight" and, as such, cannot conclude trial counsel was ineffective simply because his trial strategy was unsuccessful. Strickland v. Washington, 466 U.S. at 689, 104 S. Ct. at 2065.

Nevertheless, even assuming arguendo this Court determines this was not a valid trial strategy, trial counsel's performance cannot be found to have prejudiced Petitioner. Petitioner cannot demonstrate a motion to suppress the search warrant based on Hollingsworth's statement would have been successful. "When the defendant claims that

counsel's failure to articulate a Fourth Amendment claim was ineffective assistance, defendant must show that such claim is meritorious and that the verdict would have been different absent the evidence that should have been excluded." Sikes v. State, 323 S.C. 28, 30, 448 S.E.2d 560, 562 (1994) (citation omitted). As noted supra, however, Petitioner has failed to demonstrate Hollingsworth's statement was relied upon in the search warrant affidavit. Without being able to demonstrate Hollingsworth's statement was the sole basis for the search warrant and there were no other informants, statements, surveillance, or officers' observations that led to the issuance of the warrant, Petitioner cannot meet his burden of proving the items seized pursuant to the search warrant should have been excluded.

Further, the State presented overwhelming evidence of guilt. Petitioner was arrested in the residence where 27.51 grams of crack cocaine and 158.43 grams of marijuana were found. One of the locations the narcotics were located was in a bowl that contained: marijuana, sandwich bags, two pairs of scissors, a hand scale, \$647, and rock cocaine. (App.pp.49-50; pp.51-52). Petitioner had \$455 in cash in his pocket. Smiley testified Petitioner lived at the residence and owned the drugs. Petitioner told Deputy White he lived at the residence and provided that address as his home address to be used on both his booking and bond forms. Male and female clothing was found in the back bedroom closet. (App.p.28; p.46). Petitioner cannot demonstrate trial counsel's failure to file a motion to suppress the search warrant based on Hollingsworth's statement prejudiced his case. See Franklin v. Catoe, 346 S.C. 563, 570 n. 3, 552 S.E.2d 718, 722 n. 3 (2001) (finding overwhelming evidence of guilt negated any claim that counsel's

deficient performance could have reasonably affected the result of defendant's trial); Geter v. State, 305 S.C. 365, 367, 409 S.E.2d 344, 346 (1991) (concluding reasonable probability of a different result does not exist when there is overwhelming evidence of guilt). Especially, as noted supra, when Petitioner cannot prove he would have prevailed upon a such a motion.

H.

Accordingly, certiorari is not warranted in this case because the court of appeals did not err in affirming the PCR judge's order of dismissal. The PCR judge was correct in finding Petitioner failed to meet his burden of proving he is entitled to post-conviction relief by satisfying both prongs of the Strickland analysis. As such, Petitioner failed to demonstrate he is entitled to post-conviction relief. See Butler v. State, 286 S.C. at 442, 334 S.E.2d at 814; see also Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) ("The burden of proof is on the applicant to prove his allegations by a preponderance of the evidence.").

CONCLUSION


For the reasons stated above, this Court should deny the Petition for Writ of Certiorari to the Court of Appeals.

Respectfully submitted,

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By: 
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February 26, 2016

STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO THE COURT OF APPEALS
Appeal from Greenville County

The Honorable C. Victor Pyle, Jr., Trial Judge
The Honorable D. Garrison Hill, Post-Conviction Relief Judge

Appellate Case No. 2016-000091

Edward Andrell Whitner,.....Petitioner,

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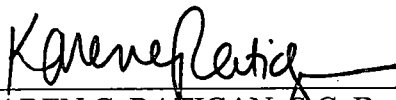
State of South Carolina,.....Respondent.

CERTIFICATE OF SERVICE

I, Karen C. Ratigan, certify that I have today served the within Return to Petition for Writ of Certiorari to the Court of Appeals upon Petitioner by depositing a copy of the same in inter-agency mail, addressed to:

Susan B. Hackett, Esquire
South Carolina Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
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I further certify that all parties required by Rule to be served have been served.
This 26th day of February, 2016.


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