

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Greenville County
Hon. Letitia H. Verdin, Circuit Court Judge
Appellate Case Tracking No. 2018-000963

Dominique J. Shumate,

Petitioner,

v.

State of South Carolina,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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ATTORNEYS FOR RESPONDENT

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STATEMENT OF QUESTIONS PRESENTED

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STATEMENT OF THE CASE

Procedural History

In February of 2012, a Greenville County Grand Jury indicted Petitioner for the following offenses: 1) trafficking cocaine base; 2) possession of a weapon during the commission of a violent crime; 3) distribution of cocaine base; 4) possession of cocaine with intent to distribute; and 5) possession of a controlled substance with intent to distribute.

On May 15, 2012, Petitioner and his co-defendant, Andrew Burnside, proceeded to trial by jury. Susannah Ross represented Petitioner at trial, and Lisa Bentley represented the State. The Honorable C. Victor Pyle, Jr., presided over the trial. On May 16, 2012, the jury found Petitioner guilty as indicted.

Judge Pyle sentenced Petitioner to the following: 1) fifteen years of imprisonment and a fine of \$50,000 for the trafficking cocaine base (second offense) conviction; 2) five years, imprisonment for the possession of a weapon during the commission of a violent crime conviction; 3) five years imprisonment for the distribution conviction; 4) one year imprisonment for the possession of cocaine conviction; and 5) one year imprisonment for the possession of a controlled substance conviction. All sentences were to run concurrent.

Petitioner filed a timely notice of intent to appeal. The appeal was perfected by Katherine H. Hudgins, Esquire. The South Carolina Court of Appeals affirmed Applicant's convictions. See State v. Shumate, Op. No. 2014-UP-410 (filed on November 19, 2014). Applicant subsequently filed a petition for writ of certiorari in the South Carolina Supreme Court on November 19, 2014. The petition was denied on June 17, 2015 and Remittitur issued on July 22, 2015.

Petitioner filed his application for post-conviction relief on June 16, 2016. After Return by the State, a hearing was convened on October 23, 2017 before the Honorable Letitia H. Verdin. Petitioner was represented by Rodney W. Richey, Esquire, and Respondent was represented by DeShawn H. Mitchell, Esquire of the South Carolina Attorney General's Office. The circuit court filed its Order of Dismissal denying Petitioner's application on May 18, 2017.

Petitioner served and filed his Petition for Writ of Certiorari on November 14, 2018. This Return follows.

Factual Background

At trial, the State called four officers from the Greenville County Sheriff's Office to describe the investigation and circumstances that led to Petitioner's arrest. Deputy Jacob Walters testified about a November of 2010 drug investigation initiated as the result of a "crime stoppers" tip. (App. 42-43) Based on the tip, the Sheriff's Office began surveillance of a particular trailer park. (App. 44) They observed heavy traffic in and out of the trailer park, including in and out of the trailer on Lot #7. (App. 44) The officers stopped several of the vehicles leaving the trailer park for traffic infractions, which led to the discovery of drugs. (App.45) Deputy Walters used certain individuals from the stops as confidential informants ("CIs"), who returned to the trailer park to make controlled drug purchases for the police. (App. 45)

On November 10, 2010, a CI was sent to Lot #7, and as a result, the police obtained a search warrant for the trailer on that lot. (App. 47) Deputy Walters served the search warrant on the Lot #7 trailer but did not participate in the search. (App. 48) On cross-examination Deputy Walters acknowledged Jerry Drummond Jr., rented the trailer. (App. 59-60)

Deputy Patrick Swift testified he participated in the execution of the search warrant on Lot #7. (App.63) Deputy Swift entered the front door of the trailer with the search team and conducted the search. (App.63-66) Deputy Swift went down a hallway where he encountered Petitioner in the bathroom, standing over the toilet with the toilet running, as if he had just flushed something. (App. 66) He handcuffed Petitioner, took Petitioner outside the trailer, and returned to the bathroom, where he noticed a UnoTM playing card floating in the toilet. (App.66; App.69)

STANDARD OF REVIEW

An appellate court must give deference to the PCR court's factual findings, and must uphold them if there is any evidence of probative value to support them. Buckson v. State, 423 S.C. 313, 320, 815 S.E.2d 436, 440 (2018) (citing Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016)). "We do not defer to a PCR court's rulings on questions of law. 'Questions of law are reviewed de novo, and we will reverse the PCR court's decision when it is controlled by an error of law.'" Mangal v. State, 421 S.C. 85, 91, 805 S.E.2d 568, 571 (2017) (internal citations omitted)(quoting Sellner, 416 S.C. at 610, 787 S.E.2d at 527).

ARGUMENT

I. Trial Counsel did not render ineffective assistance of counsel for failing to move to obtain the identity of the confidential informant when he had no right to obtain the identity of the mere tipster. Additionally, it is highly questionable whether Petitioner may assert an expectation of privacy in the location searched. Further, this issue is not properly preserved for review.

Counsel did not render ineffective assistance by failing to move to obtain the identity of the confidential informant who served as a mere tipster. Further, Petitioner does not have an expectation of privacy in the trailer searched. Finally, the issue raised on appeal differs from the issues raised at the PCR hearing and was not addressed by the trial court's ruling so it is not preserved for review on appeal.

Preservation

Initially, the issue as raised is not preserved for review on appeal. In his application, Petitioner asserted the reliability of the confidential informant was never established because he was not present with the magistrate when the warrant was obtained "nor did the confidential informant testify under Oath that he actually purchased drugs from LOT#7 or applicant Shumate, no marked currencies, monies recovered from controlled buy recovered from applicant Shumate, no evidence points to the applicant Shumate." (App. 237). At the PCR hearing, Petitioner never asserted trial counsel should have moved to obtain the identity of the confidential informant. He maintained counsel should have let the jury know his Fourth Amendment rights were violated based on "my protection of myself and not just the house." (App.262). At the hearing it appears his concern was about any search of his person and not related to the search warrant obtained for the trailer. As a result, the issue raised on appeal is different from the issue raised in his application and at the PCR hearing. Therefore, it is not properly before the Court. See Winkler

v. State, 418 S.C. 643, 662, 795 S.E.2d 686, 697 (2016) (quoting In re Michael H., 360 S.C. 540, 546, 602 S.E.2d 729, 732 (2004)) (“In order to preserve an issue for appeal, it must be raised to and ruled upon by the trial court. In other words, the trial court must be given an opportunity to resolve the issue before it is presented to the appellate court.”).

Additionally, even if the issue could be considered raised to the PCR court, it was never ruled on by the trial court in its Order. While the Order addresses Fourth Amendment claims generally, it does not address any issue related to the failure to obtain the identity of the confidential informant. (App. 290-291). As a result, it is not properly preserved for review on appeal. See Marlar v. State, 375 S.C. 407, 410, 653 S.E.2d 266, 267 (2007) (“Because respondent did not make a Rule 59(e) motion asking the PCR judge to make specific findings of fact and conclusions of law on his allegations, the issues were not preserved for appellate review.”); see also, Pruitt v. State, 310 S.C. 254, 256, 423 S.E.2d 127, 128 (1992) (“Counsel preparing proposed orders should be meticulous in doing so, opposing counsel should call any omissions to the attention of the PCR judge prior to issuance of the order, and the PCR judge should carefully review the order prior to signing it. Even after an order is filed, counsel has an obligation to review the order and file a Rule 59(e), SCRCPP, motion to alter or amend if the order fails to set forth the findings and the reasons for those findings as required by § 17-27-80 and Rule 52(a), SCRCPP.”).

Merits

In a PCR action, Applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). In a PCR action, “[t]he burden of proof is on the applicant to prove his allegations by a preponderance of the evidence.” Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002). Where the application alleges ineffective

assistance of counsel as a ground for relief, Applicant must prove “counsel’s conduct so undermined the proper functioning of the adversarial process that [it] cannot be relied upon as having produced a just result.” Strickland v. Washington, 466 U.S. 668 (1984); Butler, 286 S.C. at 442, 334 S.E.2d at 814.

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland v. Washington, 466 U.S. 668. First, Applicant must prove that counsel’s performance was deficient. Id.; Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Under this prong, the court measures an attorney’s performance by its “reasonableness under prevailing professional norms.” Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 690). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Butler, 286 S.C. at 442, 334 S.E.2d at 814. “Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.” Id. (citing Strickland, 466 U.S. at 690). Applicant must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625.

Second, counsel’s deficient performance must have prejudiced Applicant such that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” Id. at 117-18, 386 S.E.2d at 625. “A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial.” Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052).

Petitioner has failed to demonstrate trial counsel was ineffective for failing to obtain the identity of the confidential informant who acted as a mere tipster. “Generally, the State may not

be compelled to disclose the names of its confidential informants.” State v. Bultron, 318 S.C. 323, 330, 457 S.E.2d 616, 620 (Ct. App. 1995). “Such privilege is founded upon public policy to protect effective law enforcement, but it is not absolute and is subject to certain limitations and exceptions.” State v. Wright, 322 S.C. 484, 487, 472 S.E.2d 642, 644 (Ct. App. 1996). “Although the State is generally privileged from revealing the name of a confidential informant, disclosure may be required when the informant is an active participant in a criminal transaction.” State v. Burney, 294 S.C. 61, 62, 362 S.E.2d 635, 636 (1987). “[I]f the informant is an active participant in the criminal transaction and/or a material witness **on the issue of guilt or innocence**, disclosure of his identity may be required depending upon the facts and circumstances.” State v. Humphries, 354 S.C. 87, 90, 579 S.E.2d 613, 615 (2003) (emphasis added). “On the other hand, an informant’s identity need not be disclosed where he possesses only a peripheral knowledge of the crime or is a mere ‘tipster’ who supplies a lead to law enforcement.” Id.

In seeking the disclosure of the identity of a confidential informant, “the burden is upon the accused to show facts and circumstances giving rise to an exception to the privilege against disclosure” State v. Batson, 261 S.C. 128, 134, 198 S.E.2d 517, 520 (1973); see also State v. Shupper, 263 S.C. 53, 57, 207 S.E.2d 799, 800 (1974) (finding “the burden is upon the accused to show facts and circumstances giving rise to an exception to the privilege”). “[T]he onus is on the defendant to ‘come forward with something more than speculation as to the usefulness of such disclosure.’” United States v. Blevins, 960 F.2d 1252, 1259 (4th Cir. 1992) (citations omitted). “[T]he trial court has considerable discretion as to ordering, or refusing to require, disclosure and that in the event of refusal, the burden is upon the accused to show prejudice resulting therefrom.” Batson, 261 S.C. at 134-35, 198 S.E.2d at 520.

In the instant case, the informant operated as a mere tipster taking part in a controlled buy at the location later searched pursuant to the warrant. The facts of the case demonstrate the informant was neither an active participant in the crime for which Petitioner was charged nor a material witness on the issue of guilt and innocence. Officers began surveilling the location after receiving a crime stoppers tip. (App.44). After spending several days watching the trailer park, and the location (lot #7) in particular, the officers stopped a number of vehicles leaving the trailer park for various traffic infractions. (App.45). Several searches of the stopped vehicles yielded drugs. The officers then used those individuals as confidential informants to perform controlled buys from the trailer park. (App.45). One informant was sent to Lot #7, the location at issue in this appeal. Based on the controlled buy which took place, the officers obtained the search warrant which lead to the current charges. (App.46-47).

Petitioner has failed to provide any evidence sufficient to overcome the privilege against disclosing an informant. He merely speculates on what could be obtained through further questioning. Further, he has failed to demonstrate how the testimony of the informant would have been material to the question of guilt or innocence regarding the drugs found in the trailer. As a result, counsel was not deficient for failing to move to obtain the informant's identity because it would have been an unsuccessful motion.

To the extent Petitioner seems to be arguing counsel was deficient for failing to argue regarding the reliability of the informant and the failure to properly establish reliability in the affidavit, the issue was raised to the trial court. (App.14) The trial judge specifically denied the request to suppress the fruits of the search. (App.14). As a result, counsel was clearly not deficient in her representation.¹

¹ It should be noted that the Search Warrant and accompanying Affidavit are not included in the Appendix, which makes it impossible for this Court to consider any possible prejudice resulting to Petitioner. See e.g., State v.

Finally, counsel could not have been deficient in failing to contest the search warrant on any grounds, and Petitioner could not have been prejudiced by that failure, because it is highly questionable whether Petitioner had any reasonable expectation of privacy in the property at the time of the search warrant. “Fourth Amendment rights are personal rights which, like some other constitutional rights, may not be vicariously asserted.” Rakas v. Illinois, 439 U.S. 128, 133–34, 99 S.Ct. 421, 58 L.Ed.2d 387 (1978); see also, State v. McKnight, 291 S.C. 110, 115, 352 S.E.2d 471, 473 (1987) (“The defendant who seeks to suppress evidence on Fourth Amendment grounds must demonstrate *a legitimate expectation of privacy in connection with the searched premises* in order to have standing to challenge the search.” (emphasis in original)).

While an overnight guest may have a reasonable expectation of privacy in the host’s property, “a person present only intermittently or for a purely commercial purpose does not have a reasonable expectation of privacy.” State v. Flowers, 360 S.C. 1, 5, 598 S.E.2d 725, 728 (Ct. App. 2004). In State v. Robinson, 410 S.C. 519, 528-530, 765 S.E.2d 564, 569-570 (2014), the South Carolina Supreme Court provided factors to consider in determining whether the defendant demonstrated he had an actual and reasonable expectation of privacy in an area searched include: (1) “whether the defendant owned the home or had property rights to it”; (2) “whether he was an overnight guest at the home”; (3) “whether he kept a change of clothes at the home”; (4) “whether he had a key to the home”; (5) “whether he had dominion and control over the home and could exclude others from the home”; (6) “how long he had known the owner of the home”; (7) “how long he had been at the home”; (8) “whether he attempted to keep his

Brockmeyer, 406 S.C. 324, 338–39, 751 S.E.2d 645, 653 (2013) (finding appellant failed to provide the Court with a sufficient record on appeal to evaluate this assertion of error); Harkins v. Greenville Cnty., 340 S.C. 606, 616, 533 S.E.2d 886, 891 (2000) (finding it impossible to evaluate the merits of certain issues because the Appellant failed to include the relevant material in the record on appeal); Crestwood Golf Club, Inc. v. Potter, 328 S.C. 201, 215, 493 S.E.2d 826, 834 (1997) (noting an appellant bears the burden of providing a sufficient record to review his assertions of error).

activities in the home private”; (9) “whether he engaged in typical domestic activities at the home, or whether he treated it as a commercial establishment”; (10) “whether he alleged a proprietary or possessory interest in the premises and property seized”; and (11) “whether he paid rent at the home”

In the instant case, the property was owned by someone other than Petitioner and rented by someone other than Petitioner. The property was treated as a bachelor pad, with people coming and going. (App.140 Testimony indicated Petitioner did not stay overnight at the property. (App.141-142). Further, it was established that nobody had a key and, while the front door was locked, the back door remained unlocked for anyone to enter and exit. (App.262-263). In his own Application for Post-Conviction Relief, Petitioner indicated he was a mere visitor and had no possession in the property. (App. 239).² As a result, the facts demonstrate Petitioner did not have a reasonable expectation of privacy in the location searched.

This Court should deny the Petition for Writ of Certiorari. First, the issues raised are not properly preserved for review on appeal. Additionally, Petitioner cannot demonstrate an expectation of privacy requisite for challenging the search warrant and it would be necessary prior to finding any prejudice for the failure to sufficiently challenge the informant. Finally, Petitioner was not entitled to the identity of the informant because his testimony was not material to the issue of guilt and, therefore, counsel could not have been deficient in failing to seek to obtain that information.

² At trial, one witness indicated Petitioner may have paid towards some of the utility bills at the trailer. (App.142-143). However, in his testimony at PCR, Petitioner specifically testified he did not pay any bills. (App.263).

CONCLUSION

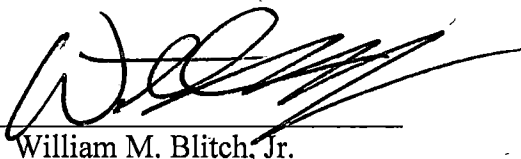
For all of the foregoing reasons, it is respectfully submitted that this Court should deny the Petition for Writ of Certiorari to the Court of Appeals.

Respectfully submitted,

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Assistant Attorney General
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BY:



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ATTORNEYS FOR RESPONDENT

March 12, 2019

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Greenville County
Hon. Letitia H. Verdin, Circuit Court Judge
Appellate Case Tracking No. 2018-000963

Dominique J. Shumate,

Petitioner,

v.

State of South Carolina,


Respondent.

PROOF OF SERVICE

I, Anne A. Mueller, certify that I have served the within Return to Petition For Writ of Certiorari by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Victor R. Seeger, Esquire
S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, SC 29211

I further certify that all parties required by Rule to be served have been served.
This 12th day of March, 2019.


ANNE A. MUELLER
Office of the Attorney General
Post Office Box 11549
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(803) 734-3727.



RECEIVED

MAR 12 2019

S.C. SUPREME COURT

ALAN WILSON
ATTORNEY GENERAL

March 12, 2019

Victor R. Seeger, Esquire
S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, SC 29211

Re: Dominique Shumate v. State of South Carolina
Appellate Case Tracking No. 2018-000963

Dear Mr. Seeger:

I am enclosing two (2) copies of the Return to Petition for Writ of Certiorari to the Court of Appeals in the above-referenced case.

If you have any questions concerning this matter, please contact me.

Sincerely,

William M. Blich, Jr.
Assistant Attorney General
S.C. Bar No. 15608

cc: Honorable Daniel E. Shearouse (original and six enclosed)
Honorable Jenny A. Kitchings
Victim Services (enclosure)