

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Greenville County  
D. Garrison Hill, Circuit Court Judge

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S.C. Supreme Court

KENNETH HENRY SHERMAN,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-001364

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PETITION FOR WRIT OF CERTIORARI

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## ISSUES PRESENTED

I. Whether the trial court correctly granted petitioner a belated appeal pursuant to *White v. State*, 236 S.C. 110, 108 S.E.2d 35 (1974).

II. Whether the PCR judge erred in concluding Petitioner did not establish ineffective assistance of counsel by ruling that calling Petitioner to testify would not have changed the trial court's denial of his motion to suppress drug evidence.

## STATEMENT

On January 10, 2012, the Greenville County Grand Jury indicted Petitioner Kenneth Henry Sherman for possession of cocaine base with intent to distribute and trafficking heroin. App. 96-100. On February 13, 2012, Petitioner proceeded to trial before The Honorable Edward W. Miller and a jury. Jake Erwin represented Petitioner and Joyce Monts represented the State. App. 1.

Prior to trial Petitioner moved to exclude drug evidence seized from Petitioner as a result of a traffic stop. App. 7, 7-11. In a hearing on the matter, the State called law enforcement officer James Godfrey to testify that on March 23, 2011, he pulled over a Dodge Stratus on Anderson Road near Greenville for speeding. Godfrey asked for the driver's information and identifying information from the other two occupants of the vehicle, including Petitioner, who was sitting behind the driver's seat. Godfrey stated Petitioner had no identification card but gave his name and birthdate. Godfrey returned to his patrol vehicle and checked the occupants for outstanding warrants. Finding records showed Petitioner had one, he returned to the Stratus and advised Petitioner he was attempting to secure the warrant. He again returned to the patrol car to wait for a copy, and he claimed Petitioner then opened the door of the Stratus and fled on foot. Godfrey and another officer at the stop chased, tazed, and handcuffed Petitioner. In his pockets they found baggies of heroin, scales, and pieces of crack cocaine. App. 7, line 21—App. 17, line 15.

Counsel for Petitioner cross-examined Godfrey. He reviewed Godfrey's account for confirmation of the order of events and some additional details. App. 18, line 9—App. 21, line 1. Counsel then argued to the trial judge that under *Sikes v. State*, 323 S.C. 28, 448 S.E.2d 560 (1994), Godfrey impermissibly seized Petitioner while he ran the warrant check. App. 21, line 11—App. 23, line 20. The State responded that the warrant search did not measurably extend the initial, valid traffic stop. App. 23, line 21—App. 24, line 4. The judge then responded that no evidence of the

length of the stop was presented. Moreover, the real issue appeared to be whether Petitioner was seized. Because Petitioner did not refuse Godfrey's request for information, the evidence did not show the interaction constituted a seizure rather than consensual encounter. Accordingly the judge denied the motion. App. 24, line 5—App. 26, line 18.

After the denial Petitioner sought to enter a plea. After a routine colloquy, the judge accepted his pleas of guilty as charged. App. 28, line 1—App. 31, line 18. The judge issued concurrent sentences of sixteen years' incarceration. App. 35, lines 19-24.

On January 15, 2013, Petitioner filed an application for post-conviction relief claiming ineffective assistance of counsel. App. 37-43; App. 88. The State filed a return on June 21, 2013. App. 44-49; App. 88. On April 23, 2014, Petitioner appeared at an evidentiary hearing before The Honorable D. Garrison Hill. Brian P. Johnson represented Petitioner and Karen C. Ratigan represented the State. App. 50.

Petitioner testified and gave a different account of the traffic stop:

Officer Godfrey asked for license, registration, and proof of insurance. And he asked for identification of the other two occupants in the car. When I refused my ID, he said he was going to call for backup if I didn't tell him who I was.

So he ran a records check on the driver. He wrote a warning ticket.

App. 58, line 24—App. 59, line 5.

After he wrote the warning, I watched him go back to the car. He came back to the car and was pressing me for my identification and asking me for my information. When I refused, I seen the second car pull up. I got scared. And I jumped out of the car and took off running.

App. 60, lines 8-12. Petitioner then clarified that after Godfrey wrote the warning ticket, he did not allow the occupants to leave. App. 60, lines 13-18. Petitioner later testified that he believed he

should have testified but that he was advised not to. App. 61, lines 9-13. He also stated that the stop lasted about thirty minutes. App. 86, lines 15-19.

Petitioner further testified that he asked counsel to file an appeal on his way back to the holding cell after sentencing. However, counsel never filed one, and he ultimately attempted to file an appeal himself, but the court dismissed it. Ap. 64, lines 2-24; App. 75, lines 2-24.

Counsel then appeared and was asked why he decided Petitioner should not testify at the suppression hearing. He stated, “I felt like it didn’t really add anything. The legal arguments that I was going to make were going to be supported by the officer’s testimony.” App. 79, lines 19-22. He also testified, when asked whether Petitioner ever asked him to file an appeal, “[T]he fact that I didn’t in this case lets me know that . . . either he didn’t ask me, or I didn’t get the message. I don’t know.” App. 82, line 20—App. 83, line 2.

On May 16, 2014, the PCR court issued an order of dismissal. The court first concluded Petitioner failed to establish counsel was ineffective in representing him at the suppression hearing because Petitioner’s testimony would not have changed its outcome. App. 91-92. However, the order also concluded that Petitioner did not knowingly and voluntarily waive his right to an appeal and ruled Petitioner should petition this Court to obtain relief pursuant to *White v. State*, 236 S.C. 110, 108 S.E.2d 35 (1974). App. 94.

## ARGUMENT

### **I. THE EVIDENCE IN THE RECORD SUPPORTS THE PCR COURT’S FINDING THAT PETITIONER WAS DENIED AN OPPORTUNITY FOR A DIRECT APPEAL, AND THIS COURT SHOULD DECIDE PETITIONER’S APPELLATE ISSUES PURSUANT TO *WHITE V. STATE*.**

The evidence in the record supports the PCR court’s finding that Petitioner was denied an opportunity for a direct appeal, and this court should decide Petitioner’s appellate issues pursuant to *White v. State*. The Sixth Amendment to the United States Constitution guarantees a defendant

the right to effective assistance of counsel. U.S. Const. amend. VI; *Strickland v. Washington*, 466 U.S. 668 (1984). “Following a trial, counsel is required to make certain the defendant is made fully aware of the right to appeal.” *Clark v. State*, 396 S.C. 164, 168, 719 S.E.2d 708, 710 (quoting *Turner v. State*, 380 S.C. 223, 224, 670 S.E.2d 373, 374 (2008)). Further, “[t]o waive a direct appeal, a defendant must make a knowing and intelligent decision not to pursue the appeal.” *Id.* “Absent an intelligent waiver by the defendant, counsel must either initiate an appeal or comply with the procedure in *Anders v. California*, 386 U.S. 738 . . . (1967).” *Id.*

When a defendant is denied an opportunity for a direct appeal, he may petition this Court for a writ of certiorari pursuant to Rule 243(i), SCACR, and this Court may decide whether Petitioner is entitled to relief based on the merits of his appellate issues. *See generally Davis v. State*, 288 S.C. 290, 342 S.E.2d 60 (1986) (citing *White v. State*, 263 S.C. 110, 208 S.E.2d 35 (1974)).

In this case, the testimony shows Petitioner did not make a knowing and intelligent waiver of his right to appeal. Petitioner testified that he asked counsel to file an appeal on his way back to the holding cell after sentencing. Counsel did not know whether Petitioner made the request. Accordingly, the evidence supports the PCR court’s finding that Petitioner was denied an opportunity for a direct appeal.

**II. THE PCR JUDGE ERRED IN RULING PETITIONER’S TESTIMONY WOULD NOT HAVE CHANGED THE OUTCOME OF THE SUPPRESSION HEARING BECAUSE PETITIONER’S REFUSAL TO IDENTIFY HIMSELF TO GODFREY MADE THEIR ENSUING ENCOUNTER NONCONSENSUAL AND CONSTITUTED AN ADDITIONAL SEIZURE BEYOND THE INITIAL TRAFFIC STOP THAT WAS NOT SUPPORTED BY REASONABLE SUSPICION.**

The PCR judge erred in ruling petitioner’s testimony would not have changed the outcome of the suppression hearing because Petitioner’s refusal to identify himself to Godfrey made their ensuing encounter nonconsensual and constituted an additional seizure beyond the initial traffic stop that was not supported by reasonable suspicion. “The purpose of the Fourth

Amendment is . . . ‘to prevent arbitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals.’” *United States v. Mendenhall*, 446 U.S. 544, 553–54 (1980) (quoting *United States v. Martinez–Fuerte*, 428 U.S. 543, 554 (1976)). The Fourth Amendment guarantees “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.” U.S. Const. amend. IV. “[T]he underlying command of the Fourth Amendment is always that searches and seizures be reasonable.” *Wilson v. Arkansas*, 514 U.S. 927, 931 (1995). The Fourth Amendment is applicable to the States through the Due Process Clause of the Fourteenth Amendment. *Mapp v. Ohio*, 367 U.S. 643 (1961).

Traffic stops are reviewed under the standard set forth in *Terry v. Ohio*, 392 U.S. 1 (1968), because a traffic stop is more analogous to an investigative detention than a custodial arrest. See *United States v. Rusher*, 966 F.2d 868, 875 (4th Cir. 1992). Consequently, *Terry* outlines a two-prong test for analyzing the constitutionality of a traffic stop: (1) whether the police officer's action was justified at the inception of the traffic stop; and (2) whether the police officer's subsequent actions were reasonably related in scope and duration to the circumstances that justified the stop. *Rusher*, 966 F.2d at 875.

With regard to the first prong, “[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.” *State v. Butler*, 343 S.C. 198, 201, 539 S.E.2d 414, 416 (Ct. App. 2000) (citations omitted). In conducting a stop, an officer may, in the interest of his safety, request that passengers provide identification and order all occupants out of the vehicle, so long as these actions do not prolong the seizure. *U.S. v. Vaughan*, 700 F.3d 705, 710 (4th Cir. 2012). Importantly, the Fourth Amendment does not require a passenger to respond to a request for identifying information,

although an independent state statute may criminalize refusal to identify oneself when compelling a response is reasonable under the Fourth Amendment. *Hiibel v. Sixth Judicial Dist. Ct. of Nev., Humboldt County*, 542 U.S. 177 (2004).

With regard to the second prong, “[a]n investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop and the scope of the detention must be carefully tailored to its underlying justification.” *State v. Pichardo*, 367 S.C. 84, 99, 623 S.E.2d 840, 847-48 (Ct. App. 2005) (citing *Florida v. Royer*, 460 U.S. 491 (1983)). Thus, this Court has held that a twenty minute detention while officers “go fishing” for evidence of an passenger’s involvement in some other crime is not permissibly within the scope of an initial, reasonable traffic stop. *Sikes v. State*, 323 S.C. at 31, 448 S.E.2d at 563 (citing *State v. Damm*, 787 P.2d 1185 (Kan. 1990) (“While Damm was properly stopped and checked for defective taillights, it was improper to seize him for the amount of time it took to run a check on every passenger in the car with him. . . . The seizure of the three occupants . . . while ‘routine record checks’ were made . . . was unreasonable.”) and *State v. Johnson*, 805 P.2d 761 (Utah 1991) (affirming lower court’s holding that defendant, who was a passenger in a traffic stop, was seized when the police officer took her name and birthdate and expected her to wait while he ran a warrants check).).

Once the initial purpose of a stop has been fulfilled, further detention is beyond the scope of the stop and therefore impermissible unless the officer has reasonable suspicion that a serious crime is afoot. *State v. Tindall*, 388 S.C. 518, 521, 698 S.E.2d 203, 205 (citing *U.S. v. Sullivan*, 138 F.3d 131 (4th Cir. 1998)). “‘Reasonable suspicion’ requires a ‘particularized and objective basis that would lead one to suspect another of criminal activity.’” *State v. Khingratsaiphon*, 352 S.C. 62, 69, 572 S.E.2d 456, 459 (2002) (quoting *United States v. Cortez*, 449 U.S. 411, 418

(1981)). In determining whether reasonable suspicion exists, the court must consider the totality of the circumstances. *State v. Rogers*, 368 S.C. 529, 534, 629 S.E.2d 679, 682 (Ct. App. 2006). A person's failure to provide identifying information when he is entitled to refuse to give it is insufficient standing alone to support a reasonable suspicion justifying detention for further investigation. See *U.S. v. Silva*, 742 F.3d 1 (1st Cir. 2014) ("Silva's refusal to provide his driver's license—coupled with [the informant's] specific allegations that Silva was producing counterfeit identification—gave police officers reasonable grounds to run a routine warrant check on his license."); *Klaucke v. Daly*, 595 F.3d 20 (1st Cir. 2010) (defendant's possession of alcohol, youthful appearance, presence in area known for underage drinking, and refusal to produce identification taken together roused reasonable suspicion he was subject to an outstanding warrant for underage drinking); *U.S. v. Kirksey*, 485 F.3d 955, 957 (7th Cir. 2007) (explaining officer may take additional, reasonable amount of time to check for outstanding warrants if the individual is already under reasonable suspicion of committing another crime).

In this case, the trial judge denied the suppression motion on grounds that no testimony showed Petitioner did not refuse Godfrey's request for identification, and therefore the encounter was consensual rather than a seizure. However, based on his testimony at the PCR hearing, Petitioner would have clarified that the encounter was not consensual: He refused Godfrey's initial request for identification, and Godfrey responded that he would call for backup if Petitioner did not comply. Godfrey proceeded to write the driver a ticket and then continued pressing Petitioner for identifying information. At some point Godfrey obtained Petitioner's information and ran a warrant check on him. For the duration of the encounter—approximately thirty minutes—Godfrey did not allow the occupants to leave.

Under these circumstances, Godfrey seized Petitioner beyond the traffic stop first and foremost after Petitioner's initial refusal when Godfrey threatened Petitioner and demanded his information. While Godfrey's initial request for Petitioner's information was within the scope of the stop, nothing compelled Petitioner to comply, and he was entitled to refuse. Godfrey's coercive interactions with Petitioner from that point on constituted a separate seizure that continued through his search for outstanding warrants against Petitioner while Petitioner waited in the back of the Stratus.


Moreover, this additional seizure was not independently justified. Petitioner's refusal to provide identifying information, standing alone, did not create a reasonable suspicion justifying further investigation through a warrant check. The refusal also did not justify a warrant search based on concerns of Godfrey's safety. A narrowly tailored seizure for safety reasons would have allowed Godfrey to order Petitioner out of the car and perhaps detain him in handcuffs or pat him down, but it would not support leaving Petitioner unattended in the Stratus while Godfrey ran a warrants check in his patrol vehicle.

Overall, the thirty minute encounter went well beyond what was reasonable to execute the traffic stop for speeding, and Petitioner's testimony would have established it constituted a seizure under the Fourth Amendment because it was not consensual. Petitioner's testimony was critical to suppressing the drug evidence, and the PCR court erred in concluding that presenting it would not have required the trial court to grant the motion to suppress.

CONCLUSION

For these reasons, Petitioner respectfully requests that this Court grant the petition for certiorari to decide Petitioner's appellate issues and to allow full briefing on the Issue II discussed above.

Respectfully submitted,

  
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Benjamin John Tripp  
Appellate Defender

ATTORNEY FOR PETITIONER

This 6th day of March, 2015.

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Greenville County  
D. Garrison Hill, Circuit Court Judge

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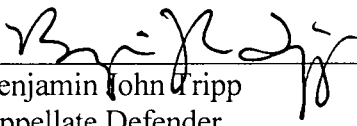
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CERTIFICATE OF SERVICE

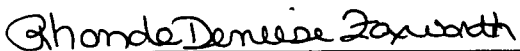
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I certify that a true copy of the petition for writ of certiorari and a copy of the appendix in this case have been served on Karen Ratigan, Esquire, Office of the Attorney General, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 6th day of March, 2015.

  
Benjamin John Tripp  
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 6th day  
of March, 2015.

 (L.S.)  
Notary Public for South Carolina  
My Commission Expires: October 17, 2021