STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

The Honorable G. Edward Welmaker, Trial Judge
The Honorable Daniel D. Hall, Post-Conviction Relief Judge

Appellate Case No. 2015-001459

Travell Levone Hill, ... Respondent/Petitioner,

v.

State of South Carolina, ... Petitioner/Respondent.

PETITIONER/RESPONDENT'S
PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Did the PCR judge err in finding trial counsel erred in not objecting to the admission of the drug evidence during trial and that Respondent suffered prejudice as a result?

STATEMENT OF THE CASE

The Greenville County Grand Jury indicted Respondent/Petitioner (hereinafter "Respondent") at the October 2008 term for trafficking cocaine (2008-GS-23-6996). (App.pp.316-18). Christopher T. Posey, Esquire represented Respondent.

After the State called the case to trial, Respondent was found guilty. On March 31, 2010, the Honorable G. Edward Welmaker sentenced Respondent to 27 years imprisonment. (App.p.181; p.315).

A notice of appeal was filed at the South Carolina Court of Appeals. Kathrine H. Hudgins, Esquire of the South Carolina Commission on Indigent Defense, Division of Appellate Defense perfected the appeal. (App.pp.183-97). The Court of Appeals affirmed Respondent's conviction and sentence. State v. Hill, Op. No. 2013-UP-198 (S.C. Ct. App. filed May 15, 2013). (App.pp.235-36). The remittitur was sent on June 4, 2013.

Respondent filed an application for post-conviction relief (PCR) on January 9, 2014 (2014-CP-23-0129) and later submitted an amended application signed by Respondent on February 13, 2015. (App.pp.237-43; pp.249-56). A hearing was held at the Greenville County Courthouse on February 18, 2015. (App.pp.257-85). Respondent was present and represented by C. Rauch Wise, Esquire. Karen C. Ratigan, Esquire of the South Carolina Attorney General's Office represented the State. In an order filed March 19, 2015, the Honorable Daniel D. Hall granted post-conviction relief on a single issue. (App.pp.288-98). After each party filed post-trial motions pursuant to Rule 59(e), SCRCP, Judge Hall filed a supplemental order on June 8, 2015 in which he denied relief

on all other issues raised at the PCR hearing. (App.pp.299-301; pp.302-05; pp.306-08; pp.309-14).

STANDARD OF REVIEW

The proper standard for review of a PCR evidentiary hearing is whether "any evidence of probative value" exists to sustain the post-conviction relief judge's findings. Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989). In a post-conviction relief proceeding, the applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985).

ARGUMENT

The PCR judge err in finding trial counsel erred in not objecting to the admission of the drug evidence during trial and that Respondent suffered prejudice as a result.

Certiorari is warranted in this case because the PCR judge erred in ordering a new trial based on trial counsel's failure to renew his in limine motion to suppress when the evidence was admitted at trial. This finding was error because Respondent failed to demonstrate both that trial counsel was deficient and he suffered prejudice as a result.

A.

Prior to voir dire, trial counsel stated he would make a suppression motion because the search was unconstitutional under State v. Williams, 351 S.C. 591, 571 S.E.2d 703 (Ct. App. 2002). (App.p.5). Trial counsel stated Respondent was the driver of a vehicle that was the subject of a traffic stop. (App.p.5). Trial counsel argued Respondent was issued a warning ticket for following another vehicle too closely and then law enforcement asked for consent to search the vehicle. (App.pp.5-6). Trial

counsel argued this action was based solely on the nervousness of Respondent and that there was no articulable evidence of any illegal activity. (App.p.6). Trial counsel further argued Respondent was not the proper person to give consent, as this vehicle belonged to a relative of the passenger of the vehicle. (App.p.6).

The assistant solicitor argued Respondent was not a valid driver on the vehicle's rental agreement and therefore did not have standing to argue a Fourth Amendment violation. (App.p.7). The assistant solicitor also argued the officer developed an articulable suspicion (according to his observations). (App.pp.7-8).

The trial judge determined he needed to hear testimony on the matter, so a jury was selected and then they proceeded with the suppression hearing. (App.p.8). Corporal Chasteen testified he performed a vehicle stop after he observed it "following a commercial vehicle at a distance that was unreasonably close." (App.pp.34-35). Corporal Chasteen testified he pulled into traffic, the vehicle changed lanes, and then the vehicle "slowed down well under the posted speed limit." (App.pp.35-36). Corporal Chasteen testified there were two people in the car, the driver (Respondent) provided his license and vehicle registration, the vehicle was a rental car.[1] (App.pp.36-38). Corporal Chasteen testified both occupants were nervous and did not make eye contact. (App.p.38). Corporal Chasteen testified Respondent "could not sit still in his seat, almost in a state of panic there, but just real fidgety. I noticed as he handed me his rental agreement the – his hands were noticeably trembling, shaking." (App.p.38). Corporal

[1] Corporal Chasteen testified he called for backup when he returned to his vehicle with the documents. (App.p.44).

Chasteen testified he "already noticed an indicator for potential criminal activity" and had Respondent exit the vehicle so he could issue a warrant for the traffic offenses. (App.pp.39). Corporal Chasteen discovered neither occupant was listed as a driver on the rental agreement and noted Respondent "continued to grow more nervous as the traffic stop continued." (App.p.40; p.42). Corporal Chasteen testified the passenger and Respondent had conflicting stories about their travel itinerary. (App.p.43). Corporal Chasteen testified on cross-examination that the "totality of the circumstances" – not just the occupants' nervousness – led to his articulable suspicion that there was criminal activity. (App.pp.46-47).

The trial judge denied the motion to suppress. The trial judge found Respondent did not have standing the make a Fourth Amendment challenge. The trial judge also said "I've tried to weigh it all and from the evidence that I've heard, I think there has been sufficient showing of articulable suspicious reasons by the officer." The trial judge found "there's enough factors that show he did have a reasonable basis for the detention." Aside from the nervousness of the parties, the trial judge also noted the long distance traveled by Respondent and the passenger and that neither were an authorized driver on the rental agreement. (App.pp.49-51).

B.

At trial, Corporal Chasteen testified to the same facts as he did in the suppression hearing. (App.pp.56-70). Corporal Chasteen testified that, immediately after issuing the traffic warning, he asked Respondent for consent to search the vehicle and Respondent refused. (App.p.70). Corporal Chasteen testified he asked his backup unit (a canine

officer) to "allow his dog, a scan of the vehicle." (App.p.70). Corporal Chasteen testified the dog alerted to the presence of drugs and he informed the vehicle's occupants they had probable cause to search the vehicle. (App.p.71). Corporal Chasteen testified they located cocaine under the carpet on the front passenger side of the vehicle. (App.p.73).

Officer Dowis testified he was the K-9 officer who responded to Chasteen's call for backup. (App.p.89; p.94). Officer Dowis confirmed Corporal Chasteen asked him "to run the canine for a refusal." (App.p.95). Officer Dowis testified his dog alerted on the front passenger seat. (App.p.96). Officer Dowis confirmed he found cocaine under the carpet of the front passenger seat. (App.pp.97-98).

Tyra Rodgers (the vehicle's passenger) stated Respondent suggested they drive from Virginia to Atlanta to go shopping, spend the night, and return. (App.pp.100-02; pp.104-05). Rodgers stated Respondent suggested they drive the car that had been rented for her use. (App.p.102). Rodgers stated Respondent used her cell phone while they were in a mall in Atlanta and told her that he was there to buy drugs. (App.pp.106-07). Rodgers stated Respondent left with his cousins and she received a call from the person who rented the vehicle for her (who wanted her to return the rental vehicle to Virginia). (App.pp.108-10). Rodgers stated she did not notice anything at her feet when she got back into the passenger side of the vehicle. (App.p.116).

James Armstrong of the Greenville County Department of Public Safety testified the total weight of cocaine in this case was 1187.79 grams. (App.p.132). When the cocaine was entered into evidence, trial counsel did not object. (App.p.134).

C.

At the PCR hearing, Respondent stated trial counsel did not properly preserve an issue regarding the search of the vehicle. (App.pp.262-63). Respondent stated trial counsel did not object when the evidence was introduced. (App.pp.263-64).

Trial counsel testified he was appointed to represent Respondent approximately five weeks before trial. (App.p.273). Trial counsel testified he met with Respondent eight to ten times, reviewed the discovery materials, and formulated a defense. (App.p.274). Trial counsel testified the trial strategy was to argue Respondent had no knowledge of the drugs and that they belonged to the vehicle's passenger. (App.pp.274-75). Trial counsel confirmed both that there was a full suppression hearing in this case and that he did not object when the cocaine was moved into evidence. Trial counsel testified this was a mistake and that he believed he was planning his closing argument at that time. (App.p.275; p.279).

In granting Respondent's application for post-conviction relief, the PCR judge found trial counsel's performance was deficient because he did not object to the introduction of the cocaine into evidence at trial. The PCR judge found the result of the appeal would have been different if trial counsel had objected. (App.pp.295-96).[2]

D.

For an applicant to be granted PCR as a result of ineffective assistance of counsel, he must show both: (1) that his counsel failed to render reasonably effective assistance

[2] The PCR judge denied all other issues that were raised at the PCR hearing. (App.p.297; pp.309-14).

under prevailing professional norms, and (2) that he was prejudiced by his counsel's ineffective performance. See Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984); Porter v. State, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006). In order to prove prejudice, an applicant must show "there 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. at 117-18, 386 S.E.2d at 625. "A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984)).

E.

The PCR judge erred in finding Respondent met his burden of proving both that trial counsel was deficient and that he was prejudiced as a result. Specifically, Respondent failed to meet his burden of proving prejudice because he cannot demonstrate either his trial or appeal would have resulted differently if trial counsel had objected when the cocaine was moved into evidence at trial. See, e.g., Sikes v. State, 323 S.C. 28, 30, 448 S.E.2d 560, 562 (1994) ("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.") (citation omitted).

The trial judge correctly found the vehicle stop and subsequent search were lawful and properly denied trial counsel's motion to suppress. Corporal Chasteen was justified in effecting the traffic stop because Respondent had been following another vehicle too

closely and then, after moving to the far left lane, drove below the posted speed limit.[3] See State v. Provet, 405 S.C. 101, 108, 747 S.E.2d 453, 457 (2013) ("Violation of motor vehicle codes provides an officer reasonable suspicion to initiate a traffic stop."). Once this lawful traffic stop was initiated, Corporal Chasteen was then permitted to "request a driver's license and vehicle registration, run a computer check, and issue a citation." State v. Pichardo, 367 S.C. 84, 98, 623 S.E.2d 840, 847 (Ct. App. 2005) (citation omitted). Upon observing Respondent's demeanor (he was nervous, fidgety, did not make eye contact, and had trembling hands),[4] Corporal Chasteen was justified in asking Respondent to exit the vehicle in order to ensure officer safety. See Pennsylvania v. Mimms, 434 U.S. 106, 110-11, 98 S. Ct. 330, 333 (1977) (holding that, based on "the inordinate risk" to his or her safety that an officer faces while conducting a traffic stop, the officer may order the driver and any passengers to exit the vehicle pending the completion of the stop); United States v. Sakyi, 160 F.3d 164, 168 (4th Cir. 1998) (finding traffic stops pose "a meaningful level of risk to the safety of police officers" and noting "the substantial risk to police officers during traffic stops is too plain for argument.") (citations omitted).

In addition, Petitioner had no standing to challenge the subsequent search of the vehicle. In United States v. Wellons, 32 F.3d 117, 119-20 (4th Cir. 1994), the United States Court of Appeals for the Fourth Circuit held the defendant was not an authorized driver of a rental car and thus had no standing to challenge the search of the vehicle and

[3] App.pp.35-36; pp.58-59.
[4] App.p.38; p.62; pp.68-69.

subsequent seizure of drugs. The Fourth Circuit noted the defendant did not have a legitimate privacy interest in the rental car. Id. Similarly in this case, Respondent was not an authorized driver of the rental car. As such, he did not have standing to challenge the officers' search of the vehicle. Trial counsel would have been unsuccessful in objecting to the admission of the drug evidence at trial and the appellate court would not have reversed Respondent's conviction.

Furthermore, in his ruling upon the suppression motion, the trial judge clearly considered the totality of the circumstances in determining Corporal Chasteen had an articulate suspicion of criminal activity. See United States v. Branch, 537 F.3d 328, 337 (4th Cir. 2008); see also State v. Wallace, 392 S.C. 47, 52, 707 S.E.2d 451, 453 (Ct. App. 2011) ("In applying the concept of reasonable suspicion to the various facts of a case, '[i]t is the entire mosaic that counts, not single tiles.'") (quoting United States v. Whitehead, 849 F.2d 849 (4th Cir. 1988). The trial judge stated he had "weighed it all" and noted "there's enough factors that show" a reasonable basis for Corporal Chasteen's actions. (App.pp.49-51). Based on both Respondent's and Rodgers' demeanors, that they had given conflicting statements, and that neither individual was listed on the vehicle's rental agreement, Corporal Chasteen had reasonable suspicion of criminal activity and properly asked his backup officer (who was a K-9 unit) to perform an exterior scan of the vehicle. See Illinois v. Wardlow, 528 U.S. 119, 124, 120 S. Ct. 673, 676 (2000) (noting "nervous, evasive behavior is a pertinent factor in determining reasonable suspicion").

Even assuming arguendo that trial counsel had objected to the introduction of the drug evidence during trial, the denial of the motion to suppress would not have been a

meritorious issue on appeal. The trial judge was correct in finding Corporal Chasteen had an articulable suspicion of criminal activity that led to the detention and ultimate search of the vehicle. The trial judge's denial of the motion to suppress in this case was supported by the evidence and would not have been reversed on appeal. See State v. Tindall, 388 S.C. 518, 521, 698 S.E.2d 203, 205 (2010) ("On appeals from a motion to suppress based on Fourth Amendment grounds, this Court applies a deferential standard of review and will reverse if there is clear error."); see also State v. Brockman. 339 S.C. 57, 66, 528 S.E.2d 661, 666 (2000) ("[W]e will review the trial court's ruling like any other factual finding and reverse if there is clear error. We will affirm if there is any evidence to support the ruling."). Accordingly, Respondent cannot demonstrate he suffered prejudice from the lack of an objection when the cocaine was admitted into evidence during the trial. See Sikes v. State, 323 S.C. at 30, 448 S.E.2d at 562.

F.

As Respondent failed to meet his burden of proving both parts of the Strickland analysis of ineffective assistance of trial counsel on this issue, the PCR judge erred in granting post-conviction relief and ordering a new trial on his trafficking cocaine charge. See Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) ("The burden of proof is on the applicant to prove his allegations by a preponderance of the evidence.").

CONCLUSION

For the reasons stated above, this Court should grant the Petition for Writ of Certiorari and reverse the lower court's ruling. If this Court grants certiorari, the State asks permission under the rules to brief the issue discussed above fully.

Respectfully submitted,

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By: 
ATTORNEYS FOR PETITIONER/
RESPONDENT

December 4, 2015

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

The Honorable G. Edward Welmaker, Trial Judge
The Honorable Daniel D. Hall, Post-Conviction Relief Judge

Appellate Case No. 2015-001459

Travell Levone Hill,..... Respondent/Petitioner,

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State of South Carolina,..... Petitioner/Respondent.

CERTIFICATE OF SERVICE

I, Karen C. Ratigan, certify that I have today served the within Petitioner/Respondent's Petition for Writ of Certiorari upon Respondent/Petitioner by depositing a copy of the same in the United States mail, postage prepaid, addressed to:

C. Rauch Wise, Esquire
305 Main Street
Greenwood, SC 29646

I further certify that all parties required by Rule to be served have been served. This 4th day December, 2015.

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December 4, 2015

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

Re: **Travell Levone Hill v. State of South Carolina**
Appellate Case No: 2015-001459
Lower Court Case No: 2014-CP-23-0129

Dear Mr. Shearouse:

Enclosed for filing please find an original and six (6) copies of the **Petitioner/Respondent's Petition for Writ of Certiorari** in the above-referenced case. The Appendix was filed October 21, 2015.

Sincerely,

Karen C. Ratigan
Senior Assistant Deputy Attorney General
SC Bar #68331

KCR/jacc
Enclosures

cc: C. Rauch Wise, Esquire
Trisha Allen, Victim Services Counselor