

**ORIGINAL**

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Greenville County

Honorable Letitia H. Verdin, Circuit Court Judge

**RECEIVED**

**NOV 14 2018**

**S.C. SUPREME COURT**

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DOMINIQUE J. SHUMATE,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2018-000963

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PETITION FOR WRIT OF CERTIORARI  
\_\_\_\_\_

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**ISSUE PRESENTED**

Whether trial counsel provided ineffective assistance for failing to move to identify the confidential informant in order to suppress the fruits of the search warrant that resulted in the arrest of Petitioner, where the confidential informant's written statement was the basis for the search warrant and where the suppression of the search warrant was crucial in Petitioner's case?

## STATEMENT

During the February 2012 term, the Greenville County Grand Jury indicted Petitioner for trafficking cocaine base, possession of a controlled substance with intent to distribute, distribution of cocaine base, possession of cocaine with intent to distribute, and possession of a weapon during the commission of a violent crime. App. 300 – 306.

A confidential informant participated in a controlled buy of crack cocaine from a trailer on Old Bleachtry road. App. 45, l. 21 – 46, l. 4; App. 47, ll. 1 – 7. Although that informant never bought drugs from Petitioner, his or her written statement that crack cocaine was being sold from the trailer constituted the basis for the search warrant for the trailer where Petitioner was later arrested. App. 47, ll. 1 – 7.

Petitioner's trial was held on May 15, 2012 in front of the Honorable C. Victor Pyle, and a jury. App. 1. Susannah Ross represented Petitioner. Id. Lisa Bentley represented the state. Id.

Petitioner was found guilty as indicted on all counts. App. 225, l. 14 – 226, l. 21. Judge Pyle sentenced Petitioner to: fifteen years' imprisonment and to pay a \$50,000 fine for trafficking cocaine base, second offense; five years' imprisonment for distribution of cocaine base; one-year imprisonment for possession of cocaine with intent to distribute; one-year imprisonment for possession of a schedule 4 controlled substance with intent to distribute; and five years' imprisonment possession of a weapon during the commission of a violent crime. App. 232, l. 21 – 233, l. 12.

A notice of appeal was filed on Petitioner's behalf and an appeal was perfected pursuant to Anders v. California, 378 U.S. 738 (1967). Petitioner's convictions were affirmed by South Carolina Court of Appeals. State v. Shumate, Op. No. 2014-UP-410 (filed November 19, 2014). App. 258, ll. 9 – 15.

On June 6, 2016, Petitioner filed an application for post-conviction relief (PCR). App. 235 – 243. The state filed its Return on January 12, 2017. App. 245 – 252. In his PCR application, Petitioner alleged that trial counsel provided ineffective assistance because the credibility of the confidential informant in his case was never challenged. App. 240.

On October 23, 2017, Petitioner had his PCR hearing held in front of the Honorable Letitia H. Verdin. App. 254. Rodney Richey represented Petitioner. Id. Deshawn Mitchell represented the state. Id.

The written statement made by the confidential informant was used as the basis to obtain the search warrant for the trailer in which Petitioner was arrested. App. 46, l. 13 – 47, l. 3. The confidential informant bought drugs from the trailer where Petitioner was later arrested, but the informant did not buy any drugs from Petitioner. App. 46, ll. 1 – 21. The criminal informant's written statement was never revealed in discovery and never provided to defense counsel because no charges were levied against Petitioner from the informant's controlled buy. App. 96, ll. 7 – 12. There was nothing on the record that indicated Petitioner never committed any crimes in front of the confidential informant.

The suppression of the evidence seized pursuant to the search warrant was crucial to Petitioner's case. Trial counsel knew that impeaching the informant's credibility was paramount in suppressing the evidence. This was evinced by the fact that trial counsel made an argument to the judge that the search warrant was invalid for lack of probable cause because it did not specifically reference the confidential informant's credibility. App. 96, ll. 15 – 20. However, trial counsel failed move to identify the state's confidential informant's to impeach his or her credibility.

Had trial counsel moved to identify the criminal informant, she could have attacked the informant's credibility and reliability which would have rendered her suppression motion successful. Trial counsel's failure to move to identify the confidential informant was particularly prejudicial to Petitioner because as trial counsel argued, "the search warrant was completely based on the word of the CI. There was nothing about the CI being reliable [in the search warrant] and if in fact there is anything in that statement based on the CI's reliability... it certainly would be relevant to the basis of this entire search warrant and goes to our case." App. 96, ll. 13 – 20.

In an order filed May 15, 2018, Judge Verdin denied Petitioner's PCR application. App. 279 – 295. Judge Verdin found that trial counsel was not ineffective because she made multiple motions regarding both the search warrant and to suppress the evidence in the case, as well as a motion to suppress the affidavit for the search warrant. App. 290 – 291.

This Petition for Writ of Certiorari follows.

## ARGUMENT

Trial counsel provided ineffective assistance for failing to move to identify the confidential informant in order to suppress the fruits of the search warrant that resulted in the arrest of Petitioner, where the confidential informant's written statement was the sole basis for the search warrant and where the suppression of the search warrant was crucial in Petitioner's case.

### **Relevant Facts**

On November 17, 2010, the Greenville County Sheriff's Office executed a search warrant on a trailer off Old Bleachtry Road. App. 47, l. 15 – 48, l. 1. Petitioner was found inside the trailer. App. 66, ll. 2 – 23. Crack cocaine as well as an assortment of other controlled substances were found inside the trailer as well. App. 73, l. 17 – 77, l. 6; App. 163, l. 9 – 164, l. 5. No illicit substances were found on Petitioner and only a nominal amount of cash was found on his person. App. 87, ll. 6 – 12.

At trial Petitioner challenged the validity of the search warrant. App. 7, l. 23 – 8, l. 2. Trial counsel made a number of arguments in a pretrial motion for the suppression of the search warrant and the drugs uncovered pursuant to its execution.

First, trial counsel argued that the police failed to return the search warrant to the issuing judicial officer as required by S.C. Code Ann. § 17-13-140. App. 11, ll. 14 – 25. Trial counsel's second reason for the suppression of the search warrant was that, "probable cause was not established in the affidavit showing a fair probability that drugs would be found... CI made purchases somewhere in this trailer park at Bleachtry Lane... there's no specific address, it is simply [redacted] Bleachtry Road, There are possibly nine trailers there... [the search warrant]

lacks specific detail to which trailer they're talking about." App. 15, l. 23 – 16, l. 15; S.C. Code Ann. § 17-13-140.

After Deputy Walters testimony in front of the jury at trial, trial counsel argued that the warrant lacked probable cause because it is based on the statement of a confidential informant and had no reference to his or her credibility. App. 96, ll. 4 – 20. Trial counsel was provided a redacted copy of the statement by the confidential informant and argued that there were discrepancies between the informant's written statement and the warrant, such that the warrant lacked specificity for probable cause. App. 97, ll. 7 – 25. However, trial counsel failed to move to identify the confidential informant to have him or her testify to the vagaries and discrepancies in the written statement and warrant.

Judge Pyle denied trial counsel's motion. App. 17, ll. 24 – 25; App. 97, ll. 23 – 25. Petitioner was found guilty as indicted on all counts. App. 225, l. 14 – 226, l. 21.

### **Discussion**

Petitioner was arrested during the execution of a search warrant at a trailer on Old Bleachtry road. App. 66, l. 2 – 67, l. 8. Prior to the execution of the search warrant, a confidential informant participated in a controlled buy of crack cocaine. App. 45, l. 21 – 46, l. 4. The informant wore an audio recording device during the controlled buy. Id. Although Petitioner was not present when the controlled buy happened, the search warrant was "completely" based on the written statement by a confidential informant. App. 54, l. 4 – 17; App. 96, ll. 4 – 20.

In Petitioner's case, trial counsel's failure to move to identify the confidential informant constituted ineffective assistance because without knowing the identity of the confidential informant she was unable to effectively attack his or her credibility. This failure ensured trial

counsel's motion to suppress the evidence uncovered from the execution of the search warrant would fail and that failure prejudiced Petitioner.

As a threshold matter, in order to attack the search warrant for lack of probable cause, Petitioner must have had a reasonable expectation of privacy in the premises searched. Rakas v. Illinois, 439 U.S. 128, 143 (1978). Petitioner did not own the trailer that was the subject of the search warrant in question. App. 141, ll. 8 – 12. However, Petitioner frequented the trailer, maintained a very close relationship with the owner of record, and helped pay the bills to maintain the trailer. App. 139, l. 1; App 142, l. 22 – 143, l. 1.

The South Carolina Supreme Court found an individual had a reasonable expectation of privacy in an apartment where he was a guest. State v. Missouri, 361 S.C. 107, 603 S.E.2d 594 (2004). The Court was persuaded that Missouri expected privacy in the apartment of his “good friend,” with whom he had grown up and frequently visited. In the past, Missouri had spent the night occasionally. Missouri explained he felt comfort at the apartment. He had a key and kept a change of clothes there. He was present in the apartment as a social guest and had been there for at least seven hours prior to the execution of the search. Id. at 115, 603 S.E.2d at 597. The Court held “[b]y choosing to share the privacy of their home with [defendant] on several occasions in the past and on the occasion in question, both the [homeowners] and [defendant] demonstrated a subjective expectation of privacy, and that expectation, we hold is one that society is prepared to recognize as reasonable.” Id. at 115, 603 S.E.2d at 597-598. In Kolle v. State, 386 S.C. 578, 590, 690 S.E.2d 73,79 (2010), this Court re-affirmed its holding in Missouri, supra, that an overnight guest has a reasonable expectation of privacy and is afforded protections pursuant to the Fourth Amendment as a result.

Following the reasoning of the United States Supreme Court, several courts have concluded that individuals who were guests, even if not overnight guests, in a person's home had a reasonable expectation of privacy. United States v. Gray, 491 F.3d 138, 144-146 (4th Cir. 2007) (detailing the distinctions between business and social guests for purposes of Fourth Amendment protections); United States v. Paradis, 351 F.3d 21, 27 (1st Cir. 2003) (finding Paradis was entitled to Fourth Amendment protection in his girlfriend's home because Paradis lived there when the two were not fighting and he kept possessions there); United States v. Rhiger, 315 F.3d 1283, 1286-1287 (10th Cir. 2003) (holding that a social guest has a sufficient expectation of privacy to challenge unreasonable searches of his host's home); United States v. Fields, 113 F.3d 313, 320-321 (2d Cir. 1997) (holding Fields had a reasonable expectation of privacy in the place searched where he had a key, paid the owner weekly to use the apartment, had used the apartment forty or fifty times, could bring guests, and could come and go as he pleased with minor restrictions despite the fact that Fields did not sleep at the place and used it for illegal activity); Bonner v. Anderson, 81 F.3d 472, 475 (4th Cir. 1996) (holding that Bonner, who was not an overnight guest, had an expectation of privacy in the home of a neighbor because Bonner was a frequent visitor who ran errands for her elderly neighbor); United States v. Foster, 654 F.Supp.2d 389, 395 (E.D.N.C. 2009) (holding the defendant had standing to challenge the search of his fiancé's apartment where the record suggested that he had moved into the apartment or was, at a minimum, a frequent visitor); Nieves v. New York City Police Dept., 716 F.Supp.2d 299, 307 (S.D.N.Y. 2010) (finding Nieves had a legitimate expectation of privacy in his friend's apartment where Nieves had been friends with the owner for several years, spent the night in the apartment about five times a month, had a key to the apartment, kept personal items there, and was the sole occupant when the police arrived to search); State v. Cuntapay, 85 P.3d 634, 641-642 (Hawai'i 2004) (holding that a guest had a reasonable expectation of privacy in

his friend's home where the guest visited once or twice a week to play cards and darts under the state's constitution); In re Welfare of B.R.K., 658 N.W.2d 565, 578 (Minn. 2003) (holding that a juvenile remaining at the home of another minor after a party without adult supervision or authorization – a short term social guest – had a reasonable expectation of privacy in the other minor's home and was afforded the Fourth Amendment's protections); State v. Tullous, 692 N.W.2d 790, 794 (S.D. 2005) (holding that the defendant had a reasonable expectation of privacy in the home of another where the defendant was a regular social guest at the home, who occasionally babysat for the homeowner and knew the location of the hidden key); State v. Trecroci, 630 N.W.2d 555, 569-570 (Wis. Ct. App. 2001) (holding that a defendant had a reasonable expectation of privacy in the attic space of her fiancée's apartment building even though the attic was not used as an attic and the defendant was not an overnight guest).

Petitioner frequented the trailer where he was arrested. App. 138, l. 25 – 139, l. 1; App. 142, ll. 6 – 8. Petitioner maintained a close relationship with the property owner, Drummond. App. 139, ll. 10 – 11. The record shows that Petitioner visited the trailer multiple times a week. App. 142, ll. 6 – 8. Petitioner was allowed inside the trailer while the property owner was incarcerated. App. 142, l. 9 – 143, l. 9. Petitioner helped pay the bills for the trailer as well. Id. Therefore, Petitioner had a reasonable expectation of privacy in the trailer searched as a social guest and standing to contest the search warrant. State v. Missouri, 361 S.C. 107, 603 S.E.2d 594 (2004).

Generally, the state may not be compelled to disclose the names of its confidential informants. State v. Burney, 294 S.C. 61, 362 S.E.2d 635 (1987). However, the United States Supreme Court has held, "Where the disclosure of an informer's identity . . . is *relevant and helpful* to the defense of an accused, or is *essential to a fair determination of a case*, the privilege must give way." Roviaro v. United States, 353 U.S. 53 (1957) (emphasis added); see State v. Hayward,

302 S.C. 75, 393 S.E.2d 635 (1990).

This Court has held, “[p]ublic policy considerations for nondisclosure of an informant's identity are absent where the informant openly participates in the criminal transaction.” State v. Diamond, 280 S.C. 296, 299, 312 S.E.2d 550, 551 (1984)(whether to call an informant as a witness is a matter for the accused rather than the state); see McLawhorn v. North Carolina, 484 F.2d 1 (4th Cir. 1973) (disclosure is required where an informant is an actual participant, particularly where he sets up the criminal transaction); see also State v. Blyther, 287 S.C. 31, 33, 336 S.E.2d 151, 152-53 (Ct. App. 1985) (finding “disclosure may be required, particularly where, in a drug related crime, he is the *only witness to the transaction other than the buyer and the defendant*”) (internal citation omitted) (*emphasis added*).

In determining whether disclosure of an informant's identity is essential to the defense, the trial court must determine whether the informant is a mere “tipster” who has only peripheral knowledge of the crime or an active participant in the criminal act or a material witness on the issue of guilt or innocence. Bultron, 318 S.C. at 329, 457 S.E.2d at 620. An informant's identity need not be disclosed where the informant possesses only a peripheral knowledge of the crime or is a mere tipster supplying a lead for law enforcement authorities to investigate. Blyther, at 31, 336 S.E.2d at 151.

Furthermore, it is necessary to examine the reliability and credibility of a confidential informant for determining the existence of probable cause. Illinois v. Gates, 462 U.S. 213, 230-235 (1983). In determining whether the information relied upon by law enforcement is reliable, no one factor is necessary or sufficient to establish probable cause. Instead, probable cause arises from the totality of the circumstances, and “[a] deficiency in one [factor] may be compensated

for, in determining the overall reliability of a tip, by a strong showing as to the other, or by some other indicia of reliability.” Id.

Without the ability to confront the informant, trial counsel was unable to effectively attack the informant’s credibility in her effort to suppress the search warrant. The search warrant, “completely” relied on the statement from the informant, who was the only witness to alleged illegal activity inside the trailer. App. 96, l. 4 – 20; Burns, 294 S.C. at 340, 364 S.E.2d at 466 (informant who was the sole witness corroborating allegation of accused drug’s use was a material witness because he was relied upon by law enforcement when seeking a warrant). Since there was no evidence that Petitioner sold anyone any illicit substances nor was Petitioner arrested with drugs on his person, the execution of the search warrant was the only reason Petitioner was brought in on the current charges. Therefore, identifying the informant to question him or her and attack his or her credibility was critical to the defense because the search warrant “completely” relied on the written statement by the confidential informant. App. 96, l. 4 – 20.

Moreover, the confidential informant’s written statement alleged vague facts. App. 15, l. 23 – 16, l. 15. For example, in the written statement the informant told police that the drug sale happened at a trailer off Old Bleachtry road but failed to specify which trailer and failed to specify who sold him crack cocaine. Id.

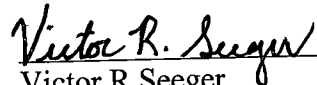
As the only source of information for the search warrant, the confidential informant was the only person who could explain any vagaries in the written statement. Blyther, at 31, 336 S.E.2d at 151. Whether the informant had ulterior motives was likewise impossible to discover, as was whether the informant was paid or received other benefits as a result of his work. Driggers, 322 S.C. at 514, 473 S.E.2d at 61 (ulterior motives of informant, relevant to reliability). Without the identity of the informant, Petitioner was unable to successfully attack the search warrant for lack of probable

cause. The state, on the other hand, was able to hide any weaknesses in their case from the jury by keeping the informant's identity a secret.

Therefore, trial counsel provided ineffective assistance of counsel that prejudiced Petitioner because her failure to move to identify the confidential informant hindered her ability to suppress the fruits of the search warrant, which resulted in Petitioner's arrest and convictions on the current charges.

**CONCLUSION**

By reason of the foregoing arguments, Petitioner respectfully requests his convictions be vacated and his case remanded to the circuit court for a new trial.

  
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Victor R Seeger  
Appellate Defender

ATTORNEY FOR PETITIONER

This 14th day of November, 2018.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Greenville County

Honorable Letitia H. Verdin, Circuit Court Judge

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DOMINIQUE J. SHUMATE,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

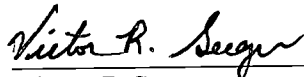
RESPONDENT

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CERTIFICATE OF SERVICE

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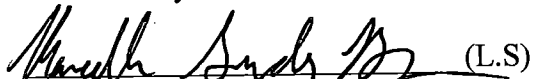
The undersigned hereby certifies that a true copy of the Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon Megan Harrigan Jameson, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Petition for Writ of Certiorari and a copy of the Appendix have been served on Dominique Jarard Shumate, #319438, at Allendale Correctional Institution, PO Box 1151, Hwy. 47, Fairfax, SC 29827, this 14th day of November, 2018.



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Victor R Seeger  
Appellate Defender  
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me  
this 14th day of November, 2018.

 (L.S)  
Notary Public for South Carolina  
My Commission Expires: July 26, 2028.