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October 22, 2018

The Honorable Daniel E. Shearouse
Clerk, Supreme Court of South Carolina
P.O. Box 11330
Columbia, SC 29211

The Honorable Scott B. Suggs
Clerk of Court
1 Public Square
Darlington, SC 29532

RECEIVED

OCT 24 2018

S.C. SUPREME COURT

**RE: Jameco Toney, #299774, v. State of South Carolina
2017-CP-16-470**

Dear Mr. Shearouse and Mr. Suggs:

Enclosed for filing is a Notice of Appeal in the above-referenced case. Also enclosed are the following:

- (1) Proof of Service of the Notice of Appeal;
- (2) A copy of the Order which is to be challenged on appeal; and
- (3) Prior Order of Appointment of Counsel.

As I was appointed to represent Mr. Toney in his PCR proceeding, I anticipate that the Office of Appellate Defense will represent Mr. Toney in this appeal.

Yours very truly,



Lance S. Boozer

Enclosures

cc: Johnny E. James, Jr., AAG
Loriene French, OAD
Jameco Toney, #299774

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

OCT 24 2018

APPEAL FROM DARLINGTON COUNTY
Court of Common Pleas

S.C. SUPREME COURT

The Honorable Larry B. Hyman, Jr., Circuit Court Judge

Case No. 2017-CP-16-470

Jameco Toney, #299774,Petitioner,

v.

State of South Carolina,.....Respondent.

NOTICE OF APPEAL

The Petitioner appeals the Honorable Larry B. Hyman, Jr.'s, Order dated October 1, 2018, denying post-conviction relief to the Petitioner. The Order was received by undersigned counsel on October 20, 2018. A copy of the Order on appeal is attached to this notice.

Respectfully submitted,



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THE STATE OF SOUTH CAROLINA
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APPEAL FROM DARLINGTON COUNTY
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The Honorable Larry B. Hyman, Jr., Circuit Court Judge

Case No. 2017-CP-16-470


Jameco Toney, #299774,Petitioner,

v.

State of South Carolina,.....Respondent.

PROOF OF SERVICE

I, Lance S. Boozer, appointed attorney for Petitioner, certify that I have today served within Notice of Appeal upon the Respondent by depositing a copy of it in the United States Mail, postage prepaid, addressed to Assistant Attorney General Johnny E. James, Jr., P.O. Box 11549, Columbia, SC 29211. I further certify that all parties required by Rule to be served have been served this 22nd day of October, 2018.



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Handwritten initials

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF DARLINGTON) FOR THE FOURTH JUDICIAL CIRCUIT

Jameco Abdul Toney,) Case No.: 2017-CP-16-00470
S.C.D.C. No. 299774,)

Applicant,)

ORDER OF DISMISSAL

v.)

State of South Carolina,)

Respondent.)

This matter comes before the Court by way of an application for post-conviction relief filed by Jameco Abdul Toney ("Applicant") on June 16, 2017, and amended by filing on October 27, 2017. Respondent made its return on or about September 1, 2017. The Court convened an evidentiary hearing into the matter on Monday, July 23, 2018, at the Darlington County Courthouse in Darlington, South Carolina. Applicant was present at the hearing and represented by Lance S. Boozer, Esq. Johnny Ellis James Jr., Esq., of the South Carolina Attorney General's Office, represented Respondent.

Applicant did not testify at the evidentiary hearing. Applicant's trial counsel, Christie Wise Henderson, Esq. ("Counsel") briefly testified. The Court had before it Applicant's records from the South Carolina Department of Corrections, a copy of the original transcript, the records of the Darlington County Clerk of Court regarding the subject conviction, Applicant's direct appeal records, the pleadings, and memoranda requested at the conclusion of the evidentiary hearing in lieu of closing arguments. The Court finds as follows:

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SCPTB JUDGE
FRK OF COURT/R.O.D.
DARLINGTON COUNTY, S.C.

I. PROCEDURAL HISTORY

Applicant is confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Darlington County Clerk of Court. Applicant was indicted at the July 2011 term of the Darlington County Grand Jury for trafficking in marijuana, between 10 and 100 pounds, 2nd offense (2011-GS-16-00811). Christie Wise Henderson, Esq. represented Applicant, and Zack Farr, Esq., of the Fourth Circuit Solicitor's Office, prosecuted the case. Applicant proceeded to trial before the Honorable R. Ferrell Cothran and a jury. The jury found Applicant guilty as indicted on November 20, 2013. Judge Cothran sentenced Applicant to imprisonment for a term of nine years.

Applicant filed a timely notice of appeal and a direct appeal was perfected by Jeffrey S. Stephens, Esq., who raised the following issue:

Did the trial court err by finding that the Appellant lacked standing to challenge both the search of the rental car he was driving and the unreasonable length of his detention as a 4th Amendment seizure?

Respondent argued that the issue was not preserved because defense counsel only objected during the hearing on the motion *in limine*, and further that the suppression motion was properly denied. By opinion decided October 19, 2016, the South Carolina Court of Appeals found the issue not preserved, did not comment on the merits, and affirmed Applicant's convictions. State v. Toney, Op. No. 2016-UP-428 (S.C. Ct. App. 2016). The Remittitur was issued on November 4, 2016.

Present Application

The present application for post-conviction relief follows. At the evidentiary hearing, Applicant proceeded only on the following allegation:

1. Ineffective assistance of counsel, in that:

- a. "Counsel was ineffective for failing to preserve for appeal whether trial court erred in finding Applicant lacked standing to challenge search of rental car and length of detention."

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed the testimony presented at the evidentiary hearing, observed the witnesses presented at the hearing, passed upon their credibility, and weighed the testimony accordingly. Further, this Court has reviewed the records submitted to it by the parties and the legal arguments made by the attorneys. Pursuant to S.C. Code Ann. § 17-27-80, this Court makes the following findings based upon all of the probative evidence presented.

A. Ineffective Assistance of Counsel

In a post-conviction relief action, an applicant has the burden of proving the allegations in his or her application. Rule 71.1(e), SCRCP; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). When an applicant alleges ineffective assistance of counsel as a ground for relief, he or she must prove "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Butler at 442, 334 S.E.2d 441 (quoting Strickland v. Washington, 466 U.S. 668, 686 (1984)). The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. Id.

"[C]ounsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Butler at 442, 334 S.E.2d 441 (quoting Strickland at 690). The applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989). "Judicial scrutiny of counsel's performance must be highly deferential, as it is all too tempting for a defendant to second-guess counsel's assistance after conviction or an adverse sentence, and it is

all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." Strickland, 466 U.S. at 689; Edwards v. State, 392 S.C. 449, 456-57, 710 S.E.2d 60, 64 (2011). "[W]hen counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel." Smith v. State, 386 S.C. 562, 567, 689 S.E.2d 629, 632 (2010) (citing Caprood v. State, 338 S.C. 103, 110, 525 S.E.2d 514, 517 (2000)).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry at 117, 386 S.E.2d at 625 (citing Strickland at 688). Second, counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry at 117-18, 386 S.E.2d at 625 (citing Strickland at 694).

The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. Strickland at 696. A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies; if it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Strickland, 466 U.S. at 696-97.

1. Failure to Object to Search of Rental Car

Applicant alleges Counsel was ineffective in failing to object to the search of the rental car he was operating during trial, such that the pre-trial ruling on his standing to challenge the search was not preserved for appeal. The Court finds Applicant cannot show any prejudice from

Counsel's failure to preserve the issue for appeal because he had no expectation of privacy in the rental car (1) categorically under the prevailing law in effect at the time of trial or (2) given the particular facts of this case under the prevailing law at the time of the evidentiary hearing. The Court finds Applicant additionally cannot show deficiency on the part of Counsel because the Court can find no precedential basis to hold defense attorneys to a continuing obligation of clairvoyance where they happen upon arguments later validated by holdings issued after trial and appeal.

The Law at Trial

Before a criminal defendant can challenge the propriety of a search or seizure, the defendant seeking to raise such a challenge must establish that his own personal Fourth Amendment rights were violated by that search or seizure in order to be entitled to the benefits of the exclusionary rule. State v. McKnight, 291 S.C. 110, 114, 352 S.E.2d 471, 473 (1987); see also Rakas v. Illinois, 439 U.S. 128, 132, n.1 (1978) ("The proponent of a motion to suppress has the burden of establishing that his own Fourth Amendment rights were violated by the challenged search or seizure."). That is true because rights protected by the Fourth Amendment are personal rights and cannot be vicariously asserted. Alderman v. United States, 394 U.S. 165, 174 (1969).

The "capacity to claim the protection of the Fourth Amendment depends not upon a property right in the invaded place but upon whether the person who claims the protection of the Amendment has a legitimate expectation of privacy in the invaded place." Rakas, 439 U.S. at 143 (citing Katz v. United States, 389 U.S. 347, 353 (1967)). A legitimate expectation of privacy is both subjective and objective in nature. State v. Missouri, 361 S.C. 107, 112, 603 S.E.2d 594, 596 (2004). In order to establish a legitimate expectation of privacy, an individual

must show: (1) the individual had a subjective expectation that the area searched would remain free from intrusion; and (2) the individual's subjective expectation is one that society recognizes as reasonable. Id.; see also Minnesota v. Olsen, 495 U.S. 91, 95-96 (1990) (instructing a subjective expectation of privacy can be considered legitimate if it is one society accepts and recognizes as reasonable).

Leading into the November 18, 2013, trial, the prevailing law in South Carolina, as well as other jurisdictions, was that the unauthorized driver of a rental vehicle had no reasonable expectation of privacy because he had no legitimate claim to the vehicle itself, no lawful right to control the vehicle, and no right whatsoever to possess the vehicle. See United States v. Hargrove, 647 F.2d 411, 412 (4th Cir. 1981) (“[O]ne who can assert no legitimate claim to the car he was driving cannot reasonably assert an expectation of privacy in a bag found in that automobile. . . . A person who cannot assert a legitimate claim to a vehicle cannot reasonably expect that the vehicle is a private repository for his personal effects, whether or not they are enclosed in some sort of a container[.]”); see also United States v. Kennedy, 638 F.3d 159, 165 (3rd Cir. 2011) (“An authorized driver on the rental agreement has lawful possession of the vehicle and, within the scope of the rental agreement, may legitimately exclude others from using it. In contrast, an authorized driver has no cognizable property interest in the rental vehicle and therefore no accompanying right to exclude. The lack of such an interest supports the position that it is objectively unreasonable for an unauthorized driver to expect privacy in the vehicle.”); United States v. Luster, 324 F.App’x 224, 225 (4th Cir. 2009) (“An unauthorized driver of a rented car has ‘no legitimate privacy interest in the car’ and, therefore, a search of the car ‘cannot have violated his Fourth Amendment rights.’”). “This conclusion is not altered where the authorized lessee allows the unauthorized driver to drive the rental vehicle, as an

unauthorized driver still does not have permission of the rental company, the owner of the vehicle.” Luster, 324 F.App’x at 225; see also United States v. Wellons, 32 F.3d 117, 119 (4th Cir. 1994) (“[A]ppellant, as an unauthorized driver of the rented car, had no legitimate privacy interest in the car and, therefore, the search of which he complains cannot have violated his Fourth Amendment rights.”).

The undisputed facts provide that Applicant was not listed as an authorized driver on the rental agreement, but rather Applicant claimed that he obtained the rental car from one Timothy Sanders, who was the authorized renter of the vehicle. (Tr. 28-29; Tr. 32-33; Tr. 41-46; Tr. 60-61). Under Wellons, good law at the time of trial, the time of appeal, and until May 14, 2018, those facts are dispositive—Applicant had no standing to assert an expectation of privacy as the unauthorized driver of a rental car. As such, Counsel’s failure to renew the objection at trial is of no consequence because it was meritless under long-standing and broadly accepted precedent.

The Law Today

Given the particular facts of this case, Applicant still could not assert a reasonable expectation of privacy in the rental car if trial were held today. On May 14, 2018, the Supreme Court of the United States abrogated the long-standing and broadly accepted precedent articulated in Wellons, and held “that the mere fact that a driver in lawful possession or control of a rental car is not listed on the rental agreement will not defeat his or her otherwise reasonable expectation of privacy.” Byrd v. United States, 138 S.Ct. 1518, 1531 (2018). The Supreme Court distinguished an unauthorized driver of a rental car from a mere passenger, who would have little expectation of privacy, by observing an unauthorized driver would have complete dominion and control over the vehicle and could exclude others from it. Id. at 1528 (citing Rakas, 439 U.S. at 149). The Supreme Court acknowledged that the inquiry turned on lawful

possession, and noted “a person present in a stolen automobile at the time of the search may not object to the lawfulness of the search of the automobile. No matter the degree of possession and control, the car thief would not have a reasonable expectation of privacy in a stolen car.” Id. at 1529 (quoting Rakas, 439 U.S. at 141, n.9). The Supreme Court left for remand the question of whether Byrd was “no better situated than a car thief” and whether “probable cause justified the search in any event.” Id. at 1531.

Given the facts of the present case, even post-Byrd, Applicant was no better situated than a car thief and had no lawful right to exclude others from the rental car. During the traffic stop, law enforcement contacted the rental car company, confirmed Applicant was an unauthorized driver, confirmed that the rental contract was expired, and confirmed the return of the car was two days overdue. The rental company representative directed law enforcement to reclaim their vehicle, tow it, and authorized law enforcement’s search. (Tr. 69, ll. 8-20; Tr. 80-82; Tr. 133-37, 168-69). In light of these facts, law enforcement had every right to take possession of the overdue rental car, arrange for its towing, and conduct an inventory search, and Applicant had no standing to contest the rental company’s consent thereto. See, e.g. State v. Miller, 423 S.C. 95, 814 S.E.2d 166 (2018) (affirming tow and inventory search of vehicle where defendant was arrested for driving with a suspended license, and the car was neither his nor that of anybody present at the apartment complex at which it was parked); see also United States v. Bullette, 854 F.3d 261, 265 (4th Cir. 2017) (“An inventory search of an automobile is lawful (1) where the circumstances reasonably justified seizure or impoundment, and (2) law enforcement conducts the inventory search according to routine and standard procedures designed to secure the vehicle or its contents.”); United States v. Brown, 787 F.2d 929, 932 (4th Cir. 1986) (“The question . . . is . . . whether the police officer’s decision to impound was reasonable under the

circumstances.”). The alternative position offered by Applicant—that the unauthorized driver of an overdue rental car has standing to object to a search over the consent of the rental company which rightfully owns the car—is facially absurd.¹

Applicant’s Stop and Detention was Reasonable Irrespective of Standing

Applicant also cannot show prejudice from Counsel’s failure to preserve the issue of the validity of the stop and search because it was entirely reasonable and appropriate under the law. “The touchstone of the Fourth Amendment is reasonableness.” Florida v. Jimeno, 500 U.S. 248, 250 (1991). Consequently, only unreasonable searches and seizures are constitutionally prohibited, and law enforcement officers are not required to be perfect or mistake-free in order to be in compliance with the requirements of the Fourth Amendment. State v. Foster, 269 S.C. 373, 378, 237 S.E.2d 589, 591 (1977).

Pursuant to the Fourth Amendment, “[a] police officer may stop and briefly detain and question a person for investigative purposes, without treading upon his Fourth Amendment rights, when the officer has a reasonable suspicion supported by articulable facts, short of probable cause for arrest, that the person is involved in criminal activity.” State v. Blassingame, 338 S.C. 240, 248, 525 S.E.2d 535, 539 (Ct. App. 1999). For Fourth Amendment purposes, an automobile stop, along with the detention of individuals during the stop, constitutes a seizure. State v. Maybank, 352 S.C. 310, 315, 573 S.E.2d 851, 854 (Ct. App. 2002). However, the initiation of an automobile stop is *per se* reasonable when either probable cause exists to believe a traffic violation has occurred or reasonable suspicion exists to believe the occupants of the

¹ If absurdity did prevail, law enforcement couldn’t have known that it needed a warrant to search the overdue rental car driven by a thief. Excluding the evidence would not have deterred any conduct, but would have served no purpose but to frustrate and confuse law enforcement which must already operate an infinite tangle of conditions precedent to any search—as such, application of the exclusionary rule would have been inappropriate, and the lower court’s ruling would have been affirmed on the merits. See, e.g. State v. Brown, 401 S.C. 82, 92, 736 S.E.2d 263, 268 (2012) (discussing Davis v. United States 564 U.S. 229 (2011)) (“[T]he exclusionary rule does not apply when the police conduct a search in accordance with existing appellate precedent.”).

vehicle are involved in criminal activity. See Knight v. State, 284 S.C. 138, 141, 325 S.E.2d 535, 537 (1985) (“[A] police officer may stop an automobile and briefly detain its occupants, even without probable cause to arrest, if he has a reasonable suspicion that the occupants, even without probable cause to arrest, if he has a reasonable suspicion that the occupants are involved in criminal activity.”); State v. Williams, 351 S.C. 591, 598, 571 S.E.2d 703, 707 (Ct. App. 2002) (“Where probable cause exists to believe that a traffic violation has occurred, the decision to stop the automobile is reasonable per se.”); Whren v. United States, 517 U.S. 806, 810 (1996) (“An automobile stop is thus subject to the constitutional imperative that it not be ‘unreasonable’ under the circumstances. As a general matter, the decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred.”).

A lawful traffic stop begins at the point an officer stops a vehicle to investigate a traffic violation and “ordinarily continues, and remains reasonable, for the duration of the stop.” Arizona v. Johnson, 555 U.S. 323, 333 (2009). Once a lawful traffic stop is initiated, an officer may order the driver and any passengers out of the vehicle pending completion of the stop and “may request a driver’s license and vehicle registration, run a computer check, and issue a citation.” State v. Pichardo, 367 S.C. 84, 98, 623 S.E.2d 840, 847 (Ct. App. 2005) (citing United States v. Sullivan, 138 F.3d 126 (4th Cir. 1998)). “Normally, the stop ends when the police have no further need to control the scene, and inform the driver and passengers they are free to leave.” Johnson, 555 U.S. at 333.

During the course of the stop, an officer can inquire into matters unrelated to the initial justification for the stop without converting the stop into something other than a lawful seizure so long as the unrelated questioning does not measurably extend the duration of the stop. Id.; see also Muehler v. Mena, 544 U.S. 93, 100-101 (2005) (instructing additional questioning during a

detention unrelated to the original purpose of the detention does not constitute an additional seizure or independent Fourth Amendment violation). Such an investigatory traffic stop must be temporary and last no longer than necessary to effectuate its purpose. Pichardo, 367 S.C. at 98, 623 S.E.2d at 848; see also United States v. Branch, 537 F.3d 328, 336 (4th Cir. 2008) (“The maximum acceptable length of a routine traffic stop cannot be stated with mathematical precision. Instead, the appropriate constitutional inquiry is whether the detention lasted longer than was necessary, given its purpose.”). Continued questioning beyond the time reasonably necessary required to complete a traffic stop is lawful and permissible where (1) the officer has a reasonable articulable suspicion of other illegal activity, or (2) the traffic stop becomes a consensual encounter. Id., 367 S.C. at 99, 623 S.E.2d at 848.

Reasonable suspicion consists of “a particularized and objective basis’ that would lead one to suspect another of criminal activity.” State v. Lesley, 326 S.C. 641, 644, 486 S.E.2d 276, 277 (Ct. App. 1997) (quoting United States v. Cortez, 449 U.S. 411, 417 (1981)). “Reasonable suspicion ‘is not readily, or even usefully, reduced to a neat set of legal rules, but, rather, entails common sense, nontechnical conceptions that deal with factual and practical considerations of everyday life on which reasonable and prudent persons, not legal technicians, act.” State v. Provet, 391 S.C. 494, 500, 706 S.E.2d 513, 516 (Ct. App. 2011) (quoting United States v. Foreman, 369 F.3d 776, 781 (4th Cir. 2004)). “In this highly fact-specific inquiry, reasonable suspicion ‘is a fluid concept which takes its substantive content from the particular context in which the standard is being assessed.” State v. Wallace, 392 S.C. 47, 51-52, 707 S.E.2d 451, 453 (Ct. App. 2011) (quoting Foreman, 369 F.3d at 781). The reasonable suspicion standard “is a less demanding standard than probable cause and requires a showing considerably less than preponderance of the evidence[.]” Illinois v. Wardlow, 528 U.S. 119, 123 (2000).

In determining the existence of reasonable suspicion, the totality of the circumstances must be considered. Pichardo, 367 S.C. at 104, 623 S.E.2d at 85. All of the circumstances of the stop, including the officer's own experience and specialized training, must be considered as a whole to determine whether the officer's actions were reasonable in light of all the information available to him at the time. See United States v. Mason, 628 F.3d 123, 129 (4th Cir. 2010) (“[J]ust as one corner of a picture might not reveal the picture’s subject or nature, each component that contributes to reasonable suspicion might not alone give rise to reasonable suspicion.”); see also United States v. Arvizu, 534 U.S. 266, 273 (2002) (“[W]e have said repeatedly that [reviewing courts] must look at the ‘totality of the circumstances’ of each case to see whether the detaining officer has a ‘particularized and objective basis’ for suspecting legal wrongdoing. The process allows officers to draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them that ‘might well elude an untrained person.’” (citations omitted)). Thus, the presence of several factors individually consistent with innocent travel can establish reasonable suspicion when viewed together in totality. United States v. Sokolow, 490 U.S. 1, 9 (1989).

In the present matter, law enforcement pulled Applicant over after observing Applicant make an unsafe lane change—a traffic violation. See S.C. Code Ann. § 56-5-1900. Therefore, the traffic stop of the rental vehicle was reasonable and proper. Law enforcement promptly discovered Applicant was not authorized to possess or drive the vehicle after reviewing the rental contract provided by Applicant, and further discovered the vehicle was two days overdue. Those two facts immediately constituted reasonable suspicion of criminal activity and necessitated an extension of the traffic stop. Law enforcement also detected numerous other indicators which, taken together, provided for reasonable suspicion of criminal activity:

- (1) The rental vehicle's windows were partially rolled down while it was travelling along the interstate, which the officer knew was commonly used to mask the odor of illegal drugs;
- (2) Applicant exhibited signs of excessive nervousness above and beyond those exhibited by drivers during routine traffic stops conducted by the officer;
- (3) Applicant's nervousness increased over time, which law enforcement identified as unusual;
- (4) Applicant provided inconsistent information about where he had been and did not know where the place he claimed to have been coming from in Columbia was located;
- (5) The responses Applicant provided did not make sense based on the fact he lived in close proximity to an unemployment office and rental agency he bypassed for ones much farther away; and
- (6) Applicant reacted differently and suspiciously looked back at the rental vehicle when asked if there was any marijuana hidden in it.

Given these factors and the considerable experience of the investigating officer, law enforcement had reasonable suspicion to believe Applicant was involved in criminal activity independent of the traffic violation he committed and, as a result, was fully justified in expanding the scope of the investigation and the length of the traffic stop. Accordingly, because law enforcement had probable cause to initiate the traffic stop and detected numerous factors providing for reasonable suspicion that Applicant was involved in criminal activity during the course of the stop, law enforcement's seizure of Applicant during the stop was entirely reasonable and did not violate any of his constitutional rights.

Finally, Applicant abandoned the property. "Abandoned property has no protection from either the search or seizure provisions of the Fourth Amendment." State v. Dupree, 319 S.C.,

454, 457, 462 S.E.2d 279, 281 (1995) (citing California v. Greenwood, 486 U.S. 35 (1988)). The same applies when the abandonment is in response to lawful police action. Id., 319 S.C. at 460, 462 S.E.2d at 283 (citing Greenwood). After law enforcement popped the trunk of the rental car and touched a bag contained therein, Applicant fled and abandoned the rental car and its contents, and upon his immediate capture volunteered that there was fifteen pounds of marijuana in the package in the trunk. (Tr. 52-54). Therefore, Applicant can show no prejudice from Counsel's failure to preserve the matter for appeal because even if Applicant had standing to challenge the search, he had *no chance* of invalidating the search and excluding the evidence at trial or otherwise prevailing on appeal.

Counsel's Fleeting Clairvoyance Does Not Obligate Continuing Clairvoyance

Applicant also cannot prevail because Counsel was not deficient in her failure to preserve for appeal the issue of Applicant's standing to challenge the search because defense attorneys are not required to be clairvoyant. It is a long-standing rule that an attorney is not required to be clairvoyant and anticipate or discover changes in the law which were not in existence at the time of trial. Harden v. State, 360 S.C. 405, 409, 602 S.E.2d 48, 50 (2004) (citing Gilmore v. State, 314 S.C. 453, 457, 445 S.E.2d 454, 456 (1994)). Typically the rule arises in PCR matters where an applicant alleges defense counsel was ineffective for failing to present *at all* an argument or law not recognized or in effect until after trial. See, e.g. Robinson v. State, 308 S.C. 74, 417 S.E.2d 88 (1992) (counsel not deficient in failing to argue battered spouse syndrome six years before its recognition in State v. Hill²); Teamer v. State, 416 S.C. 171, 183, 786 S.E.2d 109, 115 (2016) (counsel not deficient in failing to object to "reach the truth" jury instruction five years before its prohibition in State v. Daniels³); Winkler v. State, 418 S.C. 643, 653-54, 795 S.E.2d

² 387 S.C. 398, 339 S.E.2d 121 (1986)

³ 401 S.C. 251, 737 S.E.2d 473 (2012)

686, 692 (2016) (counsel not deficient in failing to object to trial court's refusal to answer jury question about what would happen if they failed to reach a unanimous sentencing verdict, where no precedent existed at the time of trial to support such an objection).

The present facts are somewhat unique, insofar as Counsel briefly "held the crystal ball" and offered an argument for Applicant's Fourth Amendment standing in the pre-trial hearing that channeled elements of the holding in Byrd years later. However, there is no precedent in our law of which this Court is aware to provide that a defense attorney who is temporarily prescient must at all points thereafter be held to the continued maintenance of his or her foresight. Counsel cannot not be held to the standard of an oracle after evidently and unknowingly divining the legal future. Had Counsel not made the prophetic argument at all, there would certainly be no deficiency, so it would be nonsensical to provide greater relief to Applicant by virtue of the fact that Counsel went above and beyond the level of competence expected of attorneys in this state and made an extraordinary, if imperfectly preserved, argument against the tide of precedent.⁴

For all of these reasons, the Court finds Applicant cannot show prejudice or deficiency as required under Strickland, and his request for relief is **DENIED**.

⁴ It is tangential to the rights of the Applicant at issue in a PCR action, but given the concurrent exposure of Counsel to liability that may come with any finding of ineffectiveness, it is reasonable to expect that such a finding could have a chilling effect on the sort of long-shot arguments of defense counsels in the future, to the detriment of defendants and the development of the law generally.

III. CONCLUSION

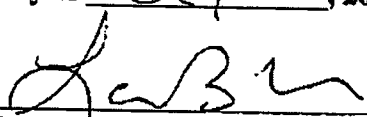
Based on all the foregoing, this Court finds and concludes that Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

This Court notifies the Applicant that he must file and serve a notice of appeal within thirty (30) days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRPC provides that if the Applicant wishes to seek appellate review, PCR counsel must serve and file a Notice of Appeal on the Applicant's behalf. Your attention is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. That the Application for Post-Conviction Relief must be denied and dismissed with prejudice; and
2. The Applicant must be remanded to the custody of the South Carolina Department of Corrections.

AND IT IS SO ORDERED this 1 day of OCT, 2018.


LARRY B. HYMAN, JR.
Presiding Judge
Fourth Judicial Circuit

10-1-18, South Carolina
Cowley

2018 OCT -9 PM 3:47
SCOTT B. SUGGS
CLERK OF COURT/R.O.D.
DARLINGTON COUNTY, S.C.

FILED

STATE OF SOUTH CAROLINA)
 COUNTY OF DARLINGTON)
 Jameco Abdul Toney,)
 Plaintiff(s),)
 -vs-)
 South Carolina State Of,)
 Defendant(s).)

IN THE COURT OF COMMON PLEAS
 4th JUDICIAL CIRCUIT
 CASE NO.: 2017CP1600470
 APPOINTMENT OF COUNSEL OR GAL
 (Select one.)

ORDER
 AMENDED ORDER

TYPE OF CASE/PROCEEDING: (Check one.)

- Post-Conviction Relief (PCR)/habeas case Adoption Juvenile
 SVP case Custody and/or Visitation Abuse and Neglect
 Minor Name Change Other: Post Convict Rel 500

It appears Jameco Abdul Toney, who is a litigant in this case, is entitled to court-appointed counsel or a guardian ad litem.

It further appears that: (Select only one.)

- counsel/guardian ad litem has not yet been appointed by the court; therefore, an appointment for counsel/guardian ad litem is necessary.
 counsel or a guardian ad litem was previously appointed by the court but has indicated either a possible conflict of interest, an entitlement to exemption, or other good cause warranting the appointment of new counsel or guardian ad litem based on:
 counsel was previously appointed by the court but has not indicated that the litigant has retained private counsel and is no longer entitled to appointed counsel.
 court appointed counsel has obtained , Esquire as substitute counsel pursuant to Rule 608(h)(2); provided, however, only the member who originally received the appointment and who sought substitute counsel shall receive credit.
 Other:

Therefore, it is ordered that Lance Boozer hereby is appointed as (Select one.)

counsel lead counsel (if capital PCR case) guardian ad litem
 for the above-named person. Any counsel or GAL previously appointed is/are hereby relieved.

(If Death Penalty PCR Case) It is further ordered that , Esquire, is hereby appointed as second counsel in this capital PCR case.

The Clerk of Court is directed to forward a copy of this order to all persons entitled to notice.

IT IS SO ORDERED
 June 30, 2017

Scott B. Suggs
 Circuit Judge Clerk of Court

Plaintiff Attorney:

Lance Boozer	
1400 Laurel Street, Suite 4A	
Columbia, SC 29201	

Defendant Attorney:

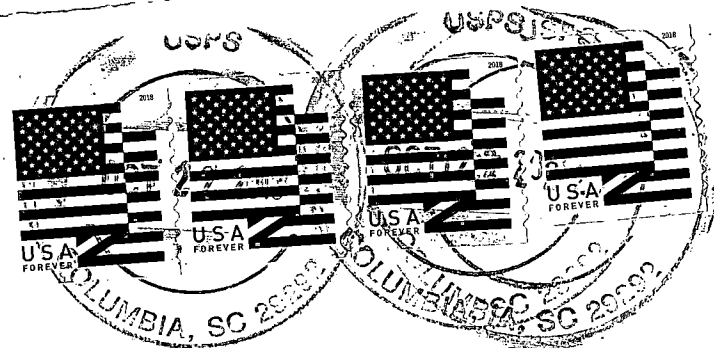
Johnny Ellis James Jr.	
PO Box 11549	
Columbia, SC 29211	

TRUE CERTIFIED COPY,
Scott B. Suggs
 CLERK OF COURT/RMC
 DARLINGTON COUNTY, SC

NOTICE: SC Supreme Court Order of September 29, 2006, requires appointed counsel entitled to payment from the Office of Indigent Defense (OID) to register the case online with OID within fifteen (15) days of this appointment at www.sccid.sc.gov, and further directs that reimbursement vouchers be submitted directly to SCCID and not to the trial judge or clerk of court. See SCCID website for further details.

THE BOOZER LAW FIRM, LLC

1419 Pendleton Street
Columbia, SC 29201



The Honorable Daniel E. Shearouse
Clerk, Supreme Court of South Carolina
P.O. Box 11330
Columbia, SC 29211