STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

The Honorable Robin B. Stilwell, Trial Judge
The Honorable James R. Barber, III, Post-Conviction Relief Judge

Appellate Case No. 2014-002386

Michael Milledge, ...Respondent,

v.

State of South Carolina, ...Petitioner.

BRIEF OF PETITIONER

ALAN WILSON
Attorney General

KAREN C. RATIGAN
Senior Assistant Attorney General
S.C. Bar # 68331

Post Office Box 11549
Columbia, S.C. 29211
(803) 734-3737

ATTORNEYS FOR PETITIONER

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

The Honorable Robin B. Stilwell, Trial Judge
The Honorable James R. Barber, III, Post-Conviction Relief Judge

---

Appellate Case No. 2014-002386

Michael Milledge, ...Respondent,

v.

State of South Carolina, ...Petitioner.

BRIEF OF PETITIONER

ALAN WILSON
Attorney General

KAREN C. RATIGAN
Senior Assistant Attorney General
S.C. Bar # 68331

Post Office Box 11549
Columbia, S.C. 29211
(803) 734-3737

ATTORNEYS FOR PETITIONER

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

STATEMENT OF ISSUE ON APPEAL

1. Did the PCR judge err in finding a new trial was warranted in this case because trial counsel failed to renew his in limine motion to suppress when the evidence was admitted at trial?

STATEMENT OF THE CASE

The Greenville County Grand Jury indicted Respondent for trafficking crack cocaine (2007-GS-23-7445, count 1), possession of a weapon during commission of a violent crime (2007-GS-23-7445, count 2), possession of ecstasy (2007-GS-23-7446), and possession with intent to distribute (PWID) cocaine (2007-GS-23-7447). (App.pp.269-70; pp.274-75; pp.278-79). Randall L. Chambers, Esquire represented Respondent.

After the State called the case to trial, Respondent was found guilty of the charges as indicted. On March 24, 2010, the Honorable Robin B. Stilwell sentenced Respondent to concurrent terms of twenty-five (25) years for trafficking crack cocaine, third offense, five (5) years for possession of a weapon during commission of a violent crime, one (1) year for possession of ecstasy, second offense, and twenty-five (25) years for PWID cocaine, third offense. (App.p.170; pp.267-68; p.273; p.277).

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 perfected the appeal. (App.pp.172-87). The Court of Appeals affirmed Respondent's convictions and sentences. State v. Milledge, Op. No. 2013-UP-273 (S.C. Ct. App. filed June 19, 2013). (App.pp.219-21). The remittitur was sent on July 9, 2013.

Respondent filed an application for post-conviction relief (PCR) on August 2, 2013 (2013-CP-23-4182). (App.pp.222-34). A hearing was held at the Greenville County Courthouse on August 28, 2014. (App.pp.240-61). Respondent was present and

represented by Brian P. Johnson, Esquire. Karen C. Ratigan, Esquire of the South Carolina Attorney General's Office represented the State. In an order filed October 28, 2014, the Honorable James R. Barber, III granted post-conviction relief and ordered a new trial. (App.pp.263-66).

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); Rule 71.1(e), SCRCP.

ARGUMENT

The PCR judge erred in granting a new trial in this case because Respondent did not meet his burden of proving both that trial counsel was deficient and that he suffered prejudice as a result.

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 subsequently admitted during trial. This finding was error because Respondent failed to meet his burden of proving both that trial counsel's representation was deficient and that he suffered prejudice as a result.

A.

There was a suppression hearing prior to the commencement of Respondent's trial. Trial counsel moved to suppress the narcotics (ecstasy, crack cocaine, and cocaine) and revolver that were discovered on Respondent's person during a traffic stop. Trial counsel argued the frisk search of Respondent was unlawful because there was no reason to believe Respondent was armed and dangerous. (App.pp.19-22).

Deputy John Lanning and Deputy Patrick Swift were riding together and observed

Respondent driving a vehicle with a cracked windshield and a missing rearview mirror. (App.pp.24-25; p.30). Deputy Lanning noted Respondent's vehicle was coming from the direction of some apartments where they "had served two SWAT narcotic search warrants" two weeks earlier. (App.p.24).[1] Deputy Lanning testified they performed a traffic stop because of the vehicle's cracked windshield. (App.p.25; pp.31-33). Deputy Lanning testified he approached the vehicle and that Respondent was nervous, avoided making eye contact, had shaking hands, and had a cell phone in one hand and his driver's license and registration in his other hand. (App.pp.25-26; pp.35-36; p.39). Deputy Lanning testified he walked away to verify Respondent's information and Deputy Swift approached Respondent's vehicle. (App.p.26).

Deputy Swift stated Respondent was nervous and "he was attempting to make a phone call on the cell phone. His hands were shaking so badly however that he couldn't dial the right number." (App.p.42). Deputy Swift testified he asked Respondent why his hands were shaking and Respondent answered it was because he was hot. (App.p.42). Deputy Swift stated he believed this was odd because people usually shake when they are cold. (App.p.43). Deputy Swift stated he told Respondent "well, I'm hot myself but my hands are not shaking." (App.p.43). Deputy Swift testified Respondent stopped answering questions, stared straight ahead, and avoided making eye contact. (App.p.43; p.46). Deputy Swift testified Respondent's actions made him nervous, so he asked Respondent to exit the vehicle. (App.pp.43-44; pp.45-46).

[1] Deputy Swift testified "[t]he general area in and of itself is a high crime area, high drug area." (App.p.41).

Deputy Lanning testified Respondent walked towards him at the rear of the vehicle, looked straight ahead, and did not make eye contact. (App.p.27). Deputy Lanning testified he asked Respondent if he had any weapons on his person and Respondent neither looked at him nor answered the question. (App.pp.27-28; p.39). Deputy Lanning testified he performed a pat down search and felt a revolver in the right front pocket of Respondent's shorts. (App.pp.28-29). Deputy Lanning testified he handcuffed Respondent and another deputy removed a revolver[2] and a bag with "the pills and the crack"[3] from his pocket. (App.p.29).

At the conclusion of the suppression hearing, the trial judge found the search was justified and reasonable under a totality of the circumstances. The trial judge found:

> [I]n the aggregate you have, first and foremost, the knowing and volitional transgression of a traffic law, which was defective equipment. Extreme nervousness, not nervousness as is customarily incident to a traffic stop but extreme nervousness to the extent that the phone couldn't be dialed. The fact that there was a phone called that being attempted at the time. The fact that it was a high drug use area, the reluctance or recalcitrance of [Respondent] to respond to any questions. And the dubiousness of the explanation for the shaking that the officer received when he asked or posed the first question. All of those things in the aggregate give me cause to believe that there was probable cause for the search.

(App.p.49).

During trial, trial counsel said he had no objection when the revolver and various narcotics were moved into evidence. (App.p.106; p.116). The jury deliberated for seven minutes before reaching a verdict that Respondent was guilty of all charges, as indicted. (App.p.160).

---

[2] Deputy Lanning testified at trial that the revolver was loaded. (App.p.94).
[3] Deputy Lanning testified at trial that the plastic bag contained two pills, two bags of suspected cocaine, and one bag of suspected cocaine base. (App.pp.97-100).

B.

At the post-conviction relief hearing, Respondent argued trial counsel was ineffective because he did not object when the evidence (a revolver and three types of narcotics) was entered at trial. (App.p.247; p.251). Respondent argued he would have prevailed upon appeal if the suppression issue had been preserved for review. (App.pp.253-54).

Trial counsel testified he believed the evidence should have been excluded at the suppression hearing because "it was a bad search." Trial counsel testified the defense argument was that Respondent's decision not to answer the officers' questions when he was stopped for a cracked windshield and missing rearview mirror was not a "sufficient legal basis for a stop and frisk." Trial counsel testified he believed he was able to articulate this argument at the suppression hearing and that "[he] did the best [he] could." (App.p.256).

In granting Respondent's application for post-conviction relief, the PCR judge found "trial counsel failed to render reasonably effective assistance under prevailing professional norms by failing to renew his *in limine* motion to suppress when evidence was admitted at trial." The PCR judge found Respondent demonstrated prejudice because "the limited factors asserted by the officers as providing justification for the pat down search do not give rise to the level of reasonable and articulable suspicion required by the Fourth Amendment." (App.p.265).

C.

For an applicant to be granted post-conviction relief as a result of ineffective

assistance of trial 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). "[C]ounsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Id. at 690, 104 S. Ct. at 2066. 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.

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. See Sellers v. State, 362 S.C. 182, 188, 607 S.E.2d 82, 85 (2005) (holding an applicant must show both error and prejudice to win post-conviction relief) (citation omitted). Specifically, Respondent failed to meet his burden of proving prejudice because he cannot demonstrate that either his trial – or subsequent appeal – would have had a different result if trial counsel objected when the revolver and narcotics were 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 found the pat down (or frisk) search of Respondent was lawful and properly denied trial counsel's motion to suppress. Deputies Lanning and Swift were justified in effecting a traffic stop because they noticed Respondent's vehicle had both a cracked windshield and a missing rearview mirror. See State v. Banda, 371 S.C. 245, 252, 639 S.E.2d 36, 40 (2006) ("The decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred."). Once this lawful traffic stop was initiated, Deputy Lanning 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 (nervousness, lack of eye contact, failing to answer questions, hands shaking to the point that he could not dial his cell phone), Deputy Swift 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). As Respondent exited the vehicle without making eye contact or answering Deputy Lanning's question about whether he

was armed, Deputy Lanning had reasonable suspicion to conduct a pat down or frisk search. See Arizona v. Johnson, 555 U.S. 323, 327, 129 S. Ct. 781, 784 (2009) (holding an officer may conduct a frisk search of the driver or passenger in the vehicle if the officer harbors "reasonable suspicion that the person subjected to the frisk is armed and dangerous"); Terry v. Ohio, 392 U.S. 1, 27, 88 S. Ct. 1868, 1883 (1968) ("The officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger.").

In his ruling upon the suppression motion, the trial judge clearly considered the totality of the circumstances in determining there was reasonable suspicion to conduct the frisk search. See United States v. Branch, 537 F.3d 328, 337 (4th Cir. 2008) ("A set of factors, each of which was individually quite consistent with innocent travel, could still, taken together, produce a reasonable suspicion of criminal activity.") (quotations omitted); 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 listed several of the events that gave rise to the officers' decision to have Respondent exit the vehicle and undergo a frisk search, noted he was considering these factors "in the aggregate," and concluded the search was lawful. (App.p.49).

Respondent's vehicle had a cracked windshield and missing rearview mirror. See State v. Banda, 371 S.C. at 252, 639 S.E.2d at 40. The vehicle was observed coming

from the direction of an apartment complex were drugs were found two weeks earlier. The area itself was known as a high crime area. See Illinois v. Wardlow, 528 U.S. 119, 124, 120 S. Ct. 673, 676 (2000) (recognizing one's presence in a high crime area is a relevant contextual consideration in a Terry analysis). Respondent did not make eye contact with the officers. Respondent was nervous and his hands were shaking to the extent that he could not properly dial his cell phone. See id. (noting "nervous, evasive behavior is a pertinent factor in determining reasonable suspicion"). Respondent stated his hands were shaking because he was hot. Respondent ceased answering the officers' questions after a comment was made about the unusual reaction of shaking hands in hot weather. Respondent did not respond when asked if he was armed. See State v. Smith, 329 S.C. 550, 557, 495 S.E.2d 798, 802 (Ct. App. 1998) (finding the officer was justified in performing a frisk search after the defendant behaved in an edgy manner and did not respond when asked whether he was armed). The totality of the circumstances led Deputies Lanning and Swift to have a reasonable suspicion Respondent was armed and posed a danger to their safety. See Terry v. Ohio, 392 U.S. at 24, 88 S. Ct. at 1881 ("When an officer is justified in believing that the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous to the officer or to others, it would appear to be clearly unreasonable to deny the officer the power to take necessary measures to determine whether the person is in fact carrying a weapon and to neutralize the threat of physical harm.").

Accordingly, it is clear the trial judge properly denied the motion to suppress the revolver and narcotics and that an objection to their admission into evidence at trial

would have been unsuccessful. The trial judge's denial of the motion to suppress in this case was abundantly 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."). As such, Respondent cannot demonstrate he suffered prejudice – either at the trial or appellate level – from the lack of an objection when the revolver and narcotics were admitted into evidence. See Sikes v. State, 323 S.C. at 30, 448 S.E.2d at 562.

E.

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 these charges. 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 reverse the post-conviction relief judge's decision to grant relief to Respondent in the form of a new trial.

Respectfully submitted,

ALAN WILSON
Attorney General

KAREN C. RATIGAN
Senior Assistant Attorney General
S.C. Bar # 68331

Post Office Box 11549
Columbia, S.C. 29211
(803) 734-3737

By: 
ATTORNEYS FOR PETITIONER

April 13, 2016

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

The Honorable Robin B. Stilwell, Trial Judge
The Honorable James R. Barber, III, Post-Conviction Relief Judge

---

Appellate Case No. 2014-002386

Michael Milledge, ...Respondent,

v.

State of South Carolina, ...Petitioner.

CERTIFICATE OF SERVICE

I, Karen C. Ratigan, certify that I have today served the within Brief of Petitioner upon Respondent by depositing a copy of the same in interagency mail and addressed to:

Susan B. Hackett, 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 13th day of April, 2016.

KAREN C. RATIGAN
S.C. Bar # 68331
Office of Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3737
ATTORNEY FOR PETITIONER

ALAN WILSON
ATTORNEY GENERAL

April 13, 2016

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

Re: **Michael Milledge v. State of South Carolina**
Appellate Case No. 2014-002386
Lower Court Case No. 2013-CP-23-4182

Dear Mr. Shearouse:

Attached are the original and fifteen (15) copies of the **Brief of Petitioner** in the above referenced case for filing in your office. Also, per Rule 243(j) included are thirteen (13) additional copies of the Appendix.

Sincerely,

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

KCR/jacc

cc: Susan B. Hackett, Esquire
Trisha Allen, Victim Services (without enclosure)