

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Horry County

Honorable William H. Seals, Circuit Court Judge

CRAIG AUSTIN LIVINGSTON,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2018-000523

PRO SE

PETITION FOR WRIT OF CERTIORARI

CRAIG A. LIVINGSTON, PRO SE

304858

K. C. I.

4344 BROAD RIVER RD

COLUMBIA, S.C. 29210

RECEIVED

DEC 27 2018

S.C. SUPREME COURT

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The P.C.R Judge erred in denying Petitioner’s claim that counsel failed to suppress the blood alcohol content by not conducting an adequate investigation concerning the policies, procedures, regulations, and requirements of South Carolina code 1976 Section 17-13-140 concerning the search warrant and return for Petitioner’s blood. Because the return for the warrant ordering Petitioner to submit one vial of blood was defective and the chain of custody was not valid because the signature of the Magistrate Judge and the officer executing the warrant was not present on the return.....	5
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ISSUE PRESENTED

The P.C.R Judge erred in denying Petitioner's claim that counsel failed to suppress the blood alcohol content by not conducting an adequate investigation concerning the policies, procedures, regulations, and requirements of South Carolina code 1976 Section 17-13-140 concerning the search warrant and return for Petitioner's blood. Because the return for the warrant ordering Petitioner to submit one vial of blood was defective and the chain of custody was not valid because the signature of the Magistrate Judge and the officer executing the warrant was not present on the return.

STATEMENT

Petitioner Craig A. Livingston pled guilty to two counts of felony DUI resulting in death during the April 2016 term of the Horry County General Sessions Court before Judge Steven H. John and was sentenced to two concurrent twenty-year prison terms. App. 1-29. Petitioner did not appeal his guilty pleas or sentences. Johnny Gardner represented petitioner at the plea proceeding and Assistant Solicitor George H. DeBusk appeared on behalf of the state.

On July 12, 2016, petitioner filed a PCR application with the Horry County Office of the Clerk of Court. App. 31-38. The respondent filed a return dated March 20, 2017, requesting that a hearing be held in response to petitioner's PCR action. App. 39-42.

A PCR hearing was convened on November 29, 2017, at the Horry County Courthouse before Judge William H. Seals. App. 44-84. Petitioner was present at the PCR hearing and represented by Steven W. Fowler, and Assistant Attorney General Johnny E. James appeared on behalf of the state.

On March 6, 2018, Judge Seals issued an Order of Dismissal therein denying petitioner's allegations of ineffective assistance of counsel in the case. App. 86-94.

Petitioner appealed Judge Seals' Order of Dismissal. This petition follows.

EXHIBIT A

WARRANT AND RETURN

STATE OF SOUTH CAROLINA

County of *Horry*

SEARCH WARRANT

Date: *December 22, 2014*

Officer: **Cpl. Michael Hodge**

3a

STATE OF SOUTH CAROLINA)
)
COUNTY OF *Horry*)
)

SEARCH WARRANT

Form Approved by
SC Attorney General
Section 19-13-160
March 15, 1978

TO ANY BONDED LAW ENFORCEMENT OFFICER OF THIS STATE OR COUNTY OR OF THE
MUNICIPALITY OF: *Horry*

It appearing from the attached affidavit that there are reasonable grounds to believe that certain property subject to seizure under provisions of Section 17-13-140, 1976 Code of Laws of South Carolina, as amended, is located on the following premises:

DESCRIPTION OF PREMISES (PERSON OR THING) TO BE SEARCHED

One Craig Austin Livingston

Now, therefore, you are hereby authorized to search the subject premises for the property described below and to seize such property if found:

DESCRIPTION OF PROPERTY

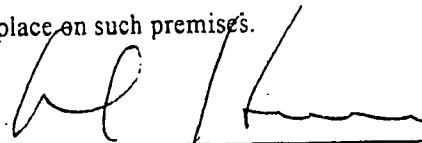
The State is requiring one Craig Austin Livingston to submit one vial of blood

This Search Warrant shall not be valid for more than ten days from the date of issuance.

" A written inventory of all property seized pursuant to this Search Warrant shall be made to *any county Magistrate* within ten days from the date of this warrant, such inventory to be signed by the officer executing this warrant, and a copy of such inventory shall be furnished to the person whose premises are searched if demand for such copy is made.

A copy of this Search Warrant shall be delivered to the person in charge of the premises searched at the time of such search if practicable, and, if not, to such person as soon thereafter as is practicable; in the event the identity of the person in charge is not known or if such person cannot be found after reasonable diligence in attempting to locate the person, a copy shall be attached to a prominent place on such premises.

Horry, South Carolina



Signature of Judge

Dated: December 22, 2014

STATE OF SOUTH CAROLINA)
)
COUNTY OF *Horry*)

AFFIDAVIT

Personally appeared before me, one Cpl. **Michael Hodge**, who being duly sworn, says that there is probable cause to believe that certain property subject to seizure under provisions of S.C. Code Ann. § 17-13-140, as amended, is located on the following premises in this County:

DESCRIPTION OF PROPERTY SOUGHT

Blood from one Craig Austin Livingston who currently resides at 888 Bennett Loop Road in Loris

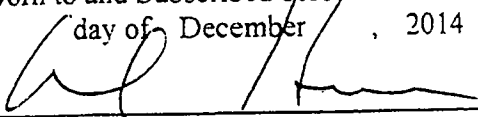
**DESCRIPTION OF PREMISES (PERSON OR THING)
TO BE SEARCHED**

Craig Austin Livingston DOB 06-19-1982 of 888 Bennett Loop Road in Loris

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

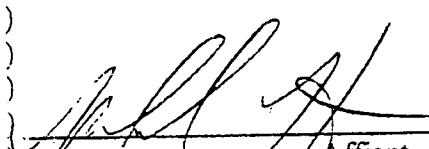
That on December 22, 2014 on Secondary Rd. 31 in the Daisy area of Loris. one Craig Austin Livingston was involved in a head on collision which caused great bodily injury to other parties involved. This collision occurred while Mr Livingston was under the influence **PREJUDICE**

Sworn to and Subscribed before me
22 day of December, 2014



Signature of Judge

10:46 PM



Affiant

) Address 3415 East Palmetto St, Florence, SC
) Phone 843-661-4820

RETURN

I received the attached Search Warrant on _____, and have executed it as follows:

On _____, 20____ at _____ o'clock a.m. / p.m., I searched (the person / vehicle) described in the warrant and (the premises)

I left a copy of the warrant with _____

SCCA 513
(3-1978)

Name of person searched or "at the place of search" with.
Together with a receipt for the items seized, if requested.

The following is an inventory of property taken pursuant to the warrant:

This inventory was made in the presence of _____

And _____

I swear that the inventory is a true and detailed account of all the property taken by me on the
warrant.

Sworn to and Subscribed before me
this _____ day of _____, 20____)

Signature of Judge)

(Signature of Officer Executing Warrant)

EXHIBIT B

CHAIN OF CUSTODY

FILED of Unit Death 681

South Carolina Department of Public Safety Chain Of Custody & Evidence Destruction

Case Number: 14FL147728HP26 Evidence Type: Blood Date Impounded: 12-23-2014 2014-1223

Highway Patrol Transport Police Bureau of Protective Service Other

Status Check One Only
 General Session Evidence Magistrate Evidence Found Recovered Safe Keeping Other

I hereby acknowledge that the listed items represent monies/ property taken from my possession and that I have received a copy of this report. Signature _____

Court Date: Pending Summons /Warrant Number: H113753, Pending

Officer: Tarte, M. S. Date of Incident: 12-22-2014 Time of Incident: 2015

Subject / Violator's Name: Livingston, Craig Austin Phone Number: ()

Violator's Address: 888 Bennett Loop
Loris, SC 29526 License Number (Tag /State) : KMI698 - SC

Item #	Quantity	Description (include make, Model and serial Numbers if applicable)	Field weight	NCIC	
				Yes	No
1	2	Evidence Box containing 2 tubes of blood			

DISPOSITION OF ITEM (S) ABOVE: (The item(s) above have been received in substantially the same condition as when seized.)

From	To	Location	Reason for Movement	Date
M. S. Tarte	Refrigerator	Conway Office	Temp Storage	12-23-2014
Refrigerator	CD Causey	" "	Log In	12-23-14
CD Causey	CD Causey	" "	Transfer to CEF	12-23-14
N.H. Harman	N.H. Harman	CEF	LOG-IN	12-23-14
LN Doolittle	SAFE	CEF	Temp Storage	12-23-14
SAFE	Prison	CEF	MOVE TO SLED	12-29-14
Prison	Prison	SLED	Analyses	12-29-14

We have further inspected such Conveyance as to condition and contents, including glove compartment, trunk, or any other applicable storage areas and do certify that all contents and condition of such conveyance, except contraband items, if any have been satisfactorily accounted for to me/us with this conveyance, or that such items have been disposed of in accordance with my/our instructions, except: (If no exceptions, have recipient write "None" in ink, in his/her handwriting)

It is my/our full understanding that this conveyance and it's contents, except contraband items, if any, are being returned to me/us by the South Carolina Department of Public Safety because such police agency has no interest in proceeding legally to have the conveyance declared forfeit and that it is in no degree an implication or admission that its seizure was unlawful. With the forgoing clearly stated, I am returning this conveyance to you on the _____ day of _____, 2014.

Signature (Individual Receiving Property) _____
 Signature (Individual Returning Property) _____

L14-16066

Sub# 1 Received (12/29/2014)
 S.C. Highway Patrol Troop #5
 Agency Case #: 14FL147728HP26

Witness: _____

Disposition of the above cases was d _____

This is to certify that I, _____
 (Person destr
 at _____
 (Where destroyed)

Case # 14FL147728HP26

SCDPS EVIDENCE

Item #1	Record #TARTE
Name: LIVINGSTON, CRAIG AUSTIN	

described evidence on _____
 (Date)

 (Witness)

Person destroying evidence

[Signature]

ARGUMENT

THE P.C.B. JUDGE ERRED IN DENYING PETITIONER'S CLAIM THAT COUNSEL FAILED TO SUPPRESS THE BLOOD ALCOHOL CONTENT BY NOT CONDUCTING AN ADEQUATE INVESTIGATION CONCERNING THE POLICIES, PROCEDURES, REGULATIONS, AND REQUIREMENTS OF SOUTH CAROLINA CODE 1976 § 17-13-140 CONCERNING THE SEARCH WARRANT AND RETURN FOR PETITIONER'S BLOOD. BECAUSE THE RETURN FOR THE WARRANT ORDERING PETITIONER TO SUBMIT ONE VIAL OF BLOOD WAS DEFECTIVE AND THE CHAIN OF CUSTODY WAS NOT VALID BECAUSE THE SIGNATURE OF THE MAGISTRATE JUDGE AND THE OFFICER EXECUTING THE WARRANT WAS NOT PRESENT ON THE RETURN.

THE INDICTMENT CHARGED THAT PETITIONER DID IN Horry COUNTY ON OR ABOUT DECEMBER 22, 2014 DRIVE A MOTOR VEHICLE WHILE UNDER THE INFLUENCE OF ALCOHOL, DRUGS, OR A COMBINATION OF BOTH, AND DID AN ACT FORBIDDEN BY LAW AND/OR NEGLECTED A DUTY IMPOSED BY LAW IN THE DRIVING OF THE VEHICLE, WHICH ACT OR NEGLECT PROXIMATELY

CAUSED THE DEATH OF MILES TOMMY WADDELL AND CHRISTOPHER LEE WADDELL, TO WIT: WHILE OPERATING A 1998 FORD SUV WHILE UNDER THE INFLUENCE OF ALCOHOL DID CROSS THE CENTER LINE ON SECONDARY 31 AND STRIKE A 2003 JEEP, OCCUPIED BY THE VICTIMS, HEAD ON, IN VIOLATION OF SECTION 56-5-2945(A)(2). APP. 96; APP. 98.

DURING THE P.C.R. HEARING, PETITIONER TESTIFIED IN EFFECT THAT THE WARRANT STATED FOR ONE VIAL OF BLOOD BUT THE LAW ENFORCEMENT OFFICER TOLD THE NURSE AT THE HOSPITAL TO TAKE TWO (2) TUBES OF BLOOD. (APP. 51, 1-10). PETITIONER STATED THAT THE RETURN WASN'T EXECUTED. (APP. 52, 8-19). PETITIONER ALSO STATED THAT COUNSEL DIDN'T TAKE NOTICE OF THE WARRANT NOR THE RETURN, NOR DID HE TRY TO SUPPRESS IT. (APP. 53, 16-25 - P. 54, 1-2).

TRIAL COUNSEL TESTIFIED AT THE P.C.R. HEARING THAT HE DID NOT NOTICE ANYTHING MISSING OR DEFICIENT IN THE MATERIALS THAT WERE PROVIDED. (APP. 66, 15-17). SEE: EXHIBIT A - WARRANT AND RETURN.

WHEN ASKED ABOUT THE WARRANT AND THE RETURN TO THE WARRANT TO DRAW BLOOD, COUNSEL EXPLAINED IT WAS DONE WITHIN THE APPROPRIATE TIME AND THE CHAIN OF CUSTODY LOOKED FINE AND HE DID NOT SEE ANYTHING WRONG WITH IT. (APP. 66, 15-25; P. 67, 1-10). SEE: EXHIBIT A AND B - RETURN AND CHAIN OF CUSTODY. WHEN ASKED ABOUT SUPPRESSING THOSE TWO (2) VIALS OF BLOOD, COUNSEL STATED NO, WE DIDN'T. I THOUGHT IT WOULD NOT HAVE ANY MERIT. I DIDN'T SEE ANY POSSIBLE WAY OF IT. (APP. 76, 23-25; P. 77, 1-8). SEE: EXHIBIT A - WARRANT AND RETURN. IN TERMS OF INVESTIGATING THE CHAIN OF CUSTODY, COUNSEL STATED ALL I DID WAS READ WHAT THE REPORT SAID. (APP. 78, 13-18). WHEN ASKED DID YOU INQUIRE AS TO WHAT PERSON WAS RESPONSIBLE FOR THE CHAIN OF CUSTODY, COUNSEL STATED NO. (APP. 78, 19-24). SEE: CHAIN OF CUSTODY - EXHIBIT B.

THE P.C.R. JUDGE FOUND NO DEFICIENCY ON COUNSEL'S BEHALF WITH RESPECT TO SUPPRESS THE WARRANT AND RETURN FOR BLOOD ALCOHOL CONTENTS AND DENIED P.C.R. BELIEF. APP. 91-92

PETITIONER WAS COERCED INTO PLEADING GUILTY BELIEVING THAT HE HAD NO OTHER CHOICE BECAUSE HE HAD NO DEFENSE. HOWEVER, A CRIMINAL DEFENSE ATTORNEY HAS THE DUTY TO CONDUCT A REASONABLE INVESTIGATION TO DISCOVER ALL REASONABLY AVAILABLE EVIDENCE TENDING TO REBUT ANY AGGRAVATING EVIDENCE INTRODUCED BY THE STATE. SEE: STATE V. MCKNIGHT, 378 S.C. 33, 661 S.E. 2d 354 (2008). ALTHOUGH, THE DEFENDANT HAS A RIGHT TO REMAIN SILENT, PLEAD NOT GUILTY, AND PUT THE STATE TO ITS BURDEN OF PROOF. SEE: STATE V. JOHNSON, 293 S.C. 321, 360 S.E. 2d 317 (1987), CITING TO DOYLE V. OHIO, 426 U.S. 610 (1976) AND GRIFFIN V. CALIFORNIA, 380 U.S. 609 (1981). THE PROSECUTION MUST PROVE EVERY ELEMENT OF THE OFFENSE CHARGED BEYOND A REASONABLE DOUBT. JACKSON V. VIRGINIA, 443 U.S. 307 (1979).

UNDER S.C. CODE ANN. § 56-5-2945, D.U.I. REQUIRES THAT THE ACTOR DRIVE A VEHICLE UNDER THE INFLUENCE OF ALCOHOL OR DRUGS, AND THAT THE ACTOR DOES AN ACT FORBIDDEN BY LAW OR NEGLECTS A DUTY IMPOSED BY LAW, AND THAT ACT OR NEGLECT PROXIMATELY CAUSES GREAT BODILY

INJURY OR DEATH. THUS, IT WAS THE BURDEN OF THE PROSECUTION TO PROVE THAT THE BLOOD ALCOHOL CONTENT WAS OVER THE LEGAL LIMIT OF 0.08.

COUNSEL'S UNPROFESSIONAL ERROR TO CONDUCT AN ADEQUATE INVESTIGATIONS, AND REQUIREMENTS OF SOUTH CAROLINA CODE 1976 § 17-13-140 CONCERNING THE SEARCH WARRANT AND RETURN FOR PETITIONER'S BLOOD TO POSSIBLY FILE A MOTION TO SUPPRESS VIOLATED PETITIONER'S RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL.

BECAUSE THE WARRANT LIMITS THE INTRUSION ON PRIVACY BY SPECIFYING THE SCOPE OF THE SEARCH, THAT IS, THE AREA THAT CAN BE SEARCHED AND THE ITEMS THAT CAN BE SOUGHT. SEE: BIRCHFIELD V. NORTH DAKOTA, 136 S. Ct. 2160, 195 L. Ed. 2d 560 (2016) SEARCHES AND SEIZURES [10]. CLEARLY THE WARRANT ORDERING PETITIONER TO SUBMIT ONE (1) VILE OF BLOOD AND THE STATE SUBMITTED TWO (2) TUBES OF BLOOD ACCORDING TO THE CHAIN OF CUSTODY AND THE STATE ALSO FAILED TO LIST THE ITEMS SEIZED ALONG WITH THE MAGISTRATE JUDGE AND THE OFFICER EXECUTING THE WARRANT SIGNATURE WITHIN THE TEN (10) DAY PERIOD PRESCRIBE BY LAW. SEE: STATE V. FREEMAN, 319 S.C. 110, 459 S.E. 2d 867 (1995).

(1995). ALSO, STATE V. CORNS, 310 S.C. 546, 426 S.E.2d 324 (1992). AND STATE V. WEAVER, 361 S.C. 73, 602 S.E.2d 786 (2004). "WHEN EVIDENCE OF DEFECTS WAS READILY AVAILABLE." SEE: RUTLAND V. STATE, 415 S.C. 570, 785 S.E.2d 350 (2016).

HAD COUNSEL CONDUCTED AN ADEQUATE INVESTIGATION CONCERNING THE WARRANT AND RETURN AND FILED A MOTION TO SUPPRESS BECAUSE OF DEFECTS; COUNSEL COULD HAVE BARGAIN A BETTER DEAL WITH THE STATE WHERE PETITIONER MAY HAVE PLEAD GUILTY TO INVOLUNTARY MANSLAUGHTER OR INSISTED ON GOING TO TRIAL. WITH THAT SAID, COUNSEL'S INEFFECTIVENESS CREATED A PLATFORM OF PREJUDICE AGAINST PETITIONER'S CASE THAT MADE PETITIONER BELIEVE HE HAD A LOSING CASE. CLEARLY COUNSEL'S ERROR DEPRIVED PETITIONER OF CRITICAL INFORMATION BELEVANT TO AN ACCURATE ASSESSMENT OF PETITIONER'S GUILT OR INNOCENCE. THEREFORE GUILTY PLEA BY PETITIONER WAS NOT VOLUNTARILY AND INTELLIGENTLY MADE. SEE: BOYKIN V. ALABAMA, 395 U.S. 268 (1964). COUNSEL'S DEFICIENT PERFORMANCE IN HIS REPRESENTATION OF PETITIONER IN THIS CASE AS OUTLINED ABOVE VIOLATED

PETITIONER'S RIGHT TO EFFECTIVE ASSISTANCE
OF LEGAL COUNSEL IN A CRIMINAL CASE AS
GUARANTEED UNDER THE SIXTH AMENDMENT
TO THE UNITED STATES CONSTITUTION. SEE:
HILL V. LOCKHART, 484 U.S. 52 (1985).

CONCLUSION

BASED ON THE FOREGOING ARGUMENT,
PETITIONER REQUESTS THAT THIS COURT
GRANT THE PETITION AND ALLOW A FULL
BRIEFING ON THE ABOVE - RAISED ISSUE.

Craig A. Livingston, Pro SE
CRAIG A. LIVINGSTON 304858

K.C.I.
4344 BROAD RIVER Rd.
COLUMBIA, S.C. 29210

THIS 20th DAY OF DECEMBER, 2018