

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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S.C. SUPREME COURT

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Certiorari to Supreme Court County

Honorable Eugene C. Griffith, Circuit Court Judge  
\_\_\_\_\_

EDWARD RORECUSE YOUNG,

RESPONDENT,

V.

STATE OF SOUTH CAROLINA,

PETITIONER

APPELLATE CASE NO. 2015-000785  
\_\_\_\_\_

BRIEF OF RESPONDENT  
\_\_\_\_\_

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**ISSUE PRESENTED**

Did the PCR judge err in finding respondent met his burden of proving counsel was deficient in explaining actual and constructive possession and that he suffered prejudice as a result?

**COUNTER-QUESTION PRESENTED**

Was there evidence to support the PCR judge's ruling that counsel was ineffective for moving to suppress the drugs on the grounds that respondent did not have constructive possession of them, and then advising respondent to plead guilty when the judge naturally did not suppress the drugs on that basis, since not having constructive possession over the drugs was a legal defense and not a constitutional basis to suppress the drugs?

**STATEMENT**

Respondent agrees with the state's procedural statement of the case.

## ARGUMENT

There was evidence to support the PCR judge's ruling that counsel was ineffective for moving to suppress the drugs on the grounds that respondent did not have constructive possession of them, and then advising respondent to plead guilty when the judge naturally did not suppress the drugs on that basis, since not having constructive possession over the drugs was a legal defense and not a constitutional basis to suppress the drugs.

### **Relevant facts**

Respondent was erroneously led to believe by his attorney, Scott Robinson, that lack of constructive possession was grounds to suppress the drugs. When respondent lost the suppression hearing on the lack of constructive possession issue, he naturally believed that he had lost on that issue -- in reality that defense -- and he agreed to plead guilty. During the suppression hearing, Robinson told the judge that the drugs were found in an old paint can in the woods. Respondent was only in those woods to "relieve himself." App. 3, ll. 2-15.

After hearing testimony during the suppression hearing, Robinson argued that the drugs should be suppressed because the state had failed to prove respondent had: "Dominion and control over these drugs where the pill bottle that was found in this paint can. The first officer testified that he did not know how long the paint can had been there [in the woods]. He also said that he had not inspected the property prior to this time to see if anyone had been there or around the paint can. . . . Just because he's present in the area mere presence is not enough to get the state pass this dominion and control they need in this matter." App. 71, l. 15 - 72, l. 17.

The assistant solicitor, Mr. Steinberg, correctly told the judge that "lack of dominion and control" over the drugs was not a suppression issue. It was properly a directed verdict issue or a jury argument following a trial. App. 73, ll. 16 - 21; 74, ll. 16-19. Assistant solicitor Steinberg

nonetheless observed: “he [Counsel Robinson] wanted a separate suppression hearing. I have given him a suppression hearing.” App. 75, ll. 2-8.

After the suppression hearing, the parties took a break, and it was announced to Judge Seals that respondent was pleading guilty to trafficking in Ice, second offense. App. 75, l. 3 – 77, l. 8. Respondent would later testify that after the judge refused to suppress the drug evidence that Robinson advised him to plead guilty. As will be seen infra, Robinson agreed that once the drug evidence was not suppressed that respondent should plead guilty.

Respondent then went through the normal guilty plea colloquy, and told the judge he was waiving his right to a jury trial or a bench trial. App. 77, l. 2 – 79, l. 25.

Steinberg then told the judge that respondent got out of an automobile while an off-duty deputy was mowing his lawn next door. Respondent “was simply relieving himself in the woods. He appeared to be nervous and then left. The deputy then searched in the area and found 100 grams of crack in a pill bottle near where the suspect was standing stooped over. Deputies then stopped this defendant approximately an hour later who had first continued to state he was just relieving himself. . . . He then stated that he was going to pick up an unknown item in exchange for \$50 but that story was later disproved.” App. 80, l. 1 – 81, l. 1. The judge told the parties that he would accept this plea as an Alford<sup>1</sup> plea. App. 81, l. 2 – 82, l. 21. Judge Seals then sentenced respondent to seven years in prison. App. 82, ll. 2 – 24.

Petitioner alleged in his PCR application that his attorney used an “invalid strategic reasoning,” and was ineffective in explaining constructive possession of drugs. App. 87.

During the PCR hearing defense counsel Scott Robinson explained that this case was “really bad luck” on respondent’s part. Robinson testified a police officer was mowing his lawn and he

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<sup>1</sup> North Carolina v. Alford, 400 U.S. 25 (1970).

saw respondent go into the woods and relieve himself. Robinson said the goal of the suppression hearing was with trying to keep “the drugs out” because respondent was not in constructive possession of them. Robinson **repeatedly confirmed** that he wanted the judge to suppress the drugs on the basis that respondent was not in constructive possession of them. App. 100, l. 20 – 101, l. 13.; 103, l. 1 – 104, l. 20. The state arguing that defense counsel was not ineffective for not explaining “actual possession” is respectfully just an attempt to divert attention from the most basic fact that defense counsel did not understand that lack of constructive possession or mere presence was not a grounds for suppressing the drugs but a defense to the charge that the jury or judge as the trier of fact would decide. Brief of Petitioner at 8-9. Furthermore, the state even defends this as “a valid trial strategy.” Brief of Petitioner at 9.

Robinson said he did not know if the drugs would be suppressed by the trial judge. Robinson added that “if the drugs were allowed in, I think it would have been prudent to consider a guilty plea.” App. 106, ll. 2 – 22.

Respondent Young testified that he did not have any control over the drugs. He said that if he would have understood from Robinson the constructive possession concept at the time -- meaning that a jury would have to find him guilty by concluding that he had constructive possession over the drugs -- “that really would have brought reasonable doubt to the jury.” App. 120 – 121, l. 23.

Respondent told the PCR judge that he now understood constructive possession was “a legal argument . . . I don’t think it constitutes the grounds of a suppression hearing though . . . there’s no reason to suppress those drugs.” App. 121, l. 24 – 122, l. 21. Respondent testified that he should not have plead guilty, and he would have gone to trial with his present understanding that all the state had against him was “mere presence in the area of the drugs.” App. 124, l. 18 – 125, l. 16.

With his current and correct understanding of the law, respondent testified he now understood that “at the trial” that lack of constructive possession of the drugs “would have been a great defense,” and that the only evidence the state had against him was his “mere presence. App. 124, l. 18 – 125, l. 16.

Respondent’s brother, Adidas Glenn, was the driver of the automobile when respondent got out of the car to relieve himself. He corroborated what was largely undisputed about respondent relieving himself in the woods, and the paint can with the drugs being found in the area. Adidas said he would have testified in respondent’s defense if he had been called as a witness at trial. App. 131, l. 3 – 139, l. 7.

PCR counsel then argued that constructive possession was not a constitutional or other legal basis for suppression of the drug evidence. Counsel said it was abundantly clear from the record that respondent was misled into thinking that constructive possession was a grounds for suppression rather than a legal argument to be made to the trier of fact. App. 143, l. 2 – 146, l. 9.

Judge Griffith then asked if respondent understood that if he ordered the guilty plea set aside that he was still facing a trial, and a longer sentence if convicted. Respondent told the judge that he understood the situation if his plea was set aside. App. 146, l. 10 – 148, l. 7.

An order granting post-conviction relief was filed on March 19, 2015. App. 150 – 154. The order stated the record reflected that plea counsel argued to the court that the drugs should be suppressed because respondent did not have dominion and control over the drugs. Respondent was advised by counsel after the judge denied the motion to suppress that he should plead guilty. Respondent learned about constructive possession after his guilty plea, and he then realized that he had been misadvised about this legal defense of not having constructive possession (mere presence),

and that it was a legal argument and not a basis for suppression. App. 152 – 153. The judge therefore granted respondent post-conviction relief. App. 153.

### **Discussion**

It is readily apparent, respectfully that trial counsel bungled this case. He moved to suppress the drugs prior to trial on the grounds that respondent did not have constructive possession over the drugs. However, constructive possession was not a constitutional unlawful search or seizure issue upon which the drugs could be suppressed. Rather, constructive possession was, as both assistant solicitor Steinberg and PCR counsel argued, a legal defense at trial or a directed verdict issue. The legal defense was that respondent never had constructive possession over the drugs, and that he was merely present.

There was certainly evidence to support the PCR judge's finding that respondent was misadvised about the law and procedure in this case, and that he would not have plead guilty had he been properly advised. See Hill v. Lockhart, 474 U.S. 52, 58 (1985). Here, trial counsel argued that the trial court should have suppressed the judge because respondent did not have dominion and control over the drugs. When the trial court inevitably did not grant the motion to suppress on that basis, defense counsel recommended that respondent plead guilty.

It is apparent from this record that respondent had a very viable defense. Defense counsel called respondent's fate "bad luck". It is much more than that -- and the present record screams out that was a case that should have been tried. Regardless, the standard of review of Judge Griffith's order in this case is "any evidence" in support of that ruling. See Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1999). There is ample evidence in this case to support the PCR judge's well-reasoned grant of post-conviction relief in this case.

Further, and most respectfully to the state, this was not “a valid trial strategy” that the PCR judge “second guessed.” Brief of Petitioner at 9. Counsel simply had a fundamental misunderstanding of the law that led him to ask for a suppress hearing on a non-existent legal basis to suppress, and respondent cannot be faulted for following his attorney’s advice and pleading guilty after the “suppression hearing.” Finally, another major problem with the state’s argument that this was a “valid legal strategy” was that competent counsel would not have shown the state his trial defense during a pre-trial hearing where no relief was possible.

What is clear in this case was that respondent contended he was not in possession of the drugs, and therefore he should not be guilty of the offense. Counsel advised that the way to achieve that goal was a motion to suppress based on lack of constructive possession of the drugs. That was error, and when the drugs were not suppressed on a legally spurious basis, as should have been totally predictable to competent counsel, counsel then advised that a guilty plea was the best option. The ill-advised suppression hearing should never have occurred, and respondent’s defense of lack of constructive possession over the drugs and mere presence should have been put before the trier of fact: A jury or the judge during a bench trial. Respondent was denied the right to a jury or bench trial where he had this very viable defense based on the erroneous advice of counsel. Cf. People v. Cunningham, 286 Ill.App.3d 346, 352 676 N.E.2d 998, 1003 (1997)(Under state procedural rules “through no fault of his own, but on the erroneous advice of trial counsel, defendant has been, in essence, denied the direct review of the denial of his motion to suppress. Trial counsel's mistake is akin to failing to perfect an appeal,” and the guilty plea is vacated and remanded.).

There was evidence to support the PCR judge’s order that counsel performed in a deficient manner, and that respondent was prejudiced. The order of the lower court should respectfully be

affirmed. Hill v. Lockhart, 474 U.S. 52, 58 (1985); Bell v. State, 410 S.C. 436, 765 S.E.2d 4  
(Ct.App. 2014)(“Any evidence” standard on post-conviction relief).

**CONCLUSION**

By reason of the foregoing argument, the order of the lower court should respectfully be affirmed.

A handwritten signature in black ink, appearing to read 'R M Dudek', written over a horizontal line.

Robert M. Dudek  
Chief Appellate Defender

ATTORNEY FOR PETITIONER

This 6th day of April, 2018.

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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S.C. SUPREME COURT

Appeal from Greenville County

Honorable Eugene C. Griffith, Circuit Court Judge

EDWARD RORECUSE YOUNG,

RESPONDENT,

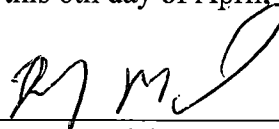
V.

STATE OF SOUTH CAROLINA,


PETITIONER

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Brief of Respondent in the above referenced case has been served upon DeShawn H. Mitchell, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Brief of Respondent has been served on Edward Rorecuse Young, #314830, at Evans Correctional Institution, 610 Hwy. 9 West, Bennettsville, SC 29512, this 6th day of April, 2018.

  
Robert M. Dudek  
Chief Appellate Defender  
ATTORNEY FOR RESPONDENT

SUBSCRIBED AND SWORN TO before me  
this 6th day of April, 2018.

 (L.S)

Notary Public for South Carolina

My Commission Expires: May 2, 2027.