STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Charleston County

Honorable Deadra L. Jefferson, Circuit Court Judge

VASHAWN RAVENEL,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2016-001051

JOHNSON PETITION FOR WRIT OF CERTIORARI

David Alexander
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ISSUE PRESENTED

Whether appellate counsel provided ineffective assistance in derogation of petitioner's Sixth Amendment right to counsel by failing to raise the issue of the suppression of a gun and ski mask found during a search that exceed the scope of a detention allowed under the Fourth Amendment and Terry v. Ohio, 392 U.S. 1 (1968)?

STATEMENT

A Charleston County grand jury indicted petitioner for assault with intent to kill, attempted armed robbery, and pointing and presenting a firearm. App. 73, ll. 16 – 23. Petitioner was also charged with carjacking which the solicitor nolle prossed before trial. App. 323, l. 13 – 324, l. 12. On July 27, 2009, petitioner was tried before the Honorable Roger M. Young and a jury. App. 1. Trip Riesen and Trip Lawton represented the State. App. 1. Stephen Harris and David M. Holton represented petitioner. App. 1. The jury convicted petitioner. App. 232, ll. 5 – 24. Judge Young sentenced petitioner to consecutive sentences of twenty years' imprisonment for armed robbery, ten years' imprisonment for assault with intent to kill, and five years' imprisonment for pointing and presenting a firearm. App. 236, ll. 10 – 16.

On appeal, petitioner was represented by Wanda H. Carter. App. 239. On September 20, 2011, the Court of Appeals affirmed petitioner's convictions. App. 248-49. On March 20, 2013, the South Carolina Supreme Court granted certiorari to review the Court of Appeals' decision. App. 264. After oral argument on January 8, 2014, the Court dismissed its grant of certiorari as improvident on February 26, 2014. App. 293-94.

On July 25, 2014, petitioner filed a PCR application. App. 295. On December 15, 2015, a hearing was held before the Honorable Deadra Jefferson. App. 311. J. Rutledge Johnson represented the State. App. 311. James K. Falk represented petitioner. App. 311. On May 9, 2016, Judge Jefferson denied petitioner's application. App. 358. This petition follows.

ARGUMENT

Appellate counsel provided ineffective assistance in derogation of petitioner's Sixth Amendment right to counsel by failing to raise the issue of the suppression of a gun and ski mask found during a search that exceeded the scope of a detention allowed under the Fourth Amendment and *Terry v. Ohio*, 392 U.S. 1 (1968).

Before trial, the court heard testimony and argument on petitioner's Fourth Amendment motion to suppress.[1] App. 28, ll. 1 – 20. Michael Simmons ("Simmons"), an employee of a Ryan's restaurant, had finished closing the business and was walking to his car when a man wearing a white hooded sweatshirt and a camouflage ski mask approached him and called out "Hey." App. 36, l. 22 – 37, l. 6. The man pointed a gun at Simmons. App. 37, ll. 7 – 12.

Simmons got in his car to flee. App. 37, ll. 7 – 12. The man pulled the trigger, but the gun did not fire. App. 37, ll. 7 – 17. Simmons' assailant tried to open the car door, but Simmons was able to drive to an area where people were standing and the man fled. App. 37, ll. 13 – 22.

Officer Darin Cobb ("Cobb") responded to an apartment complex in the direction that Simmons described the man's flight. App. 55, ll. 9 – 19. Officer Cobb heard another policeman yelling, "Show me your hands!" App. 55, ll. 9 – 19. He rounded a corner and saw a policeman holding petitioner at gunpoint. App. 55, ll. 18 – 19.

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[1] The trial judge simultaneously heard testimony and argument on petitioner's motion to suppress the victim's in-court identification pursuant to Neil v. Biggers, 409 U.S. 188 (1972). The victim was taken in a patrol car approximately fifteen minutes after the incident and asked to identify his assailant, who the victim only previously saw wearing a ski mask and a hooded sweatshirt. App. 38, l. 10 – 41, l. 24. Petitioner was in handcuffs, standing in front of a police car with a police spotlight on him. App. 38, l. 10 – 41, l. 24. This "show-up" identification was unduly suggestive and should have been suppressed. State v. Moore, 343 S.C. 282, 540 S.E.2d 445 (2000). Trial counsel argued the identification issue and made a contemporaneous objection, but appellate counsel failed to brief this issue. App. 65, l. 2 – 69, l. 6. App. 101, ll. 18 – 23. App. 242. While this issue was not raised at the PCR hearing or addressed by the PCR court, this Court could choose to remand this issue to the PCR court for development of the record and a ruling. Martinez v. Ryan, 132 S.Ct.1309 (2012) (holding that ineffective assistance of PCR counsel may excuse a procedural default in federal habeas).

Officer Cobb "moved in to detain the defendant." App. 55, ll. 21 – 25. He claimed he saw a camouflage ski mask "protruding from the left front pant pocket." App. 56, ll. 1 – 5. He also saw a bulge in the pocket. App. 56, ll. 6 – 8. Officer Cobb asked petitioner if he "had anything else on him" and petitioner replied, "I got my gun." App. 62, ll. 5 – 18. Officer Cobb took a "rusty 38 caliber revolver" from petitioner's pocket. App. 54, ll. 19 – 21. App. 62, ll. 13 – 18.

It was only after Officer Cobb seized the gun that petitioner was under arrest. App. 62, ll. 19 – 23. Petitioner was arrested for unlawful carrying of a pistol. App. 62, ll. 19 – 23. Prior to taking the gun, Officer Cobb claimed petitioner was merely detained, even though petitioner was in handcuffs. App. 62, l. 24 – 63, l. 16. On cross-examination, trial counsel forced Officer Cobb to admit that petitioner was not free to go before the gun was found. App. 64, ll. 5 – 18.

After the conclusion of testimony at the pretrial hearings, trial counsel argued that the gun, bullets, and ski mask should be suppressed. App. 69, l. 10 – 71, l. 22. Trial counsel argued that the police exceeded the scope of a search allowed during a temporary detention. App. 69, l. 10 – 70, l. 17. Trial counsel cited Terry v. Ohio, 392 U.S. 1 (1968), for the proposition that seizing the gun and ski mask exceeded the scope of the detention. App. 69, l. 10 – 70, l. 17. Therefore, as trial counsel argued, the search and seizure must have been an illegal search incident to arrest because petitioner "was not lawfully arrested at that point." App. 70, ll. 4 – 17. The trial court denied petitioner's motion to suppress. App. 71, ll. 6 – 19. Trial counsel preserved his suppression motion with a contemporaneous objection. App. 101, l. 14 – 102, l. 7.

Appellate counsel briefed a single issue—directed verdict. App. 242. Appellate counsel did not brief the illegal search and seizure issue. App. 242. Petitioner's appellate issue was rejected by the Court of Appeals and Supreme Court. App. 248-49. App. 293-94. Petitioner

raised appellate counsel's ineffective assistance in failing to brief the search and seizure issue in his PCR application. App. 303-04. At the PCR hearing, trial counsel testified that the search and seizure issue was raised and preserved. App. 320, l. 11 – 323, l. 6.

The PCR judge denied relief on this issue based on appellate counsel's testimony at the PCR hearing. App. 366. The court found appellate counsel's testimony was credible that had she "thought the illegal arrest issue was viable, then she would have raised it." App. 366. The court also found in conclusory fashion that petitioner had not demonstrated prejudice. App. 366.

The PCR court erred. The issue of whether appellate counsel was ineffective will almost always turn on the issue of prejudice under Strickland v. Washington, 466 U.S. 668, 686 (1984). The question of whether appellate counsel failed to raise an issue that was reasonably likely to succeed on appeal is wholly a question of law, which should be reviewed by this Court *de novo*. See Anderson v. State, 354 S.C. 431, 434-35, 581 S.E.2d 834, 835 (2003) (assuming *arguendo* deficient performance and turning immediately to the question of prejudice). In conducting this analysis, the Court must determine whether: (1) the issue was raised to the trial court; (2) ruled on by the trial court; (3) preserved for review; and (4) raised as an issue by appellate counsel. Each of these determinations are questions of law that can be gleaned from the trial and appellate record. As shown above, the issue was thoroughly raised by trial counsel, ruled on by the trial judge, preserved for appeal, but not raised by appellate counsel.

Turning to the all-important prejudice prong, had the search and seizure issue been raised on appeal, petitioner's conviction would have been reversed. U.S. Const. amend IV. "The Fourth Amendment applies to all seizures of a person, including only a brief detention." State v. Anderson, 415 S.C. 441, 447, 786 S.E.2d 51, 54 (2016). "Pursuant to Terry, a police officer with a reasonable suspicion based on articulable facts that a person is involved in criminal activity

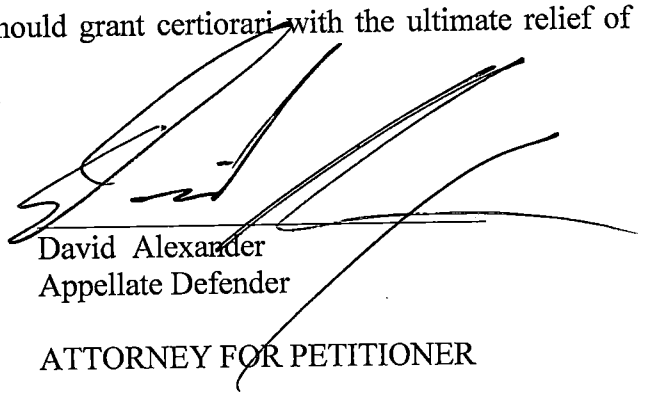
may stop, **briefly detain**, and question that person for investigative purpose, without treading upon his Fourth Amendment rights." Id. (emphasis added).

"It is axiomatic that an incident search may not precede an arrest and serve as part of its justification." Sibron v. New York, 392 U.S. 40, 63 (1968). "The police officer is not entitled to seize and search every person whom he sees on the street or of whom he makes inquiries." Id. at 64. "In the case of the self-protective search for weapons, he must be able to point to particular facts from which he reasonable inferred that the individual was armed and dangerous." Id.

In Sibron, the United States Supreme Court found that heroin obtained during the course of an investigative detention was inadmissible. Id. Similarly, the gun and ski mask were inadmissible against petitioner. Petitioner was in handcuffs and had a gun pointed at him. He posed no threat. He was not under arrest, therefore the search incident to arrest exception cannot apply. Officer Cobb's search of petitioner's pocket therefore exceeded the scope of a Terry stop and, had this issue been raised on appeal, petitioner's convictions would have been reversed.

CONCLUSION

For the foregoing reasons, this Court should grant certiorari with the ultimate relief of reversing petitioner's convictions.



David Alexander
Appellate Defender

ATTORNEY FOR PETITIONER

This 14th day of November, 2016.

STATE OF SOUTH CAROLINA

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VASHAWN RAVENEL,

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STATE OF SOUTH CAROLINA,

RESPONDENT

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Vashawn Ravenel states:

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

2. He has reviewed the record of petitioner's trial before the Honorable Deadra L. Jefferson, which was held on December 15, 2015, and, in his opinion, the appeal is without legal merit sufficient to warrant a new trial.

3. He has, pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), briefed an arguable legal issue which arose during the post-conviction relief process.

Therefore, counsel requests that the Court relieve him as counsel for Vashawn Ravenel.

Respectfully Submitted,

David Alexander
Appellate Defender
ATTORNEY FOR PETITIONER

This 14th day of November, 2016.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of his ability this Johnson Petition for Writ of Certiorari complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

David Alexander
Appellate Defender

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ATTORNEY FOR PETITIONER

This 14th day of November, 2016.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Johnson Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon Alicia Olive, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Johnson Petition for Writ of Certiorari and a copy of the Appendix have been served on Vashawn Ravenel, #336066, at Lieber Correctional Institution, P.O. Box 205, Ridgeville, SC 29472, this 14th day of November, 2016.

David Alexander
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 14th day of November, 2016.

_____ (L.S)
Notary Public for South Carolina
My Commission Expires: October 30, 2022.