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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Beaufort County

Honorable William H. Seals, Circuit Court Judge

TREVIN MILLEDGE,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2020-000276

AMENDED PETITION FOR WRIT OF CERTIORARI

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1 373 U.S. 83 (1963)

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ISSUES PRESENTED

1.

Whether the PCR court erred when it denied Petitioner's Rule 59(e) SCRCP motion in a form order where the original order failed to address certain issues of law and failed to make specific findings of fact relevant to each issue presented by Petitioner at the evidentiary hearing as required by S.C. Code Ann. § 17-27-80?

2.

Whether the PCR court erred in finding that the State of South Carolina did not commit a *Brady*[3] violation which infringed upon Petitioner's Due Process rights where the state suppressed evidence relevant to: A) the misconduct of a law enforcement officer involved in Petitioner's case, and B) the third party guilt of other individuals in the residence selling drugs?

3.

Whether the PCR court erred in finding that trial counsel provided effective representation where counsel failed to fully investigate the information contained in the search warrant and thus failed to raise a meritorious claim pursuant to *Franks v. Delaware*[4] in challenging the admission of items seized pursuant to the search warrant?

4.

Whether the PCR court erred in finding that trial counsel provided effective representation where counsel failed to object to the constructive possession jury charge as an impermissible comment on the facts of the case?

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[3] 373 U.S. 83 (1963)

[4] 438 U.S. 154 (1978)

STATEMENT OF THE CASE

On July 30, 2011, officers with the now disbanded Beaufort/Jasper Multi-Agency Drug Task Force executed a search warrant on a mobile home located on Miranda Circle in Beaufort, South Carolina. App. 147, ll. 8-16; App. 617, ll. 1-3. Present in the mobile home at the time the search warrant was executed were Petitioner Trevin Milledge, Tyrone Jenkins, Petitioner's girlfriend, and a nine-year-old girl. App. 228, l. 21-App. 229, l. 16.

The search warrant was obtained by former Investigator Justyna Lindahl. App. 226, l. 14. The search warrant affidavit relied heavily on information supplied by a purportedly "reliable and confidential informant." App. 700-701. However, as discussed *infra*, at Petitioner's PCR hearing the confidential informant used in the case provided an affidavit, along with uncontroverted testimony, that the information contained in the search warrant affidavit was false. App. 694-695; App. 577-587.

During the search of the mobile home officers discovered a handgun, documents addressed to Petitioner at the Miranda Circle residence, U.S. currency, narcotics, a digital scale, inositol powder,[5] a police scanner, and a sheet of paper that was believed to be a "drug ledger." App. 175-179; App. 182, ll. 5-8; App. 195, ll. 7-11; App. 201, l. 21-App. 202, l. 3. The initial total weight of drugs seized during the search warrant was 35.7 grams of crack cocaine and 14.5 grams of cocaine. App. 160, ll. 11-22.

A search of Petitioner produced $443 from Petitioner's left front pocket, $385 and a South Carolina ID in Petitioner's wallet, and small baggies with suspected crack cocaine and suspected cocaine from Petitioner's right front pocket. App. 164, l. 12-App. 165, l. 3. The total weight of the suspected drugs found on Petitioner was 1.21 grams of crack cocaine and 1.28

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5 According to the testimony of Sergeant William Squires "inositol powder is commonly used as a cocaine cutting agent." App. 179, ll. 13-17.

grams of cocaine. App. 359-361. Tyrone Jenkins was also detained and searched. The state entered into evidence a crack pipe that was found on Jenkins. Jenkins was subsequently charged with drugs found both in his possession and in parts of the mobile home. App. 255, l. 15-App. 258, l. 19; App. 444, l. 2-9.

Once detained, Petitioner was interviewed by former investigator Walker Michaud. App. 103, ll. 13-16. Michaud purportedly read Petitioner his Miranda[6] rights prior to interviewing him, however no Miranda waiver form was ever signed by Petitioner. App. 104, ll. 19-23; App. 109, ll. 9-10. The interview took place in an unmarked patrol vehicle that was parked outside of the residence while the search warrant was being executed. App. 104, ll. 3-4; App, 311, l. 19-25. The interview was not recorded in any manner. App. 108, ll. 22-24. Michaud alleged that Petitioner admitted that there was roughly an ounce of cocaine in a pair of white shorts folded up in his closet. App. 107, ll. 1-4; App. 322, ll. 19-21.

Petitioner was originally indicted for trafficking in cocaine base 28 to 100 grams, trafficking in cocaine 10 to 28 grams, possession with intent to distribute a schedule IV substance, possession of a controlled substance in scheduled I-V, and possession of a weapon during the commission of a violent crime. App. 526-541. Prior to trial, the state amended the two trafficking indictments: trafficking in cocaine base 28 to 100 grams was amended to 10 to 28 grams and trafficking in cocaine was amended to possession with intent to distribute cocaine. App. 114-116. These amendments were based on the radically different drug weights[7] reported from the official SLED testing. App. 292, ll. 13-21.

The state called the case to trial before the Honorable Carmen T. Mullen and a jury on

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6 384 U.S. 436 (1966)

7 SLED reported the final weights at 14.7 grams of crack cocaine and 9 grams of cocaine. App. 366, ll. 13-17.

January 26, 2015. App. 1. The state was represented by Lynorr Musser and Brian Hollen. Petitioner was represented by Jared Newman. App. 2. The jury found Petitioner guilty of trafficking in cocaine base 10 to 28 grams, possession with intent to distribute cocaine, simple possession of a schedule IV substance, and possession of a schedule II-controlled substance. Petitioner was acquitted of possession of a weapon during the commission of a violent crime. App. 508-509.

Petitioner was sentenced to concurrent terms of imprisonment for twenty-six years on the trafficking charge, twenty-six years on the possession with intent to distribute charge, and one year on each possession charge.[8] App. 513-524. Following oral arguments, the Court of Appeals affirmed Petitioner's convictions and sentences on May 30, 2018. State v. Millidge, Op. No. 2018-UP-220 (Ct. App. 2018).

Petitioner filed an application for Post-Conviction Relief on August 10, 2018. App. 542-546. The state submitted a return dated November 5, 2018. App. 547-561. A hearing was convened on April 1 and April 3, 2019, before the Honorable William H. Seals. App. 563. Petitioner was represented by Jim Brown. The state was represented by Benjamin Limbaugh. App. 563. At the hearing Edward Fields, the confidential informant referenced in the search warrant, Counsel Newman, and assistant solicitor Musser testified. App. 563; 632. Counsel Brown admitted five exhibits during the hearing, including an affidavit from Fields and the internal investigation summary of former officer Michaud. App. 564.

As discussed *infra*, the testimony at the hearing focused on whether the state had information regarding the actions of the confidential informant Fields and the misconduct of former officer Michaud which if failed to disclose, and on the alleged untruths in the search

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[8] The transcript states that Petitioner received a five-year sentence on Possession of a Schedule II substance, but the sentencing sheet reflects a one-year sentence. App. 539

warrant affidavit. After the state rested its case the hearing came to an abrupt end. App. 690-692. Counsel Brown filed a motion to reconvene on April 8, 2019. App. 761-766.

A hearing was held on the motion to reconvene on June 24, 2019, in Florence, South Carolina. App. 767. At the hearing Counsel Brown summarized the issues in Petitioner's case and asked the court to issue a "request to admit" that Fields was the confidential informant used in Petitioner's case. App. 769-774; 778, ll. 6-16. Counsel Brown also renewed all of the motions made during the original hearing. App. 779, l. 2-16. The state was given thirty days to admit or deny that Fields was the confidential informant referenced in the search warrant affidavit. App. 778, ll. 12-23. An order was issued on July 31, 2019, requiring the Beaufort County Sheriff's Office to provide the name of the confidential informant used in Petitioner's case. App. 782. The state admitted that Fields was the confidential information referenced in the search warrant in Petitioner's case.

An order of dismissal was signed by the PCR court on November 7, 2019. App. 783-801. Counsel Brown filed a Rule 59(e) motion on November 21, 2019. App. 802-806. The Rule 59(e) motion raised issues of law and specific findings of fact that were not included in the original order of dismissal. Attached to and incorporated into the Rule 59(e) motion were the original proposed order of dismissal, Petitioner's objections to the original proposed order of dismissal, and Petitioner's proposed order granting relief. App. 807-860. Petitioner's Rule 59(e) motion was dismissed in a form order that contained no findings of fact or conclusions on the issues of law that had been raised. App. 861-865.

ARGUMENT

1.

The PCR court erred when it denied Petitioner's Rule 59(e) SCRCP motion in a form order where the original order failed to address certain issues of law and failed to make specific findings of fact relevant to each issue presented by Petitioner at the evidentiary hearing as required by S.C. CODE ANN. § 17-27-80.

Relevant Facts

Petitioner alleged four grounds for relief during the PCR hearing. App. 569, ll. 11-13. The first two grounds alleged Brady, *supra*, violations by the state in violation of Petitioner's due process right. App. 569, l. 15-App. 570, l. 14. The second two grounds alleged ineffective assistance of counsel for trial counsel's failure to challenge the search warrant under Franks v. Delaware, *supra*, and for counsel's failure to object to the constructive possession charge as an impermissible charge on the facts. App. 570, l. 15-App. 571, l.5.

In support of Petitioner's claims, Counsel Brown provided testimony and an affidavit from Edward Fields, the confidential informant used in Petitioner's case, the internal investigation report documenting Michaud's misconduct and other documentation that detailed Michaud's misconduct. App. 579-589; App. 694-695; App. 717-760.

The order of dismissal contained no factual findings regarding the testimony of Fields nor the documentation of Michaud's misconduct. Further, the order failed to include a full discussion of the law regarding the Brady violations and fully omitted any discussion of the proper review of an ineffective assistance of counsel claim in the context of an alleged failure to bring a Franks challenge. Notably, Counsel Brown submitted objections to the original order of dismissal which contained the same concerns encompassed in the Rule 59(e) motion.

Discussion

The PCR court failed to address all of the evidence, issues, and law pertaining to Petitioner's case in the original order of dismissal despite Counsel Brown bringing the matter to the court's attention in the form of objections and a Rule 59(e) motion. In denying Petitioner's Rule 59(e) motion the PCR court merely filed a Form 4 judgment order. The form order was devoid of any discussion of the merits of Petitioner's 59(e) motion and did not result in any changes being made to the original order of dismissal. As such, the original order of dismissal did not contain the necessary specific findings of fact and conclusions of law required by S.C. Code Ann. § 17-27-80.

The failure of the PCR court to make specific findings of fact and conclusions of law regarding a duly raise issue at the PCR hearing is error. See, Fishburne v. State, 427 S.C. 505, 832 S.E.2d 584 (2019); Pruitt v. State, 310 S.C. 254. 423 S.E.2d 127 (1992). This Court has remanded numerous other PCR cases to the circuit court where a PCR court failed to make adequate findings of fact and conclusions of law. In McCray v. State, 305 S.C. 329, 408 S.E.2d 241 (1991) this Court remanded the case to the circuit court after finding that the PCR court's conclusions regarding ineffective assistance of counsel were insufficient for appellate review and failed to meet the standards set forth in S.C. Code Ann. § 17-27-80. See also McCullogh v. State, 320 S.C. 270, 272, 464 S.E.2d 340, 341 (1995) (admonishing all those involved in future PCR matters to be meticulous in preparing and reviewing proposed orders so that the final order sets forth the required findings and reasons for those findings). Bryson v. State, 328 S.C. 236, 236-237, 493 S.E.2d 500 (1997) (remanding the matter back to the PCR judge to "make specific findings of fact and conclusions of law as to each issue *raised by petitioner in his post-conviction relief application and at the hearing thereon"*) (emphasis added).

Notably, in 2018, this Court addressed the insufficiency of a PCR order and the summary denial of a Rule 59(e) motion in Reese v. State, 425 S.C. 108, 820 S.E.2d. 376 (2018). After the evidentiary hearing the PCR court took the matter under advisement, directing both the state and Reese to prepare proposed orders. Id. at 109, 820 S.E.2d at 376-377. The order prepared by the state was adopted by the PCR court and signed. However, in the order the state did not address each of Reese's claims and did not include specific findings of fact or conclusions of law on any of Reese's claims. Id. PCR counsel for Reese filed a Rule 59(e) motion stating that the "Order of Dismissal does not contain specific findings of fact and conclusions of law regarding each of the claims presented at the evidentiary hearing, as required by S.C. Code Ann. § 17-27-80 (2014)." Nevertheless, the circuit court summarily denied the Rule 59(e) motion. Id.

This Court, noting the numerous cases in this state's jurisprudence that require a PCR order to comply with S.C. Code Ann. § 17-27-80 and Rule 52(a) of the South Carolina Rules of Civil Procedure, found that the PCR court erred by signing an inadequate PCR order and by summarily denying the applicant's Rule 59(e) motion. Id. at 109-11, 820 S.E.2d at 377-78. The case was remanded back to the circuit court for entry of a new PCR order that complied with the law. Id. at 111, 820 S.E.2d at 378.

Much like Reese, Petitioner's original PCR order was inadequate, and the PCR court summarily denied Petitioner's Rule 59(e) motion which set forth the findings of fact and conclusions of law that the original order was lacking. Importantly, the Rule 59(e) motion was not the first time the PCR court was made aware of the deficiencies in the state's proposed order, as Counsel Brown had submitted objections, as well as a proposed order, that fully encompassed the issues raised at the PCR hearing. While the order is not totally devoid of findings, the order is inadequate because it fails to address the testimony of Edward Fields and the evidence relating

to the misconduct of Michaud, as well as failing to fully engage in the proper discussion of law as it applied to Petitioner's claims. Therefore, Petitioner respectfully request that this Court remand the proceedings to the circuit court for a new PCR order that complies with the law.

2.

The PCR court erred in finding that the State of South Carolina did not commit a *Brady*[9] violation which infringed upon Petitioner's Due Process rights where the state suppressed evidence relevant to: A) the misconduct of a law enforcement officer involved in Petitioner's case, and B) the third party guilt of other individuals in the residence selling drugs.

Relevant Facts

Impeachment Materials

On March 2, 2015, a little over a month after Petitioner's trial, Walker Michaud was forced to resign from the Beaufort County Sherriff's office after an internal investigation revealed that Michaud had lied, had improper contact with a confidential informant, and had submitted false documentation. App. 717-724; App. 744. The investigation began in February 2015, after it was discovered that Michaud had made a payment of $80 to a female confidential informant that had been reassigned from him to another officer in the summer of 2014. Michaud had been previously warned by supervisors not to have any contact with the female confidential informant. App. 718; App. 719; App. 720.

The investigation revealed that shortly before Christmas 2014, the female confidential informant contacted Michaud stating she did not have money for dinner or to buy her child a Christmas present. Michaud gave the informant $80 of his own money. In January of 2015,

[9] 373 U.S. 83 (1963)

Michaud had another officer fill out and witness an official confidential informant payment sheet stating that Michaud had paid the informant $80 on January 15, 2015, for "drug information." This information was known by Michaud and the other officer to be false. Michaud then withdrew $80 from the official drug task force fund and used it to repay himself for the $80 he had given the informant. Michaud signed the falsified documentation and submitted it at the beginning of February. App. 720-723.

As stated above, Michaud was the only witness presented to testify that Petitioner made a voluntary statement admitting to an ounce drugs that could be located in the residence. App. 107, ll. 1-4. At the pretrial hearing challenging the voluntariness of Petitioner's statement, the state only called Michaud to testify, despite the fact that Michaud claimed another officer, Officer Whitney, was present when the statement was made. App. 106, ll. 3-6. Subsequently, the court based its ruling admitting Petitioner's statement solely on what it found to be credible testimony by Michaud that Petitioner had not only waived his rights but confessed to the trafficking weight drugs found in the trailer. App. 109-110.

At the PCR hearing Counsel Brown admitted the heavily redacted investigatory summary of Michaud's misconduct, as well as an affidavit from Michaud's wife, into evidence. App. 717-725. The affidavit confirmed the contents of the investigatory report and included information that Michaud was possibly having an affair with a confidential informant. App. 744-745. While the investigation into Michaud was not formalized until after Petitioner's trial, the documents from the investigation revealed misconduct with a different confidential informant which occurred prior to Petitioner's trial and resulted in Michaud being removed as her handler. Counsel Brown argued that the information about the prior misconduct with a confidential informant should have been turned over to the defense under Brady. Further, Counsel Brown

argued that Michaud's misconduct by paying the confidential informant $80 and falsifying documents happened prior to Petitioner's trial and should have been disclosed as these were facts known by other members of law enforcement. App. 590-592.

Counsel Newman testified that he was not aware of any actual misconduct by Michaud at the time of Petitioner's trial and if he knew anything it would have been by "rumor, innuendo, those types of things." App. 605-606. However, he did testify that he had suspicions about Michaud because his reputation as an officer was "very bad." App. 619, ll. 21-25. Counsel Newman testified that he had since used the information referred by Counsel Brown, along with other information in Michaud's complete personnel file, to impeach Michaud's credibility in other trials. App. 605, ll. 8-18; App. 619, ll. 18-20. Further, Counsel Newman thought he would have been able to attack Michaud's credibility regarding Petitioner's alleged confession if he had known about Michaud's insubordination, lying, and document falsification. App. 618, l. 21-App. 619, l.14.

Assistant Solicitor Musser testified that at the time of Petitioner's trial she did not have any personal knowledge that Michaud had any disciplinary issues. App. 657-658. She admitted that if she had information that one officer had lied to another officer it would be Brady material. App. 658-659. Musser testified that if she had known about evidence or impeachment material within the possession of law enforcement that she would have turned it over but that she did not go on a "fishing expedition" to seek out exculpatory or impeachment information. App. 660-661. She further testified that she only thought she had a duty to seek out information if she had a reason to think something was amiss. App. 662, ll. 2-16.

In the order of dismissal, the PCR court ruled that Assistant Solicitor Musser did not have personal knowledge or actual information regarding any misconduct by Michaud. Therefore,

because that evidence was not in the possession of the prosecution it was not subject to the discovery requirements in Brady. App. 794-795.

Third Party Guilt Material

At the PCR hearing Counsel Brown presented an affidavit and testimony from Edward Fields, the confidential informant referenced in the search warrant. The evidence presented by Fields showed that a significant amount of information within the search warrant affidavit was false.

Fields testified that he was used by the Drug Task Force as an informant to make controlled buys. Regarding activity at the Miranda Circle address, Fields testified that he never purchased drugs from Petitioner and that he told law enforcement he never purchased drugs from Petitioner. App. 582, l. 24-App. 538, l. 3. Fields stated in both his testimony and in the affidavit, that he purchased drugs from individuals with the initials of WJ, DG, and TJ. Fields stated he told law enforcement that he had purchased the drugs from other people and that the drug buys generally occurred outside of the residence. App. 581, l. 14-App. 583, l. 8. Fields recalled wearing a wire but was unsure if the buys were video recorded. App. 582, ll. 13-19. Further, Fields adamantly denied that he identified Petitioner through a photograph as the individual he had purchased drugs from at the Miranda Circle residence. App. 585, ll. 5-22.

Assistant Solicitor Musser testified that she did not have any information regarding the confidential informant referenced in the search warrant affidavit. App. 637, ll. 5-7. She testified that even if she did have information regarding the confidential informant, she would not turn it over absent a court order. App. 637, ll. 11-18. Musser stated that she did not get information about the confidential informant in this case because it was not relevant. App. 643, ll. 11-13. Musser testified that information concerning the confidential informant would be in the control

of the Beaufort County Sheriff's Office. App. 649, ll. 6-16.

The PCR court found that Musser had no indication that the search warrant affidavit contained any misstatements, nor that Fields purchased drugs from other individuals at the Miranda Circle residence. The PCR court again ruled that because the evidence presented by Fields was not in the possession of Musser it was not subject to the discovery requirements in Brady. App. 796-797.

Discussion

The affirmative duty of the state to seek out and disclose evidence favorable to an accused has long been settled in both federal and state courts. See Brady v. Maryland, 373 U.S. 83 (1963); Kyles v. Whitley, 514 U.S. 419 (1995); Gibson v. State, 334 S.C. 515, 514 S.E.2d 320 (1999). In Brady v. Maryland, the United States Supreme Court held that the "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." Brady at 87. Later, the Supreme Court extended the requirements of Brady to cover impeachment evidence holding that a prosecutor's due process requirement included disclosure of evidence that could potentially be used to impeach or discredit a government witness. Giglio v. United States, 405 U.S. 150, 154 (1972). Importantly, the United States Supreme court has held that the individual prosecutor has a duty to learn of any favorable evidence known to others acting on the government's behalf in a case, *including the police*. Kyles at 437 (emphasis added).

An individual asserting a Brady violation must demonstrate that the evidence: (1) is favorable to the accused; (2) was in the possession of or known by the prosecution; (3) was suppressed by the State; and (4) was material to the accused's guilt or innocence or was

impeaching. Kyles, *supra*; Gibson, *supra*. "Favorable evidence is material, and constitutional error results from its suppression by the government, if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A reasonably probability of a different result is accordingly shown when the Government's evidentiary suppression undermines confidence in the outcome of the trial." Gibson, *supra*, citing Kyles at 432-36. If a Brady violation is found to have occurred, *PCR must be granted*. Gibson, *supra*. (emphasis added).

The information regarding misconduct by former officer Michaud was favorable to Petitioner because it was necessary for impeachment of his credibility. Michaud was the state's sole witness to Petitioner's alleged confession, which was contested at trial, and therefore his credibility was extremely important to the case. Notably, the trial court allowed Petitioner's alleged confession into evidence based on what it believed to be the credibly testimony of Michaud. Petitioner contended at trial that the drugs located in the trailer belonged to other people residing in the home and only Michaud's testimony linked Petitioner to the trafficking weight drugs. The main question before the jury was whether to infer constructive possession of the trafficking weight drugs to Petitioner and Petitioner's purported confession, heard and testified to only by Michaud, was a critical piece of evidence in this case that could have been challenged with the evidence of Michaud's misconduct.

The information regarding third party guilt was also favorable to Petitioner because it was exculpatory. Fields testified that he told police he did not buy drugs from Petitioner, but that he purchased drugs from other individuals at the residence, including a T.J., and often Petitioner was not even present. Further, Fields stated that law enforcement would have recordings of these transactions and recordings of him stating that he bought drugs from other people.

Considering that Petitioner's defense at trial was that the trafficking weight drugs belonged to another occupant of the home, Tyrone Jenkins, and that Fields stated he purchased drugs from someone with the initials of TJ, this highly exculpatory information was incredibly important to Petitioner's defense.

The PCR court ruled that because Assistant Solicitor Musser did not have personal knowledge of the undisclosed Brady material that no Brady violation had occurred. However, this ruling ignored the duty set out in Brady, Kyles, and its progeny, thereby disregarding decades of jurisprudence in this country and state. The undisclosed Brady evidence at issue in this case was shown to have been in the custody of the police, who were agents for the state. The PCR court's reliance on the solicitor Musser's lack of knowledge demonstrated that the state failed to honor its obligations under Brady to seek out information in the custody and control of law enforcement. Ignorance is not bliss and solicitor Musser's failure to seek out information about the confidential informant used in the case and the misconduct of Michaud cannot be excused.

Petitioner has shown that the evidence at issue was 1) favorable to his case; 2) was in possession of an agent of the state and was known to the prosecution, 3) was suppressed by the state, and 4) was material to both his actual innocence and was impeaching. The suppression of the statements made by the Fields and the repeated misconduct of Michaud undermine the confidence in the outcome of Petitioner's trial.

3.

<u>The PCR court erred in finding that trial counsel provided effective representation where counsel failed to fully investigate the information contained in the search warrant and thus failed to raise a meritorious claim pursuant to *Franks v. Delaware*[10] in challenging the admission of items seized pursuant to the search warrant.</u>

Relevant Facts

Prior to the start of trial Counsel Newman challenged the sufficiency of the search warrant affidavit, arguing that there was nothing contained within the four corners of the document that attested to the confidential informant's reliability. App. 111, l. 16-App. 112, l. 23. The state argued that law enforcement had corroborated some of the information in the warrant, thereby demonstrating the reliability of the confidential informant. The state asserted that the document was sufficient on its face. App. 113, ll. 1-18.

The trial judge agreed with the state and found the search warrant was valid. App. 113, ll. 23-App. 114, l. 6. However, at Petitioner's PCR hearing the confidential informant used in the case, Edward Fields, provided an affidavit, along with uncontroverted testimony, that the information contained in the search warrant affidavit was false. App. 694-695; App. 577-587.

Fields' affidavit and testimony included information about his actions while working as a confidential informant for the Drug Task Force. Notably, Fields stated that he was not regularly searched prior to conducting buys and that he often brought a small amount of drugs with him to the controlled buys so that he could switch out the smaller amount for the larger amount that he had just purchased. Fields also stated that he was using drugs during his time as an informant despite the fact that he had signed an agreement to refrain from drug use and other criminal

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10 438 U.S. 154 (1978)

activity. Additionally, Fields stated that he was never searched after the buys were conducted. Further, Fields indicated that law enforcement would have a record of his actions and the drug buys that were used to secure the search warrant. App. 694-95.

At the PCR hearing Counsel Newman admitted that he did not interview the Fields and that he did not seek out any details about the information contained in the search warrant. App. 601-602. He stated that law enforcement typically did not turn over information about confidential informants unless the defendant was charged with the controlled buy. However, he noted that he could have gotten information about the underlying buys in the search warrant with the confidential informant information redacted. Counsel Newman testified that the information contained in Fields' affidavit would have given rise to a Franks challenge which would have resulted in the suppression of evidence obtained during the search. App. 609-612.

The PCR court ruled that Counsel Newman had legal basis under which he could have obtained the information supplied by the Fields during the PCR hearing. Further, the court ruled that the information would not have been subject to Brady disclosure and therefore counsel could not be found deficient for failing to use the information to challenge the search warrant. App. 798. The court made no rulings on counsel's failure to investigate the information contained in the search warrant.

Discussion

In Bagwell v. State, 410 S.C. 259, 763 S.E.2d 630 (2014), this Court held that defense counsel has a duty to conduct a reasonable investigation to discover all reasonably available mitigation evidence and all reasonably available evidence tending to rebut any aggravating evidence introduced by the state. See also Ard v. Catoe, 372 S.C. 318, 642 S.E.2d 590 (2007) (holding counsel's decisions regarding the investigation of, and failure to challenge, the gunshot

residue evidence was unreasonable and clearly deficient). Further, this Court has held that failure by counsel to sufficiently challenge a search warrant may constitute deficient performance for the purposes of a PCR claim. Gantt v. State, 354 S.C. 183, 188, 580 S.E.2d 133, 136 (2003).

In Petitioner's case counsel's deficiency was two-fold. First, counsel failed to investigate the information in the search warrant. Had counsel done even minimal investigation, such as requesting the reports and recordings of the drug buys that supported the search warrant, counsel would have discovered discrepancies in the affidavit. Next, due to this failure to investigate, counsel did not sufficiently challenge the search warrant. Based on the testimony from the confidential informant, the search warrant affidavit was riddled with false statements and thus a challenge should have been brought under Franks.

A criminal defendant is entitled to effective assistance of counsel under the Sixth Amendment to the United States Constitution. Strickland v. Washington, 466 U.S. 668 (1984). When a defendant challenges a conviction on the ground that counsel was ineffective, the question becomes, "'whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.'" Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (quoting Strickland, 466 U.S. at 686; see Ard v Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007). Pursuant to Strickland v. Washington, an applicant must show that counsel's performance was deficient and that counsel's "deficient performance prejudiced the defendant to the extent that 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" Cherry v. State, 300 S.C. 115, 117-118, 386 S.E.2d 624, 625 (1989) (quoting Strickland, 466 U.S. at 688).

In order to demonstrate prejudice where the allegation against counsel is failure to

sufficiently challenge a search warrant, "the defendant must also prove that his Fourth Amendment claim is meritorious and that there is a reasonable probability that the verdict would have been different absent the excludable evidence." Kimmelman v. Morrison, 477 U.S. 365, 375 (1986).

In reviewing a challenge to the veracity of a search warrant, South Carolina employs the two-prong test outlined in Franks v. Delaware, 438 U.S. 154, 98 S.Ct. 2674 (1978). State v. Gore, 408 S.C. 237, 244, 758 S.E.2d 717, 721 (Ct. App. 2014) (citing Franks, 438 U.S. at 155–56, 98 S.Ct. 2674); State v. Missouri, 337 S.C. 548, 553–54, 524 S.E.2d 394, 396–97 (1999) (applying the two-prong Franks test). First, there must be "allegations of deliberate falsehood or of reckless disregard for the truth as to statements included in the warrant affidavit, and those allegations must be accompanied by an offer of proof." Id. The burden is on the accused to prove the allegations of perjury or reckless disregard for the truth by a preponderance of the evidence. Id. "Second, if a deliberate falsehood or a reckless disregard for the truth has been established, the court must exclude the false material and consider the remainder of the affidavit to determine if it is sufficient to establish probable cause." Id. at 245, 758 S.E.2d at 721 (citing State v. Davis, 354 S.C. 348, 360, 580 S.E.2d 778, 784 (Ct. App. 2003)). If the court determines that in light of the false material no probable cause exists, then "the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit." Id. (citing Franks, 438 U.S. at 155–56, 98 S.Ct. 2674).

The Fields' testimony and affidavit effectively eviscerated the probable cause listed in the search warrant affidavit. The search warrant asserted that a confidential informant conducted controlled buys from Petitioner, that the same confidential informant conducted a buy from Petitioner within 72 hours of the execution of the search warrant, and that the confidential informant identified Petitioner by an unmarked photograph as the person he purchased drugs

from. App. 431. Further, the affidavit of Fields, along with his testimony, revealed that the Drug Task Force exercised little if any control over him based on their repeated failures to search Fields or his vehicle, and their failure to discover that Fields regular brought his own drugs with him to the buys.

Based on the evidence presented by Fields paragraph three, four, and five of the search warrant affidavit would have had to have been struck. The remaining information then should have been evaluated to see if sufficient probable cause still existed to issue a search warrant. Once those paragraphs were removed, the search warrant affidavit contained only general statements about Petitioner's address and his past criminal history. Based on that alone, there would not have been probable cause to issue a search warrant and the trial court would have had to suppress the evidence seized during the search of the Miranda Circle residence.

Petitioner has shown that not only was counsel deficient for failing to fully investigate the case but that his deficiency was further compounded by the failure to raise a meritorious Franks challenge to the search warrant. Had counsel investigated the information contained in the search warrant and challenged the warrant under Franks it is likely that the evidence seized during the search warrant would have been suppressed and the outcome of the case would have been different.

4.

The PCR court erred in finding that trial counsel provided effective representation where counsel failed to object to the constructive possession jury charge as an impermissible comment on the facts of the case.

Relevant Facts

During the charge conference the court indicated its intention to give a constructive

possession charge. App. 402, ll. 1-3. Counsel Newman objected to the constructive possession charge citing to State v. Heath.[11] App. 402, ll. 3-14. Counsel Newman argued that under Heath the state was required to prove that Petitioner had more than a mere possessory right to the property for the court to give a constructive possession charge. He argued that the state had to show Petitioner had ownership of the property in order to show dominion and control and that the state had failed to prove ownership. App. 402, l. 5-App. 403, l. 6.

The trial court found that Heath was distinguishable from Petitioner's case and ruled that it would charge constructive possession over the objection of the defense. App. 412, ll. 10-16; App. 414, ll. 8-22. The court proceeded to charge the following language:

> "[C]onstructive possession is when a person has dominion or control, or the right to exercise dominion or control, over either the object or the premises on which the object is located. Mere presence is insufficient to prove constructive possession. To prove constructive possession, the State must show the defendant had dominion and control, or the right to exercise dominion and control, over the object."

App. 468, ll. 13-20.

The court charged the jury with this definition of constructive possession six[12] separate times, sometimes changing the word "object" to the specific drug charge or saying both "object or drugs." After the jury charge, Counsel Newman renewed his objection to the possessive construction charge under Heath but did not make any other objections to the charge. App. 489, ll. 2-3.

At the PCR hearing Counsel Brown argued that Counsel Newman was ineffective for failing to object to the constructive possession charge as an impermissible comment on the facts.

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11 370 S.C. 326, 635 S.E.2d 18 (2006)

12 App. 468, ll. 13-20; App. 472, ll. 10-18; App. 473, ll. 12-20; App. 476, ll. 8-16; App. 477, ll. 8-16; App. 479, ll. 16-24.

Counsel Brown asserted that the language of the charge equated a fact of the case with an element that had to be proven and that the charge also lessened the state's burden of proof by saying that Petitioner could be convicted based on proof of dominion and control over the premises instead of proof over dominion and control over the drugs. App. 571, l. 22-App. 572, l. 17.

On cross-examination Counsel Newman admitted that what the state had to prove, and what the jury had to find, was that Petitioner had dominion and control over the object but that the constructive possession charge given allowed an inference that finding dominion and control over the premises would equate to a finding of possession of the object. Counsel Newman agreed that the charge could be seen as equating a fact of the case with an element that had to be proven which would be impermissible under South Carolina law. App. 622, l. 4-App. 623, l. 14.

The PCR court ruled that trial counsel could not be ineffective for failing to object to a jury charge that was currently good law. The order of dismissal concluded that an attorney cannot be deficient under Strickland for failing to anticipate a subsequent change in the law. App. 800.

Discussion

Article V, Section 21 of the South Carolina Constitution prohibits a trial judge from instructing a jury regarding the facts of a case. This constitutional proscription has been in place for well over 100 years. See State v. Dill, 15 S.E. 567 (S.C. 1897). Furthermore, South Carolina courts have found that counsel can be deficient for failing to object to a jury charge even when that charge is good law. See Dawson v. State, 352 S.C. 15, 572 S.E.2d 445 (2002). As noted in Pantovich v. State, 427 S.C. 555, 832 S.E.2d 596 (2019) "[t]he modern trend … has cast doubt upon the validity of charges instructing juries on *how to interpret and use evidence*." (emphasis

added). "It is axiomatic that some matters appropriate for jury argument are not proper for charging. 'Do jurors need the court's permission to infer something? The answer is, of course not.'" State v. Belcher, 385 S.C. at 612 n.9, 685 S.E.2d at 810 n.9 (quoting Bruce A. Antkowiak, The Art of Malice, 60 RUTGERS L. REV. 435, 476 (2008)).

In recent years the appellate courts of this state have struck down various jury charges as impermissible comments on the facts in violation of the South Carolina Constitution. See State v. Belcher, 385 S.C. 597, 600, 685 S.E.2d 802, 803 (2009) (placing significant restrictions on "the [longstanding] practice for trial courts in South Carolina ... to charge juries in any murder prosecution that the jury may infer malice from the use of a deadly weapon"); State v. Cheeks, 401 S.C. 322, 328-29, 737 S.E.2d 480, 484 (2013) (finding error in charging the jury that "actual knowledge of the presence of drugs is strong evidence of intent to control its disposition or use" because doing so "is improper as an expression of the judge's view of the weight of certain evidence); State v. Stukes, 416 S.C. 493, 499-500, 787 S.E.2d 480, 483 (2016) (eliminating charging the jury that a sexual assault victim's testimony need not be corroborated); State v. Cartwright, 425 S.C. 81, 819 S.E.2d 756 (2018) (holding "the trial court shall not provide a limiting instruction or otherwise comment to the jury" on how it should interpret and use evidence of a defendant's suicide attempt); State v. Burdette, 427 S.C. 490, 832 S.E.2d 575 (2019) (extending Belcher to eliminate from all trials any charge that the jury may infer malice from the use of a deadly weapon).

In the case at bar, the order of dismissal asserts that Petitioner's claim is an effort to change settled law and that trial counsel cannot be held responsible to predict a change in the law. However, as stated above, the prohibition on a judge commenting on the fact is well established in South Carolina jurisprudence. Further, as the United States Supreme Court has

stated, there is a difference in changing the law and a court ruling discussing the law in a novel context. See generally Reed v. Ross, 468 U.S. 1 (1984); Teague v. Lane, 489 U.S. 288 (1989). Petitioner is not contending that trial counsel should have foreseen a future change in the law but that based on the facts of the case and the modern trend of case law, that trial counsel should have raised a novel issue by objecting to the constructive possession charge as an impermissible charge on the facts.

Notably, the constructive possession jury charge has been analyzed in the past. In State v. Adams, 291 S.C. 132, 352 S.E.2d. 483 (1987) this Court struck down the then used constructive possession jury instruction as impermissibly shifting the burden of proof to the defense. There, this Court held that "[t]he proper charge on constructive possession is to instruct the jury that the defendant's knowledge and possession may be inferred if the substance was found on premises under his control. The trial judge should *explain to the jury that it is free to accept or reject this permissive inference of knowledge and possession depending upon its view of the evidence*." Id. at 135-36; 352 S.E.2d at 486 (emphasis added) (internal citations omitted).

The jury instruction in Petitioner's case equated dominion and control over the Miranda Circle residence with dominion and control over the drugs such that if the jury found Petitioner had dominion and control over the residence then he was guilty. This was an improper comment on the facts of the case as it equated an element of the crime charged with a contested fact in the case without instructing the jury that it could accept or reject the inference. As this Court noted in Cheeks, *supra*, "Simply because certain facts may be considered by the jury as evidence of guilt in a given case where the circumstances warrant, *it does not follow that [the jury] should be charged that these facts are probative of guilt*. It is always for the jury to determine the facts, and *the inferences that are to be drawn from these facts*." (emphasis added).

Further, the error in not objecting to the jury charge cannot be seen as harmless considering that the constructive possession charge was given six separate times, repeatedly highlighting the fact that if the jury found Petitioner had dominion and control over the residence that fact was probative of his guilt on the drug charges. Petitioner was prejudiced by counsel's failure to object to the charge as an impermissible comment on the facts. Had counsel objected it was likely that the results of the proceeding would have been different. The main question before the jury was who had ownership of the drugs found in the residence and this question was resolved against Petitioner when the jury was told, repeatedly, that dominion and control over the home was the same as constructive possession of the drugs without need for further proof of ownership.

CONCLUSION

For the foregoing reasons, this Court should grant Petitioner's writ of certiorari to allow further briefing on these issues.

s/Jessica M. Saxon
Jessica M. Saxon
Appellate Defender

ATTORNEY FOR PETITIONER

This 28th day of October, 2020.