IN THE SUPREME COURT OF FLORIDA

CASE NO. SC04-1879

MERRIT ALONZO SIMS,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR MIAMI-DADE COUNTY, CRIMINAL DIVISION

SUPPLEMENTAL ANSWER BRIEF OF APPELLEE

CHARLES J. CRIST, JR.
Attorney General
Tallahassee, Florida

MARGARITA I. CIMADEVILLA
Assistant Attorney General
Florida Bar No. 0616990
Office of the Attorney General
Rivergate Plaza -- Suite 650
444 Brickell Avenue
Miami, Florida 33131
PH. (305) 377-5441
FAX (305) 377-5654

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATEMENT OF CASE AND FACTS

The general factual and procedural background of this case is set forth in the State's[1] initial brief.[2] On April 3, 2006, this Court relinquished jurisdiction to the trial court to hold a hearing on Defendant's claim that counsel was ineffective for failing to properly challenge the admission of canine-alert evidence during the guilt phase of the trial.

Due to space limitations and the numerous claims brought in Defendant's initial brief some additional facts pertinent to this claim were not contained in the initial briefs and are, thus, set forth here. At trial, Defendant sought to introduce evidence that a few weeks prior to shooting Police Officer Stafford during a traffic stop, he had been the subject of another traffic stop, in order to support his theory of self-defense. The State moved in limine seeking the exclusion of such evidence as improper character evidence. (SPCT. 183-86)[3] In that motion the State explicitly stated that it was seeking to

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[1] The parties will be referred to as they stood below.

[2] The procedural history upon relinquishment is contained in the three status reports filed with this Court on May 3, 2006, June 2, 2006, and July 5, 2006.

[3] As in the initial brief, the symbols "DAR" and "DAT" will be used to refer to the records on appeal and transcript of proceedings in Appellant's direct appeal. The symbols "SPCR." and "SPCT." will be used to refer to the supplemental record and transcript in the instant post conviction appeal.

establish that at the time of the murder the "Defendant was a parolee in possession of drugs." Id. During the hearing on that motion Defendant's trial counsel challenged the state's ability to prove such fact and stated that "[t]here [was] no evidence in this case that [Defendant] was in possession of drugs." (DAT. 384) The State responded that there would be evidence establishing the possession of drugs, to which counsel responded by explaining to the court that "the testimony of the officer who had the dog come up said he didn't find any drugs." Id. Trial counsel had deposed Police Officer Silvia[4] and thus, he knew no drugs had been found in the car.

The court then ruled on the motion and because of the "clash of opinions" as to what the evidence would show, inquired what the parties intended to do in openings. The State explained it would establish possession circumstantially to which Mr. Pitts once again argued that there was no evidence of such. After deciding, based on the parties' representations, that this was a jury question and both sides could make their respective arguments, the court admonished that it did not want the State accusing Defendant of something that the evidence would not

[4] It should be noted that, although the State's initial Brief, as well as the entire Direct Appeal Record refer to this Officer as Silva, upon relinquishment, it was clarified that the officer's name is in fact spelled S-i-l-v-i-a.

establish. (DAT. 386-87) The trial then proceeded.

After opening statements and a few witnesses testified, the State called Police Officer Silvia. Trial counsel did not make an objection at that time. Officer Silvia testified with respect to the foundation necessary for the introduction of this evidence.[5] (DAT. 1081-84) Trial counsel established through cross examination that no drugs had been recovered; that several days had passed from the time of when Defendant was in possession of the vehicle until it was subjected to the canine sniff; that there was no way to establish what was the substance which produced the odor to which the dog was alerting or when it had been present in the car; and that a legally prescribed substance containing cocaine would produce an alert.

Immediately following P.O. Silvia's testimony the State called Defendant's parole officer, Elsie Lynn, to testify regarding Defendant's parole status and his knowledge that possession of narcotics would be grounds for a revocation. (DAT.

[5] The testimony established that he had attended a thirteen week training conducted by the United States Customs, which has been using canines in the detection of drugs since the early '70's; that the dog had gone out thousands of times to detect a variety of illegal substances over a period of six years; that he had testified several times in state court and at least eight times in federal court regarding his dog Jake's detection of illegal substances; and he explained his methodology in conducting a search and explained that the response from the dog is readily distinguishable as an alert to the odor of one of the illegal substances the dog is trained to detect.

1090) Defendant's trial counsel asked for a sidebar at which a discussion was held regarding the fact that this officer had apparently not been listed as a witness. (DAT. 1091) During this discussion the court asked the State to articulate the relevance of this evidence, which the State did. (DAT. 1093-95) Mr. Pitts renewed his argument to the court that no evidence had been presented to establish that Defendant was in possession of narcotics, thus making his parole status inadmissible, at which point the court clearly stated "I have heard enough evidence that I think is enough to go to the jury on the presence of drugs in that car." (DAT. 1096) Mr. Pitts then reminded the court that P.O. Silvia had testified that the drugs could have been in the car for a long time to which the court responded by stating "I understand that, but it's still a jury question that may be subject to argument." Id.

On direct appeal Defendant raised as his first issue that the trial court had erred in allowing the testimony of Officer Lynn.[6] This court found that the court's Richardson inquiry was

[6] Defendant argued three separate grounds for the error. First Defendant challenged the adequacy of the Richardson inquiry. Defendant also argued that the court had erred in allowing the testimony as it was not independently admissible and the State had failed to establish Defendant had violated his parole (by possessing narcotics). Finally, Defendant argued that the trial court had erred in preventing Defendant from eliciting testimony to contradict the theory that Defendant was fearful of a parole revocation (through admission of the prior traffic stop which

proper and that the violation had neither surprised not prejudiced Defendant. Sims v. State, 681 So. 2d 1112, 1115 (1996). With respect to subissue two, this Court "rejected [the] argument" that "the trial court erred in admitting Lynn's testimony to prove that he violated parole without clear and convincing evidence of his drug possession." Id. In so holding this Court did note that the canine alert evidence had not been objected to. This Court went on to state that the evidence of parole status "became relevant and admissible when it was linked to a motive" and that "the jury could have concluded from the dog-alert evidence that [Defendant] possessed drugs." Id. In finding that no error existed with respect to the trial court's exclusion of evidence regarding the prior traffic stop, this Court noted the dissimilarity of the two incidents including the fact that in the prior stop "there was no evidence that [Defendant] possessed drugs." Id.

In its order relinquishing jurisdiction, this Court directed the trial court to "determine whether defense counsel's performance was deficient for not challenging the canine-alert testimony presented by Officer Silv[i]a and/or for not moving to strike that testimony once defense counsel learned that the

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had resulted in an arrest for driving without a license – also a basis for revocation). (Defendant's Brief in FSC Case No. 83,612 at p. 19)

State was going to present the testimony of [Defendant's] parole officer to show that, if [Defendant] was in possession of drugs, he would be found in violation of his conditional release." Upon relinquishment Defendant argued to the trial court that this Court had explicitly found Strickland prejudice and, as such, the court needed only to determine deficiency. (SPCT. 12-13) At the same time, Defendant sought to introduce the testimony of an expert who would have allegedly established the unreliability of the canine alert. The State urged the trial court to examine both prongs of Strickland based on this Court's recent admonitions to trial courts not to conduct bifurcated hearings, as well as the fact that this Court could not have found prejudice without the benefit of a factual record on the claim, which was in fact the purpose of the relinquishment. Moreover, the State pointed out that if in fact prejudice was not to be determined, the testimony of canine experts was irrelevant, as it only related to that prong.

At the evidentiary hearing Defendant first called Clinton Pitts, one of his two trial counsel. (SPCT. 26) Mr. Pitts testified that he was the lead attorney in the guilt phase and that co-counsel, Arthur Carter, was primarily responsible for the penalty phase. (SPCT. 30) He testified that the defense theory had always been self defense. (SPCT. 31, 86) Mr Carter

had deposed P.O. Silvia (SPCT. 47), but he had reviewed it. (SPCT. 51, 56) Thus, he knew there was never going to be any evidence that there were drugs in the car. (SPCT. 51) His feeling back then was that this was very weak evidence. (SPCT. 58) On cross examination Mr. Pitts stated that often a motion to strike highlights testimony, making it more prejudicial. (SPCT. 90) Specifically in this case, Mr. Pitts stated there was no value in moving to strike because in his view the testimony had no impact. (SPCT. 91, 96) After reviewing his closing argument Mr. Pitts opined he thought he was brilliant in pointing out the weakness of the State's case with respect to the theory that Defendant was in possession of drugs. (SPCT. 101)

Defendant next called Arthur Carter, who agreed that it was Mr. Pitts who was primarily responsible for the guilt phase of the trial. (SPCT. 124) Mr. Carter, like Mr. Pitts, testified that often, moving to strike testimony tends to emphasize it more. (SPCT. 131-32) After reviewing the deposition he took of Officer Silvia, Mr. Carter opined his testimony was irrelevant. (SPCT. 137) He stated that the decision had been made earlier that Defendant would testify. (PCT. 172) He testified that after Judge Carney had determined this was a matter for the jury he saw no point in objecting once again when P.O. Silvia was called, (SPCT. 178, 181), and that a motion to strike after the

testimony would have been denied (SPCT. 194-95). Although he recognized that not objecting would not preserve the issue for appeal, Mr. Carter stated that one [sometimes] has to choose the lesser of two evils. (PCT. 195)

Defendant then called Steven Potolsky to testify as an expert in the trial of capital cases. The State objected to his testimony as it related to the standards of reasonably competent capital defense, which was not beyond the understanding of the court. Mr. Potolsky testified that there are many reasons why a trial attorney may choose not to object to otherwise objectionable evidence. He testified that, in his expert opinion, trial counsel had been ineffective in failing to properly challenge the canine-alert evidence. (SPCT. 223) He stated he did not need to look at the entire case in order to conclude that counsel should have objected to this evidence.

On cross examination, when asked to specifically enumerate the actions which reasonable counsel would have taken to challenge this evidence, Mr. Potolsky opined that trial counsel should have hired an expert to challenge the reliability of the canine alert and should have sought a hearing on the admissibility of the evidence. However, Mr. Potolsky was unable to state what Florida law requires in order to properly lay a

foundation for the admission of canine alert evidence.[7] In response to what particular actions trial counsel should have taken, Mr. Potolsky stated counsel should have asked for leave of court to redepose P.O. Silvia, should have requested the appointment of an expert to attack the reliability of the evidence, should have investigated alternative sources of the odor, and should have requested the canine's records. However, he stated that he was not saying that any particular failure of these fell below the standard of professional norms at the time. Despite describing canine alert evidence several times as "unusual", eventually Mr. Potolsky admitted that this type of evidence was not subject to a Frye hearing, but insisted that an expert should have been hired to challenge its reliability. Moreover, Mr. Potolsky admitted the he himself had not hired an expert in a case he had handled involving a canine. He stated there were reasons why he did not do so in that case because a very beneficial plea offer had been made.

At the conclusion of Mr. Potolsky's testimony the State moved to strike his testimony explaining, once again, that Defendant's position was untenable. He argued this Court had

[7] In fact, he was unaware that this Court had decided the issue in 1937 and was not familiar with the name of the case. Moreover, Mr. Potolsky believed Florida law requires that the dog handler be certified and was surprised when confronted with a recent case stating otherwise.

already found prejudice, however, his theory was that counsel's deficiency was, according to his legal expert, the failure to challenge the reliability of the alert evidence. This court, the State explained below, did not have before it a record upon which to find prejudice as to the reliability of the evidence. Hence, if the court considered the testimony of deficiency as it related to failure to challenge the foundation or reliability of the evidence, it had to consider the prejudice prong. If the court agreed with Defendant that only deficiency needed to be decided, then by necessity the inquiry had to be circumscribed to the failure to object at the time Officer Silvia was called. The motion was denied.

Defendant explained to the court he next intended to call P.O. Silvia, P.O. Brett Nichols and an expert in canines. He sought to establish that the vehicle to which the canine had alerted had been subjected to a chemical fingerprinting process the day before, and that this made the alert unreliable. The State argued this testimony went beyond the scope of the hearing, as defined by Defendant. The court allowed limited testimony by both Nichols and Silvia and a proffer of the remainder of Silvia's testimony. The court then asked Defendant to proffer the testimony of the expert which Defendant had indicated he intended to call next. Counsel stated Dr. Brisbin

was an expert in scent detection and would be testifying that there was no reasonable basis to conclude drugs were in the car because the dog could have alerted to a number of different things. The court explained it did not need an expert to understand that argument. Defendant then sought to introduce the records pertaining to Jake the dog, which were admitted over the State's objection once again based on Defendant's own choice not to argue prejudice to the trial court. (SPCT. 426) The trial deposition of P.O. Silvia was also introduced.

At the conclusion of the evidence and after hearing argument the trial court found that Defendant failed to meet his burden of establishing that counsel's acts or omissions were outside the wide range of professional competent assistance. The court relied heavily on the persuasive and credible testimony of lead trial counsel Clinton Pitts. The court specifically relied on Mr. Pitts testimony that the judge had ruled on the presentation and admission of the dog sniff testimony and that he believed any added attention would place emphasis where none was due. Moreover, the court found that Mr. Pitts believed he could persuade the jury in closing argument that the entire theory of prosecution was a smoke screen since he knew that no drugs had in fact been found. (SPCR. 705-06)

SUMMARY OF THE ARGUMENT

The lower court properly denied the claim that counsel was ineffective in failing to properly challenge the admission of canine alert evidence.

ARGUMENT

I. THE LOWER COURT PROPERLY REJECTED THE CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL AT THE GUILT PHASE WITH RESPECT TO THE CANINE ALERT EVIDENCE.

Defendant asserts that the lower court erred in rejecting his claim that his trial counsel was ineffective for failing to object to the introduction of evidence that a drug detection dog had given a positive alert at the car that Defendant had driven on the day of the murder. However, the lower court correctly denied the claim and its finding that counsel was not deficient is supported by competent and substantial evidence adduced at the evidentiary hearing, as well as the pre-existing record. The trial court found that lead trial counsel Clinton Pitts perceived this evidence as weak and that he felt he could persuade the jury in closing that the State's theory was nothing more than a smoke screen. This is a finding of a strategic decision. This finding is supported by both the record and the testimony of both trial counsels at the evidentiary hearing.

Despite the passage of time and limited recollections as to specific though processes at the time, both trial counsels

stated they thought this was weak evidence. They had deposed P.O. Silvia and knew the State's theory of motive from the motion in limine. Both Mr. Pitts and Mr. Carter agreed the record speaks for itself. And they both acknowledged the record showed they argued to the trial judge that the dog alert evidence was not probative of possession by Defendant. Clearly, from the record, Judge Carney considered the argument, more than once, at the hearing on the motion in limine, and on two separate dates when the admissibility of P.O. Lynn's testimony was litigated, and he rejected counsel's arguments. The record also clearly establishes that trial counsel established the weakness of the evidence through cross examination and closing argument. Counsel also did not want to emphasize, through a motion to strike, weak evidence he could easily and "brilliantly" dismiss in cross and closing. Defendant failed to overcome the presumption that these actions were reasonable.

As fully quoted in the State's initial brief and summarized in the Statement of Facts, the argument which occurred at the time the motion in limine was litigated clearly established the position of all the parties regarding this evidence. The same arguments regarding the probative value of the evidence were articulated again, after P.O. Silvia had testified, when the State called P.O. Lynn and, once again, after a recess. At each

turn the court indicated it felt the evidence was enough to go to the jury and counsel's arguments were relevant to the weight of the evidence and the parties could address such in argument.

Moreover, through cross examination of Det. Silvia, counsel had established that other factors can trigger an alert, including certain prescription medications that might contain cocaine; that no perceptible amount of cocaine was in fact recovered from the inside of the vehicle; and that a positive alert gives the handler no indication as to when the substance might have been present. (DAT. 1088-89)

Defendant specifically complains that the trial court ignored counsel's testimony that he did not recall a strategic decision not to lodge a contemporaneous objection at the time P.O. Silvia was called. It should first be noted that a failure to recall does not establish that such a decision was not in fact made. Moreover, the failure to lodge a contemporaneous objection does not amount to a failure to challenge the evidence. As counsel testified, there are a number of ways to challenge or address evidence. Defendant also argues that Mr. Pitts' understanding of the trial court's expressions as a ruling was irrelevant. The State disagrees.

In support of his claim that counsel's alleged inactions

amounted to deficient performance[8] Defendant's legal expert testified that trial counsel failed to properly challenge the reliability of the canine alert evidence. However, Defendant failed to establish this claim at the evidentiary hearing. Mr. Potolsky's opinion in this respect is puzzling as he admitted this type of evidence would not be subject to a Frye hearing, yet insisted an expert should have been retained and a hearing requested. Moreover, in light of the requirements of Florida law with respect to the proper foundation for the introduction of canine alert evidence, as fully articulated in the State's initial brief, a foundation was properly laid in this case as detailed in the above factual summary. See Tomlinson v. State, 129 Fla. 658, 661 (1937). There was ample testimony to support the introduction of this evidence and no evidence adduced at the evidentiary hearing established that the dog's reliability could have been challenged.

Although Mr. Potolsky refused to distinguish between a challenge to the evidence based on foundation or relevance, his testimony regarding trial counsel's alleged failures clearly

[8] Defendant chose to argue to the trial court that this Court had already found prejudice and thus failed to meet his burden of establishing prejudice with respect to this claim. No evidence was adduced to establish that, had an expert been retained, records, training or track, counsel would have discovered a basis for exclusion based on the reliability and lack of foundation.

focused on the foundation of the evidence. Nonetheless, Defendant argues in his brief that the evidence should have been excluded on relevance grounds. This claim, too, fails. As argued above, the record shows counsel did attempt to exclude the evidence based on relevance immediately preceding the beginning of jury selection during the argument on the State's motion in limine (DAT. 384-86); once again when P.O. Lynn was called (DAT. 1096); and yet again when the court resumed after a recess (DAT. 1103-04). The trial court's finding that counsel was not deficient is supported by the record as it clearly shows counsel did in fact challenge the introduction of the evidence, albeit not by contemporaneous objection.

Defendant argues that had a contemporaneous objection been made the issue would then have been preserved for appeal. However, the prejudice prong of Strickland requires an analysis of the outcome of the trial proceedings not the appeal. In Pope v. State, 569 So. 2d 1241, 1245 (Fla. 1990), this Court stated that "[t]o support a claim of ineffective assistance of trial counsel, not only must the defendant demonstrate that counsel's performance was deficient, he must also demonstrate that this deficiency affected the outcome of the trial proceedings.")(citing Strickland v. Washington, 466 U.S. 668 (1984)(emphasis added)). Showing that if the canine evidence had

been admitted over objection Defendant would have been entitled to a new trial is not dispositive. Id. "A showing that there is a reasonable probability that trial counsel's failure . . . actually compromised the defendant's right to a fair trial is required to support a claim of ineffective assistance of trial counsel." Id. (emphasis added)

Moreover, the Eleventh Circuit Court of Appeals has recently held that a proper analysis of the prejudice prong of Strickland requires that one look at the effect on the outcome of the trial, not the appeal. Purvis v. Crosby, 451 F.3d 734 (11th Cir. 2006) In Purvis, the court explained that, although it had previously held in Davis v. Sec'y for the Dep't of Corr., 341 F.3d 1310 (11th Cir 2003), that a trial attorney's failure to preserve a Batson issue for appeal was ineffective assistance of trial counsel, the court meant to carve out a "razor thin exception" to the "generally applicable rule" set out in Strickland "of measuring prejudice in terms of the impact on the result of the trial instead of on the result of the appeal. Id. at 740 (emphasis added).

Although Defendant argued that this Court had already found the prejudice prong of Strickland, as allegedly evidence by the language in the order relinquishing jurisdiction, the State does not believe this Court could have made such a finding without a

factual record before it. However, it was Defendant's burden to establish such prejudice and, when given the opportunity, he chose to proceed differently. He now seeks to argue to this Court that had the proper inquiries been made this evidence would have been excluded. In support of his contention that the evidence was clearly inadmissible and would have been excluded or a new trial granted on appeal, had the proper objection been lodged, Defendant points to the trial court's alleged characterization of the evidence as speculative and complains of the exclusion of his dog expert. As Defendant chose not to argue prejudice, he cannot now rely on comments by the trial court allegedly supporting prejudice. Neither can he now complain of the exclusion of testimony which would have only been relevant to the prong Defendant repeatedly urged the trial court to ignore. Moreover, Defendant also seeks to litigate this issue, which he expressly passed on below, by now arguing to this Court that no Florida case has ever approved reliance upon a dog alert as substantive evidence of possession without a seizure.

With respect to the proper prejudice inquiry, whether a reasonable probability of a different result of the trial exists, Defendant's erroneous interpretation of this Court's order is of no consequence as no factual development beyond the existing record is necessary. It is evident from the record,

Judge Carney considered the challenges to the strength of the evidence and determined it was a weight, not an admissibility question. This is most evident in the court's statement after hearing the testimony that he had "heard evidence that [he] [thought] [was] enough to go to the jury." Defendant presented no evidence to establish that the dog was, in fact, not properly trained or unreliable such that, if counsel had objected, the evidence would have been precluded. Moreover, any additional suggestions that the dog possibly alerted to other odors, which conceivably retaining an expert might have produced, would not have led to a different result in light of the fact that the jury heard the arguments made on cross examination and closing arguments with respect to this evidence. Finally, even if the trial court had suppressed the evidence, there is still no reasonable probability that the result would have been different. Trial counsel testified that the decision to have Defendant testify was made early on as their defense all along was one of self-defense. Defendant's prior convictions and parole status would have been admissible during cross examination. Moreover, the State could have argued that driving without a license was equally powerful motive evidence. Even if Defendant's parole officer had not yet violated Defendant's parole for one arrest for that offense the week before the

murder, Defendant could have concluded a second arrest was much more likely to have brought about a violation.

Although prejudice on appeal is clearly not the proper inquiry, even if this Court were to consider it, Defendant's claim still fails. Initially it should be noted that the admission of evidence is reviewed under an abuse of discretion standard. Evidence of other crimes is admissible when it is probative of motive. § 404.14. This Court cited its decision on direct appeal in this case on this issue in Lugo v. State:

> In a criminal case, "[e]vidence of other crimes, wrongs, or acts is admissible to prove the defendant's motive." Charles W. Ehrhardt, Florida Evidence § 404.14 (2002 ed.). In Sims v. State, 681 So. 2d 1112 (Fla. 1996), we determined that evidence of a defendant's current status of being on parole was properly admitted to show the defendant's motive for murdering a police officer when the police officer stopped the car the defendant was driving. A drug-sniffing dog at the scene subsequently alerted the police officer to the possible presence of illegal drugs in the defendant's car. We determined that the trial judge properly admitted testimony from the defendant's parole officer because "the State offered [the parole officer's] testimony to establish [the defendant's] parole status and the fact that he knew illegal drug possession was a parole violation" that would result in his incarceration if detected by the police officer. Id. at 1115. We added that while the defendant's parole status was not independently admissible during the guilt phase of his trial, "it became relevant and admissible when it was linked to a motive for murdering the police officer."

Lugo v. State, 845 So. 2d 74, 103 (003). Furthermore, Florida courts have repeatedly upheld the introduction of circumstantial

evidence of drug activity as motive evidence. Jackson v. State, 522 So.2d 802 (Fla.); Wells v. State, 492 So.2d 712 (Fla. 1st DCA); Maugeri v. State, 460 So.2d 975 (Fla. 3d DCA 1984); Warren v. State, 443 So.2d 381 (Fla. 1st DCA 1983); Matlock v. State, 284 So.2d 489 (Fla. 2d DCA 1973); Cohen v. State, 581 So. 2d 926, 928 (Fla. 3rd DCA 1991).

Furthermore, Defendant's assertion that no Florida case has ever allowed evidence of a dog sniff as substantive evidence is misleading. Clearly in the typical scenario of a prosecution for drug possession charges, a dog sniff, where no drugs are seized, could hardly be thought to establish possession beyond a reasonable doubt. Where drugs are seized, the sniff would be redundant. The evidence here was not being introduced as evidence of a charged crime. Nevertheless, Defendant does not cite a single Florida case that would establish such dog alert evidence would not be admissible as substantive evidence either.

In fact, several Circuit Courts of the United States have upheld the admission of a canine sniff as substantive evidence of possession where drugs have been recovered in locations not connected to the accused such that the sniff is the sole evidence of the "possession" element. United States v. Guerrera, 554 F. 2d 987 (9th Cir 1977) (dog alert was competent evidence of the relevant fact of the presence of contraband and it was for

jury to discount the uncertainties of less than positive proof of possession); United States v. Rosario-Peralta, 199 F.3d 552 (1st Cir. 1999) (positive sniff to the deck of defendant's vessel where no narcotics were found on the vessel, was extremely probative linking bales of cocaine found in water to defendant); United States v. Boxley, 373 F.3d 759 (6th Cir. 2004) (where canine alerted to defendant's pants pocket but no narcotics were found on his person, testimony of dog handler properly admitted to link defendant to the drugs recovered in his vicinity); United States v. Massuet, 851 F. 2d 111 (4th Cir. 1988)(testimony of canine alert to defendant's airplane where drugs were thrown from the plane properly admitted because physical evidence may be connected to a defendant through circumstantial evidence). At least one state court has also considered such evidence. In State v. Sinclaire, in reviewing the sufficiency of the evidence supporting a conviction for drug trafficking, the Court of Appeals of Ohio stated that "[t]he fact that the dog alerted to the scent of drugs in the car was circumstantial evidence that drugs were present in appellant's car at some point in time," further stating that the weight of the evidence was for the jury to decide. In that case, although drugs were recovered, the sniff was the only evidence tying the recovery to appellant's vehicle. Therefore, in all these cases, the sniff is probative

of the same fact as in the instant case, that drugs were present at a previous time in a particular location.[9]

Even if this court were to disagree with respect to prejudice, as the trial court's finding of no deficiency is

[9] Evidence of canine detection of an odor of narcotics in currency has routinely been admitted to support convictions for money laundering to establish that drugs were present at an earlier time where not perceptible amount of drug is found by a human. United States v. Betancourt, 838 F. 2d 168 (6th Cir. 1988) ("the presence on some of the money of cocaine in quantities sufficient to allow detection by a police dog is circumstantial evidence of the source of the profits"); Funds in the Amount of Thirty Thousand Six Hundred Seventy Dollars, 403 F.3d at 460; $84,615 in U.S. Currency, 379 F.3d at 502; $141,770.00 in U.S. Currency, 157 F.3d at 604 (concluding that drug dog's alert to the seized money was circumstance supporting government's contention that currency at issue was substantially connected to illegal drugs and excluding testimony of expert who believed that 99 percent of United States currency was contaminated with some amount of drug residue); United States v. 159,880.00 in United States Currency, 387 F. Supp. 2d 1000 (D. Iowa 2005).

Dog sniffs are also routinely used to establish that drugs had previously been present in a vessel or vehicle in the forfeiture proceedings. United States v. $22,991.00, More or Less, in United States Currency, 227 F. Supp. 2d 1220 (D. Ala. 2002); United States v. $345,510.00 in United States Currency, 2002 U.S. Dist. LEXIS 236 (D. Minn. 2002); People v. $497,590 United States Currency, 58 Cal App. 4th 145 (Cal. Ct. App. 1997); Granado v. State, 2006 Tex. App. LEXIS 7589 (Tex. App. 2006). United States v. One 1988 Checo Let 410 Turbo Prop Aircraft, 282 F. Supp. 2d 1379 (D. Fla. 2003); U.S. v. All Funds Presently on Deposit, 813 F. Supp. 180 (E.D.N.Y. 1993).

The sniff of a trained canine has also been used to established the presence of other substances not recovered. United States v. Marji, 158 F.3d 60, 63 (2d Cir. 1998) (fire accelerant)(specifically rejecting a challenge to the reliability of canine sniffs and explaining that any such question merely means such evidence need not be given special weight but that it must be weighed by the jury like any other evidence).

amply supported by the record, the claim must fail. As the trial court found, Mr. Pitts viewed this evidence as weak. He argued to the trial judge that he did not believe the evidence was probative, but the court disagreed. Faced with that decision he chose to undermine the evidence through effective cross examination and "brilliantly" in closing argument. After a full opportunity to present evidence at a hearing, Defendant failed to establish that his trial counsel's actions in challenging the canine alert evidence fell below the standard of reasonably competent counsel. The trial court's order should be affirmed.

CONCLUSION

For the foregoing reasons, the trial court's denial of Defendant's motion for post-conviction relief should be affirmed.

Respectfully submitted,

CHARLES J. CRIST, JR.
Attorney General
Tallahassee, Florida

_____
MARGARITA I. CIMADEVILLA
Assistant Attorney General
Florida Bar No. 0616990
Office of the Attorney General
Rivergate Plaza -- Suite 950
444 Brickell Avenue
Miami, Florida 33131
PH. (305) 377-5441
FAX (305) 377-5654

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **BRIEF OF APPELLEE** was furnished by U.S. mail to **P. Benjamin Duke**, Covington & Burling, 1330 Avenue of the Americas, New York, NY 10019, and **Benjamin S. Waxman**, Robbins, Tunkey, Ross, Amsel, Raben, Waxman & Eiglarsh, P.A., 2250 Southwest Third Avenue, 4th Floor, Miami, FL 33129, this 19th day of December 2006.

_____
MARGARITA I. CIMADEVILLA
Assistant Attorney General

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief is type in Courier New 12-point font.

_____
MARGARITA I. CIMADEVILLA
Assistant Attorney General