

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

Larry B. Hyman, Jr., Circuit Court Judge

Appellate Case No. 2013-001391

Corey Jawan Robinson, #00294233,

Appellant,

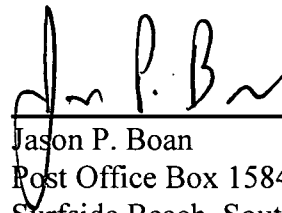
v.

State of South Carolina,

Respondent.

PETITION FOR A WRIT OF CERTIORARI

May 1, 2014



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QUESTIONS PRESENTED

1. Did the circuit court err in holding that Petitioner's appellate counsel was not ineffective in failing to file a merits brief on the issue that the drugs should have been suppressed as they were the fruit of the poisonous tree of an illegal arrest?

STATEMENT OF THE CASE

On June 3, 2008, around 5:30 p.m., the Georgetown County Sheriff's Office received an anonymous telephone call to their 911 service indicating that the caller had witnessed a black male wearing a white jersey bearing the number 32 and an orange hat making a narcotics transaction in the caller's neighborhood. (App. p. 70 lines 1-4). Georgetown Sheriff's Deputy John Seale was dispatched to the scene. (App. p. 70 lines 21-22). Upon his arrival, and without speaking to the caller, Deputy Seale began looking for someone who fit the announced description. (App. p. 70 line 22 - p. 71 line 6).

He came upon the Petitioner several streets over from where the caller had reported seeing the illegal conduct. (App. p. 70 line 22 - p. 71 line 6). Deputy Seale got out of his car, approached the Petitioner and asked him for identification. (App. p. 72 lines 14-15). Deputy Seale then asked Petitioner if he had any weapons and Petitioner responded that he did not. (App. p. 72 line 23 - p. 73 line 3). Deputy Seale asked Petitioner if he could pat him down for weapons and the Petitioner agreed while raising his hands above his head. (App. p. 73 lines 4-7). Deputy Seale then, rather than simply patting Petitioner down, attempted to place Petitioner in handcuffs so that he could do a "proper search", which Petitioner resisted. (App. p. 73 lines 7-15). At that time, Deputy Seale testified that Petitioner struck him several times and ran away. (App. p. 73 lines 16-17). Petitioner

denies striking the officer. (App. p. 298 lines 5-6). After a foot pursuit of some length, Deputy Seale caught Petitioner and wrestled him to the ground in or around the parking lot of a local club. (App. p. 73 lines 18-24). The parties continued to scuffle until Deputy Seale eventually handcuffed the Petitioner and walked him to where other officers were waiting. (App. p. 73 line 25 - p. 75 line 9).

After turning Petitioner over to a fellow officer, Deputy Seale showed another Deputy, Deputy Geno, where the Petitioner had been apprehended. (App. p. 84, lines 23-24). After a search, Deputy Geno collected some marijuana and some crack cocaine from the grounds of the club. (App. p. 85, lines 13-14). Petitioner was later given warrants for, “J-512017: Drugs / Manufacture, distribution, etc. of cocaine base, 1st,” “J-512018: Drugs / Manuf., poss. Of other sub. In Sch. I, II, III or flunitrazepam or analogue, with intent to distribute, 1st offense,” and “J-512019: Resisting/Resisting Arrest, Oppose, resist, or assault law enforcement officer serving process.” (App. pp. 387, 393 and 399).

On March 16, 2009, Petitioner was tried in the Georgetown County Court of General Sessions. Prior to the commencement of the trial, Petitioner’s attorney moved to suppress the drugs on the grounds that the State did not have probable cause to arrest the Petitioner when Deputy Seale attempted to place Petitioner in handcuffs, that Petitioner therefore had a right to resist Deputy Seale’s attempts to arrest him, and that any further detention of Petitioner amounted to an illegal seizure of his person which caused the subsequent seizure of the drug evidence to be fruit of the poisonous tree. (App. p. 10 line 25 – p. 29 line 22). This Motion was denied by The Court. (App p. 29 line 22). After pre-trial motions and the selection of the jury, Petitioner’s lawyer, Reuben Goude, Esquire, was relieved and Petitioner thereafter represented himself Pro Se. Petitioner was convicted on

Indictment # 2008-GS-22-00727 Possession of Cocaine Base with Intent to Distribute, Indictment #2008-GS-22-00728 Possession of Marijuana with Intent to Distribute and Indictment # 2008-GS-22-00729 Assault while Resisting Arrest. (App. pp. 192 line 17 - 193 line 1). Petitioner was sentenced to second offenses on each of the drug charges because the Solicitor informed the Judge that the charges had been indicted with the CDR codes for seconds (App. p. 197 lines 20-24). The solicitor offered no evidence of Petitioner's prior convictions.

Petitioner filed a timely Notice of Intent to Appeal his trial verdict and the appeal was handled by Wanda H. Carter, Esquire, Deputy Chief Appellate Defender for the South Carolina Office of Appellate Defense. Ms. Carter filed a brief pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967) on or around December 29, 2009. (App. pp. 203-213). This brief included a discussion of whether Petitioner had made a knowing and intelligent waiver of his right to counsel in deciding to proceed with his trial as a Pro Se litigant. (App. pp. 203-213). The brief did not argue Petitioner's contention that the drugs that were found should have been suppressed as being the fruit of the poisonous tree of an illegal arrest. (App. pp. 203-213). In Unpublished Opinion No. 2011-UP-191, filed on April 28, 2011, the South Carolina Court of Appeals dismissed Petitioner's appeal and relieved Ms. Carter from further representation. (App. p. 235). Petitioner attempted to appeal to the South Carolina Supreme Court as a Pro Se litigant, but his Petition for Certiorari was dismissed pursuant to State v. Lyles, 381 S.C. 442, 673 S.E. 2d 811 (2009). (App. p. 238).

Petitioner filed a Post Conviction Relief action on July 11, 2011 asserting various grounds for Post Conviction Relief. (App. pp. 236-258). Petitioner filed a Pro Se

amendment to his PCR application on February 15, 2012, offering further grounds. (App. pp. 267-273). Again, Petitioner filed a Pro Se Amended Application for Post Conviction Relief on or about February 25, 2013. (App. pp. 274 – 282). On March 5, 2013, Petitioner's Post Conviction Relief Counsel filed Amended Attachments to Petitioner's Petition for Post Conviction Relief, which included the issue at bar. (App. pp. 283-288).

On April 26, 2013, Petitioner's Post Conviction Relief hearing was conducted in front of the Honorable Larry B. Hyman at the Georgetown County Courthouse in Georgetown, South Carolina. (App. p. 289). Following a hearing, Judge Hyman denied Post Conviction Relief to the Petitioner on all grounds. (App. p. 378 line 6). He issued a written Order to that effect on May 9, 2013, Petitioner's counsel received written notice of entry of the order on June 19, 2013, and a notice of appeal was served on June 23, 2013. Petitioner now seeks a writ of certiorari to review this denial.

ARGUMENT

1. APPELLATE COUNSEL WAS INEFFECTIVE IN FAILING TO FILE A MERITS BRIEF ON THE ISSUE THAT THE DRUGS SHOULD HAVE BEEN SUPPRESSED AS THEY WERE THE FRUIT OF THE POISONOUS TREE OF AN ILLEGAL ARREST.

A criminal defendant is constitutionally entitled to the effective assistance of appellate counsel. Evitts v. Lucey, 469 U.S. 387, 398, 105 S.Ct. 830 (1985). For an applicant to be granted post-conviction relief as a result of ineffective assistance of counsel, the applicant must show that 1) counsel's performance was deficient and 2) he was prejudiced by counsel's deficient performance. See Strickland v. Washington, 466 U.S.

668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); Porter v. State, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006). “Even where appellate counsel believes his client's appeal is without merit and thus files an Anders brief, the appellant may have been entitled to a merits brief and the challenge of appellate counsel's performance should be reviewed under Strickland.” Bennett v. State, 383 S.C. 303, 310, 680 S.E. 2d 273 (2009), discussing Smith v. Robbins, 528 U.S. 259, 284, 120 S.Ct. 746 (2000).

A. DEFICIENCY OF COUNSEL’S PERFORMANCE

While it is true that, “Appellate counsel is not required to raise every nonfrivolous issue that is presented by the record,” Thrift v. State, 302 S.C. 535, 539, 397 S.E.2d 523, 526 (1990), in the matter at bar, the issue of whether or not the drugs were to be suppressed stands out as the central issue of this case. This idea that the drugs were found only after an illegal seizure of Petitioner’s person was argued by Petitioner’s counsel during the pre—trial hearings and remained the focus of Petitioner’s defense throughout the trial. Where Appellate counsel could find no issue that she believed to be meritorious and thus filed a brief pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967), her failure to brief the very real Fourth Amendment issues involved in this case stands out as being representation that is deficient under the circumstances.

B. PREJUDICE TO THE PETITIONER

"When the defendant claims that counsel's failure to articulate a Fourth Amendment claim was ineffective assistance, defendant must show that such claim is meritorious and that the verdict would have been different absent the evidence that should have been excluded." Sikes v. State, 323 S.C. 28, 30, 448 S.E.2d 560, 562 (1994). Similarly, here,

whether or not Petitioner was prejudiced by Appellate counsel's failure to raise this issue in a merits brief hinges on the merit of the argument to be made.

"The Fourth Amendment to the United States Constitution guarantees the right of the people to be free from unreasonable searches and seizures and provides that no warrants shall be issued except upon probable cause, supported by oath or affirmation and particularly describing the place to be searched and the persons or things to be seized." McHam v. State, 404 S.C 465, 476, 746 S.E.2d 41 (2013).

"A police officer may stop and briefly detain and question a person for investigative purposes, without treading upon his Fourth Amendment rights, when the officer has a reasonable suspicion supported by articulable facts, short of probable cause for arrest, that the person is involved in criminal activity." State v. Blassingame, 338 S.C. 240, 248, 525 S.E.2d 535 (Ct.App.1999).

The initial question, then, is did the State have reasonable suspicion sufficient to stop Petitioner on the roadway on the day of his arrest? In Petitioner's case, the Georgetown County Sheriffs received an anonymous telephone call which led them to stop Petitioner as he was walking down the street. (App. p.70 line 1 – p. 72 line 1). Deputy Seale offered no testimony that he observed Petitioner doing anything suspicious when he originally saw him, so unless the anonymous tip is enough to give the State reasonable suspicion, they did not have it initially.

"Reasonable suspicion based solely on a call made from an unknown location by an unknown caller lack[s] sufficient indicia of reliability to make an investigatory stop." State v. Green, 341 S.C. 214, 217, 532 S.E.2d 896 (Ct.App.2000). "Anonymous tips ... are

generally less reliable than tips from known informants and can form the basis for reasonable suspicion only if accompanied by specific indicia of reliability, for example, the correct forecast of a subject's 'not easily predicted' movements." Florida v. J.L., 529 U.S. 266, 269, 120 S.Ct. 1375 (2000), quoting Alabama v. White, 496 U.S. 325, 332, 110 S.Ct. 2412 (1990).

The detailed description of the clothing of Petitioner might lead one to conclude that this means that the anonymous tip was reliable. After all, Deputy Seale was able to find someone in the area that perfectly matched the description given by the anonymous caller. However, the United States Supreme Court has said that, "An accurate description of a subject's readily observable location and appearance is of course reliable in this limited sense: It will help the police correctly identify the person whom the tipster means to accuse. Such a tip, however, does not show that the tipster has knowledge of concealed criminal activity. The reasonable suspicion here at issue requires that a tip be reliable in its assertion of illegality, not just in its tendency to identify a determinate person." Florida v. J.L., 529 U.S. 266, 272, 120 S.Ct. 1375 (2000). It would appear, therefore, that Deputy Seale did not have any reasonable, articulable suspicion against the Petitioner.

The next question we need to address is whether or not Deputy Seale acted properly in attempting to place Petitioner in handcuffs. Deputy Seale next testified that Petitioner was acting nervous during their encounter. (App. p. 72 lines 15-25). This is the only justification he gives for asking Petitioner if he could pat him down for weapons. Deputy Seale testified that Petitioner agreed to allow the pat down and put his arms over his head. (App. p. 73 lines 4-7). Now it can be argued that Petitioner's encounter with Deputy Seale may have been consensual up until this point. However, Deputy Seale's decision to place

Petitioner in handcuffs at this point clearly exceeded the scope of any detention his suspicion may have afforded him and certainly exceeded the permission that Petitioner had just given him for the pat down. (App. p. 73 lines 7-15). At the time, Deputy Seale attempted to place Petitioner in handcuffs, he was attempting to unlawfully seize Petitioner's person without reasonable suspicion or probable cause. In effect, Deputy Seale attempted to make an unlawful arrest.

"An arrest, the highest form of seizure possible under the Fourth Amendment, occurs when a police officer physically restrains a suspect or forces submission through a show of authority." State v. Brannon, 379 S.C. 487, 507, 666 S.E. 2d 272 (S.C. App. 2008), discussing California v. Hodari D., 499 U.S. 621, 111 S.Ct. 1547 (1991). "Probable cause is defined as a good faith belief that a person is guilty of a crime when this belief rests on such grounds as would induce an ordinarily prudent and cautious person, under the circumstances, to believe likewise." Wortman v. City of Spartanburg, 310 S.C. 1, 4, 425 S.E.2d 18 (1992).

Clearly at this stage Deputy Seale had no grounds to believe that a crime had been committed other than an anonymous tip that was not even enough to create reasonable suspicion. Although Deputy Seale claims that he only was attempting to put Petitioner in handcuffs so that he could safely perform the consensual pat down for weapons, this physical restraint goes beyond what is reasonable for officer safety and thus violates Petitioner's rights under the Fourth Amendment.

The Court has stated that a person has a right to resist an unlawful arrest even to the extent of taking the life of the aggressor if it be necessary in order to regain his liberty. State v. Poinsett, 250 S.C. 293, 157 S.E.2d 570 (1967). Here, everything that happened

after Deputy Seale attempted to place Petitioner in handcuffs was a result of Deputy Seale's attempt to make an unlawful arrest and Petitioner exercising his right to resist such an unlawful arrest.

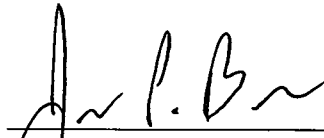
The "fruit of the poisonous tree" doctrine provides that evidence must be excluded if it would not have come to light but for the illegal actions of the police, and the evidence has been obtained by the exploitation of that illegality. State v. Copeland, 321 S.C. 318, 468 S.E.2d 620 (1996). Any contraband discovered as a result of Deputy Seale's actions should have been therefore suppressed.

In order to show that he was prejudiced by appellate counsel's performance, a PCR applicant must show that, "[T]here is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624 (1989). After examining the merits of the argument for suppression of the drug evidence based on the Fourth Amendment issues in this case, there seems to be a reasonable probability that, had appellate counsel properly briefed these issues, the Court of Appeals would have found that the trial court erred in denying Petitioner's Motion to Suppress and could have acted accordingly. Thus, Petitioner was prejudiced by appellate counsel's failure to file a merits brief arguing these points.

CONCLUSION

For the reasons stated, Petitioner asks this Court to grant the petition for a writ of certiorari.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "J. P. Boan". The signature is written in a cursive style with a large initial "J" and a long horizontal stroke at the end.

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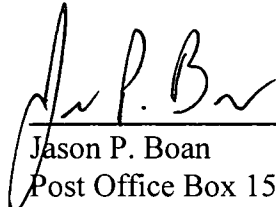
State of South Carolina,

Respondent.

PROOF OF SERVICE

I certify that I have served a Petition for Certiorari and a copy of the Appendix on the State of South Carolina by depositing a copy of it in the United States Mail, postage prepaid, on May 6, 2014, addressed to its attorney of record, Joshua L. Thomas, Esquire, Office of the Attorney General, Post Office Box 11549, Columbia, South Carolina 29211.

May 6, 2014



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S.C. SUPREME COURT

The Honorable Daniel E. Shearouse
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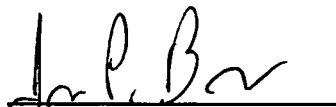
RE: Corey Jawan Robinson v. State of South Carolina, Case No. 2013-001391

Dear Mr. Shearhouse:

Enclosed, please find an original and six copies of the Petition for Certiorari as well as two copies of the Appendix in this matter.

Should you have any questions or wish to discuss this matter further, please do not hesitate to contact my office. I am,

Sincerely,



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