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SC SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Aiken County

Tanya A. Gee, Circuit Court Judge

TREVIS E. JOHNSON

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-001537

JOHNSON PETITION FOR WRIT OF CERTIORARI

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INDEX

ISSUE PRESENTED

Did the PCR judge err by finding trial counsel provided effective representation where counsel failed to properly argue his motion to suppress the drugs based on a lack of probable cause to arrest and failed to provide the trial judge with case law to support the motion to suppress where the judge denied counsel's motion and Petitioner was convicted and sentenced to twenty-five years' imprisonment?

STATEMENT OF FACTS

On December 18, 2007, Officer Aaron Fittery observed a Honda Accord speeding on Womrath Road in Aiken County, South Carolina. App. 53, ll. 1 – 10. Fittery began following the driver and activated the blue lights on his police car to initiate a traffic stop. App. 58, ll. 8 – 13. When the driver did not stop, Fittery continued following the car. App. 58, ll. 14 – 23. Fittery alleged the driver had failed to stop at two stop signs. App. 95, l. 11 – App. 69, l. 10.[1]

Fittery notified the police dispatcher that he was attempting to initiate a traffic stop and needed assistance. App. 59, ll. 7 – 9. The driver then pulled over, jumped out of the car, and ran. App. 58, l. 24 – App. 59, l. 6. Fittery ran behind the driver and observed him holding a black bag, which looked like a "woman's purse." App. 61, ll. 4 – 13. Fittery followed the driver into a "high-crime" neighborhood nearby, but lost sight of him and abandoned his pursuit. App. 63, ll. 2 – 7.

A "couple of minutes later," Officer John Rutland observed an individual walking who fit the description given to him by Fittery. App. 66, ll. 13 – 20. Rutland took the individual into custody and placed him in the patrol car. App. 66, ll. 21 – 24. Fittery arrived and identified the individual as the driver of the Honda Accord who ran, and ultimately as Petitioner. App. 66, ll. 13 – 20. Petitioner did not have a bag when Rutland stopped him. App. 66, ll. 23 – 24.

Officer Rutland then searched Petitioner and found over $800 in Petitioner's pants pocket. App. 67, l. 24 – App. 68, l. 4. Rutland retrieved his drug dog from his patrol vehicle and performed an "open air search" of the money which he had placed on the ground. App. 68, ll. 1

[1]During cross-examination at trial, Officer Fittery admitted that Petitioner running the two stop signs was not recorded by the camera on his patrol car. Fittery had not turned on the camera during the time Petitioner allegedly failed to stop at the stop signs. App. 95, l. 1 – App. 96, l. 10.

– 2. The drug dog "alerted" to the money which, according to Fittery, indicated the presence of drugs. App. 68, ll. 5 – 10. Based on the drug dog's "alert," Rutland proceeded to search that immediate area for "contraband." App. 68, ll. 5 – 10. However, there were no drugs found in the area. App. 68, ll. 16 – 18. Petitioner was then taken to the police station by a third officer who had responded to the scene. App. 68, ll. 20 – 24.

After Petitioner was taken away, Rutland and Fittery returned to the original location where Petitioner had stopped his car. App. 68, ll. 20 – 25. The officers conducted a drug dog search of Petitioner's car but, again, did not find any drugs. App. 70, ll. 13 – 15. The officers then led the drug dog along the path where Petitioner ran. App. 68, l. 11 – App. 69, l. 1. The drug dog led Rutland to an abandoned shed in a nearby neighborhood where officer Fittery had pursued Petitioner earlier. App. 76, ll. 9 – 25.

Officers discovered a black bag inside the shed underneath a work bench. App. 77, ll. 7 – 19. The black bag contained three baggies of a substance which tested positive for cocaine and weighed 252 grams. App. 157, ll. 7 – 11. Officers assumed the black bag was the same bag that Petitioner was carrying when he ran from his car. App. 77, ll. 8 – 10. Neither Petitioner's fingerprints nor DNA was found on the black bag or the three baggies containing the drugs which were inside the bag. App. 263, ll. 2 – 13; App. 269, ll. 23 – 25. Petitioner told the officers that he ran because he did not have a license and did not want to get arrested before Christmas. App. 169, ll. 1 – 4. Officer Fittery stated that he issued Petitioner a citation for reckless driving, to which Petitioner pled guilty. App. 95, ll. 9 – 10.

On April 21, 2008, Petitioner was indicted for trafficking in greater than 200 grams, but less than 400 grams of cocaine and possession with intent to distribute cocaine within proximity of a school. App. 554 – 557. Petitioner's case proceeded to a jury trial before the Honorable

Doyet A. Early, III. App. 1. Johnny Watson represented Petitioner. Beth Ann Young and Bill Weeks represented the State. App. 1.

Prior to trial, defense counsel moved to suppress the evidence against Petitioner. App. 27, ll. – 10. Counsel argued:

> "Your Honor, we'd like to make a motion to suppress the evidence based on the fact that there was no probable cause for the arrest in this case. The officer – officer Fittery indicated that he stopped the defendant for speeding.
>
> However, he had failed to issue the defendant any citation for speeding. That was the threshold reason for everything else that followed. Therefore, without probable cause for the arrest and no traffic ticket was issued, we would move to dismiss – to suppress the evidence."

App. 27, ll. 9 – 19. When the trial judge requested case law to support counsel's position, counsel responded, "I have none." App. 27, ll. 20 – 21.

The trial judge denied counsel's motion to suppress and admitted the black bag and drugs into evidence. App. 29, ll. 14 – 15. The jury found Petitioner guilty as charged. App. 429, l. 14 – App. 430, l. 1. Judge Early sentenced Petitioner to a mandatory twenty-five years' imprisonment and a fine of $100,000. App. 435. Petitioner appealed his convictions and sentence.

Direct Appeal

On April 25, 2012, the Court of Appeals dismissed Petitioner's appeal in an unpublished opinion. State v. Trevis Eugene Johnson, 2012-UP-244 (S.C. Ct. App. filed April 25, 2012). Wanda H. Carter represented Petitioner on appeal. App. 472.

PCR Hearing

On September 18, 2012, Petitioner filed a PCR application. App. 437. Respondent filed its return on January 23, 2013. App. 444. Respondent filed an amended return on July 10, 2014. App. 450. On Thursday, May 21, 2015, an evidentiary hearing was held before the Honorable Tanya A. Gee. App. 456. Courtney Clyburn Pope represented Petitioner. App. 456. Daniel F. Gourley, II. represented the State. App. 456.

At the evidentiary hearing, Petitioner stated that trial counsel moved to suppress the evidence prior to trial. App. 475, ll. 12 – 17. Petitioner explained that the suppression motion was based on the fact that there was no probable cause for Petitioner's arrest because he did not receive a ticket for his speeding violation. App. 475, ll. 21 – 23. Petitioner said that trial counsel knew he would be making the suppression motion prior to trial but did not have case law prepared to support the motion. App. 476, ll. 14 – 19.

Petitioner contended that the motion to suppress the evidence would have been successful had counsel provided the trial judge with case law supporting the argument. App. 477, ll. 11 – 13. Further, if the trial judge would have suppressed the black bag and the drugs, the State would have given Petitioner a plea offer or dismissed the case completely. App. 482, ll. 19 – 22.

Trial counsel also testified at the evidentiary hearing. Counsel admitted that he did not argue any case law in support of his motion to suppress based on lack of probable cause for the arrest. App. 515, ll. 15 – 20. Counsel stated that probable cause was "criminal law 101" and was "elementary evidence from basic . . . judicial knowledge." App. 61, ll. 4 – 9. Counsel contended that "every lawyer knows that you need probable cause" and "[c]ertainly the judge knows, the solicitor, and every lawyer knows that." App. 524, ll. 21 – 25. Counsel further contended that "[e]very police officer knows that." App. 524, ll. 21 – 25.

Order of Dismissal

Judge Gee issued an order of dismissal on June 30, 2015. App. 541. The judge wrote that she disagreed with Petitioner's contention that trial counsel was ineffective for failing to provide the judge with case law on probable cause during the motion to suppress. App. 549. The judge found that Petitioner had "failed to present specific and compelling evidence that he was prejudiced by Trial Counsel's performance." App. 549.

Petitioner appeal the PCR judge's order of dismissal. This petition for writ of certiorari follows.

ARGUMENT

The PCR judge erred by finding trial counsel provided effective representation where counsel failed to properly argue his motion to suppress the drugs based on a lack of probable cause to arrest and failed to provide the trial judge with case law to support the motion to suppress where the judge denied counsel's motion and Petitioner was convicted and sentenced to twenty-five years' imprisonment.

Defense counsel failed to properly argue the motion to suppress the drugs at Petitioner's trial. Counsel further failed to cite case law to support the motion to suppress. Because counsel was deficient in arguing the motion, the black bag and drugs were admitted into evidence. Petitioner was found guilty and sentenced to a lengthy twenty-five year prison sentence.

A warrantless search and seizure is unreasonable under the Fourth Amendment absent a recognized exception to the warrant requirement. U.S. Const. amend. IV; State v. Brown, 401 S.C. 82, 89, 736 S.E.2d 263, 266 (2012). A search incident to a lawful arrest is one such exception. State v. Freiburger, 366 S.C. 125, 131 – 32, 620 S.E. 2d 737, 740 (2005).

However, the fundamental question in determining whether an arrest is lawful is "whether probable cause existed to make the arrest." State v. Baccus, 367 S.C. 41, 49, 625 S.E.2d 216, 220 (2006); Wortman v. City of Spartanburg, 310 S.C. 1, 425 S.E.2d 18 (1992). Probable cause for a warrantless arrest exists when the circumstances within the arresting officer's knowledge are sufficient to lead a reasonable person to believe that a crime has been committed by the person being arrested. Id.

A police officer has "'probable cause to arrest without a warrant where he in good faith believes that a person is guilty of a **felony**, and his belief rests on such grounds as would induce an ordinary prudent and cautious man, under the circumstances to believe likewise.'" State v.

Cuevas, 365 S.C. 198, 204, 616 S.E.2d 718, 721 (Ct. App. 2005) (quoting State v. Roper, 274 S.C. 14, 17, 260 S.E.2d 705, 706 (1979)) (emphasis added).

If the police had probable cause to arrest a defendant and the resulting arrest is lawful, "[a] search may be conducted incident to an arrest only if it is substantially contemporaneous with the arrest and is confined to the immediate vicinity of the arrest." Freiburger, 366 S.C. at 132, 620 S.E.2d at 740. The two historical rationales for the search incident to arrest exception to the warrant requirement are "(1) the need to disarm the suspect in order to take him into custody, and (2) the need to preserve evidence for later use at trial." Knowles v. Iowa, 525 U.S. 113, 116 (1998). Thus, the concern for officer safety and preventing the destruction of evidence by the person being arrested are factors which justify such a search. Id.

A criminal defendant is entitled to effective assistance of counsel under the Sixth Amendment to the United States Constitution. Strickland v. Washington, 466 U.S. 668 (1984). When a defendant challenges a conviction on the ground that counsel was ineffective, the question becomes, "'whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result,'" Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (quoting Strickland, 466 U.S. at 686; see Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007).

Pursuant to Strickland v. Washington, a court will conduct a two-prong test when determining whether trial counsel's assistance was ineffective. Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989) (citing Strickland, 466 U.S. at 688). First, an applicant must show that counsel's performance was deficient. Strickland, 466 U.S. at 687. Under this prong, "'[t]he proper measure of attorney performance remains simply reasonableness under prevailing

professional norms.'" Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (quoting Strickland, 466 U.S. at 688).

Second, the applicant must show that counsel's "deficient performance prejudiced the defendant to the extent that '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. 115, 117-118, 386 S.E.2d 624, 625 (1989) (quoting Strickland, 466 U.S. at 688).

Here, there was no testimony that Petitioner was under arrest when Officer Rutland stopped Petitioner and handcuffed him. There was no evidence presented that Petitioner was under arrest after Officer Fittery identified Petitioner as the driver who jumped out of the car and ran. In fact, Fittery testified that he issued Petitioner a citation for reckless driving, which is not a felony. See S.C. Code Ann. § 56-5-2920; Cuevas, supra. Neither Fittery nor Rutland testified that they placed Petitioner under arrest.

Further, Petitioner was stopped and handcuffed in a completely different location from where he stopped his car and ran. Only after Petitioner was transported to the police station did Fittery and Rutland decide to drive back to Petitioner's car, which was farther down the road. At that point, the encounter was over. There was **no threat** to the officers' safety as Petitioner had already been taken away from the scene. Thus, the search was **not** contemporaneous. See Freiburger, supra.

Neither the search of Petitioner's car nor the search of the path where Petitioner ran fell within the search incident to arrest exception to the warrant requirement. There was no evidence presented that Petitioner was under arrest. Even if Petitioner has been under a lawful and valid arrest, he was away from his car and away from the path where he had run earlier.

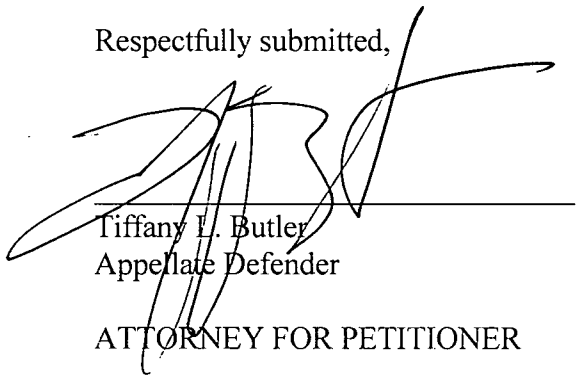
Petitioner gave no consent to search. Officer Rutland testified that no weapons were found on Petitioner and there were at least two officers present. Further, there was no evidence presented that someone else was in the car with Petitioner during his initial encounter with Fittery.

Had trial counsel properly and thoroughly argued the motion to suppress the evidence and provided relevant case law to support the motion, there is a reasonable probability that the black bag and drugs would have been suppressed. There is also a reasonable probability that the charges against Petitioner would have been dismissed. Even if the trial judge had denied counsel's motion to suppress, the issue of whether there was a lawful arrest to warrant a search incident to arrest would have been preserved for appellate review.

CONCLUSION

For the reasons argued above, Petitioner Trevis Eugene Johnson respectfully requests this Court to grant his petition for writ of certiorari with the ultimate relief of a new trial.

Respectfully submitted,



Tiffany L. Butler
Appellate Defender

ATTORNEY FOR PETITIONER

This 2nd day of May, 2016.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO AIKEN COUNTY
TANYA A. GEE, CIRCUIT COURT JUDGE

TREVIS E. JOHNSON

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-001537

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Trevis E. Johnson states:

1. She is an Appellate Defender for the South Carolina Office of Appellate Defense and was appointed to represent petitioner.

2. She has reviewed the records and transcript of petitioner's post-conviction relief hearing which was held on May 21, 2015. In her opinion seeking certiorari from the order of dismissal is without merit.

3. She 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 her as counsel for Trevis E. Johnson.

Respectfully submitted,

Tiffany L. Butler
Appellate Defender
ATTORNEY FOR PETITIONER

This 2nd day of May, 2016

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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 Daniel Gourley, Esquire and Trevis E. Johnson, #251600, at Lieber Correctional Institution this 2nd day of May, 2016.

Tiffany L. Butler
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 2nd day
of May, 2016.

Christian Ford (L.S.)
Notary Public for South Carolina
My Commission Expires: March 1, 2026