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STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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SC SUPREME COURT

Certiorari to Anderson County

Honorable R. Lawton McIntosh, Circuit Court Judge

MELODY HOLMES,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-001933

JOHNSON PETITION FOR WRIT OF CERTIORARI

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The PCR court erred by ruling defense counsel correctly thought the state's refusal to allow petitioner and defense counsel the opportunity to view the drug transaction on the alleged videotape was proper where that drug transaction constituted the alleged probable cause for the search warrant for petitioner's house where the drugs were found, since the defense had the right to challenge that alleged probable cause 3

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QUESTION PRESENTED

Whether the PCR court erred by ruling defense counsel correctly thought the state's refusal to allow petitioner and defense counsel the opportunity to view the drug transaction on the alleged videotape was proper where that drug transaction constituted the alleged probable cause for the search warrant for petitioner's house where the drugs were found, since the defense had the right to challenge that alleged probable cause?

ARGUMENT

The PCR court erred by ruling defense counsel correctly thought the state's refusal to allow petitioner and defense counsel the opportunity to view the drug transaction on the alleged videotape was proper where that drug transaction constituted the alleged probable cause for the search warrant for petitioner's house where the drugs were found, since the defense had the right to challenge that alleged probable cause.

Relevant Facts

Petitioner's defense attorney, Kurt Tavernier, was denied the opportunity to view the videotape in this case which the state alleged showed a drug transaction on petitioner's porch. He nonetheless alleged that the videotape of petitioner's duplex showed a confidential informant and another individual in a drug transaction. It was undisputed that petitioner was not the other person on the videotape. App. 67, l. 8 – 68, l. 15.

Defense counsel maintained that petitioner wanted to see the videotape "in order to obtain the identification of the CI, I asked to see it. The state would not let us see it." App. 68, ll. 4-7. Counsel said the Judge Macaulay denied the defense's motion to view the videotape "in order to protect the confidential informant's identity." App. 68, ll. 7-8.

Defense counsel reasoned that the defense was not prejudiced by the refusal of the solicitor and judge to allow them to view the videotape because the taped drug transaction was *"only a predicate for the search warrant."* App. 69, ll. 8-16. (emphasis added). Counsel reasoned that petitioner was charged with possession of the drugs that were found after the search warrant was executed. App. 69, ll. 14-20; 70, ll. 8-14. However, it was undisputed that petitioner maintained the police did not have probable cause to obtain the search warrant, and the underlying videotape providing that alleged probable cause was therefore relevant.

Petitioner was later indicted by the Anderson County Grand Jury for trafficking in cocaine 28 or more grams but less than 100 grams, possession of marijuana within intent to distribute, and possession of crack cocaine with intent to distribute. App. 97 – 102. Petitioner appeared on August 12, 2013 before the Honorable J. Cordell Maddox, Jr. and entered a plea of guilty. Kurt Tavernier represented petitioner. App. 1 – 3, l. 20.

The judge noted that a mandatory minimum sentence of seven years had to be imposed and a possible twenty-five year sentence was the maximum. App. 4, ll. 8-18. The solicitor told the judge that a search warrant was executed on petitioner's home in Anderson County. They found 33 grams of cocaine. When petitioner was booked into the detention center police found 7.3 grams of crack cocaine and **145 grams of marijuana** they claimed were, "on her person." App. 11, l. 3 – 12, l. 3.

A police investigator told the judge that petitioner's sons were drug dealers, and that petitioner "enabled" them. Tavernier argued this was irrelevant even if it was true, and the judge agreed. App. 14, l. 25 – 15, l. 22. Petitioner nonetheless told the trial judge that she was responsible for all of the drugs in the house. "Nobody else is accountable but me." App. 19, ll. 8-11. The judge sentenced petitioner to seven years concurrent on each count. App. 18, ll. 6-18.

Petitioner filed an application for post-conviction relief dated October 1, 2012. App. 21-25. Petitioner alleged the search warrant used in this case was invalid. App. 22. The state filed a return and request for an evidentiary hearing dated December 31, 2013. App. 26-31.

An evidentiary hearing was convened on February 9, 2015 before the Honorable R. Lawton McIntosh. Hugh Welborn now represented petitioner and Walt Whitman was the Assistant Attorney General. App. 33.

Petitioner testified during the PCR hearing that she wanted to see the videotape because she did not believe it actually provided probable cause for a judge to conclude that there were drugs in her home. She therefore asked defense counsel to move to suppress the drug evidence but he refused. App. 38, l. 18 – 41, l. 19. Petitioner maintained that her attorney, the solicitor, and the police detective that spoke at her guilty plea did not take her assertions seriously regarding the lack of probable cause. They were arrogant, and they were "just laughing at me. That's what they did. They was in a big courtroom like this laughing at me." App. 41, ll. 4-10.

On cross-examination, petitioner again acknowledged that the drugs found in the home belonged to her. However, her allegation again dealt with counsel's failure to challenge the lack of probable cause for the search warrant allegedly provided by the videotape. App. 61, l. 20 – 62, l. 15.

Defense Counsel Kurt Tavernier testified the video tape showed a transaction between "an individual and a confidential informant. That individual on the video was not Ms. Holmes." App. 67, ll. 8-22. Where defense counsel got this information was unclear since he testified that he was never allowed to see the videotape. App. 68, ll. 4-15. Defense counsel nonetheless maintained that the judge correctly ruled the defense did not have any right to see this videotape "not even for the trial because it was only a predicate for the search warrant." App. 69, ll. 8-16.

Defense counsel said that although petitioner took responsibility for the drugs and denied she was covering for her son, counsel offered: "I wasn't born yesterday and didn't just get off the boat. I've been around this for a long time." App. 73, ll. 5-9. Defense counsel confirmed that petitioner was adamant about the importance of viewing the videotape. App. 75, ll. 6-11.

The PCR judge denied PCR counsel's motion that the judge view the videotape in question before ruling. The judge found the videotape was irrelevant and that petitioner's guilty plea

apparently waived any legal issue of ineffective representation on that ground. App. 81, l. 9 – 83, l. 3.

A written order of dismissal dated September 4, 2015 was filed. App. 86-96. This order noted that defense counsel agreed with Judge Macaulay's ruling that the defense had no legitimate reason to want to view the videotape of the alleged drug transaction at petitioner's house. The court cited Hyman v. State, 397 S.C. 35, 47, 723 S.E.2d 375, 381 (2012), for the proposition that the defense under Rule 5 **should be allowed** to have defense counsel view the videotape and provide still photographs of the videotape to the defendant. App. 91-92. (Petitioner's emphasis).

From this order petitioner is seeking a writ of certiorari presumed to Rule 243 of the SCACR.

Discussion

A magistrate may only issue a search warrant upon a finding of probable cause. See State v. Bellamy, 336 S.C. 140, 519 S.E.2d 347 (1999). A defendant has a right to challenge misstatements or false statements which result in the issuance of a search warrant. Franks v. Delaware, 438 U.S. 154 (1978); State v. Sachs, 264 S.C. 541, 216 S.E.2d 501 (1975).

In this case, probable cause for the issuance of the search warrant was an alleged drug transaction on the porch of petitioner's duplex that was captured on videotape. Petitioner wanted to see the videotape because she did not believe it would show what the state claimed it purportedly would show as being the "probable cause" for the search warrant. As seen, defense counsel did not think he had the legal right to view the videotape, but he made the motion to view it at petitioner's insistence.

It is strange in this case that defense counsel, the judge hearing the discovery motion, and the PCR judge all thought the videotape was irrelevant because the underlying drug charges did not

arise from the drug transaction allegedly contained on the videotape. However, the fact that the videotape contained the alleged probable cause for the issue of the search warrant -- the procurement of which resulted in finding drugs in petitioner's house, and on her person -- made the discovery of the videotape of no less moment. Again, it is elementary that a defendant can challenge the issuance of a search warrant on several grounds including probable cause, misstatements or false statements given to the magistrate, and lack of sufficient specificity. See State v. Jones, 342 S.C. 121, 126, 536 S.E.2d 675, 678 (2000).

Given the reasoning of Hyman v. State, 397 S.C. 35, 723 S.E.2d 375 (2012) defense counsel should have been allowed to view the videotape, and show petitioner still photographs of it. In Hyman the Supreme Court held that defense counsel has the right to view the videotape of the drug transaction, and a procedure where the defendant was only shown still photographs of the videotape was sufficient to satisfy the state's discovery obligations. Again, the fact that the drug transaction was the alleged probable cause for the **search** warrant rather than the basis for the **arrest** warrant did not make it of any less moment.

Here, petitioner was not even shown still photographs of the videotape because defense counsel did not even think he was entitled to see the videotape. Defense counsel could hardly effectively advocate for a position he believed to be legally unsound.

In addition, the PCR judge refused to view the videotape because he erroneously thought it was irrelevant. Petitioner at a minimum should be entitled to a remand to the PCR court with an order for the PCR judge to view the videotape before making such a sweeping legal conclusion on its relevance or irrelevance.

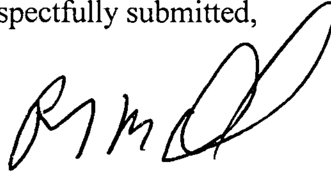
This was an unusual case where defense counsel, the judge hearing the discovery motion, and the PCR judge were all incorrect in their legal analysis regarding petitioner's right to challenge

the alleged probable cause for the search warrant -- the videotape -- where that search warrant led to the discovery of the drugs which were the basis of the drug indictments in this case.

CONCLUSION

By reason of the foregoing arguments, ruling of the PCR court should be reversed, and petitioner's guilty plea vacated. In the alternative, petitioner's case should be remanded to the PCR court with an order for the PCR court to view the videotape and issue an amended order.

Respectfully submitted,



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR PETITIONER

This 18th day of July, 2016.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO ANDERSON COUNTY
HONORABLE R. LAWTON MCINTOSH, CIRCUIT COURT JUDGE

MELODY HOLMES,

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V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-001933

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Melody Holmes states:

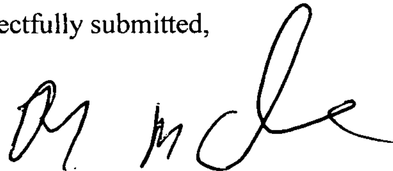
1. He is the Chief Appellate Defender for the South Carolina Office of Appellate Defense and was appointed to represent petitioner.

2. He has reviewed the records and transcript of petitioner's post-conviction relief hearing which was held on September 15, 2015. In his opinion seeking certiorari from the order of dismissal is without merit.

3. He has, pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), briefed the one arguable legal issue which arose during the post-conviction relief process.

Therefore, counsel requests that the Court relieve him as counsel for Melody Holmes.

Respectfully submitted,



Robert M. Dudek
Chief Appellate Defender
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This 18th day of July, 2016

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MELODY HOLMES,

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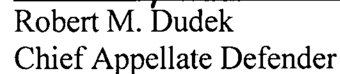
CERTIFICATE OF SERVICE

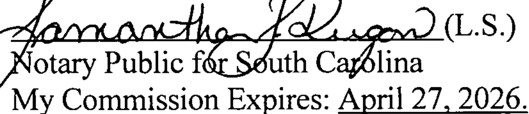
I certify that a true copy of the Johnson petition for writ of certiorari and a copy of the appendix in this case have been served on Patrick Schmeckpeper, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 and Melody Holmes, #239097, at Graham Correctional Institution, 4450 Broad River Road, Columbia, SC, 29210, this 18th day of July, 2016.



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR PETITIONER

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


(L.S.)
Notary Public for South Carolina
My Commission Expires: April 27, 2026.