2013-000373

ALAN WILSON
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December 22, 2014

The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
P.O. Box 11330
Columbia, South Carolina 29211

Re: The State v. Derrick A. McIlwain
Appellate Case No: 2014-002524

Dear Mr. Shearouse:

Enclosed please find the original and six copies of the Return to Petition for a Writ of Certiorari along with proof of service in the above-referenced case.

Sincerely,

Jennifer Ellis Roberts
Assistant Attorney General
S.C. Bar No: 79818

JER/ab
Enclosures

cc: The Honorable Jenny A. Kitchings
Wanda H. Carter, Esquire
Ms. Trisha Allen

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM LANCASTER COUNTY
Court of General Sessions
Brooks P. Goldsmith, Circuit Court Judge

Opinion No. 2014-UP-343 (S.C. Ct. App. filed September 24, 2014)
Appellate Case No. 2014-002524

State of South Carolina, ... Respondent,

v.

Derrick A. McIlwain, ... Petitioner.

RETURN TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

I. **Did the Court of Appeals properly affirm the trial court's denial of Appellant's pretrial motion to suppress evidence found in the vehicle in which he was the back seat passenger when officers stopped the car for a traffic violation, discovered prior to completion of the purpose of the traffic stop that Appellant had outstanding warrants, saw a suspicious notebook in plain view while arresting Appellant, and received the driver's consent to search the vehicle?**

STATEMENT OF THE CASE

Procedural History

A Lancaster County Grand Jury indicted Appellant for possession with intent to distribute (PWID) cocaine and PWID marijuana. (R. pp.256-59.) On February 15, 2013, the Honorable Brooks P. Goldsmith held a pretrial hearing during which he denied Appellant's motion to suppress certain evidence found during a traffic stop. (R. pp.1-76.) On February 19, 2013, Appellant and his co-defendant, Matthew Sims, proceeded to trial before a jury and Judge Goldsmith. William Frick, Esquire, represented Appellant, and Mark Grier, Esquire, represented Sims. Solicitor Douglas A. Barfield represented the State. The jury found Appellant not guilty on both PWID charges but found him guilty of two lesser-included offenses of possession. (R. p.236.) Judge Goldsmith sentenced him to eight years' imprisonment for the possession of cocaine charge, one year's imprisonment for the possession of marijuana charge, and five years' imprisonment for a probation violation, to be served concurrently. (R. p.254.) On February 21, 2013, Appellant filed a Notice of Appeal.

On September 24, 2014, the South Carolina Court of Appeals affirmed Petitioner's conviction in an unpublished opinion. See State v. McIlwain, Op. No. 2014-UP-343 (S.C. Ct. App. filed Sept. 24, 2014). Petitioner's request for rehearing was denied on October 24, 2014. A Petition for Writ of Certiorari to the Court of Appeals was submitted on November 24, 2014, and this Return follows.

Factual Background

At approximately 6:00 p.m. on October 22, 2011, Lancaster County Sherriff's Office narcotics investigator Tony Bowers noticed a vehicle that had non-working brake lights. (R. p.5, line 15-R. p.9, line 10; R. p.84, line 13-R. p.85, line 11.) He decided not

to stop the vehicle because he saw it pull into a driveway and assumed it had made it safely to its destination. (R. p.9, line 21-R. p.10, line 1; R. p.86, line 19-R. p.87, line 20.) However, he saw the same car again five to ten minutes later and decided to pursue the car because of the non-working brake lights. (R. p.10, lines 11-14; R. p.87, line 21-R. p.88, line 21.) Investigator Bowers radioed Lieutenant Ryan McLemore to let him know he was going to stop the vehicle. (R. p.89, lines 1-11.) As he was pursuing the car, he noticed the back passenger, Appellant, look back at him and fumble around in the back seat. (R. p.13, lines 16-23; R. p.94, lines 11-19.)

Bowers stopped the car, took the license and proof of insurance from the driver, and asked the passengers for their names. (R. p.14, line 2-R. p.17, line 15; R. p.92, line 23-R. p.94, line 5.) He decided to issue a written warning for the vehicle equipment and as he was walking from the stopped car back to his vehicle to write the ticket, Lt. McLemore arrived. (R. p.18, lines 10-22; R. p.95, lines 1-25.) Bowers told McLemore the names of the occupants of the car, and McLemore told Bowers he thought Appellant "was wanted out of the city," meaning there were "active charges on him." (R. p.19, lines 1-6.) At that point, Bowers ran all three names to check for warrants and found out Appellant had outstanding warrants from the Charlotte-Mecklenburg Police Department and also the City of Lancaster Police Department.[1] (R. p.19, lines 7-21.)

Bowers and McLemore walked up to the stopped car, told Appellant he was wanted, and asked him to get out of the car. (R. p.20, lines 6-24.) Bowers arrested Appellant on his outstanding warrants and handcuffed him. (R. p.21, lines 6-18.) Bowers noticed a small notebook where Appellant had been sitting that had names and

[1] While the record does not indicate what these outstanding warrants were for, Investigator Bowers testified during the suppression hearing regarding his knowledge of Appellant's having been investigated for illegal drug sales in Lancaster County and having been arrested for drugs. (R. p.8, lines 11-22.)

monetary amounts written on it. (R. p.22, lines 2-7.) Bowers stated during the suppression hearing that he suspected the notebook was a ledger of drug transactions. (R. p.24, lines 9-20.) The driver, Sims, gave Bowers consent to search the car. (R. p.25, line 24-Tr. 26, line 1; R. p.31, lines 18-22.) Bowers searched the back seat first and found a blue zipper bag containing cocaine and marijuana. (R. p.27, lines 8-24.) He also found a black zipper bag containing $60 cash. (R. p.28, line 17-Tr. 29, line 7; R. p.112, lines 1-16.) After gaining consent from Sims to search the rest of the car, Bowers then found two more bags of marijuana, a set of digital scales, and some cash in the front console. (R. p.34, line 1-R. p.37, line 14.)

At the pretrial suppression hearing, Bowers testified regarding the traffic stop, the arrest, and the search. (R. pp.4-54.) Appellant argued that based on Sikes v. State, 323 S.C. 28, 448 S.E.2d 560 (1994), there was no reason to do the warrant check and, therefore, there was an unreasonable seizure and search. (R. p.64, lines 17-20.) The State distinguished Sikes from the case at hand, pointing out that Sikes was made to sit in a patrol car for twenty minutes while the police ran warrant checks whereas Appellant was not detained when Investigator Bowers ran a warrant check on him. (R. p.67, line 7-R. p.68, line 21.) The trial court gave the following very thorough ruling:

> All right. I'm trying to analyze it one step at a time. The Court finds that the vehicle initially was legally stopped, that the officers did have the right to examine the vehicle's registration and driver's license and therefore could detain everybody in the vehicle while they did that, that the - - as I understand the testimony while the ticket was being written the officers learned that there was an outstanding warrant for the passenger, I think it was reasonable for them to stop the writing of the ticket to go and make the arrest. After making the arrest I find there was an intervening factor or circumstance in that the officers observed the notebook which gave them reasonable suspicion based on their experience that something may have been going on knowing the reasons for the arrest of

> the backseat passenger, looking at the notebook, seeing the numbers and the side names that they were familiar with, that that gave them reasonable suspicion to continue the detention and to continue the further investigation. So I find that - - I do find this, had there not been that intervening circumstance, that being the notebook, I find that the detention should have ended and there would not have been sufficient reason to continue the detention of the driver. But based on that intervening circumstance that gave the reasonable suspicion to the officers to ask for permission which was given by the defendant to search once they found illegal drugs in the back seat, I think that gave them reasonable suspicion to ask if there might be additional drugs and ask for permission to search the rest of the car. For all of those reasons I find that the motions to suppress for both defendants should be denied.

(R. p.73, line 21-R. p.74, line 25.)

At trial of Appellant and his co-defendant, Matthew Sims, the State presented testimony from Investigator Bowers regarding the traffic stop and the search. (R. p.81, line 15.) He testified that on the way to his vehicle to write a warning ticket for Sims for his defective brake lights, Lt. McLemore had arrived on the scene. (R. p.95, lines 1-25.) He stated that he started writing the warning ticket but went back to the stopped vehicle to ask Appellant to get out of the car before completing the writing of the ticket. (R. p.96, lines 6-14.) When asked about the condition of the back seat, Bowers testified there was a jacket lying on the passenger side, the opposite side of the back seat from where Appellant was sitting. (R. p.106, lines 4-5.) He explained he had noticed a ledger on the seat next to where Appellant had been sitting that contained names and monetary amounts. (R. p.97, line 7-R. p.98, line 15.) He testified the names and monetary amounts made him think of illegal drug transactions. (R. p.104, lines 19-23.) Bowers testified regarding the blue zipper bag containing drugs, which was found in the back seat to the right of where Appellant had been sitting. (R. p.106, line 2-R. p.107, line 11; R. p.109, lines 15-16.) He also recounted how Appellant was looking back at him and fumbling

around in the back seat while Bowers was following the car in his attempt to stop it. (R. p.94, lines 11-19.)

After the State rested, Appellant moved for a directed verdict, arguing the State had not proved actual possession and that the only evidence shown was merely circumstantial but not substantial. (R. p.183, lines 6-24.) The State argued circumstantial evidence showed the drugs were in the back seat beside Appellant, showing he had knowledge the items were there. (R. p.184, lines 8-17.) Further, the State pointed out that Bowers did not testify the drugs were covered by the coat that was also in the back seat and noted Bowers' testimony that he observed Appellant fumbling around in the back seat, indicating he may have been trying to do something with the drugs. (R. p.184, lines 18-25.) The trial court denied Appellant's motion, finding "there is sufficient evidence certainly because of the drugs in the back seat. I also find that the drugs in the console can be considered because of the drugs found next to him in the back seat as well as the notebook." (R. p.189, lines 3-7.)

Ultimately, the jury found Appellant not guilty of either PWID charge but found him guilty of the lesser-included possession charges. (R. p.236.) Judge Goldsmith sentenced him to eight years' imprisonment for the possession of cocaine charge, one year's imprisonment for the possession of marijuana charge, and five years' imprisonment for a probation violation, to be served concurrently. (R. p.254.)

ARGUMENT

The Court of Appeals properly affirmed the trial court's denial of Appellant's pretrial motion to suppress evidence found in the vehicle in which he was the back seat passenger when officers stopped the car for a traffic violation, discovered prior to completion of the purpose of the traffic stop that Appellant had outstanding warrants, saw a suspicious notebook in plain view while arresting Appellant, and received the driver's consent to search the vehicle.

Petitioner argued to the Court of Appeals that the trial court erred in denying his motion to suppress because he was detained beyond the scope and purpose of the traffic stop. In his petition for certiorari, Petitioner maintains that insufficient reasonable suspicion existed to justify an additional seizure of Petitioner and, thus, the Court of Appeals erred in upholding the trial court's denial of Petitioner's motion to suppress. Contrary to Petitioner's contentions, neither the Court of Appeals nor the trial court committed any error in finding Petitioner's motion to suppress the evidence in his case to be meritless. Appellant was not detained beyond the scope of the traffic stop because Investigator Bowers discovered Appellant had outstanding warrants before Bowers had completed writing the warning ticket. Additionally, Bowers based his reasonable suspicion on seeing in plain view a notebook containing names and monetary amounts that appeared to be a drug ledger. Therefore, the trial court correctly denied the motion to suppress and Petitioner's conviction was properly affirmed on appeal.

As the Court of Appeals noted in its opinion, "When reviewing a Fourth Amendment search and seizure case, an appellate court must affirm if there is any evidence to support the ruling. The appellate court will reverse only when there is clear error." State v. Morris, 395 S.C. 600, 606, 720 S.E.2d 468, 471 (Ct. App. 2011). Furthermore, the Court of Appeals noted "[a]s a general matter, the decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic

violation has occurred." Whren v. United States, 517 U.S. 806, 810 (1996). The Court also cited State v. Provet, 405 S.C. 101, 108, 747 S.E.2d 453, 458 (2013), for the proposition that a traffic stop supported by reasonable suspicion of a traffic violation remains valid until its purpose has been completed and may not be extended on unrelated matters unless reasonable suspicion exists to warrant a further seizure.

Ample evidence existed to support the trial court's denial of Petitioner's motion to suppress the evidence. The trial court held a thorough suppression hearing and issued a detailed ruling. First, the trial court found the vehicle initially was legally stopped because the officer had the legal right to stop a car for having non-working brake lights. At that point, the trial court determined the officer had the right to examine the vehicle's registration and driver's license and detain everybody in the vehicle while he did that. See State v. Woodruff, 344 S.C. 537, 549-50, 544 S.E.2d 290, 297 (2001) ("When an officer stops a vehicle for a traffic violation, he may *briefly* detain the vehicle and its occupants while he examines the vehicle registration and the driver's license." (citing Delaware v. Prouse, 440 U.S. 648 (1979))). Further, the trial court found that because Officer Bowers testified that he learned there was an outstanding warrant for Appellant while the ticket was being written, it was reasonable for him to stop the writing of the ticket to go make the arrest. The trial court then stated, "After making the arrest I find there was an intervening factor or circumstance in that the officers observed the notebook which gave them reasonable suspicion based on their experience that something may have been going on knowing the reasons for the arrest of the backseat passenger, looking at the notebook, seeing the numbers and the side names that they were familiar with, that that gave them reasonable suspicion to continue the detention and to continue the further investigation." (R. p.74, lines 5-13.) See United States v. Sprinkle, 106 F.3d 613 (4th

Cir. 1997) ("[A]n officer can couple knowledge of prior criminal involvement with more concrete factors in reaching a reasonable suspicion of current criminal activity."). The trial court determined that the intervening circumstance gave reasonable suspicion to the officers to ask for consent to search the car, which was given by the co-defendant. Moreover, the trial court ruled that once the officers found illegal drugs in the back seat, that gave them reasonable suspicion to ask if there might be additional drugs and to ask for consent to search the rest of the car. Finally, the trial court stated, "For all of those reasons I find that the motions to suppress for both defendants should be denied." (R. p.74, lines 24- 25.)

Appellant argues his detention went beyond the scope of the traffic stop, resulting in an unreasonable seizure and search. He asserts the purpose of the traffic stop, to write a warning ticket for brake lights, was complete and had ended. However, Bowers' testimony made clear he had actually not completed writing the ticket at the time Lt. McLemore informed him of Appellant's outstanding warrants, which Bowers then confirmed through a computer check. (R. p.18, lines 10-22; R. p.19, lines 1-21.) Thus, the reason for prolonging the traffic stop was to arrest Appellant after Bowers confirmed he did indeed have warrants. Accordingly, Appellant's assertion that the brake/tail light activity had been resolved, thereby rendering the extended/second detention and search unlawful, is without merit. Bowers not only had suspicion of criminal activity, he had actual confirmation of this criminal activity as soon as he checked the database and discovered Appellant indeed had outstanding warrants.

Appellant also argues "that although the scope of the stop may be enlarged, the scope and duration of the seizure must be strictly tied to and justified by the circumstances which rendered its initial undertaking proper," citing State v. Morris, 395

S.C. 600, 720 S.E.2d 468 (2011) and Sikes v. State, 323 S.C. 28, 448 S.E.2d 560 (1994). In State v. Provet, 405 S.C. 101, 747 S.E.2d 453 (2013), this Court took the opportunity to correct the suggestion made in State v. Rivera[2] "that police questioning must have some relationship to the purpose of the stop in order to withstand Fourth Amendment scrutiny." Provet, 405 S.C. at 110, 747 S.E.2d at 458. Further, this Court clarified that Rivera's suggestion "that shifting the conversation to another topic marks the end of the lawful seizure even though the citation has not been issued, regardless whether such off-topic conversation measurably extends the duration of the initial seizure" was also incorrect. Id. at 110, 747 S.E.2d at 458. This Court based its clarification in Provet on recent Fourth Amendment precedent from the United States Supreme Court and went so far as to state, "To the extent other South Carolina cases contain similar language, we note that language has likewise been superseded." Id. at 111, 747 S.E.2d at 458.

South Carolina appellate courts have held that the detainment of an individual after a traffic stop may occur if supported by reasonable suspicion. See State v. Butler, 353 S.C. 383, 577 S.E.2d 498 (Ct. App. 2003) ("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. In determining whether reasonable suspicion exists, the circumstances must be considered as a whole, and if the officer's suspicions are confirmed or further aroused, the stop may be prolonged and the scope enlarged."). Here, as soon as McLemore informed Bowers that Appellant had outstanding warrants, Bowers had reasonable suspicion that at least one person in the car was involved in criminal activity. That

[2] 384 S.C. 356, 682 S.E.2d 307 (Ct. App. 2009).

circumstance, combined with the confirmation of those warrants discovered while conducting the long-held right of an officer to run a computer check while in the process of issuing a citation, were certainly sufficient to establish reasonable suspicion. Thus, the traffic stop was not impermissibly extended and the drugs were not seized in violation of the Fourth Amendment. The trial court was correct in denying Appellant's motion to suppress and the Court of Appeals properly affirmed the decision. Accordingly, Petitioner's petition for writ of certiorari should be denied.

CONCLUSION

Respondent submits that this Court should deny the Petition for Writ of Certiorari. However, if this Court grants certiorari, Respondent asks permission under the rules to fully brief the issues.

Respectfully submitted,

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THE STATE OF SOUTH CAROLINA
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State of South Carolina, ... Respondent,

v.

Derrick A. McIlwain, ... Petitioner.

PROOF OF SERVICE

I, Angela Bennett, certify that I have served the Return to Petition for a Writ of Certiorari on Petitioner by depositing two copies of the same in the United States mail, postage prepaid, addressed to his attorney, Wanda H. Carter, Esquire, South Carolina Commission on Indigent Defense, Division of Appellate Defense, P.O. Box 11589, Columbia, South Carolina 29211.

I further certify that all parties required by Rule to be served have been served.

This 22nd day of December, 2014.

Angela Bennett

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Administrative Assistant

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