

 ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

\_\_\_\_\_  
Certiorari to Sumter County

William Jeffrey Young, Circuit Court Judge  
\_\_\_\_\_

RECEIVED

SEP 16 2013

S.C. Supreme Court

REGINALD BARNO,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

Appellate Case No. 2012-213291  
\_\_\_\_\_

JOHNSON PETITION FOR WRIT OF CERTIORARI  
\_\_\_\_\_

WANDA H. CARTER  
Deputy Chief Appellate Defender

South Carolina Commission on Indigent Defense  
Division of Appellate Defense  
PO Box 11589  
Columbia, SC 29211-1589  
(803) 734-1343

ATTORNEY FOR PETITIONER

# INDEX

INDEX.....	1
ISSUE PRESENTED.....	2
STATEMENT.....	3
ARGUMENT.....	4
CONCLUSION.....	6
PETITION TO BE RELIEVED AS COUNSEL.....	7

### ISSUE PRESENTED

Trial counsel erred in failing to move prior to trial to suppress the drugs presented in the case as tainted fruit of the poisonous tree because the traffic stop that led to the seizure of the drugs was based upon an officer's probable cause belief that petitioner was driving per a suspended license, but ultimately that same DUS charge was dismissed.

## STATEMENT

Petitioner Reginald Barno was convicted of possession of cocaine base (third offense) and possession of marijuana (second offense) per a jury trial held during the June 2009 term of the Sumter County General Sessions Court before Judge R. Ferrell Cothran. Petitioner was sentenced to imprisonment for a total of eight years. Petitioner was represented at trial by Arthur Wilder. Petitioner appealed, but his convictions and sentences were affirmed. See State v. Barno 2010-UP-500 (S.C. Ct App. November 10, 2010). Robert Pachak represented petitioner on appeal.

On December 17, 2010, petitioner filed a PCR application with the Sumter County Office of the Clerk of Court. App. 264-269. The respondent filed a return requesting that a hearing be held in response to petitioner's PCR action. App. 270-274.

A PCR hearing was convened on September 19, 2012, at the Lee County Courthouse before Judge William J. Young. App. 276-308. Petitioner was present at the hearing and represented by Charles T. Brooks. On October 16, 2012, Judge Young issued an Order of Dismissal therein denying petitioner's allegations of ineffective assistance of trial counsel in the case. App. 310-315.

Petitioner appealed Judge Young's Order of Dismissal. This petition follows.

## ARGUMENT

Trial counsel erred in failing to move prior to trial to suppress the drugs presented in the case as tainted fruit of the poisonous tree because the traffic stop that led to the seizure of the drugs was based upon an officer's probable cause belief that petitioner was driving per a suspended license, but ultimately the same DUS charge was dismissed.

At trial, Police Officer Wayne DuBose testified that on September 30, 2008, he and Investigator Tripp Mays were conducting surveillance in a particular area on Pack Road based on information received about drug activities there. Officer DuBose stated that on that same day they saw a Nissan vehicle drive into the area, and then observed a person walking toward the vehicle and finally witnessed "something" exchange hands between the driver and the walker. Officer DuBose stated that when he realized that the tag on the Nissan matched a Volvo vehicle tag, he followed the Nissan. At some point, Officer DuBose believed that appellant, who was the driver of the Nissan, might have had his license suspended previously. Officer DuBose stated that they detained appellant after the traffic stop on tag and DUS violations, and that during the stop they saw crack in plain sight in the driver's seat. Petitioner was arrested immediately arrested. Later on during the booking procedure at the police station, a small bag of marijuana was found in petitioner's front pocket. App. 72, l. 3-10; App. l. 61-p. 74, l. 25.

During the PCR hearing, petitioner testified that since his DUS charge was "thrown out" in magistrate's court, then trial counsel should have used the dismissal of the bus charge as a ground for a motion to suppress the crack cocaine found in the car and the marijuana found on his person. In other words, since the probable cause for the traffic stop stemmed from the alleged DUS and the same DUS was dismissed, then this meant that the probable cause used to support the traffic stop

was nullified, and the drugs seized afterwards rendered the drugs tainted fruit of the poisonous tree. App. 284, l. 15-p. 287, l. 20; App. 295, l. 1-11.

When asked why he did not object to the traffic stop, trial counsel testified at the PCR hearing and explained as follows:

Attorney General: One of [petitioner's] allegations is that you were ineffective for failing to object to the stop of the car...that there was no probable cause to stop him. Did you see any issue with regards to the stop?

Defense Counsel: I would defer to the transcript and whatever was testified. You know, I would have to say that if the testimony evoked a logical stream of [petitioner] coming to the attention of law enforcement that I may not have raised an objection to the search and seizure; but you know opinions differ, maybe I should have.

App. 299, l. 25 – p. 300, l. 11.

The PCR judge ruled that “counsel was not ineffective in regard to [petitioner's] allegations of ineffective assistance of counsel.” App. 313-314.

Drugs or any incriminating evidence seized unreasonably in violation of the Fourth Amendment must be suppressed as fruit of the poisonous tree. Wong v. Sun, 371 U.S. 471 (1963). Also, with respect to traffic stops, the lack of probable cause to make a traffic stop and any seizure thereafter would violate the Fourth Amendment. See State v. Moore, 404 S.C. 634 746 S.E.2d 352 (2013), citing to Whren v. United States, 517 U.S. 806 (1996). See also McHam v. State, 404 S.C. 465, 746 S.E.2d 41 (2013). In Moore, the Court held that the extended detention of the defendant that took place after the traffic stop exceeded the scope of reasonable suspicion, which violated the Fourth Amendment, and that the drugs seized thereafter should have been suppressed at trial. In McHam, the Court held that trial counsel was deficient in failing to renew his motion to suppress the drugs seized in violation of the Fourth Amendment, but did not reverse based on an analysis of the merits of the traffic stop in that case.

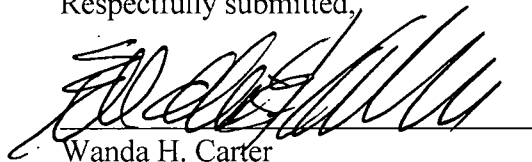
In the case at bar, one reason petitioner was stopped was due to a suspicion that he was driving per a suspended license. Thus, petitioner's argument is that since the DUS charge was dismissed, there was no probable cause for the traffic stop and the seizure of himself and the drugs that followed. Dismissals are tantamount to acquittals. State v. Taylor, Md. 617, 810 A. 2<sup>nd</sup> 964 (2002). Here, the DUS charge was dismissed. Hence, there was no probable cause for the traffic stop, and the search and seizure that followed was unreasonable and the drugs seized constituted poisonous fruit that should have been suppressed at trial. Finally, sans the existence of the drugs, there was no corpus delicti of the crime; and as a result, petitioner's convictions should be vacated.

Trial counsel's error in failing to investigate into this issue and move prior to trial to suppress the drugs based on a Fourth Amendment violation constituted ineffective assistance of counsel at trial in violation of the Sixth Amendment and Strickland v. Washington, 466 U.S. 668 (1984). But for counsel's error in this regard, there was a reasonable likelihood that the outcome of petitioner's trial would have been different.

#### CONCLUSION

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

Respectfully submitted,



Wanda H. Carter  
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER

This 16th day of September, 2013.

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

---

CERTIORARI TO SUMTER COUNTY  
WILLIAM JEFFREY YOUNG, CIRCUIT COURT JUDGE

---

REGINALD BARNO,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

---

PETITION TO BE RELIEVED AS COUNSEL

---

Counsel for Reginald Barno states:

1. She is Deputy Chief Appellate Defender for the South Carolina Office of Appellate Defense and was appointed to represent petitioner.
2. She has reviewed the records and transcript of petitioner's post-conviction relief hearing which was held on September 19, 2012. In her opinion seeking certiorari from the order of dismissal is without merit.
3. She has, pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), briefed the one arguable legal issue which arose during the post-conviction relief process.

Therefore, counsel requests that the Court relieve her as counsel for Reginald Barno.

Respectfully submitted,

  
Wanda H. Carter

Deputy Chief Appellate Defender  
ATTORNEY FOR PETITIONER

This 16th day of September, 2013

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

\_\_\_\_\_

Certiorari to Sumter County

William Jeffrey Young, Circuit Court Judge

\_\_\_\_\_

REGINALD BARNO,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

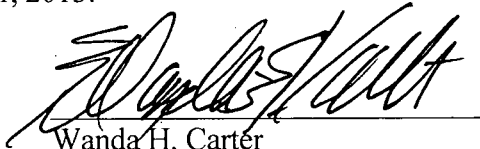
Appellate Case No. 2012-213291

\_\_\_\_\_

CERTIFICATE OF SERVICE

\_\_\_\_\_


I certify that a true copy of the Johnson petition for writ of certiorari and a copy of the appendix in this case have been served on Megan Harrigan, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Reginald Barno, #290000, at Evans Correctional Institution this 16th day of September, 2013.



Wanda H. Carter  
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 16th day  
of September, 2013.

 (L.S.)

Notary Public for South Carolina

My Commission Expires: October 30, 2022.