

 ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Greenville County

Letitia H. Verdin, Circuit Court Judge

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S.C. Supreme Court

MARLIN HUTLEY,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-000104

JOHNSON PETITION FOR WRIT OF CERTIORARI

BENJAMIN JOHN TRIPP
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South Carolina Commission on Indigent Defense
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ATTORNEY FOR PETITIONER

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ISSUE PRESENTED

Whether the record supports the PCR court's finding that trial counsel was not ineffective for failing to investigate the audio recording of a dispatch communication from a police officer who stopped Petitioner's vehicle where trial counsel's only defense strategy was to prove the stop was pretextual and therefore illegal but where he could not even remember looking into the recording.

STATEMENT

On December 14, 2010, Petitioner Marlin Hutley was indicted by the Greenville County Grand Jury for trafficking crack-cocaine and possession with the intent to distribute (PWID) cocaine, third offense. App. 81 – 84. On October 10, 2011, Petitioner proceeded to a bench trial before the Honorable Robin B. Stilwell. Petitioner was represented by Scott Robinson, and the State was represented by Assistant Solicitors Kayce McCall and Howard Steinberg. App. 1.

The State alleged that on January 25, 2010, Officer Jeffrey Hines conducted a traffic stop on the vehicle Petitioner was driving. App. 9, l. 19 – 12, l. 25. The drug evidence in this case was found on Petitioner’s person during a search incident to arrest. App. 29, ll. 1-12. A suppression hearing was held pre-trial to determine the constitutionality of the traffic stop and the admissibility of the drug evidence. App. 4, l. 12 – 42, l. 23.

Officer Hines of the Greenville City Police Department testified that on January 25, 2010, he conducted a traffic stop because Petitioner’s vehicle did not come to a complete stop “at the stop sign located at the intersection at West Washington and Washington Street Extension.” App. 11, ll. 1-21. Officer Hines asserted that the driver of the vehicle, Petitioner, told him that he did not have a driver’s license and that his name was Michael Cooper. App. App. 12, ll. 8-15. Officer Hines also maintained that he “recognized [Petitioner] from a prior incident” and that he “knew that [Petitioner’s] name was not Michael Cooper.” App. 12, ll. 16-18. Officer Hines further claimed that he issued a warning ticket for the stop sign violation and placed Petitioner under arrest for giving a false name to police and for driving without a valid driver’s license. App. 13, l. 16 – 14, l. 17.

At the suppression hearing, Petitioner acknowledged that he pled guilty to giving a false name to police, but he testified that he came to a complete stop at the stop sign. App. 32, l. 6 – 33, l.

13. Petitioner also testified that he never received a warning ticket for failing to stop at the stop sign. App. 33, ll. 17-21. Petitioner revealed that Officer Hines had previously arrested him and that Officer Hines informed him that he was the first person to “beat” one of his cases as Petitioner left the courthouse in regards to that prior arrest. App. 35, ll. 3-20.

At the conclusion of the suppression hearing, the trial court found that: (1) “the officer’s testimony is credible with respect to the reasoning for the initial stop[;]” (2) “the false name that was given to the police . . . was [a] justifiable reason for the arrest[;]” and (3) “there was . . . a legal stop incident to the suspicion of [Appellant] having violated a traffic law” App. 42, ll. 11-23.

At the conclusion of the trial, the judge found Appellant guilty as charged. App. 65, ll. 5-24. The judge then sentenced Appellant to twenty-five years imprisonment on the trafficking crack-cocaine conviction and fifteen years imprisonment on the PWID cocaine conviction. App. 72, ll. 1-7. The sentences were to run concurrently for a total of twenty-five years imprisonment. App. 85 – 86.

On December 30, 2013, Petitioner filed an application for post-conviction relief (PCR) claiming ineffective assistance of counsel. App. 80-99. The State filed a return on May 21, 2014. App. 100-104. On October 22, 2014, Petitioner appeared at an evidentiary hearing before The Honorable Letitia H. Verdin. Brian Johnson represented Petitioner and Karen Ratigan represented the State. App. 123.

Petitioner testified that when initially approaching Petitioner’s car during the traffic stop, Officer Hines stopped, backed up, and radioed to police dispatch for his license plate information. App. 131, lines 8-15. He said Officer Hines also never issued Petitioner a traffic ticket for the alleged failure to stop. App. 140, lines 13-19; App. 145, line 13—App. 146, line 1. Petitioner explained that although Officer Hine’s radio communication would prove that the traffic stop was

pretextual, he was never able to review a recording in his discovery. App. 135, line 25—App. 136, line 6; App. 137, line 25—App. 138, line 6.

Trial counsel then testified that his only strategy to defend Petitioner was to suppress the evidence from the stop based on the stop's illegality. App. 153, lines 6-12. Nevertheless, he made clear that he had no recollection of obtaining or listening to a recording of Officer Hine's radio communications. App. 151line 19—App. 152, line 20; App. 154, lines 10-19.

On December 8, 2014, the PCR court issued its order of dismissal concluding Petitioner failed to establish ineffective assistance of counsel. App. 166—App. 174. Specifically, the court stated Petitioner did not demonstrate that trial counsel's failure to investigate the audio recording of Officer Hines' communication with dispatch was ineffective. App. 171.

ARGUMENT

The record does not support the PCR court's conclusion that trial counsel adequately investigated the audio recording of Officer Hines' communication with dispatch.

The record does not support the PCR court's conclusion that trial counsel adequately investigated the audio recording of Officer Hines' communication with dispatch. 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). The United States Supreme Court has created a two-pronged test to establish ineffective assistance of counsel by which a PCR applicant must show (1) counsel's performance was deficient, and (2) the deficient performance prejudiced the defendant. *Id.* at 687.

“[A]n attorney must at a minimum, ‘conduct appropriate investigations, both factual and legal, to determine if matters of defense can be developed, and to allow himself enough time for reflection and preparation for trial.’” *Sneed v. Smith*, 670 F.2d 1348, 1353 (4th CiApp. 1982) (quoting *Coles v. Peyton*, 389 F.2d 224, 226 (4th CiApp. 1968)). In determining whether a criminal defense counsel sufficiently investigated and presented evidence favorable to the defendant, a court must identify an affirmative decision not to proceed with the evidence and assess the reasonableness of the decision under the facts and circumstances within counsel's knowledge:

“[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.”

Wiggins v. Smith, 539 U.S. 510, 521-22 (2003) (quoting *Strickland v. Washington*, 466 U.S. 668, 690-91 (1984)). See also *Lounds v. State*, 380 S.C. 454, 463, 670 S.E.2d 646, 650 (2008) (“The validity of counsel’s strategy is reviewed under ‘an objective standard of reasonableness.’” (quoting *Ingle v. State*, 348 S.C 467, 470, 560 S.E.2d 401, 402 (2002))).

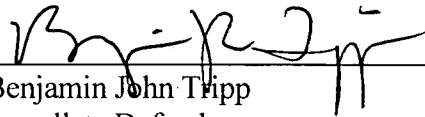
In this case, no evidence was presented at the PCR hearing to identify an affirmative decision by trial counsel not to investigate the audio recording of Officer Hines’ communication with dispatch. He testified that his only strategy to defend Petitioner was to suppress the evidence from the stop based on the stop’s illegality. He could only state that he had no recollection of obtaining or listening to a recording of Officer Hine’s radio communications. In no way did he even allude to an affirmative decision as to whether to try to obtain or listen to the recording.

Furthermore, reasonable professional judgment did not support this limitation of his investigation. Petitioner set forth clear circumstances and a motive showing Officer Hines’ stop was pretextual. Although Petitioner came to a complete stop at the stop sign and made no traffic violation, Hines pulled him over. Hines acted unduly suspicious of Petitioner in approaching his car and never issued a warning ticket for failing to stop at the stop sign. He had a motive to arrest Petitioner regardless of justification based on Petitioner’s having “beat” his previous accusations. Based on these circumstances, failing to review Hines’s unfiltered audio communication with dispatch while making the ostensibly pretextual stop could not reasonably be justified. Thus, trial counsel failed in his duty to make a reasonable decision that made investigating the recording unnecessary. The record does not support PCR court’s conclusion that his failure did not result in ineffective assistance, and this Court should reverse.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Court grant his petition for writ of certiorari to allow full briefing on the issue.

Respectfully submitted,



Benjamin John Tripp
Appellate Defender

ATTORNEY FOR PETITIONER

This 7th day of October, 2015.

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IN THE SUPREME COURT

CERTIORARI TO GREENVILLE COUNTY
LETITIA H. VERDIN, CIRCUIT COURT JUDGE

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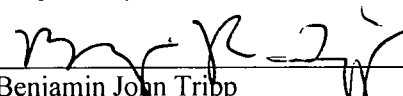
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Marlin Hutley states:

1. He is an Appellate Defender for the South Carolina Office of Appellate Defense and was appointed to represent petitioner.
2. He has reviewed the records and transcript of petitioner's post-conviction relief hearing which was held on October 22, 2014. In his opinion seeking certiorari from the order of dismissal is without merit.
3. He 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 him as counsel for Marlin Hutley.

Respectfully submitted,


Benjamin John Tripp
Appellate Defender
ATTORNEY FOR PETITIONER

This 7th day of October, 2015

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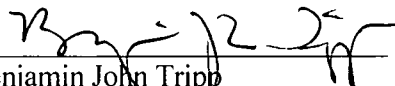
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CERTIFICATE OF SERVICE


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 Karen Ratigan, Esquire and Marlin Hutley, #240707, at Lieber Correctional Institution this 7th day of October, 2015.



Benjamin John Tripp
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 7th day
of October, 2015.


_____(L.S.)
Notary Public for South Carolina

My Commission Expires: May 12, 2025.