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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Spartanburg County

Honorable Frank R. Addy, Circuit Court Judge

ALFRED GUY HENSON,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2017-001273

SUPPLEMENTAL APPENDIX

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**STATE OF SOUTH CAROLINA)
COUNTY OF SPARTANBURG)** **IN THE COURT OF COMMON PLEAS
SEVENTH JUDICIAL CIRCUIT**

**Alfred Guy Henson, 242989,)
Applicant)** **CASE NO.: 2013-CP-42-1936**
)
v.)
) **Post trial Memorandum of Applicant**
State of South Carolina,)
Respondent.)

I. TRIAL COUNSEL FAILED TO MAKE A CONTEMPORANEOUS OBJECTION TO PRESERVE THE SEARCH WARRANT ISSUE RAISED PRIOR TO TRIAL.

In this case trial counsel made an appropriate motion in limine to suppress evidence seized on his property without a search warrant. T. p. 76.

Generally, the Fourth Amendment requires the police to have a warrant in order to conduct a search. *State v. Weaver*, 374 S.C. 313, 319, 649 S.E.2d 479, 482 (2007). Evidence seized in violation of the warrant requirement must be excluded from trial. *Id.* However, a warrantless search may nonetheless be proper under the Fourth Amendment if it falls within one of the well-established exceptions to the warrant requirement. *State v. Moore*, 377 S.C. 299, 308–09, 659 S.E.2d 256, 261 (Ct.App.2008). “These exceptions include ...: (1) search incident to a lawful arrest; (2) hot pursuit; (3) stop and frisk; (4) automobile exception; (5) the plain view doctrine; (6) consent; and (7) abandonment.” *State v. Brown*, 401 S.C. 82, 89, 736 S.E.2d 263, 266 (2012). Furthermore, if police officers are following their standard procedures, they may inventory impounded property without obtaining a warrant. See *Colorado v. Bertine*, 479 U.S. 367, 372–73, 107 S.Ct. 738, 93 L.Ed.2d 739 (1987).

“Under the ‘plain view’ exception to the warrant requirement, objects falling within the

plain view of a law enforcement officer who is rightfully in a position to view the objects are subject to seizure and may be introduced as evidence.” *State v. Wright*, 391 S.C. 436, 443, 706 S.E.2d 324, 327 (2011). Therefore, for evidence to be lawfully seized under the plain view exception, the State must show: (1) the initial intrusion which afforded the police officers the plain view of the evidence was lawful; and (2) *the incriminating nature of the evidence was immediately apparent to the seizing authorities*. *Id. Emphasis added*. In this case the officer testified that at the time of Henson’s arrest, he had placed the camera under the car. The police were not aware of the burglary at the time of Henson’s arrest. Therefore, there could be no “incriminating nature” immediately apparent at the time of Henson’s arrest. On this basis Henson’s trial attorney made a motion to suppress the evidence prior to the trial. T. p. 76. He failed however, to renew that objection during the trial when the evidence was offered. T. p. 103-104; 136.

State v. Forrester, 343 S.C. 637, 642, 541 S.E.2d 837, 840 (2001) (“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.”) (citation omitted); *State v. Mitchell*, 330 S.C. 189, 193 n.3, 498 S.E.2d 642, 644 n.3 (1998) (“We have consistently held a ruling in limine is not final, and unless an objection is made at the time the evidence is offered and a final ruling procured, the issue is not preserved for review.”) (citation omitted); *State v. King*, 349 S.C. 142, 149, 561 S.E.2d 640, 643 (Ct. App. 2002) (holding the issue of whether the trial court erred in admitting crack cocaine into evidence was not preserved for review when defense counsel moved in limine to suppress the drugs but failed to renew the

motion when the drugs were actually admitted into evidence). Trial counsel's failure to renew his motion and objection to the evidence was therefore error that prejudiced Henson's case.

II. TRIAL COUNSEL WAS FAILED TO PROPERLY CROSS-EXAMINE STATE WITNESSES AND LOST LAST ARGUMENT BY HAVING TO CALL THE SAME WITNESSES IN THE DEFENSE CASE TO ASK QUESTIONS THAT SHOULD HAVE BEEN ASKED ON CROSS.

In a criminal prosecution, where a defendant introduces no testimony, he is entitled to the final closing argument to the jury. See *State v. Crowe*, 258 S.C. 258, 188 S.E.2d 379, cert. denied, 409 U.S. 1077 (1972). The right to open and close the argument to the jury has been described as "a substantial right, the denial of which is reversible error," see *State v. Togers*, 269 S.C. 22, 24-25, 235 S.E.2d 808, 809 (1977). Here, the trial attorney failed to pay attention and ask the appropriate questions of the officers on cross-examination. He therefore had to call them back in his case in chief to ask questions of them again. A review of the testimony shows that all of the questions asked in the defense case could and should have been asked on cross in the state's case. A review of the record shows that counsel was simply unprepared or inattentive during the state's case. His testimony at the PCR indicated as much. A review of the trial transcript shows that he didn't even realize during the trial that his calling the state's witnesses in his case in chief would lead to the loss of last argument. (Day 2 Tr. p. 39, l. 22-25). When asked by the judge if he realized that, counsel stated that he thought he had last argument. Counsel's loss of last argument was prejudicial, especially in light of the case being based on circumstantial evidence.

III. TRIAL COUNSEL'S FAILURE TO OBJECT TO THE USE OF UNCOUNSELED CONVICTIONS AS PROOF OF GUILT AND ENHANCEMENT OF SENTENCE CONSTITUTES INEFFECTIVE ASSISTANCE OF COUNSEL.

The use of an uncounseled conviction resulting in a sentence of imprisonment to enhance the punishment in a subsequent conviction violates the Sixth and Fourteenth Amendments to the United States Constitution. Nichols v. United States, 511 U.S. 738, 746-47, 114 S.Ct. 1921, 128 L.Ed.2d 745 (1994). Glaze v. State, 366 S.C. 271, 274-5, 621 S.E.2d 655, 657 (2005)A conviction obtained in violation of the Sixth Amendment can not be used in a subsequent prosecution to “support guilt or enhance punishment.” Burgett v. Texas, 389 U.S. 109, 115, 88 S.Ct. 258, 19 L.Ed.2d 319 (1967); see Loper v. Beto, 405 U.S. 473, 92 S.Ct. 1014, 31 L.Ed.2d 374 (1972) (affirming this proposition in the “support guilt” context); United States v. Tucker, 404 U.S. 443, 92 S.Ct. 589, 30 L.Ed.2d 592 (1972) (affirming this proposition in the enhancement of punishment context).

After the Supreme Court's decision in Alabama v. Shelton, the United States Court of Appeals for the Fifth Circuit, in United States v. Perez-Macias, 335 F.3d 421 (5th Cir.), cert. denied, [724 F.Supp.2d 1151] Perez-Macias v. United States, 540 U.S. 994, 124 S.Ct. 495, 157 L.Ed.2d 394 (2003), considered whether an uncounseled conviction resulting in a stand alone sentence of probation for illegally reentering the United States may be employed as a sentencing enhancement in a subsequent case, even though a violation of the terms of the original probationary sentence might result in a prison term. The Fifth Circuit explained that the imposition of probation itself, without more, does not trigger the Sixth Amendment because, “[i]f a defendant receives only a sentence of probation, he is sentenced to community release with

conditions; he does not receive a sentence of imprisonment." 335 F.3d at 426-27. The Fifth Circuit found that, while a sentence of probation might later become invalid, in conformity with Argersinger v. Hamlin and Alabama v. Shelton, it is not constitutionally invalid until and unless it results in a sentence of actual imprisonment. See 335 F.3d at 426-27.

A subsequent probation revocation is sufficient to satisfy the incarceration requirement and trigger Nichols:

“We hold that plea counsel was deficient in failing to challenge the prior conviction. Petitioner did not have counsel at the magistrate hearing and although he was originally sentenced to public service only, he subsequently served time in jail as a result of the conviction. Therefore, this prior conviction could not be used for enhancement purposes. Moreover, the PCR court erred in its prejudice analysis by finding that Petitioner suffered no prejudice because his sentence was less than the maximum for a first offense of trafficking. See Thompson v. State, 340 S.C. 112, 116, 531 S.E.2d 294, 297 (2000) (holding that whether a defendant is sentenced within the sentencing range is irrelevant in showing the absence of prejudice).”

Robinson v. State, 669 S.E.2d 588, 380 S.C. 201 (S.C., 2008).

Here the state supported guilt and enhanced punishment by relying on the prior uncounseled conviction that resulted in actual incarceration through a subsequent probation revocation. Trial counsel erred in failing to raise an objection to the state’s use of the prior conviction at trial and was therefore ineffective. Because the jury was allowed to rely on that evidence to convict Henson, he was prejudiced by counsel’s error. Strickland’s two prong test is therefore satisfied.

Respectfully submitted,

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