

 ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Horry County

Steven H. John, Circuit Court Judge

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DEC 19 2011

S.C. Supreme Court

Opinion No. 2011-UP-481 (S.C. Ct. App. filed 10/28/2011)

08-GS-26-03999

THE STATE,

RESPONDENT,

V.

NORRIS H. SMITH,

PETITIONER.

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS

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CERTIFICATE OF COUNSEL

Counsel for petitioner certifies that the petition for rehearing was made and finally ruled on by the Court of Appeals on 11/18/2011.

QUESTION PRESENTED

Whether the “two issue rule” was improperly applied to procedurally bar the question of whether the trial court erred in refusing to suppress evidence that was seized when the police did not have reasonable suspicion to further detain petitioner after a traffic stop for making a turn without using a turn signal?

STATEMENT OF THE CASE

Petitioner was convicted of trafficking in cocaine after a jury trial held before the Honorable Steven H. John in Horry County on April 19, 2009. A twenty-five (25) year sentence was imposed. M. Gregory McCollum, Esquire was trial counsel. Bradley C. Richardson was solicitor.

Petitioner appealed his conviction and the final brief was submitted on July 6, 2010. Respondent's final brief was submitted on July 7, 2010.

On October 28, 2011, the Court of Appeals affirmed petitioner's conviction in an unpublished opinion basing its decision on the "two issue rule." State v. Norris Hennessey Smith, unpublished Opinion No. 2011-UP-481 (filed October 28, 2011).

Petitioner filed a petition for rehearing on November 9, 2011. The petition was denied on November 18, 2011.

This petition for writ of certiorari follows.

ARGUMENT

The “two issue rule” was improperly applied to procedurally ban the question of whether the trial court erred in refusing to suppress evidence that was seized when the police did not have reasonable suspicion to further detain petitioner after making a traffic stop for making a turn without using a turn signal.

This case involved a traffic stop that was used as a pretext to search the van petitioner was driving in for drugs. Officer Harris admitted it was his intent to pull the vehicle over once he came into contact with it. (ROA p. 13, line 6-p. 14, line 17). Harris asked Petitioner if he could search the van and petitioner initially gave consent, but later withdrew consent when he said he needed to call his boss.¹ Harris decided not to search the vehicle. (ROA. p. 15, line 22- p. 18, line 18). Harris, however, would not let petitioner leave. Petitioner did not get out of the van a second time when asked to do so. Instead, he got on a cell phone and reached down to a black bag in the center console area. The police shouted to “tase” petitioner. Officer Johnson grabbed petitioner’s arm. Petitioner was able to start the van and Officer Johnson used the taser on petitioner. Petitioner drove away and Officer Johnson fractured his wrist. (ROA. p. 26, line 8- p. 29, line 19).

In their unpublished opinion, the Court of Appeals used the “two issue rule” to procedurally bar petitioner’s suppression issue. Appellate counsel has never seen the two issue rule applied on an issue argued at a suppression hearing.

Normally, appellate counsel argues the strongest issue raised at a suppression hearing, not every issue, as we are to winnow “out weaker arguments on appeal and [focus] on one central issue

¹ Even if petitioner had given consent, a consent search during an unlawful stop is invalid unless such consent is both voluntary and not an exploitation of the unlawful stop. State v. Robinson, 306 S.C. 399, 412 S.E.2d 411 (1991), Brown v. State, 188 Ga. App. 184, 372 S.E.2d 514 (1988); US v. Miller, 821 F.2d 546 (16th cir. 1987).

if possible, or at most on a few key issues.” Jones v. Barnes, 463 U.S. 745, 751-752, 103 S. Ct. 3308, 3312(1983). A suppression hearing is intertwined with many issues, but it’s the strongest issue that is relied on in an appeal. Will trial judges now rule on a Fourth Amendment issue by citing every conceivable exception to the Fourth Amendment warrant required in hopes the two issue rule will be invoked on appeal thereby making briefs unnecessarily long by having to brief issues that may not even be relevant to the good issue at hand?

A state procedural rule should not be used to bar the application of the Fourth Amendment to the United States Constitution, Jackson v. Denno, 378 U.S. 368, 84 S. Ct. 1774 (1963), and the purpose of the exclusionary rule under Wong Sun v. United States, 371 U.S. 471, 83 S. Ct. 407 (1963). See, Chambers v. Mississippi, 410 U.S. 284, 93 S. Ct. 1038 (1973).

Respondent did not argue the two issue rule on appeal. Rather, the State argued that seizure was valid after petitioner’s “new and distinct crime.” But there was no new and distinct crime as petitioner had the right to resist an illegal arrest. State v. McGowan, 347 S.C. 618, 557 S.E.2d 657 (2001).


Petitioner also had no notice this rule would be applied on appeal concerning an issue raised at a suppression hearing. A fundamental requisite of due process is notice. Goldberg v. Kelly, 397 U.S. 254, 90 S. Ct. 1011 (1970).

The issue before the court and on appeal is whether the trial court committed an error by admitting the drugs into evidence. This was sufficiently briefed.

CONCLUSION

Petitioner requests that this petition be granted.

Respectfully submitted,



Robert M. Pachak
Appellate Defender

ATTORNEY FOR PETITIONER.

This 19th day of December, 2011

STATE OF SOUTH CAROLINA
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THE STATE,

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PETITIONER

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 has been served on Christina J. Catoe, Esquire, and the S.C. Court of Appeals this 19th day of December, 2011.



Robert M. Pachak
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 19th day
of December, 2011.

 (L.S.)

Notary Public for South Carolina
My Commission Expires: June 21, 2020