IN THE STATE OF SOUTH CAROLINA

In the Supreme Court

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S.C. SUPREME COURT

APPEAL FROM YORK COUNTY
Court of Common Pleas

The Honorable Walton J. McLeod, IV, Circuit Court Judge

Case No. 2024-001052

Kalvin R. Brown, Petitioner,

vs.

The State of South Carolina, Respondent.

PETITION FOR WRIT OF CERTIORARI

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I. Whether the PCR Court erred in concluding that trial counsel was not ineffective for failing to renew pre-trial objection to the admission of drug evidence?

II. Whether the PCR Court erred in concluding that trial counsel was not ineffective for recommending Petitioner waive a jury trial when a witness claimed ownership of the drugs found and attributed to Petitioner?

III. Whether the PCR Court erred in concluding that trial counsel was not ineffective for failing to request a *Jackson v. Denno* hearing when the State introduced a statement Petitioner made allegedly admitting to ownership of the drugs without Petitioner being able to challenge the voluntariness of the statement?

STATEMENT OF THE CASE

Petitioner is currently incarcerated in the South Carolina Department of Corrections serving a sentence of twenty-five years imprisonment with a fine of $250,000. Petitioner was indicted by the York County Grand Jury in August 2015 for one count of Trafficking in Heroin, morphine, etc., 14 grams or more, but less than 28 grams (2015-GS-46-02347). App. 463-464.

On February 24, 2016, Petitioner proceeded to a bench trial before the Honorable Perry H. Gravely in the General Sessions Court of the Sixteenth Judicial Circuit. Petitioner was represented by Willie F. Bradley and Patrick C. Sharpe, while the State was represented by Assistant Solicitors Marina Hamilton and Leslie Robinson. App. 001. Judge Gravely found Petitioner guilty as indicted and sentenced him to twenty-five years of imprisonment with a fine of $250,000. App. 262.

Applicant filed a timely notice of appeal, which was perfected by Taylor Gilliam of the South Carolina Commission on Indigent Defense, Division of Appellate Defense. App. 264-282. On direct appeal, Petitioner argued the trial court erred in denying Petitioner's motion to suppress the evidence found in the traffic stop. App. 268. The Court of Appeals denied the appeal by unpublished opinion on January 9, 2019. App. 304-305. *See The State of South Carolina v. Kalvin Ropel Brown*, 2019-UP-014 (S.C. Ct. App. filed Jan. 9, 2019). The remittitur was issued on February 1, 2019. App. 306.

Petitioner filed an application for post-conviction relief on April 30, 2019, and an amended application was filed on June 11, 2021. (Case No. 2019-CP-46-1504). App. 307-314. An evidentiary hearing was held in front of the Honorable Walton J. McLeod, IV on December 7, 2022. App. 323-431.Petitioner was present at the hearing and represented by attorney, C. Rauch Wise. Assistant Attorney General Zachary W. Jones of the South Carolina Attorney General's Office represented

Respondent. The PCR Court filed an Order of Dismissal on January 5, 2024, dismissing the application with prejudice. App. 432-444. Petitioner, through counsel, then filed a Motion to Alter or Amend Judgement under Rule 59 (e) of the South Carolina Rules of Civil Procedure (SCRCP) on January 19, 2024. App. 445-451.The State filed its Return on May 13, 2024. App. 452-458.The PCR Court filed an Order Denying Applicant's Rule 59 Motion on May 28, 2024, without oral argument pursuant to SCRCP Rule 59 (f). App. 459-462.

Petitioner entered a notice of appeal of the PCR Order involving the Rule 59 Motion on June 24, 2024. This petition for writ of certiorari follows.

STATEMENT OF FACTS

The events leading to Petitioner's conviction arise out of a traffic stop in York County on February 18, 2015. App. 42. At approximately 10:50 AM on that date, Deputy (Dep.) William R. Gibson, II of the York County Sheriff's Office, was monitoring traffic on the York/Chester County line as part of his duties involving the York County multi-jurisdictional highway interdiction team. App. 42-43. Dep. Gibson testified that he observed a vehicle following "too close to a tractor trailer" and "at that time, I pulled out and proceeded to catch up with the vehicle and initiate and a traffic stop." App. 43. The vehicle pulled over and Dep. Gibson stated he made contact with the driver of the vehicle, who gave the name "Anita Trappier", and the passenger of the vehicle, who was identified as Petitioner. App. 44.[1]

Dep. Gibson stated that he believed Petitioner said the vehicle Ms. Trappier was driving was a rental car and that Dep. Gibson eventually asked Ms. Trappier to step out of the vehicle because she "couldn't produce any type of identification as to who she was." App. 44. Due to the cold weather, Gibson brought Trappier into his patrol car and began "having a conversation with her about where she was going, where they were going…[h]ow long they plan on being there, things of that nature." App. 45. Dep. Gibson further testified that he spoke to Petitioner who stated that he and Ms. Trappier were heading to Morganton, North Carolina. App. 46. Dep. Gibson felt Petitioner and Ms. Trappier were suspicious and elaborated on his basis for that suspicion, testifying that this feeling was:

> …[b]ased on my observation and getting the conflicting stories, and no luggage and saying that they were going to be somewhere overnight…[a]nd then it was a one-way travel, a rental car, air freshener, everything that painted the picture of criminal

[1] Ms. Trappier was not fully identified as Monique Trappier, her legal name, until she was transported back to the Rock Hill Police Department. App. 45.

> activity. I think he stated he had known her for a period of years. And then she said that it was different amount of years that she had known him. So, I just drew the conclusion that there was criminal activity present.

App. 46.

Based on this "picture of criminal activity," Dep. Gibson asked Petitioner for consent to search the vehicle which Petitioner refused. App. 46. When Petitioner refused to consent, Dep. Gibson told Petitioner that he was going to deploy the narcotics K-9, "Justice," who was in the police vehicle, to walk around the vehicle and conduct a sniff. App. 47. Petitioner then, according to Dep. Gibson, stated, "look, well, the dog's going to alert." App. 47. Petitioner then complied with Dep. Gibson's instructions to step away from the vehicle and the narcotics K-9, who was specially trained to just alert for the presence of illegal narcotics, "gave a positive alert to the rear door area of the car." App. 47-48. After Dep. Gibson his personal qualifications and training needed to be a handler of a narcotics K-9, the State moved to have Dep. Gibson declared an expert in "canine narcotics detection" without objection. App. 50.

After the narcotics K-9 alerted, Dep. Gibson testified that he conducted an interior search of the vehicle where he found two jackets, which Petitioner supposedly claimed one of, again without corroboration. App. 54-55. Inside the jacket, Dep. Gibson found a toothpick container with a powdery substance and a hard substance which he "recognized to be crack cocaine." App. 55. Petitioner did not identify what the substance was in the jacket pocket and Dep. Gibson stated he ultimately concluded that it was illegal narcotics or cocaine. App. 56. Despite Dep. Gibson's assurance that it was cocaine, the substance was actually heroin. App. 58.

Dep. Gibson stated that he read Petitioner his rights under *Miranda v. Arizona*, 384 U.S. 436 (1966), and he was taken back to the police station to be interviewed, where he said Petitioner

admitted to ownership of the narcotics. App. 60-64. On cross examination, Dep. Gibson admitted that he did not have Petitioner sign a written statement detailing his ownership of the narcotics and there was no recording of said statement either. App. 67. There was additionally no corroboration to Petitioner's statement on the side of the road where he said the narcotics K-9 would alert on the vehicle. App. 70.

On cross-examination, Dep. Gibson stated that he also grew suspicious because Ms. Trappier had initially said the pair was going to Asheville, North Carolina and Petitioner has said Morganton. App 71-72. However, he admitted he had no idea how far away the two places were and stated they could have been in a close vicinity. App. 73-74. Dep. Gibson also admitted that although he found their lack of luggage suspicious, before he searched the vehicle, he had no idea if any luggage was in the trunk or other parts of the car he could not search at the time. App. 77-78. Dep. Gibson further testified that one of his main duties, and what would have been his duty the night of the search, was narcotics enforcement, and testified that traveling too close to behind cars does not mean the driver or occupants are involved in drug trafficking. App. 96-97. At the end of his testimony, Dep. Gibson stated that he in fact did not cite Ms. Trappier for following too closely—the initial reason he stated he pulled her over for initially. App. 102.

ARGUMENT

I. Whether the PCR Court erred in concluding that trial counsel was not ineffective for failing to the renew pre-trial objection to the admission of drug evidence when the trial court's pre-trial ruling was not final?

A criminal defendant has the right to effective assistance of counsel under the Sixth Amendment of the United States Constitution. *Strickland v. Washington*, 466 U.S. 668 (1984). "The Sixth Amendment right to counsel attaches upon initiation of adversarial judicial

proceedings and at all critical stages of a criminal trial." *State v. Sterling*, 377 S.C. 475, 479, 661 S.E.2d 99, 101 (2008). "In order to prove counsel was ineffective, the [Petitioner] must show: (1) counsel's performance was deficient; and (2) there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different." *Lounds v. State*, 380 S.C. 454, 459, 670 S.E.2d 646, 648-649 (2008) (citing *Strickland v. Washington*, 566 U.S. 668 (1984)). "A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial." *Id.* "Moreover, 'when a defendant's conviction is challenged, the question is whether there is a reasonable probability that, absent the errors, the fact finder would have had a reasonable doubt respecting guilt.'" *Id.* (quoting *Ard v. Catoe*, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007)) (internal quotation marks and citations omitted).

In reviewing PCR cases, this Court has noted: "[o]ur standard of review in PCR cases depends on the specific issue before us. We defer to a PCR court's findings of fact and will uphold them if there is evidence in the record to support them. We review questions of law de novo, with no deference to trial courts." *Smalls v. State*, 422 S.C. 174, 180-181, 810 S.E.2d 836, 839-840 (2018) (citations omitted). "The Court will reverse the PCR court's decisions when it is controlled by an error of law." *Pierce v. State*, 338 S.C. 139, 145, 526 S.E.2d 222, 225 (2000).

Pre-trial motion to suppress drug evidence

Before the bench trial began, Counsel moved to suppress the drug evidence "found as a result of the traffic stop because the traffic stop was unreasonably delayed." App. 6. Counsel argued that "[t]he purpose for the stop was over at a certain time and we wanted to argue that anything past that point…any reasonable suspicion or anything that came past that point, should be excluded." App. 6. Counsel cited the Supreme Court decision, *Rodriguez v. United States*, 575 U.S.

348, 135 S.Ct. 1609 (2015), as the basis for their motion. App. 7. *Rodriguez* held that "a police stop exceeding the time needed to handle the matter for which the stop was made violates the Constitution's shield against unreasonable seizures." *Id.* at 350. Counsel noted that the traffic stop occurred before the opinion to which the trial court replied, "[s]o the officer would not have known about that." App. 7

After agreeing with the trial court that Dep. Gibson "would not have known" about the *Rodriguez* decision, Counsel further argued:

> It's our opinion this is pretty much a pre-textual stop. You could see this on the video the cars drive by. The officer, Officer Gibson, makes the stop for following too closely. As you're watching the video you see all these cars drive by. None of them appear that they're too close. It's our opinion that Officer Gibson sees the Florida tags that are on the car that the Defendant rented in Georgetown and follows him based on that. Either way, he catches up with them and pulls them over for following too closely."

App. 8.

Counsel urged the trial court to examine the video of the traffic stop and see that Petitioner and Trappier were not giving different stories as to where they were headed, which Dep. Gibson used as reasons for his prolonging of the traffic stop. App. 9. Counsel then went on to speak about the meaning of "seizure" as explained by the Supreme Court and argued to the Court that while Ms. Trappier may have done something illegal—by giving the police a false name—Petitioner had not done anything to warrant suspicion and should have been free to go and take the vehicle with him. App. 9-11. At the end of the argument, Counsel provided to the Court the Fourth Circuit Court of Appeals opinion, *United States v. Foster*, 634 F.3d 243 (4th Cir. 2011), which found that law enforcement in that case did not have the appropriate amount of suspicion to prolong a traffic stop.

The State responded that none of the case law was applicable because the "stop had not concluded." App. 21.

The trial court denied the motion, really before the State had responded, by stating:

> I want to make a couple of comments. I think there's a distinction when you pull off when somebody's speeding and all that…[b]ut here you have…a rental car in the name of the passenger, a driver who doesn't have a license and gives false names. I think it's a lot of different circumstances…but you've got a lot of reasonable suspicions going on here. Just the fact that it's a rental car.

App. 20-21.

After the State responded the trial court formally denied the motion, but told Counsel, "I'll review…the evidence and at the appropriate time I'll be glad to…let you renew your motion if we need to do that." App. 24. Trial counsel *did not object* to the introduction of the drug evidence when it was offered during the trial. As a result, the Court of Appeals held the issue was not preserved for appeal because Counsel did not renew their objection at the time the evidence was offered and the pre-trial ruling a motion *in limine* rather than a final ruling. *See The State v. Kalvin Ropel Brown*, 2019 -UP-014 (S.C. Ct. App. filed Jan. 9, 2019).

PCR Evidentiary Hearing and Order of Dismissal

In the evidentiary hearing before the PCR Court on December 7, 2022, trial counsel affirmed he had made a motion to suppress and that the judge had denied the motion, but noted, the ruling was "kind of…vague." App. 334. PCR counsel had trial counsel examine the transcript at the time the drug evidence and evidence from Dep. Gibson was admitted and trial counsel noted that no objection was re-raised at the time. App. 335. Trial counsel further admitted agreed that the

pre-trial motion was "not a very definitive ruling" and nothing prevented them from re-raising the pre-trial objection to the drug evidence. App. 334.

The PCR Court found that trial counsel was not ineffective for failing to re-raise the objection and stated:

> Applicant contends Counsel was ineffective for failing to renew his objection at the time the drug evidence was introduced; however, he has not presented any new arguments or evidence in support of his Fourth Amendment claims. The Court finds Applicant has not shown Counsel was ineffective as to this allegation because Applicant's Fourth Amendment claim has no merit. Under *Rodriguez*, an officer who initiates a traffic stop may continue to detain a motorist util the purpose of the stop is completed. In this case, the purpose of the stop was not completed because Trappier refused to give her real name. Therefore, the use of the drug detection dog did not prolong the stop beyond its original justification. Under *Illinois v. Caballes*, 543 U.S. 405 (2005), the use of the drug detection dog is permissible during a traffic stop as long as the stop is not unreasonably prolonged as a result.

App. 440.

The PCR Court further noted that even if the traffic stop had been prolonged unreasonably, Dep. Gibson "certainly had reasonable suspicion." App. 440. The Court based this conclusion on Trappier's "highly suspicious refusal to provide her real name, combine with other indica suggestive of criminal activity, such as the discrepancies between Trappier's responses and Applicant's responses to Gibson's questions." App. 440.

Argument

The PCR Court erred when it found the trial counsel was not ineffective for failing to re-raise the objection the drug evidence when it was entered. Due to counsel's failure, an appellate court was unable to formally review it on the merits. Additionally, despite the PCR Court's claim that such an argument had "no merit," Petitioner's claim does in fact have merit and the trial

court's denial of the suppression motion would have been overturned. Therefore, trial counsel's failure to re-raise the objection constituted ineffective assistance.

During counsel's pre-trial motion, the trial court seemed to brush off the arguments regarding the holding of *Rodriguez*—that law enforcement cannot impermissibly extend a traffic stop beyond its intended purpose—as "unknowable" to Dep. Gibson as the traffic stop in question occurred before *Rodriguez* was released. However, *Rodriguez* is born from a long line of precedent and was "knowable" to Dep. Gibson at the time the traffic stop occurred.

The Fourth Amendment provides that the "right of the people to be secure in their persons houses, papers, and effects against unreasonable searches and seizures, shall not be violated…" U.S. Const. Amend. IV. "A seizure lawful at its inception can nevertheless violate the Fourth Amendment because its manner of execution unreasonably infringes…[on] interests protected by the Fourth Amendment." *United States v. Jacobsen*, 466 U.S. 109, 124 (1984) (citing *United States v. Place*, 462 U.S. 696, 703 (1983)). Seizures, which occur doing traffic violations, do justify a police investigation for the traffic violation and the Supreme Court has noted on several occasions that a routine traffic stop is "more analogous to a so-called " *Terry* stop'… than a formal arrest." *Knowles v. Iowa*, 525 U.S. 113, 117 (1998) (quoting *Berkermer v. McCarty*, 468 U.S. 420, 438 (1984), in turn citing *Terry v. Ohio*, 392 U.S. 1 (1968)). Seizures for the purpose of catering to the traffic stop is lawful for the time period it takes to complete the "mission" of the traffic stop, but "can become unlawful if it prolonged beyond the time reasonably required to complete that mission." *Illinois v. Caballes*, 543 U.S. 405, 407 (2005). Therefore, the "scope of the detention" regarding the traffic stop "must be carefully tailored to its underlying justification." *Florida v. Royer*, 460 U.S. 491, 500 (1983). When the tasks tied to the traffic infraction and its underlying justification are completed

or should have been completed, law enforcement's authority to seize individuals dissipates. *See generally United States v. Sharpe*, 470 U.S. 675, 686 (1985).

Conducting a dog sniff for purposes of searching for narcotics is not an aspect of an ordinary traffic stop, rather the dog sniff's purpose is "detect[ing] evidence of ordinary criminal wrongdoing." *City of Indianapolis v. Edmond*, 531 U.S. 32, 40-41 (2000). Dog sniffs do not implicate the Fourth Amendment *per se* but do become unlawful if it prolongs the purpose of the traffic stop—such as issuing a warning ticket. *Rodriguez v. United States*, 575 U.S. 348, 354-355 (2015) (citing *Arizona v. Johnson*, 555 U.S. 323, 327-328 (2009); *Caballes*, 543 U.S. at 405-406, 408)).

Despite involvement of a dog sniff or otherwise, "[l]engthening the detention [of an individual] for further questioning beyond that related to the initial [traffic] stop is permissible in two circumstances. First, the officer may detain the driver for questioning unrelated to the initial stop if he has an objectively reasonable an articulable suspicion illegal activity has occurred or is occurring. Second, further questioning unrelated, the initial stop is permissible if the initial detention has become a consensual encounter." *United States v. Hunnicutt*, 135 F.3d 1345, 1349 (10th Cir. 1998) (internal citations omitted).

Dep. Gibson's initial traffic stop for Trappier following too closely may have been lawful. As a part of the ordinary traffic stop, he had the ability to conduct inquiries such as checking drivers' licenses, checking for outstanding arrest warrants, and making sure the driver had proof of insurance and registration. *See Rodriguez*, 575 U.S. at 348 (citing *Delaware v. Prouse*, 440 U.S. 648, 658-660 (1979)). However, he did not have the ability to hold Petitioner at the scene and then

search the vehicle based on a suspect and arbitrary reasoning and prolong the traffic stop so a narcotics dog could arrive.

Dep. Gibson said that he had reasonable suspicion that a crime may be occurring, or contraband was located in the car because Petitioner and Trappier were in a rental car, were supposedly heading to two different places, and there was air freshener and no luggage in the vehicle. According to his logic, Petitioner and Trappier were likely trafficking drugs. None of these factors constituted reasonable suspicion. The PCR Court reasoned that the traffic stop was not unreasonably prolonged because Trappier gave the name "Anita Trappier" and did not have a driver's license. However, that fact alone does not constitute reasonable suspicion as well. It seems Dep. Gibson took innocuous facts and twisted them into his own narrative as he was patrolling that night as part of a law enforcement unit looking for individuals trafficking narcotics between South and North Carolina.

Even Trappier providing a false name to Dep. Gibson is not enough to prolong the stop so that the narcotics dog could arrive. Dep. Gibson made the stop because he felt she was driving too closely. It is not hard to infer she provided a false name because she is fact was driving on a suspended license and did not want to be cited for two traffic violations. App. 184. Driving under suspension is not an automatic precursor into drug trafficking. Once Dep. Gibson found that the name she had given and was false, he had the ability to ticket or arrest her based on those facts and the traffic stop would have ended. Instead, he asked Petitioner to search the car based on some vague notion of criminal activity and was denied by Petitioner. Petitioner was then detained long enough so that the narcotics dog could conduct a sniff. Dep. Gibson impermissibly prolonged the

traffic stop when his reason for pulling over the vehicle should have been dealt with and the investigation into that infraction closed.

The PCR Court erred finding otherwise and Petitioner respectfully asks this Court to grant certiorari to review the PCR Court's decision on this claim.

II. Whether the PCR Court erred in concluding that trial counsel was not ineffective for recommending Petitioner waive jury trial when a witness claimed ownership of the drugs found and attributed to Petitioner?

Testimony of Monique Trappier at Trial

At the time of trial and her testimony, Mr. Trappier had not been charged with any crime related to the narcotics. App. 164-165. After being advised of her Fifth Amendment rights, Trappier stated on direct examination by trial counsel that the drugs were hers. App. 177. She further explained that she purchased the drugs without the Petitioner being present and that she knew she and the Petitioner were traveling the next morning—for reasons unrelated to the drugs—and she had "every intention of traveling with [her] stuff." App. 181-182. Trappier told law enforcement that the drugs were cocaine but stated that law enforcement "didn't really ask me to ownership or who it belonged to." App. 182. She also noted that she was charged with giving false information to the police, and driving under suspension, but was not charged with following too closely or possession of narcotics. App. 184. Trappier also stated she tried to confess ownership of the drugs to law enforcement and the Solicitor's Office, but nothing came of it. App. 189-194.

PCR Evidentiary Hearing and Order of Dismissal

At the evidentiary hearing, trial counsel stated that he became aware of a statement from Ms. Trappier that that she was responsible for the drugs in the car "about the second time or third time" he and Petitioner met pre-trial to discuss the case. App. 351. Ms. Trappier even came into

the trial counsel's office to speak to him about this fact and trial counsel refused to speak to her until she had been advised of her rights by separate counsel. App. 351. Trial counsel was also aware of a written statement that Trappier had given to the Solicitor's office about ownership of the drugs. App. 353. Trial counsel testified that after Trappier had been properly advised by separate counsel, he knew she was going to testify and he admitted she had credibility as a witness, despite issues like her addiction. App. 356.

The PCR Court found that trial counsel was not ineffective for recommending a bench trial over a jury trial. The PCR Court found that:

> At the outset of Applicant's trial, the trial court conducted a thorough colloquy with Applicant regarding his decision to waive the right to a jury trial. Ultimately, the trial court found Applicant's waiver was knowing, voluntary, and intelligent. Applicant does not challenge the voluntariness of the waiver; rather he alleges counsel was ineffective for recommending that he waive a jury trial and go forward with a bench trial only. Applicant argues he was prejudiced by waiving a jury trial becomes some juror might have voted to acquit Applicant after his co-defendant Trappier testified that the drugs belonged to her. The Counsel find this allegation is without merit."

App. 441.

The PCR Court also states that trial counsel did not recommend a bench trial, but Petitioner is unable to locate that in the record. App. 441.

Argument

The PCR Court erred when it found trial counsel was not ineffective for recommending a bench trial when trial counsel was aware Trappier claimed ownership of the drugs and exculpated Petitioner. Had Petitioner proceeded a jury trial, a jury very likely would have acquitted Petitioner because of the Trappier's statement.

A criminal defendant has the right to effective assistance of counsel under the Sixth Amendment of the United States Constitution. *Strickland v. Washington*, 466 U.S. 668 (1984). "The Sixth Amendment right to counsel attaches upon initiation of adversarial judicial proceedings and at all critical stages of a criminal trial." *State v. Sterling*, 377 S.C. 475, 479, 661 S.E.2d 99, 101 (2008). "In order to prove counsel was ineffective, the [Petitioner] must show: (1) counsel's performance was deficient; and (2) there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different." *Lounds v. State*, 380 S.C. 454, 459, 670 S.E.2d 646, 648-649 (2008) (citing *Strickland v. Washington*, 566 U.S. 668 (1984)). "A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial." *Id.* "Moreover, 'when a defendant's conviction is challenged, the question is whether there is a reasonable probability that, absent the errors, the fact finder would have had a reasonable doubt respecting guilt.'" *Id.* (quoting *Ard v. Catoe*, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007)) (internal quotation marks and citations omitted).

Further, "[a]ttorneys have a duty to consult with their clients regarding 'important decisions,' including questions of overarching 'defense strategy."' *Moore v. State*, 399 S.C. 641, 732 S.E.2d 871, 874 (2012) (quoting *Florida v. Nixon*, 543 U.S. 175, 187 (2004)). There is a presumption of a valid trial strategy on behalf of counsel, but that disappears when counsel fails to actually articulate a valid trial strategy for their particular action. *See generally Smith v. State*, 386 S.C. 562, 567-568, 689 S.E.2d. 629, 632-633 (2010).

Under the Sixth Amendment, Petitioner had a constitutional right to a jury trial. U.S. Const. Amend. VI. For some reason, which is not articulated, and even with the presence of Trappier's statement and willingness to testify, trial counsel recommended Petitioner waive his right to a jury

trial and proceed with a bench trial. This advice constituted ineffective assistance of counsel. The PCR Court stated that trial counsel relayed he did not recommend a bench trial, but a review of the record does not reveal this unequivocal statement. Even if trial counsel had articulated some reason for this waiver, such reason cannot be considered valid trial strategy. Trial counsel felt Trappier was credible and therefore her statement, claiming ownership of the drugs, even in the face of possible charges, was credible and could have been important exculpatory evidence to present to a jury. Trial counsel's ineffectiveness therefore prejudiced Petitioner because a jury very well may have found Trappier's statement credible as well and acquitted Petitioner of all charges.

The PCR Court erred finding otherwise and Petitioner respectfully asks this Court to grant certiorari to review the PCR Court's decision on this claim.

III. Whether the PCR Court erred in concluding that trial counsel was not ineffective for failing to request a *Jackson v. Denno* hearing when the State introduced a statement Petitioner made allegedly admitting to ownership of the drugs without Petitioner being able to challenge the voluntariness of the statement?

Pre-trial Suppression Motion and Trial Testimony

Trial counsel also sought to suppress evidence of a statement supposedly made by Petitioner to Dep. Gibson claiming ownership of the drugs. App. 25. Trial counsel explained:

> Officer Gibson gives a summary of the stop. […] On the bottom of his summary, he basically states that my client made an out-of-court statement, a confession to him…saying that the cocaine that they had found in the car was his.

App. 26.

Trial counsel further took issue with the fact that the statement (1) was not videotaped leading to possible misinterpretation by the officer, (2) this supposed confession was not signed or endorsed by the client; (3) this statement was not written by the client, (4) the statement was supposedly

given at the station leading to issues involving custodial interrogation. App. 25-28. The trial court ultimately found at that time he could not suppress the statement but relayed to counsel that they could renew their objection when the evidence was entered. App. 31. Trial counsel did not seek a hearing under *Jackson v. Denno*, 378 U.S. 368, 84 S.Ct. 1774 (1964) even though he raised questions about how the statement was taken by Dep. Gibson.

PCR Evidentiary Hearing and Order of Dismissal

When first asked about the *Denno* hearing issue, one of the trial counsels simply could not remember any details regarding discussing with Petitioner about a *Denno* hearing, his right to testify, or if the attorneys discussed it amongst themselves. App. 335; 337. The other trial counsel noted that he seemed to not have asked for a full blown *Denno* hearing because the Judge would still end up hearing the statement and Dep. Gibson's testimony and cross-examination would serve as a quasi-*Denno* hearing. App. 358. Trial counsel further confirmed that he did not ask the trial court for a *Denno* hearing which would have allowed Petitioner to testify as to the voluntariness of his statement and he also did not discuss a possible *Denno* hearing with Petitioner. App. 359.

Argument

The PCR Court erred when it found trial counsel was not ineffective for failing to request a *Jackson v. Denno*, 378 U.S. 369 (1964), hearing when the State sought to introduce a statement supposedly made by Petitioner while in law enforcement custody. Trial counsel's failure to request a *Denno* hearing barred Petitioner from challenging the voluntariness of his statement.

"The admission or exclusion of evidence rests in the sound discretion of the trial judge and will not be reversed on appeal absent an abuse of discretion. *State v. Johnson*, 413 S.C. 458, 466, 776 S.E.2d 367, 371 (2015) (citing *State v. Gaster*, 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002)). In

Jackson v. Denno, the Supreme Court held that in order for a defendant's statement or confession to admitted before the jury as evidence, the trial court must rule outside the presence of the jury that the statement or confession was given freely and voluntarily. *Jackson*, 378 U.S. at 393. This Court has further noted that trial court must make an affirmative finding that there was no violation of a Defendant's *Miranda* rights, including coercion, before a statement may be admitted into evidence. *Johnson*, 413 S.C. at 466 (citing *Miranda v. Arizona*, 384 U.S. 436 (1966)).

As a matter of practice and normal advocacy in South Carolina courts, trial counsels representing defendants often make a motion for a *Denno* hearing if their client made a statement to law enforcement, especially a statement that implicates the client in the offense they are charged with. Statements to law enforcement are often the strongest, and sometimes only, piece of evidence the State may have in tying an individual to a crime.

In Petitioner's case, counsel made arguments regarding the suspect nature of the alleged statement Petitioner made to Dep. Gibson claiming the drugs. Trial counsel noted that there is no audio or video recording of the statement made by Petitioner, Petitioner never attested to or signed any written statement, and the only evidence of such a statement was written by Dep. Gibson in a police report after Petitioner was in custody and supposedly made the statement. Trial counsel made all the arguments which can logically be inferred as to be challenging the voluntariness of Petitioner's statement. However, trial counsel failed to actually request a *Denno* hearing and did not even discuss the possibility with Petitioner. His failure to request such an important pre-trial hearing barred Petitioner from being able to challenge the voluntariness of his statement. The statement was then entered and considered by the trial court in convicting Petitioner. Such a failure by trial counsel renders his performance constitutionally ineffective and prejudiced Petitioner. Had

Petitioner's statement been barred from entered evidence eligible to be considered by the trial court, the outcome of the trial would have been different.

The PCR Court's erred in finding otherwise and Petitioner respectfully asks this Court to grant certiorari to review the PCR Court's decision on this claim.

CONCLUSION

Petitioner therefore requests this Court to grant the writ of certiorari and allow appellate review of the Order of Dismissal and Denial of the Rule 59 Motion signed by the Honorable Walton J. McLeod, IV.

August 13, 2024

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