

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Pickens County
Court of Common Pleas
The Honorable Perry H. Gravely, Circuit Court Judge

Appellate Case No. 2016-000197

LAROLD LEE MORRIS,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

ALAN WILSON
Attorney General

DESHAWN H. MITCHELL
Assistant Attorney General
SC Bar No. 101813

Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3737

ATTORNEYS FOR RESPONDENT

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S.C. SUPREME COURT

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RESPONDENT'S QUESTIONS PRESENTED

Did Trial counsel's failure to renew his objection prejudice the Petitioner?

STATEMENT OF THE CASE

Petitioner is confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Pickens County Clerk of Court. Petitioner was indicted at the February 2013 term of the Pickens County Grand Jury for first-degree burglary (2012-GS-39-0700), possession of a pistol with obliterated serial number (2012-GS-39-0752), armed robbery (2013-GS-39-0457), and conspiracy (2013-GS-39-0458). He was represented by David D. Cantrell, Jr., Esquire.

After the State called the case to trial, Petitioner was found guilty. On March 20, 2013, the Honorable Edward W. Miller sentenced the Petitioner to concurrent terms of 25 years for first-degree burglary, 5 years for possession of a pistol with obliterated serial number, 25 years for armed robbery, and 5 years for conspiracy.

A notice of appeal was filed at the South Carolina Court of Appeals. Robert M. Dudek, Esquire of the South Carolina Commission on Indigent Defense, Division of Appellate Defense and Chris Paton, Esquire perfected the appeal. The Court of Appeals affirmed the Petitioner's convictions and sentences. *State v. Morris*. Op. No. 2U14-UP-420 (S.C. Ct. App. filed Nov. 26, 2014). The remittitur was sent on December 12, 2014.

Petitioner filed a PCR application January 8, 2015. The Respondent made its return on May 29, 2015. An evidentiary hearing was held on December 14, 2015. Petitioner was present and represented by R. Mills Ariail, Jr., Esquire. Karen C. Ratigan, Esquire of the South Carolina Office of the Attorney General represented the Respondent. The Honorable Perry H. Gravely denied and dismissed the PCR application by order filed January 19, 2016.

Petitioner filed a notice of appeal. His attorney submitted a notice of appeal to the South Carolina Supreme Court on January 28, 2016. His attorney submitted a petition for writ of certiorari and appendix on October 20, 2016. This return follows.

STANDARD OF REVIEW

The proper standard for reviewing a PCR evidentiary hearing is whether “any evidence of probative value” exists to sustain the post-conviction relief judge's findings. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). In a PCR proceeding, the Petitioner bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

ARGUMENT

Trial counsel's failure to renew his objection did not prejudice the Petitioner.

Petitioner asserts that Counsel was ineffective in his representation of Petitioner in failing to renew an objection previously made during a pretrial motion hearing to suppress. This argument is without merit.

A.

In a post-conviction relief action, the applicant has the burden of proving the allegations in the application. Rule 71.1(e), SCRPC; Butler, 286 S.C. 441, 334 S.E.2d 813 (1985). Where ineffective assistance of counsel is alleged as a ground for relief, the applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, (1984); Butler, 286 S.C. 441, 334 S.E.2d 813 (1985).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler, 286 S.C. 441, 334 S.E.2d 813 (1985). The applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland). Second, counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that,

but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. At 117-18, 386 S.E.2d at 625.

B.

As previously mentioned Petitioner was found guilty and sentenced to concurrent terms of 25 years for first-degree burglary, 5 years for possession of a pistol with obliterated serial number, 25 years for armed robbery, and 5 years for conspiracy. Prior to trial, Petitioner made a motion to suppress a search warrant of the home of the Petitioner's sister. (App.p.118-121). The Petitioner argued that the search warrant was a violation of the Fourth Amendment and the warrant contained mere conclusory statements that form no basis for probable cause and should be suppressed. (App.p.119.LL.17-19). The trial judge ruled denying the Petitioner's motion to suppress. (App.p.121.LL.4-7).

C.

Petitioner filed a PCR application alleging ineffective assistance of counsel. More specifically, Petitioner alleged during his PCR hearing that his Counsel failed to renew objections to introduction of evidence in violation of the 4th, 6th, and 14th Amendments of the United State Constitution. (App.p.457). At the hearing Counsel testified that he made all possible arguments at trial against the search warrant. App.p.459). In denying Petitioner's application for post-conviction relief, the PCR judge found the Petitioner failed to meet his burden of proving trial counsel did not properly challenge the search warrants in this case. (App. p.459). Additionally, the Court noted that it had examined the trial record and noted that Counsel made arguments in his motion to suppress in which he challenged various aspects of the search warrants. (App.p.459). Moreover, the Court found the Petitioner failed to articulate what additional arguments trial counsel could have made that would have been more successful. See,

e.g., Skeen v. State. 325 S.C. 210, 481 S.E.2d 129 (1997) (holding applicant not entitled to relief where no evidence presented at PCR hearing to show how additional preparation would have had any possible effect on the result at trial). (App.p.460).

D.

The PCR judge did not err in his ruling that Petitioner failed to meet his burden entitling him to post-conviction relief. In this case the Petitioner alleged that evidence came into his trial that was prejudicial because his Counsel failed to renew his objection thus denying him the ability to have an appellate review of that issue. Counsel, prior to trial made a motion to suppress items found during the search of the residence of the Petitioner's sister because the search warrant lacked probable cause. (App.p.118-121). The Court denied this motion during pretrial. (App.p.121). During the course of trial, photographs of those items were introduced into evidence. (App.p.289-290). At that time Counsel did not renew his pre-trial objection to the items or search warrant. (App.p.290). When Petitioner appealed his conviction based on a search warrant that was lacking in probable cause, the Court of Appeals held that the issue was not preserved for appellate review. (App.p.466).

As previously discussed, Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove that counsel's performance was deficient. Second, counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* At 117-18, 386 S.E.2d at 625. Here, there is no question that Petitioner's Counsel failed to renew his objection during the trial causing the Petitioner's issue to not be preserved for appellate review. ("In most cases, '[m]aking a motion in limine to exclude evidence at the beginning of trial does not preserve an issue for review because

a motion in limine is not a final determination. The moving party, therefore, must make a contemporaneous objection when the evidence is introduced' ") State v. Forrester, 343 S.C. 637, 642, 541 S.E.2d 837, 840 (2001). However, discussion about the validity of the search warrant is warranted to show that even if Petitioner has satisfied the first prong of the Strickland test, he fails at satisfying the second prong.

An appellate court reviewing the decision to issue a search warrant should decide whether the magistrate had a substantial basis for concluding that probable cause existed. State v. Philpot, 317 S.C. 458, 461, 454 S.E.2d 905, 907 (Ct. App. 1995). This review, like the determination by the magistrate, is governed by the 'totality of the circumstances' test. State v. Jones, 342 S.C. 121, 536 S.E.2d 675 (2000); King, 349 S.C. at 148, 561 S.E.2d at 643. A reviewing court must give great deference to a magistrate's determination of probable cause. State v. Weston, 329 S.C. 287, 494 S.E.2d 801 (1997); State v. Davis, 354 S.C. 348, 580 S.E.2d 778 (Ct. App. 2003).

A search warrant may issue only upon a finding of probable cause. State v. Bellamy, 336 S.C. 140, 519 S.E.2d 347 (1999); see also S.C. Code Ann. §17-13-140 (1985) (providing that search warrants may be issued "only upon affidavit sworn to before the magistrate ... establishing the grounds for the warrant"). The affidavit must contain sufficient underlying facts and information upon which the magistrate may make a determination of probable cause. Philpot, 317 S.C. at 461, 454 S.E.2d at 907. Affidavits are not meticulously drawn by lawyers, but are normally drafted by non-lawyers in the haste of a criminal investigation, and must therefore be viewed in a common sense and realistic fashion. State v. Sullivan, 267 S.C. 610, 230 S.E.2d 621 (1976).

The task of the reviewing court is to decide whether the magistrate had a substantial basis for concluding probable cause existed. State v. Adolphe, 314 S.C. 89, 441 S.E.2d 832 (Ct. App. 1994). The term “probable cause” does not import absolute certainty. State v. Bennett, 256 S.C. 234, 182 S.E.2d 291 (1971). Rather, in determining whether a search warrant should be issued, magistrates are concerned with probabilities and not certainties. Sullivan, 267 S.C. at 617, 230 S.E.2d at 624. Oral testimony may be used to supplement search warrant affidavits. State v. Robinson, 335 S.C. 620, 518 S.E.2d 269 (Ct. App. 1999). Mere conclusory statements which give the magistrate no basis to make a judgment regarding probable cause are insufficient. State v. Baccus, 367 S.C. 41, 47, 625 S.E.2d 216, 219, 222 (2006); State v. Smith, 301 S.C. 371, 373, 392 S.E.2d 182, 183 (1990); State v. Jenkins, 398 S.C. 215, 222-23, 727 S.E.2d 761, 765 (Ct. App. 2012); see also Weston, 329 S.C. at 291, 494 S.E.2d at 803 (an affidavit supporting a search warrant could not have provided a substantial basis for finding probable cause to search Weston’s car when the affidavit failed to set forth any facts as to why police believed Weston committed the crime and the first three sentences of the affidavit contained conclusory statements).

The magistrate’s task in determining whether to issue the search warrant is to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, there is a fair probability that contraband or evidence of a crime will be found in a particular place. State v. Rutledge, 373 S.C. 312, 644 S.E.2d 789 (Ct. App. 2007); State v. Adolphe, 314 S.C. 89, 441 S.E.2d 832 (Ct. App. 1994); see also State v. Crane, 296 S.C. 336, 338-39, 372 S.E.2d 587, 588-89 (1988) (holding the magistrate should determine probable cause based on all the information available to him at the time the warrant is issued, including sworn oral testimony); State v. Adams, 291 S.C. 132, 133-34, 352 S.E.2d 483, 485 (1987) (“A

determination of probable cause depends upon the totality of the circumstances”). In determining the validity of the warrant, a reviewing court may consider only information brought to the magistrate's attention. State v. Owen, 275 S.C. 586, 274 S.E.2d 510 (1981); State v. Gentile, 373 S.C. 506, 646 S.E.2d 171 (Ct. App. 2007).

Moreover, the search warrant in this case was not invalid. The affidavit used for the purposes of gaining a search warrant written by Investigator Justice contained the following; (App.p.454).

DESCRIPTION OF PROPERTY SOUGHT

Ipods, X-box game systems/games, laptops, luggage, backpacks, masks, televisions, cell phones or any other electronic devices.

REASON FOR AFFIANT'S BELIEF THAT THE PROPERTY SOUGHT IS ON THE SUBJECT PREMISES

Larold Lee Morris, a tenant in the above referenced apartment, is suspected in several armed robberies in the City of Central. During the course of the robberies items such as, IPODS, laptops, Televisions, Xbox game Systems/games, cell phones and other electronics were taken from the victim's homes. The suspect(s) in these cases used a handgun, latex gloves, masks and dressed in all black driving a silver Chevy Impala. This vehicle was stopped on 3/8/2011 in the Town limits of Central and once I began interviewing the subjects and locating the firearms it is believed that the stolen property is located in said apartment.

Given the investigation that had taken place by Investigator Justice and the evidence that was found in the Petitioner's car, it would be reasonable for a magistrate to believe that the items listed in the affidavit could be found in the Petitioner's home and thus would found probable cause. See State v. McLaughlin, 307 S.C. 19, 22, 413 S.E.2d 819, 821 (1992) (holding probable cause to search a toolbox was established by defendant's suspicious behavior, his possession of large amounts of cash, the presence of a marijuana cigarette, and his repeated denials of ownership of the toolbox); Davis, 354 S.C. at 358, 580 S.E.2d at 783 (circumstances of

defendant's flight from police after they attempted traffic stop allowed a reasonable inference of guilty conduct, supporting probable cause to search motel room for which key was found in search of defendant); State v. Bultron, 318 S.C. 323, 333, 457 S.E.2d 616, 622 (Ct. App. 1995) (holding defendant's suspicious activity was part of the basis for finding that probable cause existed for a search).

Moreover, the search warrant should be upheld under United States v. Leon, 468 U.S. 897 (1984). The Leon Court held that when an officer acting in objective good faith has obtained a search warrant from a judge or magistrate and acted within its scope, a reviewing court should not order a suppression of the evidence based on a lack of probable cause. *Id.* at 915-16. In Weston, the Court cited to State v. Johnson, 302 S.C. 243, 395 S.E.2d 167 (1990), which generally precluded application of the Leon good-faith exception when an affidavit fails to provide a magistrate with a substantial basis for finding probable cause. Weston, 329 S.C. at 293, 494 S.E.2d at 804. The Weston Court noted, however, that "Johnson should not be read as prohibiting application of the good-faith exception every time an affidavit fails to satisfy the technical requirements of Gates. Suppression is appropriate in only a few situations, including when an affidavit is 'so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable.'" *Id.* (quoting Leon, 468 U.S. at 923). In the present case, there was clearly good-faith, measured objectively, on the part of the police to comply with the warrant requirements for the residence, and the affidavit was not so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable. State v. Herring, 387 S.C. 201, 692 S.E.2d 490 (2009); State v. Covert, 382 S.C. 205, 675 S.E.2d 740 (2009).

In the event the affidavit is found insufficient to establish probable cause, and the Leon good-faith exception is rejected by this Court, any error in the admission of the evidence

obtained pursuant to the search of the residence was harmless beyond a reasonable doubt. See, e.g., Baccus, 367 S.C. at 55-56, 625 S.E.2d at 223-242 (“When guilt is conclusively proven by competent evidence, such that no other rational conclusion could be reached, this Court will not set aside a conviction for insubstantial errors not affecting the result”); State v. Davis, 309 S.C. 326, 422 S.E.2d 133 (1992) (erroneous admission of evidence may constitute harmless error if the evidence did not affect the outcome of the trial), overruled on other grounds by Brightman v. State, 336 S.C. 348, 520 S.E.2d 614 (1999); State v. Bernotas, 277 S.C. 106, 283 S.E.2d 580 (1981) (for an error in the erroneous admission of unlawfully seized evidence to require reversal, the appellant must be sufficiently prejudiced); State v. Woods, 376 S.C. 125, 654 S.E.2d 867 (Ct. App. 2007).

Furthermore, without looking at the evidence that Petitioner seeks to have excluded, the State presented vast amounts of evidence that helped prove the Petitioner’s guilt. There was testimony from one of the victims who stated two men, one of which wore a mask robbed him in his apartment with a gun in their possession and one of the robbers referred to the other as “Junior”. (App.p.148-149). They stole an X-box. (App.p.108.LL.7). A month later three men were seen outside the same apartment. One of them wore a mask. (App.p.155.LL.20-25). A police officer stopped the car the three men were in and one of those men was the Petitioner. (App.p.218-221). After a search of the car the police found a black gun, masks, and a box of latex gloves. (App.p.222-233). Additionally, the Petitioner’s DNA was found on one of the masks. (App.p.325-326). Furthermore, earlier that night the Petitioner sent a text message to one of the other co-defendants saying they should “get,” i.e., rob” one of the victims. (App.p.252.LL.1-4). One of the co-defendants also referred to the Petitioner as “Junior”. (App.p.244.LL.10-14). Moreover, after the robbery one of the victims saw that his X-Box user

name was online. The victim's avatar was changed to an African-American male and his "gamer tag" was changed to "Lil Abel." (App.p.275.LL.22-25) Petitioner admitted to the police that his "gamer tag" was "Little Abel." (App.p.275.LL.5-11). The testimony thus demonstrated substantial evidence that Petitioner and his friends robbed the apartment in February and then decided to return to the same apartment a month later. Given this abundant evidence of Morris's guilt, Defendant is unable to prove the second prong of the Strickland test.

E.

Accordingly, even if Petitioner has proved the first prong of the Strickland test he has failed to prove the second prong of the Strickland test that counsel's deficient performance prejudiced him such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Cherry*, 300 S.C. at 117-18, 386 S.E.2d at 625. As Petitioner failed to meet his burden of proving ineffective assistance of trial counsel on this issue, the PCR judge did not err in denying the PCR application. See *Frasier v. State*, 351 S.G. 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.").

[Signature follows]

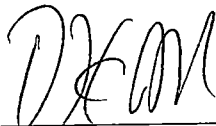
CONCLUSION

For the foregoing reasons, the Petition should be denied. Should this Court grant the Petition for Writ of Certiorari, Respondent requests permission to more fully brief the issues herein.

Respectfully submitted,

ALAN WILSON
Attorney General

DESHAWN H. MITCHELL
Assistant Attorney General
SC Bar No. 101813

By: 
ATTORNEYS FOR RESPONDENT

Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3737

April 6, 2017

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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The Honorable Perry H. Gravely, Circuit Court Judge

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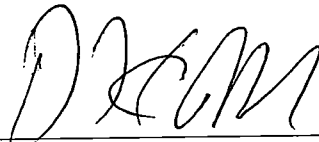
Respondent.

CERTIFICATE OF SERVICE

I, DeShawn H. Mitchell, certify that I have today served the within **Return to Petition for Writ of Certiorari** upon Appellant by depositing a copy of the same in the United States mail, postage prepaid, addressed to:

LaNelle C. DuRant, Esquire
South Carolina Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, South Carolina 29211-1589

I further certify that all parties required by Rule to be served have been served.
This 6th day of April, 2017.



DESHAWN H. MITCHELL
Assistant Attorney General
S.C. Bar # 101813
Office of Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3737
ATTORNEY FOR RESPONDENT

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