

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

The Honorable Letitia H. Verdin, Circuit Court Judge

Appellate Case No. 2015-000096

RECEIVED

FEB 01 2016

SC SUPREME COURT

Kevin Tijuan Hardy, Petitioner,

v.

State of South Carolina, Respondent.

**RETURN TO PETITION FOR
WRIT OF CERTIORARI**

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QUESTION PRESENTED

1. Did trial counsel err 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 OF THE CASE

The Greenville County Grand Jury indicted Petitioner at the October 2005 term of General Sessions for trafficking cocaine, 400 or more grams (2005-GS-23-8183) and trafficking cocaine, more than 28 grams (2005-GS-23-8184). (App.pp.292-95). Symmes Culbertson, Esquire represented Petitioner.

After the State called the case to trial, Petitioner was found guilty. On June 17, 2009, the Honorable G. Edward Welmaker sentenced Petitioner to concurrent terms of 25 years for trafficking cocaine, 400 or more grams and 7 years for trafficking cocaine, 28-100 grams. (App.p.222).

A notice of appeal was filed at the South Carolina Court of Appeals. LaNelle C. DuRant, Esquire of the South Carolina Commission on Indigent Defense, Division of Appellate Defense represented Petitioner on appeal. The Court of Appeals affirmed the Petitioner's convictions and sentences. State v. Hardy, Op. No. 2012-UP-315 (S.C. Ct. App. filed May 23, 2012). (Supp.App.pp.2-5). The remittitur was sent on June 12, 2012.

Petitioner filed an application for post-conviction relief (PCR) on March 12, 2013 (2013-CP-23-1426). (App.pp.225-32). A hearing was held at the Greenville County Courthouse on October 22, 2014. (App.pp.240-81). Petitioner was present and represented by Brian P. Johnson, Esquire. Karen C. Ratigan, Esquire of the South Carolina Attorney General's Office represented Respondent. The Honorable Letitia H. Verdin denied relief in an order filed December 19, 2014. (App.pp.283-91).

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 did not err in finding Petitioner failed to meet his burden of proving trial counsel should have objected to the traffic stop on the basis of racial profiling.

Petitioner argues trial counsel erred in not objecting to the traffic stop on the basis of discrimination due to racial profiling because one reason for the stop was that Petitioner was a “black male driving alone.” (Cert. Pet., p.4). Petitioner’s argument is without merit.

A.

Petitioner was stopped on I-85 for driving and equipment infractions. During the course of the traffic stop, officers discovered five packages of narcotics in Petitioner’s trunk and placed him under arrest. (App.p.75). The packages contained 1.237 kilograms of cocaine and 60.70 grams of crack cocaine. (App.pp.167-68). At the outset of trial, a suppression hearing was conducted. (App.pp.6-46).

Trooper John Owens, an experienced officer with the Advanced Criminal Enforcement unit of the South Carolina Highway Patrol, detailed the circumstances of the traffic stop. Trooper Owens was patrolling I-85 when he observed Petitioner’s vehicle

going several miles per hour below the posted speed limit and impeding the flow of traffic. (App.pp.7-8). Additionally, Trooper Owens noticed Petitioner's windshield was cracked directly in the driver's line of sight. (App.p.8). Based on the driving and equipment violations, Trooper Owens moved to stop Petitioner's vehicle and observed Petitioner commit another traffic infraction by changing lanes without signaling. (App.p.8; p.22; pp.24-25).

After stopping Petitioner's vehicle, Trooper Owens approached the car and discovered there was "one black male driver occupant." (App.p.9; p.10). Trooper Owens observed one bag in the rear seat, numerous air fresheners, a cell phone, a map, and a fast food bag inside the vehicle. (App.p.9; p.10; pp.30-33). Trooper Owens noticed Petitioner had an accelerated heart rate and shaking hands. (App.p.9; p.10; pp.33-34). Trooper Owens advised Petitioner he would issue a warning for equipment and moving infractions, and asked for Petitioner's license and registration. (App.p.11; p.26). Though Petitioner had been advised he would receive a warning, Trooper Owens noticed his hands continued to shake "tremendously," Petitioner's heart rate and breathing remained accelerated and he began taking deep breaths. (App.p.11). Petitioner had also forgotten to deactivate his turn signal. (App.p.9; p.10; pp.34-35). Trooper Owens believed Petitioner's overtly nervous behavior was suspicious. (App.p.34).

After obtaining the license and registration, Trooper Owens asked Petitioner to step out of the vehicle, noticed a bulge in the pocket of his pants, and asked for permission to conduct a pat-down search. (App.p.11). He located a large sum of cash in Petitioner's pocket and then moved back towards his vehicle to write the warning (while

continuing to speak with Petitioner). (App.pp.11-12; p.27).

During his conversation with Petitioner, Petitioner revealed the address listed on his driver's license was incorrect because he had recently moved to Atlanta. (App.p.12; p.38). Petitioner stated he had been in Atlanta since the beginning of July, had not yet obtained employment, and was looking for a job. (App.p.12; p.36). Trooper Owens' suspicions were heightened based on his knowledge Atlanta was the southeastern hub for illegal drug activity and I-85 was a major drug corridor. (App.p.13; p.34).

Regarding the purpose of his trip, Petitioner stated he was going to Raleigh to get a criminal history report to enable him to get a job and was planning on staying for several days. (App.p.12; p.13). Trooper Owens became suspicious of Petitioner's response due to the fact a criminal history report was readily available from any local law enforcement agency. (App.p.12). His suspicions were further raised by the fact Petitioner was making a lengthy trip and had a large quantity of cash on hand even though Petitioner stated he had no job. (App.pp.12-13). Additionally, Trooper Owens believed Petitioner's answer was suspicious because Petitioner had moved to and was living in Atlanta without a job. (App.p.12). Shortly after the traffic stop began, Trooper Owens requested back-up based on his growing suspicions. (App.p.15; p.17; p.18).

Petitioner repeatedly invited the officer to check his criminal record, assuring Trooper Owens that he had never been in trouble before. (App.p.13). Trooper Owens believed Petitioner's overly-cooperative behavior was suspicious under the circumstances. (App.p.13).

Trooper Owens asked Petitioner if there were any illegal narcotics in his car and

Petitioner looked down and away before answering the question. (App.p.36). Based on his training and experience, Trooper Owens recognized Petitioner's body language as a sign of deception. (App.pp.36-37). Trooper Owens then asked Petitioner if he had any luggage in the car. (App.p.37). Petitioner hesitated before responding to the question, which Trooper Owens recognized as another sign of deception. (App.p.14; p.37). Immediately after answering the questions, Petitioner informed the officer his brother was in the military. (App.p.37). Trooper Owens found Petitioner's unprompted statement to be suspicious and designed to convince him Petitioner was a good person. (App.pp.37-38).

Trooper Owens testified the process had been prolonged because Petitioner reported living at an address inconsistent with the information on his license. (App.pp.14-15). He completed writing the warning citation, gave it to Petitioner with his license, and explained the citation. (App.p.16). After he finished explaining the citation, Trooper Owens immediately asked Petitioner for consent to search his vehicle based on the indicators of criminal activity he had observed during the stop. (App.p.16). After questioning about his right to consent, Petitioner denied the request. (App.p.16).

During the course of the traffic stop, Trooper Owens observed multiple factors he believed were indicators of criminal activity based on his training and experience, including: (1) the presence of numerous air fresheners, commonly used to mask the odor of narcotics; (2) the presence of a cell phone though Petitioner reported no source of income; (3) the presence of a road map even though Petitioner was returning to Raleigh, a city he was allegedly familiar with; (4) the tremendous shaking of Petitioner's hands; (5)

Petitioner's visibly-accelerated heart rate; (6) Petitioner's accelerated and deep breathing; (7) the continuation of Petitioner's outward signs of nervousness after he was advised he would only receive a warning; (8) Atlanta's status as a regional drug hub; (9) I-85's status as a drug corridor; (10) the turn signal left activated for the duration of the stop; (11) the large quantity of money in Petitioner's pocket without a source of income; (12) the extended travel without a source of income; (13) the lack of necessity for the travel based on Petitioner's stated reason of obtaining a criminal history report; (14) Petitioner's deceptive body language when asked if illegal narcotics were present in his vehicle; (15) Petitioner's overly-cooperative behavior; (16) the unsolicited volunteering of information designed to make Petitioner appear to be a good person; (17) Petitioner's hesitation when asked about luggage; (18) inconsistencies between Petitioner's self-reported address and the address listed on his license; (19) Petitioner's claim he had moved to and had been living in Atlanta without a job or source of income; (20) the presence of one bag on the rear seat; and (21) the presence of a fast food bag. (App.pp.9-14; pp.29-38). However, Trooper Owens specifically testified he did not consider Petitioner's race to be an indicator of criminal activity. (App.p.31). Based on these factors, Trooper Owens testified he extended the duration of the traffic stop after he issued the warning citation.

Following the officer's testimony, trial counsel conceded the initial traffic stop was justified. (App.p.40; p.45). However, trial counsel argued the drugs discovered during the stop should be suppressed because there was no justification to prolong the detention beyond the initial stop. (App.pp.39-40; p.45). Trial counsel contended Trooper Owens only possessed a suspicion of criminal activity as opposed to a reasonable belief.

App.p.45). In rebuttal, the assistant solicitor argued the observed indicators established a reasonable articulable suspicion to extend the traffic stop beyond its initial purpose. (App.p.44). The trial judge denied Petitioner's suppression motion, finding Trooper Owens articulated sufficient factors to justify further detention under the totality of the circumstances. (App.pp.45-46).

Trooper Owens offered nearly identical testimony when he testified during the State's case-in-chief at trial. (App.pp.59-122).

At the conclusion of the State's case, trial counsel renewed the suppression motion, arguing there was no justification to extend the stop beyond writing a ticket and the officer's testimony Petitioner was never free to leave made the stop illegal. (App.p.171; pp.172-73). The trial judge again denied the motion, finding sufficient factors had been presented to justify an extension of the stop under the totality of the circumstances. (App.pp.174-75).

B.

At the PCR hearing, Petitioner argued a reason for his traffic stop was because he had been racially profiled. Petitioner argued the appellate court could not review this issue because trial counsel did not make this objection at trial. (App.pp.258-59).

Trial counsel testified he did not argue racial profiling at trial because there was no "clear-cut evidence at trial that that actually transpired or took place." (App.p.273). Trial counsel testified "it is a difficult thing to prove that somebody got racially profiled and pulled over." (App.pp.275-76). Trial counsel testified there was "no concrete evidence" to support an argument for racial profiling. (App.p.276).

In denying Petitioner’s application for post-conviction relief, the PCR judge found Petitioner “failed to meet his burden of proving that trial counsel was ineffective for not further pursuing this issue.” The PCR judge noted “[a] substantial amount” of trial counsel’s cross-examination of Trooper Owens “was devoted to attacking the officer’s identification of reasonable suspicion during the early stages of the traffic stop.” (App.pp.287-88).

C.

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 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)).

D.

Petitioner failed to meet his burden of proving – under Strickland – either that (1) trial counsel erred in his performance and provided deficient representation or (2) he was prejudiced as a result.

Error

The PCR judge did not err in not making a specific argument that the traffic stop was unlawful because Trooper Owens had engaged in racial profiling of Petitioner.

Based on the evidence and testimony presented during the suppression hearing, trial counsel did not believe there was an adequate basis to contend the existence of racial profiling in this case. See, e.g., United States v. Armstrong, 517 U.S. 456, 116 S. Ct. 1480 (1996) (finding claims of selective, race-based law enforcement require a demanding standard of proof). During the suppression hearing, a single question was asked about Petitioner's race and Trooper Owens stated that a black male alone in a car did not give him reason to believe a criminal activity was taking place. (App.p.31). It is clear trial counsel, because no evidence or testimony supported an argument about racial profiling, simply chose to argue other reasons the evidence seized in the traffic stop should be suppressed. See Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 597 (2007) ("There is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case."); see also Wood v. Allen, 558 U.S. 290, 130 S. Ct. 841 (2010) (holding a strategic or tactical decision does not have to be articulated by counsel on the record and that it is enough that the record show a basis for strategy, not that counsel announce that strategy on the record).

There can be no error in trial counsel's decision not to pursue a racial profiling argument. This is highlighted by the language in the court of appeals' opinion affirming Petitioner's convictions and sentences. The court of appeals noted Trooper Owens

“referenced [Petitioner]’s race when he was discussing the details of what he observed after he stopped [Petitioner], and his subsequent testimony makes clear that this was not included as one of the factors to support reasonable suspicion to extend the stop.” (Supp.App.p.5). Further, Petitioner failed to support his argument at the PCR hearing with the introduction of evidence or testimony to corroborate the Trooper Owens racially profiled him. See Butler v. State, 286 S.C. at 442, 334 S.E.2d at 814. As such, Petitioner failed to meet his burden of proving trial counsel’s performance was deficient.

Prejudice

Petitioner also failed to demonstrate he was prejudiced by the lack of an argument concerning racial profiling. Petitioner cannot meet his burden of proving prejudice because there is no reasonable probability the result of his trial could have been different if trial counsel had made an argument about the existence of racial profiling. See Cherry v. State, 300 S.C. at 117-18, 386 S.E.2d at 625.

It is important to re-emphasize that, as noted supra, the mere fact that Trooper Owens referenced Petitioner’s race in his testimony did not establish that race was a factor used to justify the extension of the traffic stop. Trooper Owens, in fact, stated that a black male alone in a car did not give him reason to believe there was criminal activity. See, e.g., United States v. Suarez, 321 Fed. Appx. 302, 305 (4th Cir. 2009 (“Other than contradictory testimony on the issue of whether one officer described Appellants as ‘black,’ there is nothing in the joint appendix to suggest that race played any part in the traffic stop. The district court determined that even assuming the comment was made, it was merely a descriptor used to identify the vehicle’s occupants rather than evidence of

improper racial motivation.”).

Regardless, Petitioner cannot demonstrate prejudice because – even if trial counsel had raised a racial profiling argument – it would not have been successful at trial. Trooper Owens articulated more than 20 factors he believed were indicators of criminal activity (based on his training and experience). Petitioner failed to present any evidence or testimony at the PCR hearing that these factors were improper, non-existent, or unreliable. Petitioner cannot demonstrate he was prejudiced by trial counsel’s representation because the State presented overwhelming evidence of his guilt. Not only did Petitioner fail to rebut Trooper Owens’ numerous factors that were indicators of criminal activity, Petitioner also failed to demonstrate the subsequent search of his vehicle and seizure of a large volume of narcotics from the trunk were improper. There is no reasonable probability of an acquittal at Petitioner’s trial because the State presented overwhelming evidence of his guilt. See Franklin v. Catoe, 346 S.C. 563, 570 n. 3, 552 S.E.2d 718, 722 n. 3 (2001) (finding overwhelming evidence of guilt negated any claim that counsel’s deficient performance could have reasonably affected the result of defendant’s trial); Geter v. State, 305 S.C. 365, 367, 409 S.E.2d 344, 346 (1991) (concluding reasonable probability of a different result does not exist when there is overwhelming evidence of guilt). As such, Petitioner failed to meet his burden of proving he was prejudiced as the result of trial counsel’s decision not to pursue a racial profiling argument.

E.

Accordingly, Petitioner failed to prove the first prong of the Strickland test – that

trial counsel failed to render reasonably effective assistance under prevailing professional norms. Similarly, Petitioner also failed to prove the second prong of Strickland – that he was prejudiced by trial counsel’s performance.

As Petitioner failed to meet his burden of proving ineffective assistance of trial counsel on this issue, the PCR judge did not err in denying the PCR application. 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 foregoing reasons, Respondent submits this Court should deny the Petition for Writ of Certiorari. However, if this Court grants certiorari, Respondent requests the opportunity to fully brief the issue discussed above.

Respectfully submitted,

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By: 
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February 1, 2016

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

The Honorable Letitia H. Verdin, Circuit Court Judge

Appellate Case No. 2015-000096

Kevin Tijuan Hardy, Petitioner,

v.


State of South Carolina, Respondent.

CERTIFICATE OF SERVICE

I, Karen C. Ratigan, certify that I have today served the within Return to Petition for Writ of Certiorari upon Petitioner by depositing a copy of the same in inter-agency mail and addressed to:

Wanda H. Carter, Esquire
South Carolina Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, South Carolina 29211-1589

I further certify that all parties required by Rule to be served have been served.
This 1st day of February, 2016.


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February 1, 2016

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

Re: Kevin Tijuan Hardy v. State of South Carolina
Appellate Case No: 2015-000096
Lower Court Case No: 2013-CP-23-1426

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FEB 01 2016

SC SUPREME COURT

Dear Mr. Shearouse:

Enclosed for filing please find an original and six (6) copies of the **Return to Petition for Writ of Certiorari** in the above-captioned case. If there are any questions or comments, please do not hesitate to contact me at any time.

Sincerely,

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

KCR/jacc
Enclosures

cc: Wanda H. Carter, Esquire
Trisha Allen, Victim Services (without enclosure)