IN THE SUPREME COURT OF FLORIDA

DELMER SMITH,	:	
Appellant,	:	
vs.	:	Case No. SC18-42
STATE OF FLORIDA,	:	
Appellee.	:	
_____	:	

APPEAL FROM THE CIRCUIT
COURT IN AND FOR MANATEE
COUNTY STATE OF FLORIDA

SUPPLEMENTAL INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT REGARDING REFERENCES

References to the record of the direct appeal of the trial, judgment and sentence in this case are in the form (ROA. 123). References to the postconviction record on appeal are in the form (PC-ROA. 123). References to the June 5, 2019 hearing pursuant to the remand are in the form (R. 123). References to the June 13, 2019 hearing pursuant to the remand are in the form (R2. 123). References to the June 24, 2019 Amended Order Denying Defendant's Motion For Postconviction Relief are in the form (Order. 123). Arguments will be numbered in conformity with the Amended Order.[1] Generally, Delmer Smith is referred to as Mr. Smith.

[1] The claim involving the duffel bag was referenced as "Claim 1" in the Amended Order. This claim corresponds with Claim II in Appellant's Initial Brief. The claim involving the bag that came from Mr. Smith's car was referenced as "Amended Claim 1" in the Amended Order as well as Appellant's Amended Motion for Postconviction Relief which the circuit court allowed Appellant to file. It will be labeled as such in this Supplemental Initial Brief.

STATEMENT OF THE CASE AND FACTS

Delmer Smith was sentenced to death on May 28, 2013. Mr. Smith's case is currently pending before this Court on his appeal of the circuit court's denial of his Motion to Vacate Judgment and Sentence, as well as the circuit court's denial of his Amended Motion to Vacate Judgment and Sentence. A full procedural history and statement of facts is contained in his Initial Brief, filed on May 18, 2018. On April 25, 2019, this case was remanded to the circuit court for further fact finding.

On June 5, 2019, former Sarasota Sheriff's Office Crime Scene Technician Jessica Jarecki testified that the original stipulation entered at Mr. Smith's trial claiming the medical encyclopedia originated from a duffel bag in the attic was incorrect and it had actually originated from a bag collected from Martha Tejeda by Detective Ortiz. (R. 28-29) Sarasota Sheriff's Office Detective Michael Dumer testified that he authored the search warrant application for the bag and other property collected on September 15, 2009 from Ms. Tejeda belonging to Mr. Smith. (R. 43-44) This application was not sought until October 27, 2009, a full forty-three days after the medical encyclopedia was found inside the bag by law enforcement on September 15, 2009. (R. 48, 51-53)

On June 13, 2019, Sarasota Sheriff's Office Detective Rafael Ortiz testified that on September 15, 2009, he received at least one bag of property from Ms. Tejeda that he knew to belong to Mr. Smith. (R2. 18-21) This bag originated from Mr.

Smith's car. (R2. 20) Detective Ortiz did not open the bag while at the residence and was unaware of the contents. (R2. 23) He admitted he knew that Mr. Smith was incarcerated at the time. (R2. 18-19)

Mr. Smith's former trial counsel Daniel Hernandez testified that he was responsible for handling the guilt phase. (R2. 7) He had previously been under the impression that the medical encyclopedia was retrieved from Ms. Tejeda's attic. (R2. 7) During preparation for trial, he reviewed Detective Ortiz's September 15, 2009 report that details the receipt of the bag originating from Mr. Smith's car. (R2.10) He also reviewed Detective Dumer's search warrant application. (R2. 12) He admitted that the date of receipt for the items Detective Dumer wished to search was the same date Detective Ortiz obtained the bag from Ms. Tejeda, September 15, 2009. (R2. 12-13) He acknowledged that the date of Detective Dumer's warrant application was October 27, 2019. (R2. 13) He conceded that the property receipt dated September 15, 2009, was attached to the warrant and it listed the medical encyclopedia among the bag's contents. (R2. 13-14) He offered no strategic reason for failing to file a motion to suppress the medical encyclopedia. (R2. 15)

Detective Dumer's testimony also established that a separate warrant Sarasota County applied for on October 20, 2009, which was for any forensic evidence located on Mr. Smith's cell phone, was not the same warrant that would have authorized Manatee County to do any forensic search of Mr. Smith's phone. (R. 58)

The reason for that is Sarasota County's warrant for forensic cell phone data was for a separate case that Mr. Smith was convicted of in 2011. (R. 59) Jerome Diamond, former Manatee County Sheriff's Office computer forensics technician, testified that a forensic download was not done on Mr. Smith's phone until July of 2012 shortly before Mr. Smith's trial in this case. (R2. 71-72) There is no evidence that the two counties shared any of the information or that the download done by Manatee County was simply a duplicate of the one authorized by a judge in the Sarasota County case.

The circuit court allowed Appellant to file an "Amended Claim I" involving the bag originating in Mr. Smith's car based on these new facts. On June 24, 2019, the circuit court denied Appellant's original Claim I and Amended Claim I because the proposed motions to suppress would have been meritless and so Mr. Smith's trial counsel cannot be deemed ineffective for failing to file them. (Order. 16, 18)

SUMMARY OF ARGUMENT

The circuit court erred when it denied Mr. Smith's claim that trial counsel was ineffective for failing to file a motion to suppress evidence the police found as the result of an illegal search and seizure of items in a duffel bag that belonged to Mr. Smith. Had counsel filed such a motion before trial, it would have been granted and Mr. Smith would not have been prejudiced by the entry of inculpating evidence, possession of stolen property belonging to the deceased victim.

Further, the circuit court erred when it denied Mr. Smith's claim that trial counsel was ineffective for failing to file a motion to suppress evidence that the police found on September 15, 2009, as a result of an illegal search and seizure of a bag belonging to Mr. Smith. Had counsel filed this additional motion before trial, it would have been granted and Mr. Smith would not have been prejudiced by the entry of inculpating evidence, possession of a medical encyclopedia identified by the deceased victim's husband as belonging to their family.

ARGUMENT

ISSUE I

MR. SMITH'S TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO FILE A MOTION TO SUPPRESS EVIDENCE THE POLICE FOUND AS THE RESULT OF AN ILLEGAL SEARCH AND SEIZURE OF ITEMS IN A DUFFEL BAG THAT BELONGED TO DELMER SMITH THUS VIOLATING MR. SMITH'S RIGHTS UNDER THE FOURTH, FIFTH, SIXTH AND FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION. THE LOWER COURT ERRED IN DENYING RELIEF.

How Sarasota County Sheriff's Office sought out, seized, and handled this duffel bag does not reflect an inventory search faithful to the protections of the Fourth Amendment. For the most part, this original claim and argument related to it remain intact. However, based on the supplemental hearings in this case, the circuit court did make limited new findings in relation to this original claim and they will be addressed here.

Under *Strickland v. Washington*, there are two prongs of an ineffective assistance claim: deficient performance and prejudice. 466 U.S. 668, 687 (1984). Trial counsel was deficient because reasonable counsel would have filed a motion to suppress to remedy the Fourth Amendment violation here. As a result of trial counsel's deficiency, Mr. Smith was prejudiced. Had the jury not considered the illicit evidence found inside this duffel bag, there was a reasonable probability of a

different outcome. The circuit court found that Mr. Smith's ineffective assistance claim must fail because had trial counsel filed such a motion to suppress, it would have been denied. The circuit court stated the "inventory search of the duffel bag … was conducted in good faith and was not a subterfuge to conduct a warrantless search for incriminating evidence." (Order. 15) The notion that opening the duffel bag, or any piece of property belonging to Mr. Smith, was a valid inventory search needs to be dispelled in so far as it may serve as an alternative ground for relief for the government.

Under established United States Supreme Court precedent, three primary criteria determine the validity of an inventory search. First, ***the object or person searched must be lawfully in police custody***. *South Dakota v. Opperman*, 428 U.S. 364, 375 (1976) (Emphasis added.); *Colorado v. Bertine*, 479 U.S. 367, 372-73 (1987). Second, the inventory must be conducted pursuant to standard, routine, police procedures. *Opperman*, 428 U.S. at 372; *Bertine*, 479 U.S. at 373-74. Lastly, ***there must be no suggestion*** that the procedure is a pretext designed to conceal an investigatory motive. *Opperman*, 428 U.S. at 376 (Powell, concurring: ***"Inventory searches … are not conducted in order to discover evidence of crime."***) (Emphasis added.); *Bertine*, 479 U.S. at 373-74. [2]

[2] This section will focus on the third criteria, that there cannot be indication that the inventory is a pretext designed to conceal an investigatory motive. There will be analysis as to the first criteria, that the object or person searched must be lawfully in police custody, discussed in Amended Issue I section of this brief as the same law and reasoning that applies to Mr. Smith's duffel bags also applies to his bag that is the subject of the later section.

The circuit court noted the record was void of any "indication that the inventory search of the duffel bag and other items was conducted ***for any reason other than to catalog the contents of the property received from Ms. Tejeda***." (Order. 15) (Emphasis added.) The argument that the only reason police looked into the bags and other property they received from Ms. Tejeda was to catalog the contents loses all credibility the moment one considers the reason the police had the items in the first place. Detective Dumer testified that multiple police agencies were investigating Mr. Smith and suspected that he was the perpetrator in as many as "12 or more similar crimes that [police] believed to be related". (R. 52) This multi-agency investigation was so fixated on Mr. Smith that police were regularly monitoring his jail phone calls. (ROA. 2170-223) (R. 45) It is obvious the police did not take this evidence only to catalog it, but instead seized it for the purpose of evidence preservation.

Designating this intrusion a valid inventory search was error because it failed the legal requirements. However, the circuit court's conclusion is just as troubling when one considers the historical purpose of inventory searches. An inventory search serves the needs of protection of the owner's property, protection of police against claims of lost or stolen property, and protection of police against potential danger from such things as explosives. *Bertine,* 479 U.S. at 372.

The police did obtain a separate search warrant for the locked strong box that originated in one of the duffel bags from the attic prior to opening it. (R. 34) This search warrant was obtained and executed after the illegal search of the duffel bag. There is no basis to conclude that the content of the duffel bag posed any more "danger" to police than the contents of the locked strong box. The fact that a search warrant was obtained for the strong box should cause this Court to seriously doubt the genuineness of any safety-related motivations by police in relation to the other containers opened without a warrant, including this duffel bag. Accordingly, nothing at the supplemental evidentiary hearings altered the fact that the warrantless search of the duffel bag violated the Fourth Amendment and all evidence seized from that bag, including the contents of the locked strong box, would have been excluded had counsel filed a motion to suppress.

Inventory searches are for situations where police are burdened with someone else's property and must for their own safety and liability keep a record of what is there and any damage. Inventory searches are not intended to be used by police as a sham to enable them to inspect property that for whatever reason appears suspicious. Police should not be able to invite danger by venturing out and seeking items they suspect are involved in criminal activity and then claiming they must inventory these items for the purpose of avoiding or minimizing the same danger they themselves created by seizing it. That is exactly what police did in this case. They did not

stumble upon Mr. Smith's property in Ms. Tejeda's attic or in her driveway. They did not need to be protected from any of its potential contents when the obvious, safe alternative was to leave the property right where it was. Doing that would have saved the police department from any false claims of stolen property as well as ensured the personal safety and property interests of everyone involved. Following the lower court's logic would result in the police having the capability to go out into the community and retrieve anything they please as long as a stand-in is available to give consent without consulting the rightful owner, open it, and catalog its contents supposedly for the sole purpose of knowing what is inside for their own safety. That reasoning is circular and erroneous and results in nothing but a self-fulfilling prophecy. Such a conspicuous circumvention of the Fourth Amendment's warrant requirement cannot be tolerated.

AMENDED ISSUE I

MR. SMITH'S TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO FILE A MOTION TO SUPPRESS EVIDENCE THAT THE POLICE FOUND ON SEPTEMBER 15, 2009 AS A RESULT OF AN ILLEGAL SEARCH AND SEIZURE OF A BAG BELONGING TO MR. SMITH THUS VIOLATING MR. SMITH'S RIGHTS UNDER THE FOURTH, FIFTH, SIXTH AND FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION. THE LOWER COURT ERRED IN DENYING RELIEF.

A. Expectation of privacy.

Disputed permission is no match for the Fourth Amendment's ceaseless reverence for personal privacy. Police were well aware of Mr. Smith's attempts to keep this property out of the hands of law enforcement so they sought out inferior consent as a substitute. An invitation that is at best disputed, without more, gives police no better authority to perform a warrantless search than a situation void of any consent at all.

As discussed in the above section, *Strickland v. Washington* requires proof of both deficient performance and prejudice. 466 U.S. 668, 687 (1984). Trial counsel was deficient because reasonable counsel would have filed a motion to suppress to remedy the Fourth Amendment violation as to this bag as well. As a result of trial counsel's deficiency, Mr. Smith was prejudiced. Had the jury not considered the

medical encyclopedia found inside this bag, there was a reasonable probability of a different outcome.

The circuit court erroneously found that since Mr. Smith "shared access" to his car with Martha Tejeda that he had "no legitimate expectation of privacy in the items" within it and any motion to suppress filed would have been denied. (Order. 17) The crux of this conclusion was the court's interpretation of the recorded jail phone calls between the two introduced during Mr. Smith's trial. Most notably that Mr. Smith "did not object or otherwise attempt to limit her access to his vehicle or the property in his storage unit." (Order. 17) However, an objective reading of that portion of the evidence and other testimony reveals a different conclusion.

In the recorded jail phone calls that police monitored and introduced at trial, Mr. Smith vehemently objected to Ms. Tejeda giving any of the property to police or letting them search it. (ROA. 2221-22) On the September 12, 2009 call, while Ms. Tejeda is at the storage facility collecting the items, Mr. Smith limits her access to these multiple times. He tells her he wants her to store and keep the property for him. (ROA. 2178) He tells her she cannot let any children look in or go into the bags. (ROA. 2215) He tells her what to do with the bags and where to keep them. (ROA. 2215-16) He tells her to retrieve his car because he doesn't want to "leave [his] car over there." (ROA. 2180) She assures him "[w]hen you come back, you have your car here." (ROA. 2181) At any point, Mr. Smith could have offered Ms. Tejeda the

contents of his car and the storage unit to have as her own and go through at her leisure but he did not. Ms. Tejeda's actions also reflect her lack of possessory interest in the property. Most of it she kept in her attic until the time that police seized it. (ROA. 2161) Likewise, the car remained parked in her garage until it was taken away. (ROA. 2163)

Ms. Tejeda's actual or apparent authority to consent to the search of her home does not automatically extend to property that does not belong to her. *See United States v. Ruiz*, 428 F.3d 877 (9th Cir. 2005) (authority to consent to a search of property does not necessarily translate into authority to search specific containers). Ms. Tejeda did not have actual authority to consent unless there was proof Mr. Smith had expressly authorized her to give consent or if the she had mutual use of the property and joint access or control over it. *See United States v. Davis*, 332 F.3d 1163, 1169 (9th Cir. 2003). This viewpoint, that "the right to consent rests not on the law of property but rests rather on mutual use of the property by persons generally having joint access or control for most purposes ....", is rooted in *United States v. Matlock*, 415 U.S. 164, 170 n. 7 (1974). *See also United States v. Jaras*, 86 F.3d 383, 389 (5th Cir. 1996) (when person giving consent admonishes an officer that a bag belongs to third party who is the subject of a search, ***this may be understood to deny joint access and control over the property***). (Emphasis added.)

In *Jaras*, police found drugs as a result of searching a suitcase they found in the trunk of a car after getting consent from the driver. 86 F.3d at 385-86. The Fifth Circuit Court of Appeals ruled the defendant's motion to suppress should have been granted. The reasoning was simply that the driver told police upon consenting that the suitcase actually did not belong to him but to his passenger, the defendant. *Id*. at 388. There is no question as to the owner of this property in the eyes of law enforcement. Both Detective Dumer and Detective Ortiz admitted knowing these items belonged to Mr. Smith based on statements from Ms. Tejeda and the recorded calls. (R. 44-45, R2. 22) Law enforcement knew that they could not get consent from Mr. Smith so they turned to the person with whom Mr. Smith entrusted the property. Further proof that police knew the dubious nature of this consent was the after-the-fact search warrant sought by Detective Dumer. (R. 48, 51-53)

Mutual access is not determinative of mutual use. *See Jones v. State*, 648 So. 2d 669, 675 (Fla. 1994) (holding that "[e]ven though hospital staff generally has joint access to and control of personal effects kept in a patient's room, the staff cannot consent to the search or seizure of the effects because it has no right to mutual use of a patient's belongings."). There is no evidence Ms. Tejeda had the right to mutual use of any property that originated in Mr. Smith's car. Ms. Tejeda was instructed to pick the items up from the storage unit and keep, at least the bags, intact until his return. The urgency of this task and the importance of the bags being moved and not

left in the storage unit was conveyed to Ms. Tejeda several times. It follows logically that if these items were significant enough to Mr. Smith to require immediate relocating, that he was not relinquishing possessory interest in the items.

Expectation of privacy can be implied if a defendant entrusts his belongings to another person for storage. *United States v. Wilson*, 536 F.2d 883, 885 (9th Cir. 1976). In *Wilson*, the Ninth Circuit Court of Appeals held that although a tenant could effectively consent to police searching her apartment, she could not, having disclaimed any ownership or possessory interest in the defendant's suitcases which he had left there while visiting the night before, give effective consent to search the suitcases based on either actual or apparent authority. *Id*. at 884-85.

The test which this Court employs is one of "objective reasonableness." *Florida v. Jimeno*, 500 U.S. 248 (1991). Facts known to the police in this case that suggested Ms. Tejeda did not have authority include that she identified the property as belonging to Mr. Smith, the contents of the bag were not known to her as she did not describe them as she was handing the bag over to Detective Ortiz (R2. 23), the bag was closed when it was handed over (R2. 23), and the police were well aware of Mr. Smith's efforts to conceal all of his property to the public based on the jail phone calls. Ms. Tejeda did not identify any of Mr. Smith's property as property the two of them shared. Also, Ms. Tejeda indicated that she turned Mr. Smith's property over to police out of fear of being associated with any of its contents. (ROA. 2164-

66) It is not logical for law enforcement to draw a conclusion that Ms. Tejeda had the requisite mutual use of Mr. Smith's property when she turned over the property because she suspected that Mr. Smith was hoarding contraband and wanted to disaffiliate with it.

Nor did Ms. Tejeda have apparent authority to consent to the search of the bag. This would have required proof that the searching officers "reasonably (though erroneously) believe[d] that the person who has consented to their" search had authority to do so. *Illinois v. Rodriguez*, 497 U.S. 177, 186 (1990). Police did not mistakenly rely on information that, if true, would have justified a belief that Ms. Tejeda had actual authority to consent to a search of the bag positively belonging to Ms. Smith. There were no mistakes of fact here. Rather, Ms. Tejeda clearly informed Detective Ortiz that the bag did not belong to her and that it belonged to Mr. Smith. Therefore, this search cannot be justified based on Ms. Tejeda's consent.

What amplifies the intrusion in this case is the senselessness of it. It is distressing to consider the ease with which this search could have been performed constitutionally. The police in this case could have simply applied for a warrant to search the storage unit when they found out the address of the facility and the unit number on September 11, 2009. (ROA. 2174-76) This information was obtained from the recorded jail phone calls between Mr. Smith and Ms. Tejeda and marked the discovery of the last piece of the puzzle police needed to apply for a warrant to

seize these particular items; their location. Situations in which police are aware of the specific location of evidence of criminal activity but do not possess the means to enter said premises by way of asking the owner are the very dilemmas warrants are intended to remedy. The State cannot conceivably claim that the need for exigency frustrated law enforcement efforts to obtain a warrant. This bag was seized on September 15, 2009, but not from the attic like both parties in this case were led to believe by the stipulation entered at trial. (R. 14, 24) The bag was collected that day by Detective Ortiz and opened to reveal its contents. (R2. 18) The bag was transported to the forensic laboratory on September 17, 2009, then opened and photographed on September 18, 2009. (R. 11-12, 17) Inside was the medical encyclopedia. (R. 12) The warrant that corresponds with this evidence was not applied for until October 27, 2009. (R. 48) It was not executed until a day later on October 28, 2009. (R. 48) This was clearly not an urgent matter to police. This is not because there is any reason to believe police were anything but hard at work to solve these crimes but because they already knew what was in this bag and all the other containers belonging to Mr. Smith because they already examined them. This warrant was an afterthought used to inoculate the entirety of this multi-jurisdictional investigation that at times skirted constitutional protections.

B. Inventory search.

The circuit court indicated that the inventory search exception to the warrant requirement also applied to the bag discussed in this section when it stated: "Detective Ortiz did not personally search the black plastic bag that Ms. Tejeda presented to him; rather, he delivered it to the property room at the SCSO Detective Bureau, where an inventory search was conducted pursuant to SCSO policy." (Order. 17) The same law and analysis argued in the Issue I section of this brief applies here as well. The limited additional arguments applicable to this bag are included here.

Inventory searches ***must be conducted pursuant to standard, routine, police procedures***. *Opperman*, 428 U.S. at 372; *Bertine*, 479 U.S. at 373-74. (Emphasis added.) Jessica Jarecki, employed as a crime scene technician for Sarasota County Sheriff's Office at the time of this crime, enlightened the circuit court about the policy in regards to documenting the contents of any containers:

> If it was a bag or a box, an overall photograph would be taken of the initial container, and then a series of photographs would be taken as the process of removing those items from the bag. So an overall of the container, a photograph of the open container with the contents inside, and then additional photographs would be taken as items would be removed from that bag to inventory the contents of that bag.

(R. 33)

This policy was not followed. A photograph of this black bag opened with the medical encyclopedia, or any other contents inside, does not exist. (R. 53-55) None

of the evidentiary photographs taken by crime scene technicians in this case display the bag at the beginning of this inventory process. The lack of any "overall" photographs as is required by Sarasota Sheriff's Office policy proves this inventory was not done in compliance with standardized procedure.

The first criteria for inventory searches, that the object or person searched must be lawfully in police custody, was discussed in depth in subsection A of this section of the brief. As subsection A explains, the seizure itself of this bag and all of Mr. Smith's property was unlawful. The same law and analysis applies here to this bag. The police took this bag for the same reason they towed Mr. Smith's car away, to store it in order to process evidence at a later date. The bag was seized and inspected for the purpose of a criminal investigation so it categorically cannot be found to be a valid inventory search.

The seizure and search of this bag also dishonored the classic purposes of inventory searches. This bag of car contents had no nexus to Mr. Smith's arrest and it was therefore unnecessary for the police to inventory it. The car was not illegally parked or otherwise causing a disturbance or danger to the public. The possibility that the car contained items that would endanger police weighed in favor of not seizing the car. It was removed from Ms. Tejeda's garage not for archival purposes but for the purposes of extracting potential evidence from it. Therefore, this inventory search was tainted no matter the manner in which it was performed.

CONCLUSION

Appellant respectfully requests this Honorable Court to reverse his Conviction and Death Sentence.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on July 24, 2019 a true copy in PDF format of the foregoing SUPPLEMENTAL INITIAL BRIEF has been transmitted to the Clerk of the Supreme Court of Florida, through the Florida Courts E-Filing Portal, which will serve a Notice of Electronic Filing to: Christina Z. Pacheco, Assistant Attorney General, 3507 East Frontage Road, Suite 200, Tampa, Florida 33607-7013 (Christina.pacheco@myfloridalegal.com and capapp@myfloridalegal.com). A hard copy will be sent by first class U.S. Mail to Delmer Smith III, DOC #135769, Florida State Prison, P.O. Box 800, Raiford, Florida 32083.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that a true copy of the foregoing SUPPLEMENTAL INITIAL BRIEF OF APPELLANT was generated by computer using Microsoft Word with Times New Roman 14 point font, pursuant to Fla. R. App. P. 9.210 (a)(2).

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