

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Greenville County

Letitia H. Verdin, Circuit Court Judge

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OCT 12 2015

S.C. Supreme Court

KEVIN T. HARDY,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-000096

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

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ISSUE PRESENTED

Trial counsel erred in failing to object to the illegal traffic stop of petitioner on the basis of discrimination due to racial profiling because one reason for the stop was that petitioner was a “black male driving alone,” which constituted an unconstitutional race-based rationale prohibited by the Fourteenth Amendment Equal Protection Clause.

STATEMENT

Petitioner Kevin T. Hardy was convicted of trafficking in cocaine (400 or more grams) and trafficking in cocaine (28 or more grams) per a jury trial held during the June 2009 term of the Greenville County General Sessions Court before Judge Edward G. Welmaker. Petitioner was sentenced to imprisonment for a period of twenty-five years. Symmes Culbertson represented petitioner at trial, and Assistant Solicitor Joyce Monts appeared on behalf of the state. Petitioner appealed, but his convictions and sentences were affirmed. See State v. Hardy, Opinion No. 2012-UP-315 (S.C. Ct. App. filed May 23, 2012). Lanelle C. Durant, of the Office of Appellate Defense, represented petitioner on appeal.

On March 12, 2013, petitioner filed a PCR application with the Greenville County Office of the Clerk of Court. App. 225 – 232. The respondent filed a return dated October 23, 2013, requesting that a hearing be held in the case. App. 233 – 238. A PCR hearing was convened on October 22, 2014, at the Greenville County Courthouse before Judge Letitia H. Verdin. App. 240 – 181. Petitioner was present at the hearing and represented by Brian Johnson, and Assistant Attorney General Karen Ratigan appeared on behalf of the state.

On December 8, 2014, Judge Verdin issued an Order of Dismissal therein denying petitioner's allegations of ineffective assistance of trial counsel in the case. App. 283 – 291.

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

ARGUMENT

Trial counsel erred in failing to object to the illegal traffic stop of petitioner on the basis of discrimination due to racial profiling because one reason for the stop was that petitioner was a “black male driving alone,” which constituted an unconstitutional race-based rationale prohibited by the Fourteenth Amendment Equal Protection Clause.

Petitioner stood trial on trafficking charges emanating from a traffic stop and a positive dog sniff for drugs that occurred thereafter. During a pretrial hearing held regarding the legality of the traffic stop, Police Officer Dale Owens testified that shortly after 8:00 p.m. on July 27, 2005, he noticed a male, subsequently identified as petitioner, driving a vehicle “below the posted speed limit in the center lane.....impeding...the flow of traffic” while he was patrolling on Interstate 85 in Greenville County, South Carolina. Additionally, Officer Owens stated that he observed a crack on the windshield of petitioner’s vehicle, and that petitioner made an improper lane change, and lastly that petitioner was the “sole [and black] occupant in the vehicle.” App. 7, l. 4 – p. 9, l. 1. Officer Owens added that after petitioner stopped his vehicle, he approached petitioner and suspected criminal activity when he observed the following:

- 1.) one bag on the rear seat;
- 2.) one black make driver occupant;
- 3.) numerous air fresheners;
- 4.) one cell phone;
- 5.) one map;
- 6.) one fast food bag; and the
- 7.) driver’s hand shaking and accelerated pulse/heart rate. App. 9, l. 2-16; App. 10 lines 20-24.

Police Officer Owens asked petitioner to exit the car and a pat down search followed. The search yielded a large amount of money in petitioner's left front pocket. App. 11, l. 18 – 25. Owens stated that he was going to write a warning, but later, while he was waiting for the dispatcher to report on the VIN number of the vehicle driven by petitioner, he decided to ask petitioner for consent to search his vehicle. Petitioner responded with a “no” answer. App. 15, l. 7 – p. 16, l. 11. By this time, troopers with dogs arrived on the scene and the dogs alerted to drugs being present in the vehicle. App. 16, l. 12 – p. 17, l. 25. Afterwards, cocaine was retrieved from petitioner's vehicle. Counsel objected to the search on the ground that there was no justification for the prolonged search in this case that led ultimately to the dog sniff of petitioner's vehicle. App. 39, l. 21 – p. 40, l. 8. The trial judge ruled that under the totality of the circumstances, sufficient reasonable suspicion existed in the case to support the extended detention of the traffic stop of petitioner. App. 45, l. 24 – p. 46, l. 19. Note that petitioner did not testify at trial.

On direct appeal, appellate counsel cited to error where the trial judge allowed the use the “one black male” factor as reason to stop and search petitioner's vehicle because this was discriminatory and in violation of the Equal Protection Clause of the Fourteenth Amendment. However, the appellate court failed to rule on this particular issue because trial counsel did not object to the same. The South Carolina Court of Appeals' opinion expounded on why this issue was not reviewable on direct appeal as follows:

We further find no merit to [petitioner's] contention the trial court erred in “allowing the State to present, as one of the factors for reasonable suspicion to search, ‘one black male driving alone’ which was discriminatory and violated the Equal Protection Clause of the United States Constitution.” This issue if not preserved for review. Although [petitioner's] trial counsel questioned the officer concerning consideration of a “black male driving alone” as a factor to support reasonable suspicion, [petitioner] never argued to the trial court that the State had presented such a factor or that I should not be allowed to present such a factor, never argued to the trial court that such amounted to selective enforcement, and never asserted that it was a violation of his right to equal

protection. In fact, [petitioner] raised no objection or motion in regard to this matter whatsoever. See State v. Jennings, 394 S.C. 473, 481-82, 716 S.E.2d 91, 95 (2011) (holding the rule that for an issue to be properly preserved it has to be raised to and ruled on by the trial court also applies to constitutional arguments); State v. McKnight, 352 S.C. 635, 646, 576 S.E.2d 168, 174 (2003) (noting contention must be raised to and ruled upon by trial court to be preserved for appellate review); State v. Haigler, 334 S.C. 623, 632, 515 S.E.2d 88, 92 (1999) (noting a constructional argument is not preserved for appeal where the appellant fails to argue the constitutional basis for this request at trial). Supp. App. 2-4.

The only other issue of merit argued by trial counsel in the case was a motion to suppress the drugs due to the fact that the police unlawfully prolonged the search beyond the scope of the purpose of the traffic stop in order to bring on a dog sniff wherein after the drugs were found. This issue was addressed on appeal, but deemed not to be reversible error by the appellate court.

During the PCR hearing, petitioner testified in effect that trial counsel preserved the issue of suppressing the drugs because the search was prolonged well outside the purpose of the stop, but that counsel failed to object to the initial stop as an illegal stop and the search that followed on the ground that the stop was discriminatory in that it was initiated on the basis of race (“one black make driving alone”) due to racial profiling, which in effect precluded appellate review of such an issue. App. 253, l. 20 – p. 254, l. 16; App. 258, l. 4 – p. 260, l. 7.

Trial counsel testified at the PCR hearing. His admission regarding error in failing to raise the illegal stop issue based on racial profiling as follows:

Q. Mr. Hardy had argued today that you should have brought up the issue of racial profiling. Is that something you considered at the time?

A. You know, sitting here today, it is my personal opinion Mr. Hardy was stopped for driving while black. That was not an issue that got raised at trial... I don't think there was any clear-cut evidence at trial that that actually transpired or took place. While that might have been my personal feeling, there was no evidence to support that other than the testimony of the officer as to why he stopped him.

Q. Now, you stated that you believe that he was basically pulled over for driving while black?

A. I did say that.

Q. Now, I believe you also testified that you didn't believe that you could prove it basically. I don't think you thought you could prove it or make that argument?

A. I don't know how you actually prove something like that. I think it is a difficult thing to prove that somebody got racially profiled and pulled over. I think there were certainly some indications that transpired in this case. There was, in my opinion, no concrete evidence to show that...the allegation...[that]...the reason he was stopped was because he was black, I don't – that is a difficult argument to make that the only reason he was stopped was because he was black. I tried to point out to the judge the stated reasons for his stop was somewhat questionable.

App. 273, lines. 8-22; App. 275, l. 17 – p. 276, l. 15.

The PCR judge ruled that petitioner failed to establish counsel's ineffectiveness by not raising the issue of racial profiling as a basis for the traffic stop because "the [police] officer's subsequent testimony [made] it clear that [petitioner's] race was not included as one of the factors to support reasonable suspicion to extend the stop." App. 287 – 288.

In Rodriguez v. United States, 135 S. Ct. 1609 (2015)¹ the United States Supreme Court held that a routine traffic stop under Terry v. Ohio, 392 U.S. 1 (1968), based on reasonable suspicion must be justified at its inception. Moreover, the temporary detention of an individual during a traffic stop must not be unreasonable under the Fourth Amendment, which means that "stops...based on such considerations as race...are precluded by the Equal Protection Clause of the Fourteenth Amendment. See Maryland State Conference of NAACP Branches et al. v. Maryland State Police, 454 F. Supp.2d 339 (2006), citing to Whren v. United States, 517 U.S. 806 (1996). In

¹ In Rodriguez, the United States Supreme Court remanded on the issue of whether the stop of the motorist was prolonged beyond the purpose of the stop in order to conduct a dog sniff test.

the Maryland case, the plaintiff (black male driver) reported that after asking the officer why he (black male driver) was stopped and if he had been speeding,² the officer responded “no, not really,” and proceeded to ask if drugs or firearms were in the car, and then requested consent to search the car. 454 F. Supp. 2nd at 345. The Court in the Maryland case found that the “not really” response did not justify the stop, and that this violated the plaintiff’s Fourth and Fourteenth Amendment rights as this scenario constituted circumstantial evidence of racial profiling.

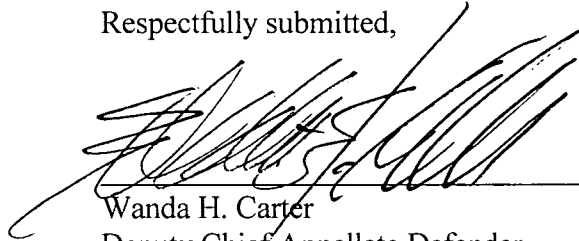
Here, Officer Owens’ inclusion of the factor of “one black male driving alone” as reasonable suspicion to initiate a traffic stop of petitioner was a discriminatory basis for the stop because this involved racial profiling. Hence, the argument that the traffic stop was race-based and thus illegal was available for trial counsel to present at trial, particularly since the remaining reasons for the stop were matters of **pretext**. In order to establish an equal protection violation, one must establish that he or she was intentionally and purposefully subjected to treatment different from others similarly situated. TNS Mills Inc. v. S.C. Dep’t of Revenue, 331 S.C. 611, 503 S.E.2d 471 (1998); Village of Willowbrook v. Olech, 528 U.S. 562 (2000). Counsel’s failure to raise this issue in question as a ground to challenge the stop as illegal and to suppress the drugs seized in petitioner’s case was tantamount to deficient legal representation of petitioner in violation of his Sixth Amendment right to receipt of effective legal representation in a criminal case. See Strickland v. Washington, 466 U.S. 68 (1984). Also, but for counsel’s error in this regard, a reasonable probability exists that the pretrial motion to suppress most likely would have been granted at best, or in the alternate, the issue would have been preserved for appellate review at the very least.

² Plaintiff alleged he was traveling at approximately 70 miles per hour southbound on Interstate 95....in the middle lane of traffic driving at the same speed as the vehicles visible to him, on cruise control. 454 F. Supp. 2d at 345.

CONCLUSION

Based on the foregoing argument, counsel for petitioner requests that the petition be granted and full briefing allowed on the issue raised above in the case.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Wanda H. Carter', written over a horizontal line.

Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER

This 12th day of October, 2015.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Greenville County

Letitia H. Verdin, Circuit Court Judge

KEVIN T. HARDY,

PETITIONER,

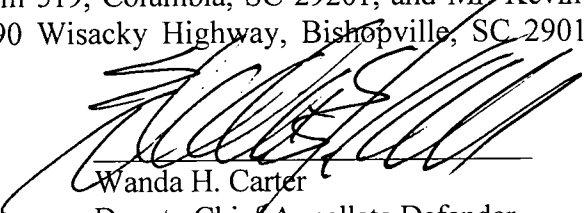
V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

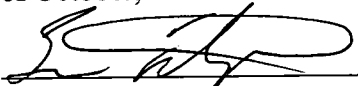
I certify that a true copy of the petition for writ of certiorari and a copy of the appendix and supplemental appendix in this case have been served on Karen Ratigan, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Mr. Kevin Hardy #335620, at Lee Correctional Institution, 990 Wisacky Highway, Bishopville, SC 29010, this 12th day of October, 2015.



Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 12th day
of October, 2015.



(L.S.)
Notary Public for South Carolina

My Commission Expires: October 30, 2022.