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JAN 25 2016

S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas
Daniel D. Hall, Circuit Court Judge

Appellate Case No. 2015-001459

Travell L. Hill, ... Respondent-Petitioner,

vs

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

RETURN TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

The Respondent agrees with the Statement of the Case as set forth by the Petitioner.

ARGUMENT

Did the Post Conviction Relief Judge err when he determined that trial counsel was ineffective and the Applicant was prejudiced when trial counsel failed to object to the introduction of the drugs at trial after trial counsel had made apre-trial motion to suppress the evidence as a result of an illegal search and seizure?

Judge Daniel D. Hall, the Post Conviction relief judge, made two very distinct factual findings. He found that trial counsel was ineffective for failing to raise an objection at the time the drugs were introduced into evidence after having made a pretrial motion to suppress the evidence. He found "For an objection to be preserved for appellate review, the objection must be made at the time the evidence is presented." App. at 291. He cited the appropriate authority to support that conclusion. This conclusion is supported by ample evidence in the record as trial counsel in fact failed to object when the drugs were introduced into evidence. App. at 133, l 24 to 134, l 5.

Second Judge Hall found that the Applicant was prejudiced by the fact that the South Carolina Court of Appeals refused to rule upon the suppression issue because it was not preserved. "Therefore defense counsel's failure to object prevented him from effectively appealing his case." App. at 296. This fact is also supported by ample evidence in the record as the Court of Appeals did in fact refuse to rule on the issue because it was not preserved. The Court of Appeals said "A ruling in limine is not final; unless an objection is made at the time the evidence is offered and a final ruling procured, the issue is not preserved for review." App. at

236.

These are the two issues the PCR judge ruled upon in his order. He did not address the question of whether the Applicant would have been successful on his appeal. He found that the actions of trial counsel "prevented Hill from effectively appealing the case." App. at 296. Based upon these two findings, he granted Mr. Hill a new trial.

After the initial order was issued, counsel for Mr. Hill asked the PCR court to clarify the order as to whether the intent was to give Mr. Hill a new trial or a new appeal. App. at 303-304. In their Return to Motion to Alter or Amend they only asserted that the order was clear that the PCR judge had given Mr. Hill a new trial. They raised no issue concerning the sufficiency of the evidence to make such a ruling nor did they contend that the PCR judge did not rule on any issue. App. at 307. In fact they asserted that the trial judge had properly ruled on all issues. They never requested that the PCR judge rule on the merits of the legality of the stop and search. The State should have requested that the PCR judge rule on the legality of the stop and search in a Rule 59 motion. "A party must file such a motion when an issue or argument has been raised, but not ruled on, in order to preserve it for appellate review." *Elam v. S. Carolina Dep't of Transp.*, 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004)

Thus, as the PCR judge never ruled on the specific issue the Petitioner now asks this Court to rule upon, this Court should deny the Petition for Writ of Certiorari.

Did the arresting officer unlawfully seize Travell Hill when the Officer prolonged the traffic stop longer than was necessary when the officer did not have articulable suspension to further detain Mr. Hill?

On the merits of this issue, the trial judge at the original trial erred in failing to find that

Officer Shannon Chasteen improperly seized Travel Hill and searched the automobile he was driving when the officer did not have sufficient facts to detain Mr. Hill after the officer had written the warning ticket. Our Supreme Court has recognized that a traffic stop is a seizure of a person and is lawful when based upon sufficient facts. But"[a]ny further detention for questioning is beyond the scope of the stop and therefore illegal unless the officer has reasonable suspicion of a serious crime." *State v. Tindall*, 388 S.C. 518, 521, 698 S.E. 2d 203,205 (2010). In this case the further detention is not based upon articulable suspension.

In attempting to justify the continued detention of Mr. Hill, Officer Chasteen stated "First and foremost was just the nervousness of both the occupants."[1] App. At 38, ll 13-14. Based upon this nervousness alone he concluded, "At that point in time based upon my training and experience, I've already noticed an indicator for potential criminal activity." App. at 39, ll 2-4. No court has ever held that nervousness alone is sufficient to further detain a citizen.

He further testified that a mere lane change by Mr. Hill was "the first indicator that something could be possibly wrong." App. at 39, ll 10-11. He attributed Mr. Hill's lance change to be "[i]n [Mr. Hill's] mind he's creating distance." App. at 39, l 15. He never testified Mr. Hill was exceeding the speed limit. The reason for the stop was "for following too close and impeding traffic." App. at 39, ll 6-7.

He also testified the stories of Mr. Hill and the passenger were in conflict. App. at 43, ll 10-11. The conflict was Mr. Hill stated they went down to Atlanta to party and see a good friend.

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[1] Interestingly Tyra Rodgers testified at trial that she did not know the drugs were in the automobile. App. at 116, ll 2-6. She subsequently entered a plea to possession of cocaine with intent to distribute. Petitioner's Exhibit № 2.

App. at 43, ll 17-18. Ms. Rodgers stated she went to go shopping for shoes and see relatives. App. at 40, ll 19-21. He also stated he did not notice luggage in the automobile. App. at 41, ll 17-19.

After he had given Mr. Hill a warning ticket, Mr. Hill should have been free to go about his way. The officer had received no request from Avis to seize the automobile. App. at 47, 3-6. Mr. Hill driving a rental vehicle without being a designated driver violated no law. Instead of letting Mr. Hill leave, the officer asked for permission to search the automobile. This permission was denied. App. at 70, 7-16. At that point he refused to let Mr. Hill leave and instead asked Officer Brad Dowis to use his dog to search the automobile. Rec. on 70, ll 17-19. Officer Chasteen had previously radioed Officer Dowis to bring his dog to the scene. App. at 66, ll 15-22.

The trial court judge in his ruling noted that the factors stated by Officer Chasteen were susceptible to an innocent interpretation. App. at 50, ll 6-24. The primary basis for denying the motion to suppress was not that the prolonged detention of Mr. Hill was an unconstitutional seizure, but because he was not a driver on the rental contract. App. at 49, ll 16-22; 51, ll 4-6. In reliance upon this basis for denying the trial court cited *United States v. Wellons*, 32 F.3d 117, 118-119 (4th Cir. 1994) for the proposition that Mr. Hill did not have standing to object to the search fo the automobile. Such reliance is misplaced for two reasons. First the *Wellons* court said "The trooper soon learned that Hertz Corporation had confirmed that appellant was not listed as an authorized driver and had requested that the trooper, therefore, impound the car." *Id.* at 118-119. If the owner of the car had requested that the car be impounded, of course the driver did not have standing to object to the search. Those facts do not exist here. Second, the position of Mr. Hill is that the seizure of his person is improper. "A person is seized by the police and thus

entitled to challenge the government's action under the Fourth Amendment when the officer, 'by means of physical force or show of authority, terminates or restrains his freedom of movement . . . through means intentionally applied.'" *Brendlin v. California,* 551 U.S. 249, 254, (2007)(internal citations omitted). As our Supreme Court has said:

> We find the officer's continued detention of Tindall exceeded the scope of the traffic stop and constituted a seizure for purposes of the Fourth Amendment. A reasonable person in Tindall's position-seated in the front seat of the patrol car with two officers standing at his door, another officer to his left, and a police dog in the back seat-would not have felt free to terminate the encounter.

State v. Tindall, 388 S.C. 518, 522-523, 698 S.E.2d 203, 205 (2010) *See also, State v. Pichardo,* 367 S.C. 84, 98, 623 S.E.2d 840, 847-848 (2005*)* ("However, any further detention for questioning is beyond the scope of the stop and therefore illegal unless the officer has a reasonable suspicion of a serious crime.")

Here Officer Chasteen requested that a drug dog search the automobile after Mr. Hill had refused to consent to have his automobile searched. Two officers were present during the search. As in *Tindall*, with two police officers present and a drug dog, no reasonable person would have felt free to leave. The person of Mr. Hill had been seized without probable cause.

Officer Chasteen had no legal reason to continue the detention of Mr. Hill after the warning ticket was issued. In *Tindall* the driver was also driving a rental car of which he was not a designated driver. He seemed nervous and gave an inadequate explanation for his travels. The case is virtually identical to the present case. Even considering the totality of circumstances, Officer Chasteen had no basis to conclude that criminal activity was occurring. *See, State v. Moore,* 404 S.C. 634, 746 S.E.2d 352 (2014), *cert. granted* Nov. 20, 2014, *argued* May 19, 2015.

The Fourth Circuit has recently held that a non-designated driver of a rental car that would not be able to be turned in by the due date, who was unable to provide a permanent address in New York, and was traveling on Interstate 85 did not provide the officer with sufficient "suspicion that criminal activity is afoot to execute a brief investigatory detention." *U.S. v. Williams,* 808 F.3d 238, 245 (4th Cir. 2015). In this case, if Officer Chasteen believed that he had sufficient facts to believe that a serious crime was afoot, he would not have needed to ask permission to search the automobile nor would he have needed to give Mr. Hill the warning ticket. His asking permission is an indication he believed he he did not have a legal basis for the search. Certainly the refusal of Mr. Hill to permit the search of the car cannot be the basis for the search. As the Fourth Circuit has also said "However, an officer and the Government must do more than simply label a behavior as "suspicious"to make it so. The Government must also be able to either articulate why a particular behavior is suspicious or logically demonstrate, given the surrounding circumstances, that the behavior is likely to be indicative of some more sinister activity than may appear at first glance." *United States v. Foster*, 634 F.3d 243, 248 (4th Cir. 2011). In this case, Officer Chasteen had no objective factors that would make this stop suspicious of a crime being afoot then would be in most of his stops. Thus, the trial court erred in failing to suppress the evidence against Mr. Hill.

CONCLUSION

For the foegoing reasons this Court should deny the Petition for Writ of Certiorari.

January 18, 2016

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AFFIDAVIT OF SERVICE

PERSONALLY appeared before me Sandy Traynham who, after being duly sworn, deposes and says that she is the receptionist for C. Rauch Wise, Attorney for the Appellant in the above entitled case. That on January 19, 2016, she did deposit in the United States Mail with proper postage affixed thereto three copies of the ~~Reply~~ Return to Petition for Writ of Certiorari in the above case addressed to Karen Christine Ratigan, Office of the Attorney General, P.O. Box 11549, Columbia, South Carolina.

SWORN to and Subscribed

Sandy Traynham

before me this 20 day

of January, 2016.

Mary Jane Hartley (L.S.)
Notary Public for South Carolina
My Commission expires: 11/30/22

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January 20, 2016

Daniel Shearouse, Clerk
SC Supreme Court
P.O. Box 11330
Columbia, SC 29211

Re: Travell L. Hill vs The State, 2015-001459

Dear Mr. Shearouse:

Enclosed herewith is the original and six copes of the ~~Reply~~ Return to Petition for Writ of Certiorari concerning the above referenced matter, together with the original Affidavit of Service.

With kindest regards, I am

Very truly yours,

C. Rauch Wise

CRW/mjh
cc: Karen Christine Ratigan