STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Greenville County

James R. Barber, III, Circuit Court Judge

MICHAEL MILLEDGE,

RESPONDENT,

V.

STATE OF SOUTH CAROLINA,

PETITIONER

APPELLATE CASE NO. 2014-002386

BRIEF OF RESPONDENT

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ISSUE PRESENTED

Does the record support the PCR court's ruling that trial counsel rendered ineffective assistance in violation of the Sixth and Fourteenth Amendments by failing to make a contemporaneous objection to the introduction of critical evidence to preserve his motion *in limine* to suppress where the officer's "frisk" of Respondent was not supported by specific and articulable reasonable suspicion that he was armed and dangerous?

STATEMENT

On September 18, 2007, a Greenville County grand jury indicted Respondent for trafficking crack cocaine (2007-GS-23-7445 – count 1), possession of a weapon during the commission of a violent crime (2007-GS-23-7445 – count 2), possession of ecstasy (2007-GS-23-7446), and possession of cocaine with intent to distribute (2007-GS-23-7447). App. 269-270; App. 274-275; App. 278-279. The state, represented by Howard Steinberg, called the case for trial before the Honorable Robin B. Stilwell and a jury on March 29, 2010. App. 1. Randy Chambers represented Respondent. App. 1. The jury found Respondent guilty as charged. App. 160, line 22 – App. 161, line 12. Judge Stilwell sentenced Respondent to twenty-five years' imprisonment for trafficking crack cocaine, five years' imprisonment for possession of a weapon, one year imprisonment for possession of ecstasy, and twenty-five years' imprisonment for possession of cocaine with intent to distribute. He ordered all sentences to be served concurrently. App. 170, lines 1-20; App. 267-268; App. 273; App. 277.

Respondent filed a timely notice of appeal, which was perfected by LaNelle Cantey Durant. App. 172-187. On June 19, 2013, the Court of Appeals affirmed Respondent's convictions and sentences in an unpublished opinion. State v. Milledge, 2013-UP-273 (S.C. Ct. App. filed June 19, 2013); App. 219-221. On August 2, 2013, Respondent filed an application for post-conviction relief (PCR). App. 222-234. The Honorable James R. Barber, III, convened an evidentiary hearing on the matter on August 28, 2014. Brian Johnson represented Respondent, and Karen Ratigan represented Petitioner. App. 240. By an order filed on October 28, 2014, Judge Barber granted Respondent relief from his convictions and sentences. App. 263-266.

The state filed a notice of appeal. On April 13, 2015, the state filed its petition for writ of certiorari. On August 28, 2015, Respondent filed his return. On February 12, 2016, this Court

granted the state's petition and ordered the parties to brief the issue presented. On April 13, 2016, the state filed its brief. Respondent now files his brief.

ARGUMENT

The record supports the PCR court's ruling that trial counsel rendered ineffective assistance in violation of the Sixth and Fourteenth Amendments by failing to make a contemporaneous objection to the introduction of critical evidence to preserve his motion *in limine* to suppress where the officer's "frisk" of Respondent was not supported by specific and articulable reasonable suspicion that he was armed and dangerous.

Relevant facts

Trial facts

During pre-trial proceedings, trial counsel moved to suppress the evidence found in Respondent's possession based upon the unlawfulness of the pat down search of Respondent's person. Trial counsel properly articulated the legal test – that to justify a frisk, "a reasonable person in the officer's position must believe the frisk was necessary to preserve the officer's safety." App. 21, lines 21-23. "Further to justify the frisk the officer must be able to specify particular facts on which he or she based his or belief that the suspect was armed and dangerous." App. 21, line 24 – App. 22, line 1. Trial counsel argued the officers lacked reasonable and articulable suspicion because "the only reason for doing the frisk" was that Respondent seemed nervous. App. 19, line 20 – App. 22, line 7. He added that one of the officers claimed Respondent was "extremely nervous and his hands were shaking." App. 20, line 19. Trial counsel cited State v. Fowler, 322 S.C. 263, 471 S.E.2d 706 (Ct. App. 1996) to support his position. App. 20, line 25 – App. 21, line 7. He explained that in Fowler, the Court of Appeals concluded the police lacked articulable suspicion to search him. App. 21, lines 14-17.

The prosecutor argued the search was because Respondent was stopped in a high crime area, exhibited nervousness, stopped answering questions, and gave "a million mile stare." App. 22, lines

9-22. According to the prosecutor, this was "not a high crime area but among the highest crime areas in Greenville." App. 24, lines 11-13. He asserted the state would argue Respondent was not only exhibiting nervousness, but was exhibiting "extreme nervousness. ... the kind that would make any, in the Court's words, any reasonable prudent officer have pause for concern." App. 24, lines 13-16. Thereafter, a pre-trial hearing concerning the suppression motion commenced.

On June 27, 2007, John Lanning with the Greenville County Sheriff's Office initiated the traffic stop of Respondent because he saw the car had a cracked windshield. He elaborated that he "had probable cause for the cracked windshield and to further investigate as part of [his] duties, to see what was going on." He wanted to identify Respondent, "see where he was coming from and do a general information stop." App. 24, line 23 – App. 25, line 3; App. 30, lines 9-12; App. 31, lines 9-17. He explained that whenever he stops a car in that area, there is a possibility of drug activity. App. 33, lines 10-11. Lanning described the area where the traffic stop occurred as "a lower income area of town," where there are "[a] lot of transients." He emphasized there were "[a] lot of apartment complexes" where he had "issues," including serving "two SWAT narcotic search warrants two weeks prior to this incident." Although irrelevant to the case, he elaborated that drugs were found as a result of those search warrants. Respondent was stopped between one-quarter of a mile and one-half of a mile from that area. App. 24, lines 1-16. Lanning was forced to admit,

however, that no one saw Respondent leaving "those apartments."[1] The information about the apartments simply described the nature of the area where the stop occurred. App. 30, line 21 – App. 31, line 1.[2]

Lanning left his unmarked SUV to make contact with Respondent, the driver. Although no one else was in the car with Respondent, Fred Miller, another officer, approached the passenger side. Respondent gave Lanning his driver's license and registration card. App. 25, line 15; App. 34, lines 15-18; App. 34, line 25 – App. 35, line 5; App. 41, lines 22-24. Lanning noticed Respondent was nervous during the stop. App. 25, lines 22-24; App. 36, lines 15-16. Lanning then stepped to the back of the car to "run" Respondent's information. App. 26, lines 14-18. Although Lanning observed Respondent was nervous, he had no reason to think Respondent was armed. App. 37, lines 2-8. Lanning was frank – he had no suspicion of any kind regarding his dealings with Respondent. App. 37, lines 13-16.

While Lanning was at the rear of the car, Patrick Swift, the third officer on the scene, approached Respondent. App. 26, lines 19-21; App. 42, lines 4-8. Swift also thought Respondent appeared nervous. Swift claimed that Respondent had his cell phone in his hand and attempted to make a phone call, but was unable to do so because his hands were shaking so badly. App. 42, lines

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[1]Petitioner wrote that Respondent's car "was observed coming from the direction of an apartment complex were [*sic*] drugs were found two weeks earlier." Cert. pet. at 10; see also, BOP at 8 ("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."). On direct examination, Lanning was asked if Respondent's car was in the "same direction or different direction," presumably of the apartments, and he answered, "Coming away from those apartments." App. 24, lines 17-19. However, on cross-examination, he made clear that *no one* observed Respondent leaving the apartments and the *only* relevance of his mentioning the apartments was to explain that the area where the stop occurred was a high crime area. App. 30, line 21 – App. 31, line 1.

[2] Another officer present at the stop, Patrick Swift, described the area as "a high crime area, high drug area." App. 41, lines 16-19.

9-18. Swift asked Respondent why his hands were shaking, and Respondent stated that it was because he was hot. App. 42, lines 20-22. Finding Respondent's answer "unusual," Swift told Respondent that he too was hot, but that his hands were not shaking. App. 43, lines 1-7. According to Swift, thereafter, Respondent "stared straight ahead" and refused to answer any other questions. App. 43, lines 9-17. Swift claimed he was "nervous for [his] safety" because Respondent was not making eye contact, refused to answer questions, and because of the area. App. 43, lines 18-23. As a result, Swift asked Respondent to step out of the car. App. 27, lines 1-3; App. 44, lines 1-2. There was no indication that Swift told Lanning of his interaction with Respondent at the car.

Lanning "felt that obviously Deputy Swift must have had a reason to ask him to step out." App. 27, lines 6-7. He and Swift had worked closely in the past, and if Swift "had a reason to pull [Respondent] out of the vehicle, [Lanning] felt that there was an issue" to address. He explained, "And what we would normally do would be to - - to pat him down for weapons." App. 37, lines 17-25.

Lanning noticed that when Respondent walked to the rear of the car, Respondent was not looking at Lanning or anyone in particular – "he was just kind of looking straight ahead." App. 27, lines 9-15. When Respondent arrived at the rear of the car, Lanning asked him to place his hands on the trunk. Lanning then asked if he had "any guns, knives, bazookas, anything that's going to hurt me, beat me up, make me bleed." Lanning noted that he used those terms because he was "looking for a reaction." However, Respondent did not react. He did not "even acknowledge" Lanning. He simply "continued to look straight ahead." App. 27, line 19 – App. 28, line 9. Lanning decided he "was going to pat him down for weapons." App. 28, lines 12-14. Again, Lanning was frank – *he* had "absolutely no reason to believe" that Respondent needed to be frisked; he "simply deferred to

Swift." App. 38, lines 3-8. He searched Respondent because Swift got him out of the car – Lanning "felt that there was a reason that he had brought him out of the car." App. 38, lines 14-24.

During the pat down, Lanning felt what he believed to be a revolver in Respondent's front right pocket. Lanning placed Respondent in handcuffs then. Miller reached into Respondent's pocket and pulled out a gun and drugs. App. 28, line 25 – App. 29, line 24.

The trial judge denied the motion to suppress. He explained that the issue was whether the police had "a reasonably articulable suspicion to conduct the frisk." According to the judge, the "individual characteristics ... standing alone probably would not stand for the proposition or support that reasonably articulable suspicion that would warrant probable cause." Nevertheless, he found that "in the aggregate," "it was an appropriate search." App. 47, line 14 – App. 48, line 25. He elaborated that he considered "the knowing and volitional transgression of a traffic law, which was defective equipment [cracked windshield and missing rearview mirror]," "[e]xtreme nervousness," "[t]he fact that there was a phone call that [*sic*] being attempted at the time," "[t]he fact that it was a high drug 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." App. 49, lines 6-21.

Despite having moved to suppress the evidence during the pre-trial hearing, trial counsel failed to renew his objection at the time the evidence was admitted. In fact, trial counsel informed the trial court that the evidence was being moved in "without objection." App. 106, line 15; App. 116, line 8.

Direct appeal

On appeal, Respondent asserted the trial court erred in admitting the evidence because the officer's frisk violated the Fourth Amendment. App. 173. The state countered that the issue "was

not preserved for appellate review because defense counsel waived his pre-trial objection to the admission of the evidence by affirmatively indicating he had no objection at the time the evidence was introduced during trial." App. 193. In affirming Respondent's conviction, the Court of Appeals refused to address the merits because the issue was not preserved for review. App. 220. The Court of Appeals cited State v. Simpson, 325 S.C. 37, 42, 479 S.E.2d 57, 60 (1996) for the proposition that "[a] ruling in limine is not a final ruling on the admissibility of evidence. Unless an objection is made at the time the evidence is offered and a final ruling made, the issue is not preserved for review." App. 220. Additionally, the Court cited Burke v. AnMed Health, 393 S.C. 48, 55, 710 S.E.2d 84, 88 (Ct. App. 2011) for the proposition that "[w]hen a party states to the trial court that it has no objection to the introduction of evidence, even though the party previously made a motion to exclude the evidence, the issue raised in the previous motion is not preserved for appellate review." Thus, the Court of Appeals clearly held that the error was not preserved for review because trial counsel failed to renew his objection at the time the evidence was offered.

PCR hearing

Respondent testified that trial counsel was ineffective for failing "to properly preserve [his] Fourth Amendment suppression issue for appellate review by failing to renew [his] pretrial motion to suppress the evidence when the evidence was entered at trial." App. 247, lines 3-10. He noted the Court of Appeals found this issue unpreserved because of trial counsel's failure to renew the objection. App. 247, lines 21-24; App. 251, lines 1-18.

Trial counsel testified the "key issue" in Respondent's case was the suppression issue. App. 255, lines 15-17. Trial counsel was surprised to learn by reading the transcript that he failed to renew his objection when the evidence was admitted. App. 256, line 21 – App. 257, line 3. According to trial counsel, "it was a bad search." App. 256, line 2. Trial counsel recalled law

enforcement based the frisk, at least in part, on Respondent's refusal to answer questions, "which, of course, by law he doesn't have to answer any questions. He's not required to." App. 256, lines 3-6. Concerning the police officers' claims that Respondent was nervous, trial counsel said his "position was that that didn't give them a right to get him out of the car and search him." App. 256, lines 7-9. He explained there was no "sufficient legal basis for [the] frisk." App. 256, lines 12-14.

At the conclusion of the evidence, Petitioner argued that Respondent could not "demonstrate any prejudice because the stop and the search were proper." Referring the PCR judge to the brief filed by the state in the direct appeal, Petitioner argued that even if trial counsel "had made the motion as the evidence came in, this would not have been successful on appeal simply because of the weight of the case law and evidence against [Respondent]." App. 259, lines 9-20. After a brief colloquy with the PCR court, it appeared Petitioner conceded that trial counsel performed deficiently by failing to renew the objection when the evidence was admitted. However, Petitioner maintained Respondent could not demonstrate prejudice "because the stop and search would both be considered lawful." App. 259, line 21 – App. 260, line 24.

Order granting relief

Concerning deficient performance, Judge Barber relied upon McHam v. State, 404 S.C. 465, 746 S.E.2d 41 (2013) to conclude "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." App. 265. Additionally, citing State v. Tindall, 388 S.C. 518, 698 S.E.2d 203 (2010), Judge Barber found "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. 265. Thus, he concluded there was a

reasonable probability that, but for trial counsel's failure to renew the objection, the result of the proceeding would have been different." App. 265.

Discussion

STANDARD OF REVIEW

The proper standard for appellate review of a PCR court's grant of relief is whether "any evidence of probative value" exists to sustain the PCR court's findings. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989); see also Terry v. State, 394 S.C. 62, 66, 714 S.E.2d 326, 328 (2011); Webb v. State, 281 S.C. 237, 238, 314 S.E.2d 839, 839 (1984)(setting forth the scope of review applicable to the grant of post-conviction relief: "'any evidence' of probative value to support the post-conviction judge's factual findings is sufficient to uphold those findings on appeal"). If any probative evidence exists to support the PCR court's decisions, the ruling *must* be upheld. Smith v. State, 369 S.C. 135, 138, 631 S.E.2d 260, 261 (2006); Jackson v. State, 329 S.C. 345, 348, 495 S.E.2d 768, 769 (1998); Skeen v. State, 325 S.C. 210, 481 S.E.2d 129 (1997). The appellate court "will uphold the findings of the PCR judge when there is any evidence of probative value to support them" and "will reverse the PCR judge's decision when it is controlled by an error of law." Suber v. State, 371 S.C. 554, 558-559, 640 S.E.2d 884, 886 (2007). The reviewing court must give great deference to the PCR court's findings of fact and conclusions of law. Dempsey v. State, 363 S.C. 365, 368, 610 S.E.2d 812, 814 (2005). Also, appellate courts must consider that the PCR applicant has the burden of proving his entitlement to relief, but the standard of proof is by a preponderance of the evidence. Rule 71.1(e), SCRCP.

RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL

The Sixth Amendment to the United States Constitution guarantees criminal defendants the right to the effective assistance of counsel. U.S. Const. amend. VI. To prove ineffective assistance

of counsel, Respondent must establish that counsel's representation fell below an objective standard of reasonableness, and that counsel's deficient performance prejudiced his defense. Strickland v. Washington, 466 U.S. 668 (1984); Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997). "The benchmark for judging any claim of ineffectiveness must be 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." Strickland, 466 U.S. at 686. To prove ineffective assistance of counsel, "the defendant must show that counsel's performance was deficient" and "that the deficient performance prejudiced the defense." Id. "When a convicted defendant complains of the ineffectiveness of counsel's assistance, the defendant must show that counsel's representation fell below an objective standard of reasonableness." Id. at 687-688. "[T]he performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances." Id. at 688. Concerning prejudice, "a defendant need not show that counsel's deficient conduct more likely than not altered the outcome in the case." Rather, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694.

Deficient performance

In light of Petitioner's apparent concession that trial counsel performed deficiently by failing to renew his objection at the time the evidence was admitted, Respondent will touch on this issue

only briefly.[3] "Representation of a criminal defendant entails certain basic duties." Id. at 688. Counsel has "the overarching duty to advocate the defendant's cause" and "a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." Id. "[T]he performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances." Id. South Carolina's preservation rules require a contemporaneous objection in order to preserve for appeal a motion *in limine*. State v. Smith, 337 S.C. 27, 32, 522 S.E.2d 598, 600(1999); State v. Simpson, 325 S.C. 37, 42, 479 S.E.2d 57, 60 (1996); State v. Schumpert, 312 S.C. 502, 507, 435 S.E.2d 859, 862 (1993); Burke, 393 S.C. at 55, 710 S.E.2d at 88 (Ct. App. 2011). In a case strikingly similar to Respondent's, McHam, 404 S.C. at 474, 746 S.E.2d at 46, this Court held that McHam's counsel's "failure to renew the Fourth Amendment objection" when the drugs were actually admitted into evidence "constituted deficient performance" where the drugs were the most critical piece of evidence. See also Gibbs v. State, 403 S.C. 484, 493-495, 744 S.E.2d 170, 174-176 (2013)(analyzing trial counsel's failure to object contemporaneously to the identification testimony under the prejudice prong only).

The record supports the PCR judge's finding of deficient performance where trial counsel failed to renew his objection when the evidence was admitted in light of Petitioner's concession at the hearing and clear South Carolina authority on this point. Trial counsel offered no reason for his failure to renew the objection and explained that he was surprised to learn he had permitted the evidence to be admitted "without objection." He had argued the issue thoroughly during the pre-

[3]Although Petitioner stated the PCR judge erred in finding trial counsel was deficient *and* that such deficiency was prejudicial to Respondent, the petition for writ of certiorari and the brief of petitioner focuses exclusively on prejudice. Cert. pet. at 8; BOP at 11. Further, Petitioner appeared to concede the deficient performance prong during the PCR hearing. App. 259, line 21 – App. 260, line 24.

trial hearing and presented what he believed was a meritorious basis for excluding the state's critical evidence – the drugs and gun. He recognized the importance of the seized evidence to the state's case and provided no explanation for his failure to preserve for appeal his objection to the introduction of the evidence based upon the police officers' violation of Respondent's rights during the illegal search. Counsel's deficient performance is clear and the record amply supports the PCR court's findings and conclusions of law on this point.

Prejudice

"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." Sikes v. State, 323 S.C. 28, 30, 448 S.E.2d 560, 562 (1994)(citing Kimmelman v. Morrison, 477 U.S. 365 (1986)). Thus, whether Respondent suffered prejudice as a result of trial counsel's deficient performance turns on the merits of his Fourth Amendment claim.

The Fourth Amendment

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. "[T]he underlying command of the Fourth Amendment is always that searches and seizures be reasonable." Wilson v. Arkansas, 514 U.S. 927, 931 (1995). "A search compromises the individual interest in privacy; a seizure deprives the individual of dominion over his or her person or property." State v. Wright, 391 S.C. 436, 442, 706 S.E.2d 324, 327 (2011)(citing Horton v. California, 496 U.S. 128, 133 (1990)). The Fourth Amendment prohibits "unreasonable searches and seizures" by the Government, and its protections extend to brief investigatory stops of persons or vehicles that fall short of an arrest. Terry v. Ohio, 392 U.S. 1, 9 (1968).

Terry "stop and frisk"

Police may conduct a "stop and frisk" if two conditions are met. First, the stop must be lawful, which requires the police officer to reasonably suspect the person stopped is committing or has committed a criminal offense. In a traffic-stop setting, this condition is met "whenever it is lawful for police to detain an automobile and its occupants pending inquiry into a vehicular violation."[4] If a motor vehicle is detained lawfully for a traffic violation, the police may order the driver to exit the vehicle without violating the Fourth Amendment. Pennsylvania v. Mimms, 434 U.S. 106, 111 (1977); see also, State v. Williams, 351 S.C. 591, 598, 571 S.E.2d 703, 707 (Ct. App. 2002). "Any further detention for questioning is beyond the scope of the Terry stop and therefore illegal unless the officer has a reasonable suspicion of a serious crime." United States v. Rusher, 966 F.2d 868, 876-877 (4th Cir. 1992).

Second, in order to frisk a person, the police must *reasonably suspect* the person stopped is *armed and dangerous*. Arizona v. Johnson, 555 U.S. 323, 326-327 (2009)(discussing Terry, 392 U.S. 1); see also State v. Butler, 353 S.C. 383, 393, 577 S.E.2d 498, 503 (Ct. App. 2003)(stating "[t]he law is settled, though, that there must be a showing that the officer had a reasonable fear for himself or the safety of others to justify the greater intrusion of a pat-down"). The police "must be able to point to specific and articulable facts which, when taken together with rational inferences from those facts, reasonably warrant the intrusion." Terry, 392 U.S. at 21. "[I]narticulate hunches" are not acceptable. Id. at 22. The ultimate question "is whether a

[4] A traffic stop involves an officer determining whether to issue a traffic ticket and "'ordinary inquiries incident to [the traffic] stop," such as "checking the driver's license, determining whether there are outstanding warrants against the driver, and inspecting the automobile's registration and proof of insurance." Rodriguez v. United States, 135 S.Ct. 1609, 1615 (2015)(quoting Illinois v. Caballes, 543 U.S. 405, 408 (2005)).

reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger." Id. at 27.

Before an officer "places a hand on the person of a citizen in search of anything, he must have constitutionally adequate, reasonable grounds for doing so." Sibron v. New York, 392 U.S. 40, 64 (1968). The officer "must be able to point to particular facts from which he reasonably inferred that the individual was armed and dangerous." Id. "Nothing in Terry can be understood to allow a generalized 'cursory search for weapons' or indeed, any search whatever for anything but weapons. The 'narrow scope' of the Terry exception does not permit a frisk for weapons on less than reasonable belief or suspicion directed at the person to be frisked." Ybarra v. Illinois, 444 U.S. 85, 93-94 (1979). "The purpose of this limited search is not to discover evidence of a crime, but to allow the officer to pursue his investigation without fear of violence." Adams v. Williams, 407 U.S. 143, 146 (1972).

Terry "stop"

While cases dealing with the Terry "stop" are helpful, their value in understanding the Terry "frisk" is limited due to the distinction between the two criteria. For the Terry "stop," the question is whether there is reasonable suspicion that criminal activity is afoot. Obviously, the observations by law enforcement that would justify a stop must be directed to showing why those observations would lead a reasonable person to suspect criminal conduct. On the other hand, to justify a Terry "frisk," there must be observations to support a reasonable person's belief that a person is *armed and dangerous*. See United States v. Sakyi, 160 F.3d 164, 168-169 (4th Cir. 1998)(explaining that "a generalized risk to officer safety" does not justify a routine "pat-down" because a frisk "is substantially more intrusive than an order to exit a vehicle or open its doors" and the police "must have justification for a frisk ... beyond the mere justification for

the traffic stop"). While some factors may overlap in some cases, observations by police that would suggest criminal activity do *not* automatically also suggest that a person is armed and dangerous. If the same factors could justify both in all cases, then there would be no need for the two steps and two different criteria. Instead, the Supreme Court requires the police to satisfy a second requirement in order to frisk a person – reasonable suspicion that the person is *armed and dangerous.*

Thus, a brief discussion of two principles from the Terry "stop" cases may assist, albeit in a limited fashion, understanding what is necessary for a Terry "frisk." In United States v. Cortez, 449 U.S. 411, 417 (1981), the Court held that in order to determine whether the police had reasonable suspicion to conduct a Terry stop, the reviewing court must examine "the totality of the circumstances." See also United States v. Arvizu, 534 U.S. 266, 273 (2002); State v. Rogers, 368 S.C. 529, 534, 629 S.E.2d 679, 682 (Ct. App. 2006). In examining the specific and articulable facts offered by officers to justify the reasonable suspicion that criminal activity was afoot, courts must examine the reasonableness of the explanations provided. Recently, the Court of Appeals expressed concern with activity being labeled as suspicious despite no reason why such activity would be suspicious:

> We are mindful of concerns regarding the state "using whatever facts are present, no matter how innocent, as indicia of suspicious activity" and that the state "must do more than simply label a behavior as 'suspicious' to make it so." The state must "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."

State v. Burgess, 394 S.C. 407, 415, 714 S.E.2d 917, 921 (Ct. App. 2011)(quoting United States v. David Foster, 634 F.3d 243, 248 (4th Cir. 2011)); see also United States v. Massenburg, 654 F.3d 480, 482 (4th Cir.2011); United States v. Digiovanni, 650 F.3d 498, 512 (4th Cir.2011);

State v. Moore, 415 S.C. 245, 254-255, 781 S.E.2d 897, 902 (2016)(commenting on "law enforcement's reliance on the seemingly omnipresent factor of nervousness" and explaining that "[g]eneral nervousness will almost invariably be present in a traffic stop").

One principle that may extend to a Terry frisk analysis is consideration of a totality of the circumstances when analyzing whether specific and articulable reasonable suspicion that a person is armed and dangerous exists. A second principle that may extend to a Terry frisk analysis is ensuring that the reasons articulated are specific and supported by more than bare assertions.

A recent Fourth Circuit opinion regarding investigatory *stops* sheds light on the requisite evidence necessary to provide law enforcement with reasonable suspicion to believe that criminal activity may be afoot, a lower and broader standard than necessary for a frisk. In United States v. Zachary Foster, ___ F.3d ___, 2016 WL 2996904 (4th Cir. 2016), the Fourth Circuit held the police had reasonable suspicion to believe Foster was or had been engaged in criminal activity based on five factors: (1) a 911 call reporting a gunshot in the area; (2) shortly after the officers were dispatched, Foster was the only person they encountered in the area; (3) the stop occurred late at night in a part of the city described as "high crime"; (4) Foster did not respond to the officers' questions and avoided eye contact; and (5) Foster reached for his right pocket after being asked if he were carrying a weapon – a "security check." Id. at *5.

Analyzing each factor in turn, the Fourth Circuit explained the anonymous tip fell "far short of supplying the officers with reasonable suspicion." Id. The court also was not persuaded that Foster's presence in the area was indicative of criminal activity either where he was found four blocks away from the site of the alleged gunfire. Id. at *6. Recognizing that "the high-crime reputation of an area and the late hour of a police encounter can contribute to a finding of

reasonable suspicion," the court found those facts insufficient to justify an investigatory stop. Id. The court explained "[t]he area in which the police stopped Foster was not known specifically for gun-related incidents." Id. Likewise, the court held Foster's failure to respond to or make eye contact with the officers did not provide reasonable suspicion. Id. In light of the fact that Foster was not required to respond to the police, his silence was not significant. Id. The court called the lack of eye contact to be a "mild" reaction to the police officers' inquiries and afforded it very little weight in its analysis. Id. at *6-7. Based on those four factors, the court found no reasonable suspicion that Foster was engaged in criminal activity. Id. at *7. However, Foster's "security check" when asked if he had a weapon "tip[ped] the scales in the government's favor." Id. at *7. It was not unreasonable for the officers to have concluded that Foster might have a weapon where the police were investigating a report of a gunshot and the one person they encountered in the area reached for his pocket when asked if he was carrying a weapon. Id.

Terry "frisk"

The cases discussing Terry "frisks" emphasize the necessity that the specific and articulable facts to support reasonable suspicion must relate to possession of a weapon. For example, in Mimms, 434 U.S. at 111-112, the United States Supreme Court held there was "little doubt" the officer had reasonable suspicion to suspect a defendant was armed and dangerous where the officer observed a bulge in the defendant's jacket. However, in Sibron, 392 U.S. at 64, the Court held the officer had no reasonable suspicion that Sibron was armed and dangerous where the officer had observed Sibron talking with a number of known narcotics addicts over an eight-hour period of time. The Court noted the officers did not see Sibron put his hand in his pocket, which would have given the officer cause to fear he was going for a weapon. Id. Similarly, the Court held officers lacked reasonable suspicion to frisk Ybarra where his "hands

were empty, [he] gave no indication of possessing a weapon, [he] made no gestures or other actions indicative of an intent to commit an assault, and [he] acted generally in a manner that was not threatening." Ybarra, 444 U.S. at 93-95.

This Court found reasonable suspicion to believe the defendant was armed and dangerous in State v. Khingratsaiphon, 352 S.C. 62, 70-71, 572 S.E.2d 456, 460 (2002), where the defendant fit the description of a suspect in a shooting, the defendant was dressed in baggy clothing, which could easily conceal a weapon, there was gang graffiti on a nearby wall, another individual was approaching the officer and the defendant, and the officer heard a commotion. See also United States v. Moore, 817 F.2d 1105, 1108 (4th Cir. 1987)(finding a frisk for weapons warranted where an officer, acting alone, conducted a Terry stop late at night on a dark street and the officer was investigating a burglary, "a felony that often involves the use of weapons"); State v. Blassingame, 338 S.C. 240, 249, 525 S.E.2d 535, 540 (Ct. App. 1999)(finding reasonable suspicion that a suspect may be armed where an officer was "faced with a man who met the description of an armed carjacker, kidnapper, and robber who could not satisfactorily explain why he was in the area").

In Butler, 353 S.C. at 393, 577 S.E.2d at 503, the Court of Appeals held the police lacked reasonable suspicion to frisk Butler where the officer simply said he was suspicious, and where the only facts in the record to support a suspicion were that he smelled alcohol and that the driver gave an incorrect name for the passenger. Specifically, the officer "did not indicate what his specific suspicions were and, particularly, did not indicate he was suspicious that Butler was armed or dangerous." Id. After noting that "the indisputable nexus between drugs and guns presumptively creates a reasonable suspicion of danger to an officer," the Court of Appeals explained the case did "not involve a heightened apprehension of danger based upon a

reasonable suspicion of drug activity, allowing the conclusion that guns would likely be present." Id. at 391-394, 577 S.E.2d at 502-503.

In United States v. Burton, 228 F.3d 524 (4th Cir. 2000), the Fourth Circuit Court of Appeals held an officer's search of Burton was not supported by reasonable suspicion. The officers were serving outstanding warrants when they saw Burton at a pay phone outside a convenience store. Id. at 525. One officer approached Burton and requested his identification. Burton did not respond. Despite repeated requests from the officers, "Burton remained mute." Id. Then, the officers asked Burton to remove his right hand from his coat pocket. Burton failed to do so, the officers repeated their requests, but to no avail. Id. An officer thrust his hand into Burton's coat and grabbed his right hand. The two then struggled. Id. While on the ground, Burton pointed a gun at the officer, squeezing the trigger. The gun jammed, and the officers arrested Burton. Id.

Recognizing that police may initiate "police-citizen encounters," the court explained that a citizen has the "'right to ignore his interrogator and walk away.'" Id. at 527 (quoting Terry, 392 U.S. at 33 (Harlan, J., concurring)). The court emphasized that an officer may not conduct a Terry frisk unless the officer first has a basis for a Terry stop. Id. at 528. The police had no reason to suspect Burton was engaged in criminal activity because he was just standing at a telephone booth. Id. When the officers approached, "all he did was to continue standing as he was and refuse to answer questions." Id. An individual has the "'right to go about his business or stay put and remain silent in the face of police questioning.'" Id. at 529 (quoting Illinois v. Wardlow, 528 U.S. 119, 125 (2000)). "[A]n individual's 'refusal to cooperate, without more, does not furnish the minimal level of objective justification needed for detention or seizure.'" Id. (quoting Florida v. Bostick, 501 U.S. 429, 437 (1991)).

APPLICATION

Turning to the merits of Respondent's claim, it is clear the trial judge erred in admitting the critical evidence because the officers lacked specific and articulable reasonable suspicion to believe Respondent was armed and dangerous. In admitting the evidence, the judge listed several facts that he considered at arriving at his conclusion. A review of those facts and dispelling them with case law clearly demonstrates the lack of reasonable suspicion to believe Respondent was armed and dangerous at the time of the frisk.

Oddly, the trial judge declared that he considered "the knowing and volitional transgression of a traffic law, which was defective equipment," as a factor for permitting the frisk. Certainly, if a suspect had been stopped upon suspicion that he had committed, was committing, or was about to commit a type of crime for which the offender would likely be armed, then that fact would weigh heavily in favor in permitting a frisk. See e.g., United States v. Johnson, 581 F.3d 994 (9th Cir. 2009)(considering the stopped individual was suspected of casing a bank for a robbery in the Terry "frisk" analysis); United States v. Snow, 656 F.3d 498 (7th Cir. 2011)(explaining that suspicion of burglary supported the frisk). Respondent was stopped because he had a cracked windshield and no rearview mirror. Those two minor traffic offenses could lead no reasonable person to believe Respondent was armed and dangerous. Having a cracked windshield and lacking a rearview mirror are not crimes that require the use of a weapon, even tangentially, or connote danger. See generally, United States v. McKoy, 428 F.3d 38 (1st Cir. 2005)(explaining this was not a case where the police had reason to suspect the presence of firearms based on the type of crime suspected because the defendant was stopped for parking and license plate violations, "from which no assumption about weapons may fairly be drawn"); United States v. Lott, 870 F.2d 778, 784-785 (1st Cir. 1989)(holding the police did not have reason to suspect the presence of firearms based on

the type of crime suspected where the car was stopped for failing to comply with two traffic signs, the license plate was in disarray, and one tail light was out); Caldwell v. State, 780 A.2d 1037, 1052 (Del. 2001)(finding no facts to support a frisk where the traffic stop was for violation of a parking statute); State v. Varnado, 582 N.W.2d 886, 889-890 (Minn. 1998)(re-affirming its holding that "[p]olice officers may not ordinarily make searches upon apprehending motorists for simple traffic violations or upon the slightest hint of illegality" and finding the search of the driver unreasonable where the driver was stopped for a *cracked windshield*); State v. Shearer, 548 N.W.2d 792, 796 (S.D. 1996)(finding no basis for the frisk where the officer testified he had no reason to believe the defendant was armed and dangerous and the basis for the traffic stop was an object dangling from the interior rearview mirror in violation of a state statute). The trial judge's use of the cracked windshield as a factor to decide the Terry frisk's reasonableness was an error of law.

One of the factors relied upon by the trial judge was the officers' observations that Respondent was nervous during the traffic stop. Nervous behavior has been considered a pertinent factor when determining reasonable suspicion to *stop* by many courts, including this one. Wardlow, 528 U.S. at 124; United States v. Mason, 628 F.3d 123 (4th Cir. 2010)(finding reasonable suspicion to prolong a traffic stop where one factor was that the defendant was sweating and unusually nervous, which became more pronounced as the traffic stop continued); United States v. Foreman, 369 F.3d 776 (4th Cir. 2004)(finding the officer had reasonable suspicion to order the "drug sniff dog" where one factor was that the defendant was exceptionally nervous, which became more pronounced when trooper raised the issue of drug trafficking); Moore, 415 S.C. at 254-255, 781 S.E.2d at 902 (accepting that nervous behavior is a pertinent factor in determining reasonable suspicion to prolong a stop, but noting weariness "with the many creative ways law enforcement attempts to parlay the single element of

nervousness into a myriad of factors supporting reasonable suspicion"); State v. Hewins, 409 S.C. 93, 760 S.E.2d 814 (2014)(finding no reasonable suspicion for extending the scope of the traffic stop despite the officer testifying the defendant was nervous even after being issued a warning citation); State v. Provet, 405 S.C. 101, 747 S.E.2d 453 (2013)(finding reasonable suspicion to prolong the stop where one factor was defendant's nervousness as displayed by extreme hand shaking and accelerated breathing); State v. Corley, 392 S.C. 125, 708 S.E.2d 217 (2011)(finding reasonable suspicion to prolong a traffic stop where one factor was the defendant was nervous as demonstrated by his being "fidgety," short of breath, and avoiding eye contact); State v. Tindall, 388 S.C. 518, 698 S.E.2d 203 (2010)(finding no reasonable suspicion to exceed the scope of a stop where the defendant engaged in a "felony stretch" – designated as a sign of stress – and was nervous); State v. Pichardo, 367 S.C. 84, 623 S.E.2d 840 (2005)(finding the officer's sole reliance on the defendant's nervousness insufficient to establish reasonable suspicion to exceed the scope of the stop); State v. Wallace, 392 S.C. 47, 707 S.E.2d 451 (Ct. App. 2011)(finding reasonable suspicion for extending a stop where one factor was the driver became increasingly nervous instead of gradually relaxing and passenger's hand was unsteady passing identification and was sweating despite mild temperature).

To the extent nervousness is a factor for consideration of whether a person is *armed and dangerous*, it must be noted that being nervous is not *directly* related to being armed and dangerous. Most, if not all, individuals stopped by police are nervous, even extremely nervous. In United States v. Spinner, 475 F.3d 356, 360 (D.C. Cir. 2007), the Circuit Court of Appeals for the District of Columbia explained that "the suspicion that someone is armed ... must be based upon something more than his mere nervousness." The court elaborated that "[a] person stopped by the police is entitled to be nervous without thereby suggesting he is armed and dangerous, or indeed, has

anything to hide." Id. Further, the court observed "[w]ere nervous behavior alone enough to justify the search of a vehicle, the distinction between a stop and a search would lose all practical significance, as the stop would routinely – perhaps invariably – be followed by a search." Id.; see also United States v. Salzano, 158 F.3d 1107, 1113 (10th Cir. 1998)(noting "it is common for most people to exhibit signs of nervousness when confronted by law enforcement whether or not the person is currently engaged in criminal activity"); State v. Lee, 658 N.W.2d 669, 678-679 (Neb. 2003)(holding that "nervousness is of limited value" because "it is common knowledge that most citizens whether innocent or guilty, when confronted by a law enforcement officer who asks them potentially incriminating questions are likely to exhibit some signs of nervousness"); Damato v. State, 64 P.3d 700, 708 (Wyo. 2003)(explaining the factor of "extreme nervousness" has limited significance because most citizens exhibit signs of nervousness when confronted by police and as such, this factor must be treated with caution). The officers' testimony that Respondent was nervous deserves little weight as all people are nervous when stopped by police and the fact that a person is nervous does not correlate with being armed and dangerous.[5]

Another factor relied upon by the trial judge was that the stop and subsequent frisk occurred in a "high crime area" or "high drug area." The Supreme Court has made clear that "[a]n individual's presence in an area of expected criminal activity, standing alone, is not enough to support a reasonable, particularized suspicion that the person is committing a crime." Wardlaw, 528

[5] Arguably, Swift's observations regarding shaking hands and an attempted phone call should not be included in the analysis because he failed to alert Lanning to those observations and Lanning was the officer who performed the frisk. As such, the state could not rely on the collective-knowledge doctrine or fellow officer rule in making its case for reasonable articulable suspicion that Respondent was armed and dangerous. See United States v. Massenberg, 654 F.3d 480, 491-492 (4th Cir. 2011)(explaining the collective-knowledge doctrine is limited to when an officer acts on the information and instruction of other officers).

U.S. at 124 (citing Brown v. Texas, 443 U.S. 47 (1979)); see also Foster, ___ F.3d ___, 2016 WL 2996904 at *6; Massenburg, 654 F.3d at 488 (explaining that while presence in a "high-drug, high-crime area" "counts among the totality of the circumstances," it does little to support particularized suspicion); United States v. Sprinkle, 106 F.3d 613 (4th Cir. 1997)(holding that an officer observing an individual, even a known drug dealer recently released from prison, "in a high crime neighborhood at 5:30 p.m. on a sunny day does not provide independent or freestanding grounds for reasonable suspicion"). However, "the fact that the stop occurred in a 'high crime area'" may be considered "among the relevant contextual considerations in a Terry analysis." Wardlaw, 528 U.S. at 124. In Fowler, 322 S.C. at 267, 471 S.E.2d at 708, the South Carolina Court of Appeals held the police lacked reasonable suspicion to frisk Fowler because the police did not have a reasonable belief that he was armed and dangerous. The stop and frisk of Fowler occurred when the police "were routinely patrolling a 'high drug area'" and "saw Fowler come from the front yard of a suspected drug house." Id. at 265, 471 S.E.2d at 707. Fifteen minutes later, the police saw Fowler again, which was when they decided to stop and frisk him. Id. The police found a knife and cash. Id. According to the officers, "Fowler walked in a 'suspicious manner,' acted 'kind of scared,'" and appeared as if he was trying to elude police. Id. "Their suspicions were also aroused because 'he cut behind some houses' and 'didn't come to the corner and make a right hand turn on the sidewalk like normal people would make that route.'" Id. The police knew Fowler had a prior drug conviction and "'was known to carry weapons, and his company with suspected drug dealers and persons known to carry weapons." Id. However, the police admitted Fowler "did not do anything to make the police believe he was armed or involved in drug activity" that night. Id. at 266, 471 S.E.2d at 707.

There was ample testimony in the record that the area in which Respondent was stopped and frisked was a high crime area. However, there was no testimony connecting Respondent to crime in the area or indicating what type of crimes were occurring in the area. Despite repeated attempts by the officers to draw attention to apartments where search warrants had been recently executed, the officer admitted that he did not see Respondent leaving the apartments. In fact, the officer stopped Respondent between one-quarter and one-half mile from the apartments. Thus, there was no connection between Respondent and the apartments discussed repeatedly by the officers. The state was left with the simple fact that Respondent was in what the officers considered a "high drug area" when they effectuated the traffic stop. Additionally, there is no connection between being in a high crime area and being armed and dangerous.

The trial judge also relied upon what he called "the reluctance or recalcitrance of [Respondent] to respond to any questions" to find the frisk was supported by reasonable suspicion that Respondent was armed. While the record supports the fact that that Respondent stopped answering questions when Swift retorted that his hands were not shaking despite the hot weather, the record also supports the fact that Respondent complied with all requests made of him by the police and had provided everything necessary to complete the traffic stop. Swift's questioning went beyond what was necessary for completion of the traffic stop, and Respondent was not obligated to respond. Respondent was constitutionally entitled not to respond to intrusive questioning – especially when he was stopped for a cracked windshield and lack of rearview mirror. See Terry, 392 U.S. at 33 (Harlan, J., concurring); Wardlow, 528 U.S. at 673; Bostick, 501 U.S. at 437.

To the extent Petitioner relies upon the evidence in the record that Respondent would not make eye contact with the officers, the record negates any possibility that this was a sign that Respondent was armed and dangerous. In describing Respondent as not "looking at anyone in

particular," Lanning testified that this caused him concerned because he "was looking to see if he was going to attempt to run." App. 27, lines 9-18. Swift echoed this concern: "A lot of times when people are avoiding eye contact they are looking for a way out of the situation." App. 44, lines 11-24. Thus, Respondent avoiding eye contact with the officers was not indicative that he was armed and dangerous to the very officers who conducted the search. However, discounting the subjective understanding of the officers still reveals that lack of eye contact fails to suggest a person is armed and dangerous. Respondent's conduct simply demonstrated that he was no longer willing to engage in the conversation he was having with the officers during the traffic stop. He had provided his information and had answered their questions. He was waiting for his information to be returned, any traffic ticket to be written, and his ability to proceed to his intended destination. See Massenburg, 654 F.3d at 489 (noting the government often argues that an individual looking directly at an officer or staring at an officer is cause for suspicion and that "[g]iven the complex reality of citizen-police relationships in many cities, a young man's keeping his eyes down during a police encounter seems just as likely to be a show of respect and an attempt to avoid confrontation"); Foster, ___ F.3d ___, 2016 WL 2996904 at *6-7 (holding a suspect's lack of eye contact to be a "mild" reaction to the police officers' inquiries and affording it very little weight in its analysis).

Trial counsel was ineffective in failing to preserve the search issue for appellate review. Respondent was prejudiced by counsel's deficient performance. As discussed above, the frisk was unlawful because it was not supported by specific and articulable facts to establish reasonable suspicion that Respondent was *armed and dangerous*. No officer observed a bulge on Respondent's person. Respondent's hands were visible to the officers and showed he had no weapon in them. His minor traffic offenses were not inherently associated with weapons. He was

not wearing baggy clothing to conceal a weapon. There were three officers and only one person in Respondent's car. The record does not indicate the stop occurred at night or was in a deserted area. There is simply no evidence to support a reasonable suspicion that Respondent was armed and dangerous. If counsel had objected to the admission of evidence at trial, the appellate court would have reached the merits of the search issue, corrected the trial court's error in admitting the evidence seized pursuant to an unlawful search, and granted a new trial.

CONCLUSION

Respondent respectfully requests this Court affirm the PCR court's ruling.

Respectfully submitted,

Susan B. Hackett
Appellate Defender

ATTORNEY FOR RESPONDENT.

This 13th day of July, 2016

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Greenville County

James R. Barber, III, Circuit Court Judge

MICHAEL MILLEDGE,

RESPONDENT,

V.

STATE OF SOUTH CAROLINA,

PETITIONER

CERTIFICATE OF SERVICE

I certify that a true copy of the brief of respondent, in this case has been served on Karen Ratigan, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Mr. Michael Milledge #340057, at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210 this 13th day of July, 2016.

Susan B. Hackett

Susan B. Hackett
Appellate Defender

ATTORNEY FOR RESPONDENT

SWORN TO BEFORE ME this 13th day
of July, 2016.

(L.S.)

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