STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Spartanburg County

Honorable Grace Gilchrist Knie, Circuit Court Judge

ASHLEY EUGENE MOORE,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2018-000069

JOHNSON PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Whether trial counsel provided ineffective assistance of counsel by not arguing Petitioner was illegally detained and searched as punishment for his refusal to consent to search his car?

STATEMENT

The Spartanburg County Grand Jury indicted Petitioner during the October 2010 term for trafficking cocaine base and possession of a firearm or knife during the commission of or attempt to commit a violent crime. App. 343 – 344. On April 25, 2011, Petitioner proceeded to trial before the Honorable Roger L. Couch and a jury. App. 1. Robert Hall represented Petitioner and Eddie Hunter represented the state. Id. The jury found Petitioner guilty as indicted. App. 285, l. 22 – 286, l. 9. Judge Couch sentenced Petitioner to twenty-five (25) years imprisonment for trafficking cocaine base and five (5) years imprisonment for possession of a weapon during the commission of a violent crime. App. 289, l. 23 – 290, l. 4.

On September 23, 2016, Petitioner filed a PCR application that alleged ineffective assistance of trial counsel for failure to object to the unconstitutional search and seizure performed by police. App. 292 – 298. On June 12, 2017, the state filed its return. App. 299 – 303. On September 22, 2017, Petitioner had his PCR hearing in front of the Honorable Grace Gilchrist Knie. App. 306. Rodney W. Richey represented Petitioner and Valerie Giovanoli represented the state. Id.

Through an order filed on December 14, 2017, Judge Knie denied Petitioner's application for post-conviction relief. App. 333 – 342.

This petition for Writ of Certiorari follows.

ARGUMENT

Trial counsel provided ineffective assistance of counsel by not arguing Petitioner was illegally detained and searched as punishment for his refusal to consent to search his car.

Relevant Facts

On June 30, 2010, Petitioner drove down Interstate 85 ("I-85"). App. 33, ll. 9 – 15. Officer Owens pulled over Petitioner for moving violations. App. 33, l. 22 – 34, l. 10; App. 35, ll. 13 – 19. After he pulled over Petitioner, Officer Owens said he smelled alcohol and had Petitioner perform three sobriety tests, which Petitioner passed. App. 46, ll. 8 – 14; App. 315, 2 – 9. The police told Petitioner they would give him a citation and let him be on his way if he consented to one more "search procedure" a "sniff air test." App. 315, ll. 10 – 17. Police clarified what they meant by that when they specifically asked Petitioner for consent to search his car. App. 315, ll. 18 – 21. Petitioner denied the request and, without any reasonable suspicion that Petitioner committed a crime, Officer Owens called in a K-9 unit to perform a dog sniff search on the car. App. 68, l. 23 – 69, l. 17.

After police concluded Petitioner was not driving while impaired, which was the initial reason for the stop, Petitioner was detained for an **additional fifteen minutes** to wait for the K-9 unit to arrive. App. 71, ll. 2 – 5.

At trial, the arresting officers testified to several innocuous actions Petitioner made during the stop as a means of conjuring up reasonable suspicion for a K-9 unit to search the car. Some examples include: they stated that Petitioner's posture and hand placement showed that Petitioner was likely a criminal because he assumed the, "felony position" or the, "defeated look," or the, "position of arrest." App. 53, ll. 13 – 16; App. 55, ll. 11 – 20; App. 60, l. 22 – 61, l. 1. That Petitioner's absent minded mistake when he failed to turn off his turn signal after he

pulled over belied a hidden criminality. App. 40, ll. 16 – 25; App. 42, ll. 2 – 9. The police's suspicions were aroused because Petitioner continued to talk on his cell phone when he was pulled over. App. 44, ll. 1 – 8. The fact Petitioner he held his foot on the brake when they pulled over him over indicated criminal behavior. App. 42, ll. 16 – 23. That Petitioner took fifteen seconds to pull over, which according to the police was "a long time to pull over," leant to criminal activity. App. 41, l. 22 – 42, l. 1. Petitioner took his cell phone with him when police asked him to exit the car and that was considered a criminal indicator because "it's their device for communication." App. 51, ll. 3 – 9. The police criminalized Petitioner's smoking habit because the fact that he smoked a cigarette during the stop indicated criminal behavior. App. 52, ll. 9 – 18. Petitioner had cash when the police patted him down and that was considered suspicious. App. 53, l. 19 – 54, l. 11. The fact that Petitioner said he was traveling to his grandmother's house at a late hour also meant Petitioner likely committed a crime. App. 59, l. 19 – 60, l. 20. Lastly, that Petitioner drove a rental car from a suburb of Atlanta implied criminal activity. App. 57, l. 3 – 58, l. 12. According to the arresting officers, these completely legal and non-threatening actions are all definitive indicators of criminal activity that gave police the power to extend Petitioner's detainment for the K-9 unit to arrive and search his vehicle without his consent. App. 69, l. 21 – 70.

The K-9 unit eventually arrived at the scene, the dog alerted police to the passenger door, and although no drugs were located in that spot, police searched the rest of the vehicle and found cocaine base and a semi-automatic hand gun. App. 73, ll. 2 – 12. Police arrested Petitioner and charged him with trafficking in cocaine base and possession of a firearm or knife during commission of or attempt to commit a violent crime. App. 73, ll. 4 – 5; App. 343 – 344.

At trial, defense counsel moved to suppress the crack cocaine and pistol seized as a result of the unreasonable detention of Petitioner. App. 28, ll. 2 – 6. Defense counsel argued that the reasonable suspicion alleged by the officers amounted to common behavior among all drivers. App. 98, ll. 6 – 7. It is common for people to talk on their phones when they drive, "some people, in our culture, are attached to the phone." App. 98, ll. 15 – 16. "The signal, the using the phone, driving slumped in the seat, looks at his pockets after he's been searched, these are things that, you know people will do." App. 98, ll. 22 – 25. "[Petitioner] held his hands up when he was searched, but that may indicate that he's watched TV or seen that kind of police duty to hold your hands up…These things [Y]our [H]onor are not that unusual." App. 99, ll. 1 – 5. Defense counsel further argued all of Petitioner's actions during the stop that police used against him as "suspicious" were, "reasonable behaviors on his part, [for] somebody in his position." App. 99, ll. 8 – 9. Therefore, he concluded, there was no reasonable suspicion to detain Petitioner for an additional, "15 or 16 minutes before the dog got there," and that, "[Petitioner] should have been released after he was given the warning tickets and said no, I don't want you searching my stuff, which is everybody's right." App. 101, ll. 11 – 17. However, trial counsel did not argue that police punished Petitioner because he exercised his Constitutional right to privacy when he denied the police's request for consent to search his car.

Judge Couch found the police presented enough specific and articulable facts to prove reasonable suspicion to detain Petitioner for a dog sniff search; and therefore denied Petitioner's motion to suppress. App. 114, ll. 20 – 22.

At his PCR hearing, Petitioner testified that his counsel was ineffective for his failure to adequately argue the suppression motion. App. 313, ll. 11 – 20. The entirety of Petitioner's case rested on the suppression motion. App. 313, ll. 21 – 23. Trial counsel testified that he did not know

what other arguments he could have made. App. 319, ll. 14 – 16. Trial counsel also stated at PCR that the suppression motion was the crux of the case. App. 16, ll. 6 – 9.

In an order filed on December 14, 2017, Judge Knie denied Petitioner's PCR application and concluded that trial counsel did not provide ineffective assistance for failure to adequately argue the suppression motion at trial. App. 333 – 342. That denial was an error, and that error prejudiced Petitioner.

Discussion

Trial counsel provided ineffective assistance when he failed to argue that Petitioner was illegally detained and searched as punishment for his refusal to consent to the police's request to search his car. Petitioner denied consent to search his vehicle and as a consequence the police detained Petitioner for an unreasonable period of time, and without reasonable suspicion, to have a K-9 unit arrive to search the vehicle. Moreover, the police continued to detain Petitioner after the initial reason for the stop had concluded because they held him there after he passed the field sobriety tests and proved he was not driving while impaired. "Violation of motor vehicle codes provides an officer reasonable suspicion to initiate a traffic stop." State v. Provet, 405, S.C. 101, 108, 747 S.E.2d 453, 457 (2013) (citing Pennsylvania v. Mimms, 434 U.S. 106, 109, 98 S.Ct. 330 (1977). "A traffic stop supported by reasonable suspicion of a traffic violation remains valid until the purpose of the traffic stop has been complete." Id. (*citing* Arizona v. Johnson, 555 U.S. 323, 333, 129 S.Ct. 781, 788 (2009)); see Rodriguez v. United States, __ U.S __, 135 S.Ct. 1609, 1616 (2015) (holding that even a *de minimis* extension of a traffic stop is unconstitutional absent reasonable suspicion). Therefore, the PCR court erred in holding that trial counsel provided effective assistance of counsel because the police had no reasonable suspicion to detain

Petitioner after he passed the field sobriety tests and only did so in retaliation of Petitioner exercising his Constitutional right to privacy.

To establish ineffective assistance of counsel, the Petitioner must satisfy the two-prong test set forth in Strickland, 466 U.S. 668. "First, a defendant must show that counsel's performance was deficient. Under this prong, [t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms." Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989) (internal citations omitted). "The second prong of the Strickland test requires a showing that the 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." Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (quoting Strickland, 466 U.S. at 692).

In this case, trial counsel's performance was deficient, as it fell below an objective standard of reasonableness. See Strickland, 466 U.S. at 687-88. Specifically, trial counsel should have argued that police punished Petitioner for exercising his Constitutional rights when they detained him for an unreasonable amount of time after the initial reason for the stop was alleviated, and without reasonable suspicion, to have a K-9 unit arrive to search the car.

The articulable facts that police testified at trial that gave rise to their suspicion that Petitioner committed a crime were scant; and therefore, they subjected Petitioner to a longer detainment and illegal search for a different reason. The timing of the police's decision to extend Petitioner's detention is indicative of why they decided to hold Petitioner and call in the K-9 unit to search his car. After Petitioner told them he did not consent to a search, police immediately subjected him to a prolonged detainment in order to search his car with a K-9 unit. Therefore, it is reasonable to believe that police initiated this prolonged detainment, and search, in response to

Petitioner exercising his Constitutional right to privacy. Trial counsel should have argued that Petitioner was being punished for refusing to consent to a search, and because trial counsel did not make that argument, he provided deficient performance.

In Florida v. Royer, 460 U.S. 491, 103 S.Ct. 1319 (1983) the Supreme Court held that a person who exercised their Constitutional right to refuse to give consent for a search or seizure, "may not be detained even momentarily without reasonable, objective grounds for doing so; *and his refusal to listen or answer does not, without more, furnish those grounds.* Id. at 498, 103 S.Ct. at 1324. (citing United States v. Mendenhall, 446 U.S. 544, 556, 100 S.Ct., 1870, 1878) (emphasis added). Therefore, in the instant case, if police did not have objective grounds for extending Petitioner's detainment, they could not use his refusal of consent against him.

The nebulous explanations that the arresting officers gave as the grounds for Petitioner's prolonged detainment were the same type that the Court refuted in Reid v. Georgia, 448 U.S. 438, 100 S.Ct. 2752 (1980). In Reid, all but one of a set of circumstances were held to "*describe a very large category of presumably innocent travelers*, who would be subject to virtually random seizures were the Court to conclude that as little foundation as there was in this case could justify a seizure." Id. at 441, 100 S.Ct. at 2654. The Reid Court discounted the following factors: that Reid flew in from a principal source city, that he arrived early in the morning...and that he had no luggage other than a shoulder bag. Id. The Court also found irrelevant that the itinerary on the tickets of Reid and his companion showed a visit of only one day in Ft. Lauderdale, and that both men appeared nervous during the encounter with the DEA agent. Id. at 439, 100 S.Ct. at 2753. (emphasis added) United States v. White, 890 F.2d 1413, 1417 (1989) (citing Reid, supra).

As in Reid, in the instant case the reasons the officers gave for the prolonged detention of Petitioner "describe a very large category of presumably innocent travelers." Therefore, the officers'

explanation for prolonging Petitioner's detainment was insufficient to constitute reasonable suspicion. Since they did not have reasonable suspicion that Petitioner committed a crime, the officers could only have detained him in response to his refusal to consent to the search of his car. Officer Owens specifically told Petitioner they would let him be on his way, if he consented to one more search procedure. App. 315, ll. 10 – 17. Then Owens detained Petitioner directly after he refused to consent to that search procedure. Therefore, had trial counsel argued that police punished Petitioner when he exercised his right to refuse to consent, the suppression motion would have been successful.

As to prejudice, trial counsel's deficient performance "so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." See Butler, 286 S.C. at 442, 334 S.E.2d at 814 (quoting Strickland, 466 U.S. at 692). Suppression of the evidence found during the unlawful search of Petitioner's car was critical in Petitioner's defense and failure to suppress that evidence, due to ineffective assistance, prejudiced Petitioner.

It is important to note that on direct appeal the Court of Appeals decided in favor of Petitioner. State v. Moore, 404 S.C. 634, 746 S.E.2d 352 (2013); App. 310, ll. 4 – 9. That decision evinced how close the call was in regards to whether police had reasonable suspicion to extend Petitioner's detainment and search his vehicle. Had counsel made the argument that the police punished Petitioner for exercising his Constitutional right to privacy, it would have been enough tip the totality of circumstances in Petitioner's favor. Therefore, the PCR court erred when it found trial counsel provided effective assistance of counsel because "there is a reasonable probability that, but for [trial] counsel's unprofessional errors, the result of the proceeding would have been different." App. 363 – 373; Cherry, 300 S.C. at 118, 386 S.E.2d at 625 (internal citations omitted); See Strickland, 466 U.S. at 694.

CONCLUSION

Based on the foregoing argument, Petitioner respectfully requests that his Writ of Certiorari be granted to allow full briefing on the issue.

Victor R. Seeger
Appellate Defender

ATTORNEY FOR PETITIONER

This 8th day of May, 2018.

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for Ashley Eugene Moore states:

1. He is 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 Judge Grace Gilchrist Knie, which was held on September 22, 2017, 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 Ashley Eugene Moore.

Respectfully Submitted,

Victor R. Seeger

Victor R. Seeger
Appellate Defender
ATTORNEY FOR PETITIONER

This 8th day of May, 2018.

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."

Victor R. Seeger
Appellate Defender

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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 Megan Harrigan Jameson, 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 Ashley Eugene Moore, #345798, at Lee Correctional Institution, 990 Wisacky Hwy., Bishopville, SC 29010, this 8th day of May, 2018.

Victor R. Seeger

Victor R. Seeger
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 8th day of May, 2018.

Maria Mendez (L.S)

Notary Public for South Carolina
My Commission Expires: July 3, 2023