

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Spartanburg County
R. Scott Sprouse, Circuit Court Judge

RECEIVED

MAY 18 2016

SC SUPREME COURT

JEFFREY B. FALLS,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-001935

PETITION FOR WRIT OF CERTIORARI

TIFFANY L. BUTLER
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

ATTORNEY FOR PETITIONER

INDEX

INDEX.....1

ISSUE PRESENTED2

STATEMENT OF FACTS3

ARGUMENT10

CONCLUSION16

ISSUE PRESENTED

Did the PCR court err by finding Petitioner did not prove prejudice from counsel's deficient performance where counsel made a thoroughly researched motion in *limine* to suppress the drugs because the prolonged detention and subsequent search of Petitioner's vehicle was illegal, but counsel inexplicably failed to contemporaneously object when the drugs were offered into evidence, since the Court of Appeals found that the Fourth Amendment search issue was not preserved for appellate review, and the PCR court's finding that it could not conclude there was a reasonable probability of a different outcome if the issue had been preserved was erroneous?

STATEMENT OF FACTS

At approximately 9:00 p.m. on February 20, 2007, Petitioner was driving north on I-85 in Spartanburg County, South Carolina. App. 52, ll. 8 – 17. Petitioner was pulled over near mile marker sixty-two by Officer D.G. Wilson of the South Carolina Highway Patrol. App. 53, ll. 1 – 6. Petitioner told Officer Wilson that he was driving back to Charlotte from Atlanta. App. 102, ll. 22 – 25. Wilson alleged that Petitioner had driven over the white line “on several occasions.” App. 53, l. 20. Wilson drove beside Petitioner’s vehicle for approximately two miles and maintained he saw Petitioner cross over the white line. App. 53, ll. 20 – 23.

Officer Wilson initiated the blue lights on his patrol car and drove behind Petitioner’s car at ten seconds before 9:00 p.m. to conduct the traffic stop. App. 63, ll. 19 – 21. At 9:04 p.m., Wilson was holding Petitioner’s driver’s license and the rental car agreement for the car, and was talking to Petitioner while Petitioner was sitting in the driver’s seat. App. 64, l. 16 – App. 65, l. 18. Thirty-seven seconds later, at 9:04:37 p.m., the officer informed Petitioner that he would be given a warning for improper lane usage. App. 66, ll. 7 – 12.

After informing Petitioner that he would be given a warning, Wilson did not write anything on the ticket pad for several minutes. App. 71, l. 19 – App. 72, l. 10. At 9:07 p.m., Wilson was still writing the citation. App. 81, ll. 11 – 17. Wilson walked back to his patrol car and inquired on the radio about other patrol units in the area. App. 86, ll. 4 – 21. Almost ten minutes into the stop and six minutes after informing Petitioner that he would get a warning, at approximately 9:10 p.m., Wilson handed Petitioner the citation. App. 93, ll. 9 – 17.

Officer Wilson told Petitioner to “drive careful” and “to be safe out there” and put the citation in Petitioner’s hand. App. 94, ll. 6 – 15. While the putting the citation in Petitioner’s hand, Wilson asked Petitioner for permission to search his car. App. 94, ll. 18 – 20. Petitioner asked

Wilson if he refused to give consent, would he be free to leave. App. 96, ll. 13 – 16. Wilson took the citation back and told Petitioner that he had a K-9 unit coming. App. 96, ll. 17 – 18. The time was 9:11 p.m. at this point in the traffic stop. App. 99, l. 22.

Wilson admitted that he called for the backup officer, which he knew was a K-9 officer, at 9:07 p.m., before handing the warning ticket to Petitioner. App. 96, l. 19 – App. 97, l. 3. Wilson also admitted that Petitioner was not free to leave until the K-9 conducted a sniff search around Petitioner's car. App. 98, ll. 2 – 5. Wilson told Petitioner that if the dog "alerts" to his car, he would not need Petitioner's consent to search. App. 99, ll. 12 – 15.

The drug dog unit arrived at 9:13 p.m., thirteen minutes after the stop was initiated and three minutes after the officer handed Petitioner the warning citation and told him to drive carefully and "to be safe out there." App. 110, l. 21 – App. 111, l. 4. The dog "alerted" to the vehicle and over 250 grams of cocaine was discovered in the driver's side door panel. App. 216, ll. 15 – 24.

On May 20, 2007, Petitioner was indicted for trafficking in cocaine. App. 666. Petitioner's case proceeded to a jury trial on August 10, 2011, before the Honorable Roger L. Couch. App. 1. Chris Thompson represented Petitioner. App. 1. Ryan McCarty and Travis Moore represented the State. App. 1.

Trial

Prior to trial, defense counsel moved to suppress the cocaine found in the vehicle Petitioner was driving. App. 51. Officer Wilson testified during the suppression hearing. App. 52. Wilson claimed that as he approached Petitioner's car, Petitioner's head dropped from his view as if he had leaned over to put something underneath the seat. App. 92, ll. 14 – 23. He then made his first call for the backup unit. App. 92, ll. 14 – 23. Wilson later acknowledged that he did not know whether the K-9 was trained to search for weapons. App. 148, l. 23 – App. 149, l. 1.

Wilson stated that the car Petitioner was in was “unusually clean” and “immaculate” for a rental car. App. 116, ll. 20 – 22. Wilson also claimed that Petitioner seemed more nervous than the average motorist and began licking his lips. App. 91, ll. 16 – 19. Wilson stated that Petitioner had “cotton mouth” because his lips appeared dry and white, which was a sign of being nervous. App. 105, l. 24 – 25. Wilson also did not believe that Petitioner drove from Charlotte to Atlanta earlier that afternoon to “hang out” with his cousin. App. 118, ll. 3 – 14.

Wilson admitted that he verified the rental agreement before returning it to Petitioner. App. 105, ll. 16 – 20. Petitioner rented the car on February 14, 2007 and the car was due back at the Avis Car Rental on February 21, 2007, the day after the traffic stop. App. 105, ll. 16 – 20. Wilson did not smell alcohol or marijuana when he approached Petitioner’s car. App. 70, ll. 10 – 14. There were no weapons found in the rental car during the search. App. 155, ll. 16 – 18.

Following Officer Wilson’s pretrial testimony, defense counsel argued that the search of Petitioner’s car was illegal because the officer improperly prolonged the traffic stop. App. 166, ll. 17 – 18. Correctly citing State v. Tindall, 388 S.C. 518, 698 S.E.2d 203 (2010), counsel argued that once the officer returned Petitioner’s driver’s license, informed Petitioner that he would be getting a warning citation, and actually handed Petitioner the citation, the purpose of the traffic stop ended. App. 178, ll. 10 – 19.

Counsel explained that in Tindall, this Court “took the position that the purpose of the stop was over as soon as the ticket would be or the warning was completed.” App. 168, ll. 9 – 18.

Counsel further added:

“[T]he Court made it clear that once the officer informed Tindall he would write him a ticket, at this point the purpose of the stop was accomplished except for issuing the warning ticket, and then, however, rather than issue the ticket, the officer

continued to question Tindall for an additional six or seven minutes.”

App. 169, l. 22 – App. 170, l. 3; see Tindall, at 522, 698 S.E.2d at 205.

Counsel concluded:

“I would go into the fact that my client has his license returned to him. That is evidence . . . that he has, has his wallet there. He is putting that back in there. The officer’s returned his, his license. He’s told him that he’ll be getting a warning, and eventually does give him a warning, puts it in his hand, but pulls it back, and he refuses to allow the search. My argument would be that when he returns that license and told him he was getting a warning, well that ended that search and that he had to have renewed reasonable suspicion.”

App. 178, ll. 10 -19. Therefore, Wilson needed “renewed reasonable suspicion” to detain Petitioner longer.

Counsel argued that if the officer had seen Petitioner lean over and reach under his seat, it did not rise to the level of reasonable suspicion to bring in a drug dog to search Petitioner’s car. App. 179, ll. 1 – 7. The fact that Officer Wilson had told Petitioner “to be careful out there” and handed him the warning citation meant the stop had concluded. App. 179, ll. 8 – 12. Petitioner’s refusal to allow his car to be searched was not reasonable suspicion that would justify the officer searching the car with the drug dog. App. 179, ll. 12 – 16.

The trial judge agreed with Petitioner that Officer Wilson needed reasonable suspicion to further detain Petitioner after he had given him the citation. App. 178, ll. 20 – 22. The judge also agreed that Petitioner’s refusal to give consent to search did not give the officer reasonable suspicion that there was criminal activity occurring. App. 179, ll. 17 – 19.

However, the trial judge denied defense counsel's motion and admitted the drugs into evidence. The judge stated:

“I find that the reasonable suspicion developed prior to the time of the renewed or continued detention. I guess you can put it either way. Therefore, I find that the officer had a reasonable suspicion to continue the detention after the traffic stop, and that the, therefore, the search, ‘the free air sniff’¹ would have been proper.”

App. 189, ll. 2 – 5. The judge further added:

“I think there was a reasonable suspicion that had been developed prior to the time that the warning was handed and pulled back.”

App. 189, ll. 10 – 12. When the State moved to admit the drugs into evidence, defense counsel failed to renew his prior, well-reasoned objection. App. 265, l. 24 – App. 266, l. 5.

Petitioner was found guilty and sentenced to twenty-five years' imprisonment with a fine of \$100,000. App. 500. Petitioner appealed his guilty plea and sentence.

Direct Appeal

James P. Craig represented Petitioner on appeal. App. 503. The South Carolina Court of Appeals held that the issue of whether the trial judge erred by denying the motion to suppress was not preserved for review and affirmed Petitioner's conviction and sentence in an unpublished opinion. State v. Jeffrey Bernard Falls, Op. No. 2013-UP-420 (S.C. Ct. App filed November 20, 2013); App. 559.

¹ During the “free air sniff,” the drug dog officer walked the drug dog around Petitioner's car and allowed the dog to sniff around the outside of the car in an attempt to detect drugs. App. 99.

PCR Hearing

On January 9, 2014, Petitioner filed a PCR application. App. 562. Petitioner amended the PCR application on April 8, 2014. App. 569. Respondent filed its return on October 9, 2014 requesting an evidentiary hearing. App. 578.

An evidentiary hearing was held on June 8, 2015 before the Honorable R. Scott Sprouse. App. 583. John Brandt Rucker represented Petitioner. Suzanne H. White represented the State. App. 583.

Petitioner testified that he was detained by the officer for fourteen minutes before the drug dog arrived. App. 597, ll. 15 – 17. Petitioner stated that defense counsel did not renew the objection to the drug evidence being admitted at trial. App. 604, ll. 8 – 10. Petitioner explained that if counsel had renewed his objection, the issue of whether the search was illegal would have been preserved for review by the Court of Appeals. App. 604, ll. 11 – 18. Petitioner said that his case would have been reversed and remanded if counsel had only renewed his objection. App. 604, ll. 11 – 18.

Defense counsel testified that he put **a lot of time into preparing the motion to suppress**. App. 636, ll. 7 – 10 (emphasis added). Counsel admitted that he “probably overlooked” renewing his objection when the evidence was admitted at trial. App. 637, ll. 8 – 13. Counsel also agreed that if the Court of Appeals could have reviewed the trial court’s ruling denying the motion to suppress, Petitioner would have had a good argument on appeal. App. 639, l. 22 – App. 640, l. 2.

Order of Dismissal

The PCR judge issued an order of dismissal on July 21, 2015. App. 658. The PCR judge found that defense counsel’s failure to preserve the motion to suppress for appeal “constituted deficient performance.” App. 663. The judge wrote that there were factual questions “as to whether

detaining [Petitioner] until the officer with the drug dog arrived was reasonable in light of the circumstances.” App. 663.

The PCR judge determined that it could not “conduct its own merits analysis because the trial judge ruled on that particular issue.” App. 664. The judge further wrote that “[t]here is no way that [it] can conclude that there is a reasonable probability of a different outcome had trial counsel preserved his objection on the challenged evidence.” App. 664.

The judge found that Petitioner “would have been able to make a good faith argument to the appellate courts, but nothing further.” App. 664. Therefore, according to the PCR judge, Petitioner failed to show that he was prejudiced by counsel’s deficient performance. App. 664.

Petitioner appealed the order of dismissal. This petition for writ of certiorari follows.

ARGUMENT

The PCR judge erred by finding Petitioner did not prove prejudice from counsel's deficient performance where counsel made a thoroughly researched motion in limine to suppress the drugs because the prolonged detention and subsequent search of Petitioner's vehicle was illegal, but counsel inexplicably failed to contemporaneously object when the drugs were offered into evidence, since the Court of Appeals found that the Fourth Amendment search issue was not preserved for appellate review, and the PCR court's finding that it could not conclude there was a reasonable probability of a different outcome if the issue had been preserved was erroneous.

The PCR judge correctly found defense counsel was deficient for failing to contemporaneously object when the drugs were offered into evidence at trial. The prolonged detention and subsequent search of Petitioner's car was illegal under the Fourth Amendment. Because counsel failed to contemporaneously object when the drugs were offered into evidence, the issue of whether the search was valid was not preserved for appeal.

In State v. Tindall, 388 S.C. 518, 698 S.E.2d 203 (2010), this Court held that the officer's continued detention of Tindall exceeded the scope of the traffic stop and constituted a seizure for purposes of the Fourth Amendment. The Court found that the purpose of the traffic stop was accomplished when the dispatcher reported no problems with Tindall's driver's license and vehicle, and the only remaining task was the issuance of the warning ticket. Id. at 522, 698 S.E.2d at 205.

Because the purpose of the traffic stop had ended, this Court considered "whether the officer reasonably suspected a serious crime at the point in which he chose not to conclude the traffic stop, despite his stated intention to issue a warning ticket, instead opting to continue his questioning." Id. at 523, 698 S.E.2d at 206. The officer stated that Tindall was driving to Durham, North Carolina, to meet his brother in a rental car which was rented the day before by a third party and due to be

returned to Atlanta on the day of the stop. Id. The officer also stated that Tindall did a ‘felony stretch’ when he got out of his car and seemed nervous. Id.

This Court found that those facts “did not provide the officer with a ‘reasonable suspicion that a serious crime was afoot.” Id. This Court determined that “the continued detention was illegal and the drugs recovered during the search of the vehicle must be suppressed.” Id.

The Fourth Amendment guarantees “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.” U.S. Const. amend. IV.

The temporary detention of individuals during a traffic stop by police, even if only for a brief period and for a limited purpose, constitutes a seizure of the persons within the meaning of the Fourth Amendment. Whren v. United States, 517 U.S. 806, 809–10 (1996); see also United States v. Arvizu, 534 U.S. 266, 273 (2002) (noting the Fourth Amendment’s protection against “unreasonable searches and seizures” extends to “brief investigatory stops of persons or vehicles”).

Because traffic stops are more analogous to an investigative detention than a custodial arrest, they are reviewed under the standard set forth in Terry v. Ohio, 392 U.S. 1 (1968). United States v. Rusher, 966 F.2d 868, 875 (4th Cir. 1992).

Terry provides a two-prong test for analyzing whether a traffic stop is constitutional: (1) whether the police officer’s action was justified at the inception of the traffic stop, and (2) whether the police officer’s subsequent actions were reasonably related in scope and duration to the circumstances that justified the stop. Rusher, 966 F.2d at 875.

As to whether the officer’s actions were reasonably related in scope, “the investigative methods employed should be the least intrusive means reasonably available to verify or dispel the officer’s suspicion in a short period of time.” Florida v. Royer, 460 U.S. 491, 500 (1983). The traffic stop may become “unlawful if it is prolonged beyond the time reasonably required to

complete [its] mission.” Illinois v. Caballes, 543 U.S. 405, 407 (2005); see Royer, 460 U.S. at 500 (noting the scope of a seizure “must be carefully tailored to its underlying justification,” and that the government bears the burden to “demonstrate that the seizure it seeks to justify . . . was sufficiently limited in scope and duration to satisfy the conditions of an investigative seizure”).

A traffic stop typically ends when the police officer has “no further need to control the scene, and inform[s] the driver and passengers they are free to leave.” Arizona v. Johnson, 555 U.S. 323 (2009); see United States v. Sullivan, 138 F.3d 126, 132 (4th Cir. 1998) (finding the test for determining if a particular encounter constitutes a seizure within the meaning of the Fourth Amendment is “whether, under the totality of the circumstances surrounding the encounter, a reasonable person in the suspect’s position would have felt free to decline the officer’s requests or otherwise terminate the encounter”). Accordingly, “[o]nce the purpose of that stop has been fulfilled, the continued detention of the car and the occupants amounts to a second detention.” State v. Pichardo, 367 S.C. 84, 998, 623 S.E.2d 840, 848 (Ct. App. 2005)

Before an officer can extend a traffic stop, there must be reasonable, articulable suspicion of other illegal activity. Id. at 99, 623 S.E.2d at 848. The officer must articulate facts sufficient to support a “reasonable suspicion” that criminal activity has occurred or is occurring. State v. Butler, 343 S.C. 198, 539 S.E.2d 414 (Ct. App. 2000). Reasonable suspicion requires “a particularized and objective basis that would lead one to suspect another of criminal activity.” United States v. Cortez, 449 U.S. 411, 417 (1981). Reasonable suspicion requires “something more than an inchoate and unparticularized suspicion or hunch.” State v. Rogers, 368 S.C. 529, 534, 629 S.E.2d 679, 682 (Ct. App. 2006).

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). This Court has held that trial counsel’s failure to preserve a motion to suppress in a drug case constituted deficient performance. McHam v. State, 404 S.C. 465, 746 S.E.2d 41 (2013).

Here, the PCR court correctly found defense counsel was deficient for failing to contemporaneously object when the drugs were offered into evidence at trial. The prolonged detention and subsequent search of Petitioner’s car was illegal under the Fourth Amendment.

Officer Wilson did not have reasonable and articulable suspicion that criminal activity had occurred or was occurring because he had already informed Petitioner that he would only receive a warning ticket and told defendant to “be careful.” There were no problems with Petitioner’s

driver's license or the rental agreement for Petitioner's car. Wilson did not smell alcohol or marijuana as he approached Petitioner's car. Further, Petitioner's nervousness was not sufficient to support reasonable suspicion of "some other crime." Pichardo, 367 S.C. at 104, 623 S.E.2d at 851. Petitioner's refusal to give Wilson consent to search his vehicle, likewise, did not constitute reasonable suspicion.

Although Wilson stated that he saw Petitioner lean over as if he was reaching under the driver's seat, Wilson allegedly observed this at the start of the traffic stop. In fact, Wilson had decided to issue a warning citation **after** he allegedly observed Petitioner lean over. Once Wilson returned the rental agreement and informed Petitioner that he would receive a warning citation, the traffic stop concluded. Tindall, 388 S.C. at 518, 698 S.E.2d at 205.

Officer Wilson did not physically hand Petitioner the citation until several minutes **after** he informed Petitioner that he would receive a warning. At the time he handed Petitioner the citation, he asked for permission to search, which was **after** the stop had concluded. Because Wilson had no reasonable suspicion that Petitioner was engaged in criminal activity **after** the purpose of the stop concluded – when he informed Petitioner that he would be given a warning – the prolonged detention and subsequent search of the car was illegal.

The drugs found should have been suppressed at trial. Had counsel objected at the time the drugs were offered into evidence, there is a reasonable probability that the trial judge would have changed his initial ruling and suppressed the evidence. See State v. Smith, 337 S.C. 27, 32, 522 S.E.2d 598, 600 (1999) ("A pretrial ruling on the admissibility of evidence is preliminary and is subject to change based on developments at trial. A ruling in *limine* is not final; unless an objection is made at the time the evidence is offered and a final ruling procured.").

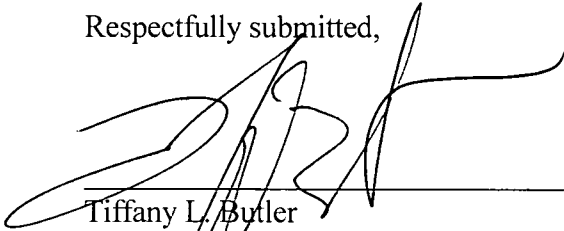
To the extent that the PCR court determined that it could **not** “conduct its own merits analysis because the trial judge ruled on that particular issue,” the court is incorrect. App. 664. The PCR court’s assertion that “[t]here is **no way that [it] can conclude** that there is a reasonable probability of a different outcome had trial counsel preserved his objection on the challenged evidence,” likewise, is incorrect. App. 664 (emphasis added). The Strickland standard of an ineffective assistance of counsel claim **requires the PCR court** to determine whether “there is a reasonable probability that, but for counsel’s professional errors, the result of the proceeding would have been different.” Strickland, 466 U.S. at 694 (emphasis added).

Because defense counsel failed to contemporaneously object to admission of the drugs, the issue was not preserved for appeal. See McHam, supra. Therefore, the Court of Appeals could not review the trial judge’s error in admitting the drug evidence at trial. Had the Court of Appeals reviewed the trial judge’s ruling, there is a reasonable probability that Petitioner’s sentence and conviction would have been reversed and a new trial ordered.

CONCLUSION

For the reasons argued above, Petitioner Jeffrey Bernard Falls 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 18th day of May, 2016.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Spartanburg County
R. Scott Sprouse, Circuit Court Judge

JEFFREY B. FALLS,
PETITIONER,

V.

STATE OF SOUTH CAROLINA,
RESPONDENT

CERTIFICATE OF SERVICE

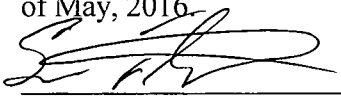
I certify that a true copy of the petition for writ of certiorari and a copy of the appendix in this case have been served on Alicia Olive, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, Mr. Jeffrey B. Falls #347321, at McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29899, this 18th day of May, 2016.



Tiffany L. Butler
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 18th day
of May, 2016.



(L.S.)

Notary Public for South Carolina
My Commission Expires: October 30, 2022.