STATE OF SOUTH CAROLINA
In the Supreme Court

On Writ of Certiorari to Charleston County
John C. Hayes, III, Post-Conviction Relief Judge
Stephanie P. McDonald, Trial Court Judge

Appellate Case No. 2016-002309

THERRON RICHARDSON,

Respondent,

vs.

THE STATE OF SOUTH CAROLINA,

Petitioner.

PETITION FOR A WRIT OF CERTIORARI

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STATEMENT OF ISSUE ON CERTIORARI

Did the post-conviction relief court err as a matter of law by granting Richardson a new trial, where it applied an incorrect standard and erroneously granted relief despite failing to make the requisite finding that Richardson would have prevailed on appeal had the issue been preserved for appellate review?

STATEMENT OF THE CASE

Procedural History

During its April 2011 term, the Charleston County Grand Jury indicted Richardson for trafficking cocaine (2011-GS-10-02320), possession of a firearm during the commission of a violent crime (2011-GS-10-02321), and four counts of unlawful possession of a firearm by a person convicted of a crime of violence (2011-GS-10-02323, -02324, -02325 & -02326). He was initially represented by Alicia Penn and Mary Ford of the Ninth Circuit Public Defender's Office, including during a May 9, 2012, pretrial suppression hearing before the Honorable R. Markley Dennis; however, he was ultimately represented at trial by Donna K. Taylor and D. Lynn Bowley, Esquires, of the Charleston County Bar. On November 13-15, 2012, Richardson proceeded to a jury trial in the Charleston County Court of General Sessions before the Honorable Stephanie P. McDonald, circuit court judge. At the conclusion of trial, the jury convicted Richardson as indicted. Judge McDonald sentenced Richardson to thirty years' imprisonment for trafficking cocaine, a consecutive term of five years' imprisonment for one count of unlawful possession of a firearm (2011-GS-10-02323), and four concurrent terms of five years' imprisonment for each of the three remaining counts of unlawful possession of a firearm and the single count of possession of a firearm during commission of a violent crime, for an aggregate sentence of thirty-five years' imprisonment.

Richardson timely filed a notice of intent to appeal his convictions and sentences and an appeal was perfected by Appellate Defender Robert M. Pachak of the South Carolina Commission on Indigent Defense–Division of Appellate Defense. Following briefing, the South Carolina Court of Appeals affirmed Richardson's conviction and sentence in an unpublished

summary opinion. State v. Therron Richardson, Op. No. 2014-UP-471 (Ct. App. filed Dec. 17, 2104). The Remittitur was returned to the circuit court on January 6, 2015.

Thereafter, Richardson filed a timely application for post-conviction relief on March 27, 2015, alleging he was being held in custody unlawfully based on an allegation of ineffective assistance of trial counsel for failing to timely object to the introduction of evidence seized from his home, thereby failing to preserve the issue for appellate review. The State made its Return on July 29, 2015, requesting an evidentiary hearing be held. An evidentiary hearing into the application was convened August 3, 2016, in the Charleston County Court of General Sessions before the Honorable John C Hayes, III, circuit court judge. Richardson was present at the hearing and represented by Rodney Davis, Esquire. The State was represented by Assistant Attorney General J. Rutledge Johnson of the South Carolina Attorney General's Office. Richardson did not testify at the hearing but presented testimony from trial counsels and appellate counsel.

Following the evidentiary hearing, Judge Hayes issued a written order granting Richardson post-conviction relief, finding trial counsel was ineffective for failing to contemporaneously object to the introduction of evidence seized from Richardson's home, thereby failing to preserve the issue for appellate review. Notably, Judge Hayes stated he did "not find that [Richardson] would have prevailed on appeal . . ." This order was filed on August 15, 2016. The State did not receive notice of entry of the order until October 17, 2016. The State served its notice of appeal on November 16, 2016.

Factual History

On October 17, 2010, at 11:15 a.m., Deputies Jason Bowen and Julius Alexander of the Charleston County Sheriff's Department were dispatched to Richardson's house in response to

an emergency call. An unidentified female had called 911 at 11:09 a.m. claiming to be trapped in a bedroom at the residence after being attacked by her boyfriend. Upon arriving at the house at 11:24 a.m., the officers knocked and announced their presence but received no response. They then split up and walked around the residence, discovering a sliding glass door at the back that was partially open. The officers entered the house to try to locate the 911 caller and to conduct a protective sweep for anyone who might be a threat. They did not discover any people in the house; however, during the sweep they observed guns, a safe, a large sum of cash, a digital scale, and a white powdery residue that appeared to be cocaine. Based on these observations, the Sheriff's Department obtained a search warrant and the narcotics division conducted a search of the house. They discovered over 2,000 grams of cocaine, five loaded guns, over twenty thousand dollars in cash, digital scales, and other evidence of illegal drug activity, and charged Richardson with trafficking cocaine, possession of a firearm during the commission of a violent crime, and five counts of possession of a firearm by a person convicted of a violent crime. (App. p. 519).

On May 7, 2012, Richardson filed a motion to suppress all evidence obtained from his residence on grounds it was obtained in violation of the Fourth Amendment to the United States Constitution and Article I, Section 10 of the South Carolina Constitution. A suppression hearing was held on May 9, 2012, before the Honorable R. Markley Dennis. Richardson was present and was represented by Alicia Penn and Mary Ford of the Ninth Circuit Public Defender's Office. The State was represented by Assistant Solicitor Emmanuel Ferguson of the Ninth Circuit Solicitor's Office. (App. p. 519).

During the suppression hearing, the State first played a tape recording of the 911 call and then presented testimony from Deputy Bowen. (App. p. 11, line 25 - p. 13, line 23). Bowen was working patrol duty on October 17, 2010, when he was dispatched to a Charleston County

address for an "in-progress domestic violence call." He was told a female called 911 because her boyfriend had choked her and she had locked herself in a room inside the house for her safety. Bowen explained his primary goal in any domestic call is "person safety." Deputy Alexander was also dispatched to the address and arrived at the house simultaneously with Bowen. Bowen approached the front door where he noticed a "key-type deadbolt" instead of a doorknob, which is highly unusual and made him afraid someone was "controlling" the 911 caller and could be keeping her locked in the house. Bowen knocked on the door several times with increasing intensity and loudness but did not get a response. Bowen and Alexander then decided to "cover" the house to see if there were any open windows or other doors. Alexander discovered a sliding glass door in the rear that was partially open. The officers entered the house to secure the scene and to make sure nobody inside was harmed. They searched the house for places they thought people could be hiding because they were concerned about an injured person or a person in danger. During the search they found no people but saw a scale with white powder residue and razor blades in the bathroom, a safe and money strewn about in a closet, and several guns on the floor under a bed. They secured the scene and waited for their supervisor to arrive. (App. p. 13, line 19 - p. 23, line 20).

On cross-examination, Bowen acknowledged he did not see anyone flee from the house and saw no broken windows or bullet holes on the house, or footprint marks on the door. He also did not hear any screaming, footsteps, or toilets flushing before they entered. (App. p. 28, line 10 - p. 29, line 1). However, on re-direct examination, Bowen explained the fact they did not hear anything could mean a victim was unconscious and lying in the house, or she was staying quiet due to fear. (App. p. 35, line 12 - p. 38, line 25). Richardson then called several witnesses, including Deputy Alexander, to the stand. Alexander corroborated Bowen's account of the

events which led to the search of Richardson's house. (App.p.66, line 13-p.77, line 15). Later that day, the Sheriff's Department obtained a search warrant for the house based on the observations made by Bowen and Alexander, and the narcotics team executed a search which ultimately led to the charges against Richardson. (App .p. 337, line 8-p.341, line 2).

After hearing testimony and oral arguments, and reviewing the exhibits and parties' written submissions, Judge Dennis orally announced: "I am just suppressing this evidence today." (App.p.100, line 22-p.101, line 20). However, upon further consideration, Judge Dennis issued a written order denying the motion to suppress by finding "the warrantless search & seizure to be proper, reasonable and not violative of Defendant's constitutional rights." (App. p. 101, line 1; p. 521).

On June 29, 2012, Richardson filed a motion to reconsider. (App. p. 521). Then, on August 13, 2012, Richardson filed a motion to exclude the same evidence, but on different grounds, arguing it was obtained in violation of the criminal domestic violence (CDV) provisions of the South Carolina Code Ann. § 16-25-70(H)(1)(a)". (App. p. 521). On August 28, 2012, Judge Dennis convened a hearing on Richardson's motions. Richardson was present and was represented by Mary Ford of the Ninth Circuit Public Defender's Office and Donna Taylor, Esquire. The State was represented by Assistant Solicitors Emmanuel Ferguson and Culver Kidd of the Ninth Circuit Solicitor's Office. After hearing arguments from Richardson, Judge Dennis denied the motion to reconsider and declined to rule on the motion to suppress on statutory grounds, finding the new motion was premature and should be raised to the trial judge. (App. p. 104 - p.114).

On November 13, 2012, the case was called for trial before the Honorable Stephanie P. McDonald; however, with consent of the parties, Judge Dennis conducted jury qualification and

selection while Judge McDonald handled a prior commitment. Richardson was present and represented by Donna K. Taylor and D. Lynn Bowley, Esquires. (App.p.46-p.175). Later that day, Judge McDonald assumed her role as presiding trial court judge and heard pre-trial motions, including Richardson's motion to exclude/suppress the evidence pursuant to the CDV statute. After hearing arguments from both parties, reviewing section 16-25-70 of the Code, and reviewing two published opinions which addressed the statute,[1] Judge McDonald found the officers did not enter Richardson's residence pursuant to the authorization of the CDV statute and denied the motion to suppress. (App. p. 154, line 1 - p. 170, line 10). The jury was then sworn, and the case proceeded to trial. (App. p. 179, line 1 - p. 180, line 8).

During the course of trial, the State sought to introduce various items into evidence, all of which were found either during the initial protective sweep or the subsequent search of Richardson's house. These included: (1) plastic baggies, scales, boxes, spoons and other items associated with the sale and distribution of narcotics; (2) bills, receipts, and other items linking Richardson to ownership of the house, (3) several guns, clips and ammunition; and (4) more than 2,000 grams (two kilograms) of cocaine. In each instance, Richardson stated he had "no objection" to the items introduced, and the evidence was admitted "without objection." (App. p. 348, lines 1-11; p. 357, lines 1-8; p. 361, lines 7-15; p. 366, lines 1-6; p. 371, lines 3-9; p. 372, lines 3-10). After the State concluded its case in chief, Richardson asked to "renew all prior arguments" including his request to exclude evidence under the CDV statute. The trial judge reiterated her earlier ruling to admit the evidence: "in light of the purpose and function of the domestic violence statute as well as the Supreme Court State v. Cannon decision." (App. p. 441, line 13-p. 443, line 5).

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[1] State v. Cannon, 336 S.C. 335, 520 S.E.2d 317 (1999); State v. Roberts, 340 S.C. 238, 530 S.E.2d 899 (Ct. App. 2000).

At the end of trial, the jury found Richardson guilty on all counts, and Richardson asked to renew any motions he had previously made. The trial judge said she stood by her prior rulings and denied the motions. (App. p. 492, line 11-p. 494, line 24). Richardson was sentenced to thirty years' imprisonment for trafficking cocaine, a consecutive term of five years' imprisonment for one count of unlawful possession of a firearm, and four concurrent terms of five years' imprisonment for each of the three remaining counts of unlawful possession of a firearm and the single count of possession of a firearm during the commission of a violent crime. (App. pp. 611-40;. p. 497, line 23-p. 499, line 10).

STANDARD OF REVIEW

The proper standard of review of a post-conviction relief decision is whether "any evidence of probative value" exists to sustain the lower court's findings. Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989). The reviewing court should reverse the post-conviction relief court if there is no probative evidence to support the lower court's ruling or if it is controlled by an error of law. Suber v. State, 371 S.C. 554, 558-59, 640 S.E.2d 884, 886 (2007) (citing Sheppard v. State, 357 S.C. 646, 651, 594 S.E.2d 462, 465 (2004)).

In a post-conviction relief action, an applicant has the burden of proving the allegations in his or her application. Rule 71.1(e), SCRCP; Caprood v. State, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). When an applicant alleges ineffective assistance of counsel as a ground for relief, he or she must prove "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. The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. "There is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case." Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007). 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 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." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Strickland, 466 U.S. 668.

ARGUMENT

The post-conviction relief court erred as a matter of law by granting Richardson a new trial, where it applied an incorrect standard and erroneously granted relief despite failing to make the requisite finding that Richardson would have prevailed on appeal had the issue been preserved for appellate review.

When the issue is that trial counsel failed to preserve the search issue for an appeal, certiorari is proper where the post-conviction relief court had not concluded Richardson would have prevailed on appeal, but only found "Applicant would have had the search and seizure issue addressed by an appellate court." This conclusion falls short of the prejudice prong requirement of Strickland v. Washington of a reasonable probability the **result** of the proceeding would have been different. In finding that while the proceeding and not the result would have been different, the post-conviction relief court erroneously granted Richardson a new trial.

In its order of dismissal, the post-conviction relief court found:

> Trial counsel should have protected the record for appeal and was ineffective in not doing so.
>
> There is no question trial counsel's failure to protect the record for appeal prejudiced Applicant. The failure to preserve the issue of the seizure extinguished Applicant's opportunity to have a very viable constitutional claim reviewed by an appellate court. The result in the proceeding, i.e. trial and appeal, would have been different if the record had been protected. **The undersigned does not find that Applicant would have prevailed on appeal,** but must, and does find the proceedings would have been different. Simply put, Applicant would have had the search and seizure issue addressed by an appellate court.

(App. 609). Essentially, the post-conviction relief court acknowledges the ultimate result of the proceeding would not have been different—Richardson would **not** have prevailed on appeal, but nonetheless, erroneously finds "the result of the proceedings would have been different." This

finding constitutes an error of law requiring this Court's review on certiorari and ultimately reversal.[2]

A. The prejudice prong requirement that the result of the proceeding would likely have been different was not found.

This Court has previously held an issue that was raised on direct appeal but found to be unpreserved may be raised in the context of a post-conviction relief claim alleging ineffective assistance of counsel. McHam v. State, 404 S.C. 465, 475, 746 S.E.2d 41, 47 (2013) (citing McLaughlin v. State, 352 S.C. 476, 575 S.E.2d 841 (2003); Foye v. State, 335 S.C. 586, 518 S.E.2d 265 (1999)). However, to be entitled to relief on such a claim, an applicant must establish the underlying claim is meritorious and would have resulted in a reversal on appeal to a reasonable probability. McHam, 404 S.C. at 475–76, 746 S.E.2d at 47 ("Since the Fourth Amendment issue was not considered on direct appeal because it was unpreserved, an examination of the merits of the issue is appropriate in analyzing the prejudice prong in McHam's PCR claim.") (citing Sikes v. State, 323 S.C. 28, 30, 448 S.E.2d 560, 562 (1994) ("When the defendant claims that counsel's failure to articulate a Fourth Amendment claim was ineffective assistance, [the] defendant must show that such claim is **meritorious** and that the verdict would have been different absent the evidence that should have been excluded." (emphasis in McHam)). Therefore, before a post-conviction relief court can find an applicant has prevailed on a claim of ineffective assistance of trial counsel for failing to preserve a ground for appellate review, the court must determine the underlying claim was meritorious and a reasonable probability that it would have resulted in reversal and a new trial.

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[2] The post-conviction relief court's order also contains an error of fact—it indicated Richardson testified at the evidentiary hearing when he did not. See App. p. 608; see also App. p. 550-92. This is further evidence of a convoluted and contradictory order not properly based on the record or correct law.

In this case, the post-conviction relief court did not make an express finding Richardson would have prevailed on appeal had trial counsel properly preserved his suppression arguments for appellate review. In contrast, the post-conviction relief court found Richardson would not have prevailed on his appeal. Therefore, this ultimate grant of relief is based on an error of law requiring reversal.

B. The prejudice prong cannot be satisfied on this record when the evidence was admissible so the failure to preserve for an impact on the result.

Moreover, Richardson is unable to meet his requisite burden of proof entitling him to relief—that he would have prevailed on the merits of his claim if it had been preserved for appellate review. On appeal, Richardson argued the trial court erred in denying his motion to suppress evidence seized from his residence following a police response to a 911 emergency call because the evidence was not found in plain view in a room in which the police were "interviewing, detaining, or pursuing a suspect" under S.C. Code section 16-25-70(H)(1)(a), which makes such evidence inadmissible in a court of law by statute. However, the trial court properly denied Richardson's pre-trial motion to suppress and admitted the drugs, weapons, and other items entered into evidence because the deputies did not enter Richardson's home under the authority of S.C. Code Ann. § 16-25-70(C), and therefore, the exclusionary provisions of S.C. Code Ann. § 16-25-70(H) do not apply. Furthermore, to the extent the officers did enter under the authority of § 16-25-70(C), the evidence was properly admitted pursuant to § 16-25-70(H) because: (1) it was found in "plain view of a law enforcement officer in a room in which the officer [was] . . . pursuing a suspect," and (2) the purpose behind the statute would not be furthered by suppression in Richardson's case.

Chapter 25 of Title 16 of the South Carolina Code sets forth general provisions regarding criminal domestic violence. It permits a warrantless arrest of a person: "if the officer has

probable cause to believe that the person is committing or has freshly committed a misdemeanor or felony pursuant to the provisions of Section 16-25-20(A) or (D), 16-25-65, or 16-25-125, even if the act did not take place in the presence of the officer." S.C. Code Ann. § 16-25-70(A) (Supp. 2010). It further provides:

> **In effecting a warrantless arrest under this section,** a law enforcement officer **may enter the residence of the person to be arrested in order to effect the arrest** where the officer has probable cause to believe that the action is reasonably necessary to prevent physical harm or danger to a family or household member.

S.C. Code Ann. § 16-25-70(C) (Supp. 2010) (emphasis added). Thus, the statute contemplates warrantless entry of a residence to effect a warrantless arrest. The entry may naturally result in a "plain view" warrantless search of the room where the arrest is made, and the arrest itself may naturally result in a warrantless search of the person "incident to arrest." The statute then addresses the admissibility of evidence discovered during these likely warrantless searches as follows:

> Evidence discovered as a result of a warrantless search administered pursuant to a complaint filed under this article is admissible in a court of law:
>
> (1) if it is found:
>
> (a) in plain view of a law enforcement officer in a room in which the officer is interviewing, detaining, or pursuing a suspect; or
>
> (b) pursuant to a search incident to a lawful arrest for a violation of this article or for a violation of Chapter 3, Title 16; or
>
> (2) if it is evidence of a violation of this article.
>
> An officer may arrest and file criminal charges against a suspect for any offense that arises from evidence discovered pursuant to this section.
>
> Unless otherwise provided for in this section, no evidence of a crime found as a result of a warrantless search administered

> pursuant to a complaint filed under this article is admissible in any court of law.

S.C. Code Ann. § 16-25-70(H) (Supp. 2010).

The warrantless search admissibility provisions in subsection (H) are only triggered if the warrantless search was actually conducted pursuant to subsection (C). State v. Cannon, 336 S.C. 335, 339, 520 S.E.2d 317, 319 (1999). Subsection (C) allows the officers to enter the residence in order to effect an arrest. Here, the officers entered Richardson's residence under exigent circumstances to protect the life and safety of a potential victim. Because they did not enter Richardson's home in order to effect an arrest, they did not enter the home under the authority of subsection 16-25-70(C), and subsection 16-25-70(H) does not apply. Id.

Regardless, to the extent Richardson contends the officers did enter his home under authority of section 16-25-70(C), in an effort to effect a warrantless arrest, then the evidence found in "plain view" was admissible under section 16-25-70(H) because it was discovered in a room where the officers were pursuing a suspect. If the officers entered Richardson's house under the authority of section 16-25-70(C), then the evidence discovered in the house was admissible under the clear and unambiguous language of section 16-25-70(H). If they did not enter Richardson's house under the authority of section 16-25-70(C), then, as explained above, section 16-25-70(H) does not apply. Cannon, 336 S.C. at 339, 520 S.E.2d at 319.

The Court of Appeals has found: "the ostensible purpose behind section 16-25-70(H) is to promote victims' access to protection from domestic violence unimpeded by the fear that unrelated criminal charges may result from summoning police assistance." State v. Roberts, 340 S.C. 238, 241, 530 S.E.2d 899, 901 (Ct. App. 2000). Although Deputies Bowen and Alexander were responding to a domestic violence call and would presumably have relied upon the authority of section 16-25-70(A) to arrest a CDV perpetrator, they did not, as was the case in

Roberts, "rely upon authority of section 16-25-70(A) to arrest" Richardson or conduct the search. Id. Instead, they entered Richardson's home under exigent circumstances and ultimately arrested Richardson for drug and weapons charges, not CDV. Because the goal of 16-25-70(H) would not be furthered by suppression in Richardson's case, the trial court properly denied his motion to suppress.

Therefore, even if trial counsel had renewed Richardson's motion to suppress and objected when the evidence was introduced during trial, Richardson has not shown that there is a reasonable probability the outcome of the trial would have been different because his underlying claim fails on its merits. Under these circumstances, Richardson has not established the requisite prejudice to support his claim of ineffective assistance of counsel. McHam, 404 S.C. at 481–82, 746 S.E.2d at 50. See generally Foye, 335 S.C. 586, 518 S.E.2d 265 (holding PCR was properly denied where the applicant did not prove he was prejudiced by trial counsel's deficient performance in failing to preserve an issue at trial).

Based on the foregoing, the post-conviction relief court erred in granting Richardson relief and remanding his case to the court of general sessions for a new trial. Therefore, the State asks this Court to grant certiorari and ultimately reverse the lower court's grant of post-conviction relief.

CONCLUSION

For all the foregoing reasons, the State requests that this Court grant this petition for a writ of certiorari and reverse the post-conviction relief court's grant of a new trial.

Respectfully submitted,

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June 23, 2017

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Petitioner.

PROOF OF SERVICE

I, Megan Harrigan Jameson, certify that I have served the within Petition for Writ of Certiorari and Appendix on Respondent by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

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I further certify that all parties required by Rule to be served have been served.
This 23rd day of June, 2017.

Megan Harrigan Jameson

MEGAN HARRIGAN JAMESON
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