

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Spartanburg County

Roger L. Couch, Special Circuit Court Judge

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JAN - 9 2012

S.C. Supreme Court

BOBBY GIBSON,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

PETITION FOR WRIT OF CERTIORARI

WANDA H. CARTER
Deputy Chief Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
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ATTORNEY FOR PETITIONER

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ISSUE PRESENTED

Trial counsel erred in failing to preserve the search warrant violation in the case as an issue for appellate review (unsigned copies of warrants were left at petitioner's residence and business property) because there was a reasonable likelihood that but for the error, petitioner's trafficking convictions would have been vacated on appeal.

STATEMENT

Petitioner Bobby Gibson, Jr. was convicted of possession of crack cocaine, trafficking in crack cocaine, and trafficking in cocaine during the April 2005 term of the Spartanburg County General Sessions Court before Judge Doyet A. Early. Petitioner received an aggregate thirty-year prison sentence. Thomas A. M. Boggs represented petitioner at trial. App. 1-321. Petitioner appealed his trial court convictions and sentences.

Petitioner was represented on appeal by Katherine Carruth Link. On appeal, appellate counsel argued and that the initial search of petitioner near his car exceeded the scope of the alleged search incident to arrest and that the subsequent searches of petitioner's residence and business property resulted in search warrant violations in the case also. After briefing by both parties on appeal, (App. 323-340; App. 341-359), the Court of Appeals issued an opinion affirming petitioner's convictions and sentences. See State v. Gibson, Unpublished Opinion No. 2006-UP-372 (Ct. App. filed October 31, 2006). App. 370-377. The Court of Appeals held that trial counsel's objections to the search warrant violations were untimely raised in that the same did not come forth during the state's case or prior to trial at the pretrial hearing on the search incident to arrest question, but rather after the search evidence had already been admitted into evidence. Also, the Court of Appeals upheld the search incident to arrest conducted by the police as constitutional. Subsequently, the Court of Appeals denied petitioner's petition for rehearing in the case, (App. 378-385), and thereafter, the South Carolina Supreme Court denied petitioner's petition for writ of certiorari to the South Carolina Court of Appeals. App. 386-425.

On November 14, 2008, petitioner filed an application for post conviction relief with the Spartanburg County Office of the Clerk of Court. App. 426-433. The respondent filed a return dated August 20, 2009, requesting that a hearing be held in the case. App. 434-437.

A hearing was convened on September 14, 2010, at the Spartanburg County Courthouse before Judge Roger L. Couch. J. Franklin Wilkes represented petitioner at the PCR hearing. App. 438-549. On May 16, 2011, Judge Couch issued an order of dismissal in the case therein denying petitioner's allegations of ineffective assistance of counsel. App. 551-564.

Petitioner appealed Judge Couch's order of dismissal. This petition follows.

ARGUMENT

Trial counsel erred in failing to preserve the search warrant violation in the case as an issue for appellate review (unsigned copies of warrants were left at petitioner's residence and business property) because there was a reasonable likelihood that but for the error, petitioner's trafficking convictions would have been vacated on appeal.

At trial, police officer Brian Duncan testified that he was patrolling in Spartanburg around 10:00 a.m. on September 30, 2004, when he observed petitioner driving out of an automobile shop. Officer Duncan stated that since he was aware of the fact that petitioner's license had been previously suspended, he stopped petitioner and placed him under arrest. Officer Duncan added that he found crack cocaine inside petitioner's cell phone case located on him pursuant to a search incident to arrest. App. 102, l. 20 – p. 112, l. 9. Prior to trial, a pretrial hearing was held on the issue of whether to suppress the drugs confiscated during the traffic stop and search incident to arrest that followed, which ultimately lead to the procurement of search warrants to search petitioner's home and business property where drugs were found also. App. 33, l. 14 – p. 34, l. 15.

Defense counsel argued in effect that the warrants were illegal because they emanated from the illegal search incident to arrest. App. 34, l. 21 – p. 36, l. 5; App. 56, l. 18 – p. 61, l. 6; App. 74, l. 14 – p. 77, l. 20.

During the pretrial hearing, Officer Duncan summarized the events that led to the stop and described the search incident to arrest. App. 37, l. 8 – p. 43, l. 3. Then, defense counsel cross examined Officer Duncan regarding the search incident to arrest. App. 44, l. 1 – p. 56, l. 6. Afterwards, the trial judge ruled that the search incident to arrest that occurred in the case was a lawful search. App. 77, l. 22 – p. 78, l. 24.

As the trial continued, narcotics officer Nathan Cantrell testified that he executed two search warrants on that same day: one at petitioner's residence and one at petitioner's business property. Officer Cantrell testified that he found crack at the residence and cocaine at the business property. App. 124, l. 9 – p. 147, l. 7.

Then, after the state rested its case (App. 220, l. 24 – p. 221, l. 1), defense counsel moved to quash those search warrants and suppress the drugs seized per the search because the warrants left at petitioner's residence and business property were unsigned, which violated S.C. Code Ann. §17-13-140 and 150, and rendered the two searches improperly executed and invalid. App. 222, l. 6 – p. 235, l. 10. The court denied counsel's search warrant objections. App. 245, l. 16 – p. 246, l. 8.

During the PCR hearing, petitioner's PCR attorney questioned trial counsel about whether he properly preserved for appeal the issue of the search warrant violations that occurred in the case. Trial counsel responded by testifying that the search warrant violation motion was an "add on" to the main (search incident to arrest) motion raised later on at the close of the case. App. 514, l. 5 – p. 517, l. 22; App. 520, l. 4 – p. 521, l. 10. However, trial counsel acknowledged that the appellate

court did not address the search warrant violation issue because the issue was not preserved for appellate review. App. 521, l. 21 – p. 522, l. 18. Note that petitioner did not testify at trial, but he did testify at the search warrant violation hearing and verified that the copies of the warrants left at his residence and business property were not signed. App. 234, l. 2 – p. 235, l. 10.

During the PCR hearing, petitioner testified in effect that trial counsel erred in failing to raise the search warrant violation issue simultaneously with the pre-trial search incident to arrest motion to suppress that had been presented before the trial began in the case. App. 507, l. 20 – p. 509, l. 16.

As a rule, a warrant that is unsigned when it is served is an invalid warrant and not deemed legally issued per the search warrant’s requirements of S.C. Code Ann. §17-13-140 and 150, which would in turn mean that the evidence seized pursuant to the violation must be suppressed. State v. Covert, 382 S.C. 205, 675 S.E.2d 740 (2009). The Covert court held that public policy considerations require that a warrant be signed by the judicial officer in order to avoid an “unfinished paper” impression. “The signature is the assurance that a judicial officer has found that law enforcement has made the requisite probable cause showing, and serves as notice to the citizen upon whom the warrant is served that it is a validly issued warrant.” See State v. Covert, citing to Davis v. Sanders, 40 S.C. 507, 19 S.E. 138 (1894).

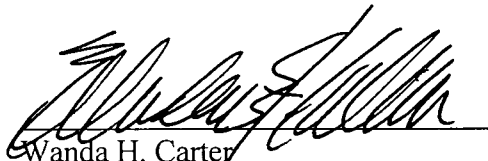
Clearly, had the search warrant violation issue in question been properly preserved in order to allow appellate review of the same, then the outcome of petitioner’s appeal might have ended differently. As a rule, a contemporaneous objection must be made when the evidence in question is introduced at trial. State v. Wiles, 383 S.C. 151, 679 S.E.2d 172 (2009); State v. Byers, 392 S.C. 438, 710 S.E.2d 55 (2011). Here, the drugs had already been placed into evidence before any

objection was made by defense counsel in the matter. App. 209, l. 4 – p. 220, l. 18. Trial counsel moved to exclude the drugs in the case after the drugs had been introduced into evidence at trial, and after the state rested its case. App. 220, l. 24 – p. 223, l. 20. This was error on trial counsel’s behalf because the search warrant violation issue ended up being unpreserved for appellate review. Trial counsel erred in failing to preserve the search warrant violation issue in the case for appellate review. Counsel’s error constituted deficient legal representation in violation of The Sixth and Fourteenth Amendments to the United States Constitution. See Strickland v. Washington, 466 U.S. 668 (1984).

CONCLUSION

Based on the foregoing argument, petitioner requests that the Court grant the petition and allow full briefing on the issue.

Respectfully submitted,



Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER

This 9th day of January, 2012.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Spartanburg County
Roger L. Couch, Special Circuit Court Judge

BOBBY GIBSON,

PETITIONER,

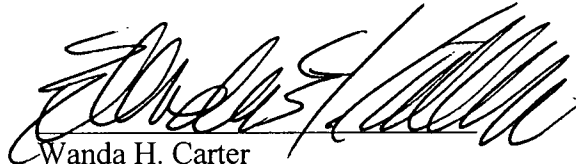
V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

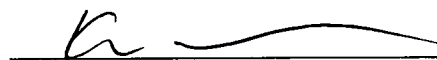
I certify that a true copy of the petition for writ of certiorari and a copy of the appendix and supplemental appendix in this case have been served on Suzanne H. White, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 9th day of January, 2012.



Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 9th day
of January, 2012.

 (L.S.)

Notary Public for South Carolina
My Commission Expires: October 2, 2013.