

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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On Petition for Writ of Certiorari
Appeal from Greenville County
The Honorable Daniel D. Hall, Post-Conviction Relief Court Judge
Appellate Case No. 2018-000480

S.C. SUPREME COURT

KARRIEM PROVET,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

RESPONDENT’S ISSUE PRESENTED1

STATEMENT OF THE CASE.....2

STANDARD OF REVIEW6

ARGUMENT.....7

 The record amply supports the Post-Conviction Relief Judge’s findings that Trial Counsel was not ineffective for failing to investigate the length of the traffic stop, specifically purported inconsistencies between the traffic stop video and dispatch radio logs, and that Petitioner failed to establish any prejudice.....7

CONCLUSION.....13

RESPONDENT'S ISSUE PRESENTED

The record amply supports the Post-Conviction Relief Judge's findings that Trial Counsel was not ineffective for failing to investigate the length of the traffic stop, specifically purported inconsistencies between the traffic stop video and dispatch radio logs, and that Petitioner failed to establish any prejudice.

STATEMENT OF THE CASE

On May 24, 2005, the Greenville County Grand Jury indicted Petitioner Karriem Provet on one count of trafficking cocaine, more than 100 grams, and one count of resisting arrest, arising from a traffic stop on May 1, 2002. The matter was called for a jury trial on August 7, 2007, before the Honorable Carmen T. Mullen, Circuit Court Judge. William Long, Esquire, (Trial Counsel) represented Petitioner, and Assistant Solicitor John D. Newkirk, Esquire, prosecuted the case.

Prior to trial, Petitioner moved to suppress all evidence, including a videotape of the traffic stop at issue and drugs seized from the car. He asserted his detention was unconstitutional because it was not based on reasonable suspicion of criminal activity. He further asserted he did not consent to the search of his car, and even if he did, it was involuntary because the detention was illegal and the circumstances were coercive. Petitioner did not testify at the suppression hearing, even after the trial court advised him his testimony could not be used against him at trial, and he stated he had discussed the option with Trial Counsel. The trial court denied the motion to suppress, finding the totality of the evidence established reasonable suspicion to extend the traffic stop, and Petitioner's consent to search the vehicle was knowing and voluntary. (Corrected Appendix, pp. 185-274).

The jury convicted Petitioner as indicted on both counts. The trial court sentenced Petitioner to concurrent prison terms of twenty-five years (trafficking) and one year (resisting arrest). (Corrected Appendix, pp. 471-486). The South Carolina Court of Appeals affirmed Petitioner's convictions and sentences on January 31, 2011. State v. Provet, 391 S.C. 494, 706 S.E.2d 513 (Ct. App. 2011). The South Carolina Supreme Court granted certiorari to review the Court of Appeals decision, and affirmed the Court of Appeals on August 13, 2013 State v. Provet, 405 S.C. 101, 747 S.E.2d 453 (2013). At issue in both courts was whether the officer

unconstitutionally extended the original traffic stop, and whether Petitioner consented to the search of his vehicle.

Petitioner filed an application for post-conviction relief on August 2, 2014, raising the following allegations:

1. Ineffective assistance of counsel:
 - a. Failed to challenge and object to the initial traffic stop.
 - b. Failed to challenge and object to reasonable suspicion.
 - c. Failed to challenge and object to officer testimony about air freshener.
 - d. Failed to challenge and object that the officer lacked probable cause for the second detention.
 - e. Failed to challenge and object to a “copy of a copy” (sic) of the vehicle transport video being put into evidence.
 - f. Failed to view vehicle transport video with [Petitioner].
 - g. Failed to subpoena radio transmission tapes and call logs.
 - h. Failed to challenge and object to the resisting arrest charge.
 - i. Failed to challenge the K-9 certification.
 - j. Failed to properly prepare for trial.
 - k. Failed to challenge and investigate why the case was dismissed with leave to restore.
 - l. Failed to challenge the chain of custody.
 - m. Failed to challenge and object to the length of time the evidence was in the officer’s control.
 - n. Failed to subpoena the evidence custodian.
2. Procedural due process.
3. Prosecutorial misconduct.

(Corrected Appendix, pp. 25-33). Respondent submitted its return on January 8, 2015.

(Appendix, pp. 34-37).

The matter was called for an evidentiary hearing on June 26, 2017, at the Greenville County Courthouse before the Honorable Daniel Dewitt Hall, Post-Conviction Relief Judge. Petitioner was present at the hearing and represented by William G. Yarborough, III, Esquire. Respondent was represented by Assistant Attorney General DeShawn Mitchell of the South

Carolina Attorney General's Office. Petitioner testified on his own behalf, and presented testimony from Trial Counsel, Peter Gordon Skidmore, and Petitioner's wife, Shontea Smith. (Corrected Appendix, pp. 38-139). Following the hearing, the Post-Conviction Relief Judge issued an Order of Dismissal signed on February 13, 2018, and filed March 2, 2018, denying Petitioner's application for post-conviction relief. (Corrected Appendix, pp. 1-24).

Petitioner filed a notice of appeal on March 10, 2018. Petitioner filed his Petition for Writ of Certiorari and Appendix on September 17, 2018. Respondent now submits this Return to the Petition for Writ of Certiorari.

STANDARD OF REVIEW

The post-conviction relief court's findings of fact and conclusions of law receive great deference during appellate review. Caprood v. State, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000). The proper standard of review of a post-conviction relief evidentiary hearing is whether "any evidence of probative value" exists to sustain the post-conviction relief judge's findings. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

ARGUMENT

The record amply supports the Post-Conviction Relief Judge's findings that Trial Counsel was not ineffective for failing to investigate the length of the traffic stop, specifically purported inconsistencies between the traffic stop video and dispatch radio logs, and that Petitioner failed to establish any prejudice.

Petitioner argues the Post-Conviction Relief Judge erred in finding Trial Counsel was not ineffective for failing to investigate the length of the traffic stop and purported inconsistencies between the traffic stop video and dispatch radio logs, because such an investigation would have established the officer unreasonably extended the traffic stop in violation of the Fourteenth Amendment.¹ Probative evidence in the record amply supports the Post-Conviction Relief Judge's findings that Petitioner failed to meet his burden to prove 1) Trial Counsel was ineffective, and 2) he was prejudiced by the purported ineffectiveness.

Petitioner, like all other defendants, has a right to the assistance of effective counsel as provided by the Sixth Amendment to the United States Constitution. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668 (1984); Lomax v. State, 379 S.C. 93, 665 S.E.2d 164 (2008). Petitioner has the burden of proving the allegations in his post-conviction relief action, and when alleging that trial counsel was constitutionally ineffective, he must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that it cannot be relied upon as having produced a just result." Strickland, 466 U.S. at 686

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland, 466 U.S. 668. First, Petitioner must prove that

¹As set forth above, Petitioner raised numerous allegations of ineffective assistance of counsel in his Post-Conviction Relief application, but the only issue Petitioner raises in the Petition for Writ of Certiorari is the alleged ineffective assistance of counsel regarding failure to investigate and obtain the radio logs. Therefore, the remaining issues are not before this Court for review.

counsel's performance was deficient. Id.; Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 690). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Id. (citing Strickland, 466 U.S. at 690). Petitioner must overcome this presumption to receive relief. Cherry, 300 S.C. at 118; 386 S.E.2d at 625. Second, counsel's deficient performance must have prejudiced Petitioner such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

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. 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. 668.

Moreover, Strickland does not require a finding of ineffectiveness merely for deviation from some rigid rule of representation. Rather, Strickland requires the post-conviction relief applicant to prove "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Id. at 697. Therefore, the function of the post-conviction relief court is to determine if "in light of all the circumstances,

the identified acts or omissions were outside the wide range of professional competent assistance” required of a criminal defense attorney.” Id. at 690.

Petitioner argues Trial Counsel was ineffective for failing to obtain the South Carolina Highway Patrol radio call logs from the night of the traffic stop. He contends the logs show a one hour and ten minute difference between the time the officer testified he stopped Petitioner (10:10 p.m.) and called dispatch for a records check (several minutes later), and the times reflected on the video. He claims the video time stamp indicates the officer actually stopped him at 9:02 p.m., they were on the side of the road for over an hour waiting on the K-9 unit to arrive, and the radio logs show the officer did not call dispatch for a license check until 10:12 p.m. The difference between the video time stamp and the radio logs, and Trial Counsel’s failure to obtain the radio logs prior to trial, do not rise to the level of ineffective assistance of counsel, or constitute such prejudice to Petitioner that there is a reasonable probability the result at trial would have been different.

The radio logs actually substantiate the officer’s trial testimony regarding the time of the stop and license check request. Even though Petitioner failed to present any substantive evidence regarding the meaning of certain codes and handwritten log entries, for purposes of argument, the logs may indicate the officer’s call sign is “R9.”² According to the logs, R9 requested the records check (license and registration) involving Petitioner at 10:12 p.m., which is consistent with the officer’s trial testimony that he stopped Petitioner at approximately 10:10 p.m., talked with him for a few minutes while filling out a warning ticket for the traffic offenses he observed, and then contacted dispatch for the records check. Also according to the logs,

²Absent substantive evidence regarding the Highway Patrol’s code system and method of recording dispatch calls, the assertions herein are based on a generic knowledge of law enforcement dispatch codes, and logical deductions from that knowledge.

dispatch responded with the requested information at 10:16 p.m. (Corrected Appendix, pp. 157, 190-227, 294-327). The approximately thirty minute video, including the time stamp on the video, was entered in evidence and played for the jury. (Corrected Appendix, pp. 311-312).³ Therefore, any discrepancy between the video time stamp and the officer's testimony was already before the jury.

The logs also substantiate R9's testimony that the K-9 officer (apparent call sign "R25") arrived while R9 was completing the warning ticket, which was minutes after R9 requested the K-9 officer's assistance. The logs indicate R25 arrived at 10:15 p.m., approximately four minutes after R9 requested the records check from dispatch, and approximately one minute before dispatch conveyed the records information to R9. Approximately two minutes later (10:18 p.m.), both R25 and R9 alerted dispatch they were chasing the subject on foot, and a call for assistance went out to all officers. (Corrected Appendix, p. 157).

Petitioner's contention he was actually stopped at 9:02 p.m. is belied by the very logs on which he relies. Again, assuming for argument the officer's sign is R9, according to the radio logs, R9 stopped a gold Pontiac with a Texas license plate on northbound I-85 and requested a records check at 9:55 p.m., and then went back in service (10-8) at 10:01 p.m. (Corrected Appendix, pp. 155-156). Therefore, R9 could not have stopped Petitioner at 9:02 p.m., and then waited on the side of the road for over an hour until 10:12 p.m. before requesting a records check on Petitioner.

³The video was transported to the Court on October 29, 2018.

Petitioner submitted no evidence the video presented at trial was altered in any way, and again, the time stamp was displayed on the video itself.⁴ In essence, he asks this court to simply accept his assertion regarding the length of the traffic stop as truth, and then re-examine the analysis of the trial court, the court of appeals and this Court in affirming his conviction.⁵ His argument makes it abundantly clear this case turned primarily, if not solely, on Petitioner's credibility, and the Post-Conviction Relief Judge expressly found Petitioner's testimony at the hearing was not credible. (Corrected Appendix, p. 13). Credibility findings are entitled to great deference on appellate review. *See Frierson v. State*, 423 S.C. 257, 815 S.E.2d 433, 435 (2018) (“[W]e afford great deference to a PCR court's credibility findings.”).

At the post-conviction relief hearing, Petitioner testified he told Trial Counsel repeatedly that the traffic stop was much longer than the video indicated, including right after he viewed the video with Trial Counsel during the suppression hearing.⁶ (Corrected Appendix, pp. 76-104, 111-115). Significantly, when given the opportunity to testify about the traffic stop after hearing the officer's testimony and viewing the video at the suppression hearing, Petitioner declined to testify even after the trial court advised him nothing he said in his hearing testimony could be used against him at trial. Even though he did not have the radio logs at the time, Petitioner knew what time R9 testified he initiated the traffic stop, and what time was indicated on the video.

⁴There are totally innocent reasons the time stamp on a video could be inaccurate, including daylight savings time, which would automatically create a one hour difference (9:12 p.m. ET on the video is 10:12 p.m. DST), and the jostling a camera mounted inside a law enforcement vehicle may sustain. The video itself, regardless of the time stamp, is the best evidence of what happened during the stop, how long the stop lasted, and when it shifted from a traffic stop to an investigation.

⁵The vast majority of Petitioner's argument in the Petition for Writ of Certiorari is rehashing whether the officer's observations during the traffic stop constituted reasonable suspicion to extend the stop, an issue already decided in Petitioner's direct appeal.

⁶Petitioner's wife also testified at the post-conviction relief hearing that she told Trial Counsel Petitioner was “adamant” the traffic stop lasted longer than shown on the video, which she had viewed and actually transcribed prior to trial. (Corrected Appendix, pp. 120-124).

(Corrected Appendix, pp. 241-246). Rather than testify under oath about his version of the traffic stop prior to trial, however, Petitioner sat silent.

The Post-Conviction Relief Judge found Trial Counsel diligently pursued suppression of the video and all evidence obtained thereafter, and Petitioner showed no prejudice resulting from Trial Counsel's performance. On the specific issue regarding the radio logs, the Post-Conviction Relief Judge found the only evidence regarding an interpretation of the logs' contents was the testimony of Petitioner's private investigator, who never worked for the Highway Patrol and never spoke to anyone at the Highway Patrol about the logs' contents, and Petitioner's own self-serving testimony, which was not credible. In the absence of evidence from someone with the Highway Patrol explaining what the logs contained, the Post-Conviction Relief Judge found there was no compelling evidence Trial Counsel was ineffective in failing to obtain the logs, or that the trial outcome would have been different if the logs had been obtained. (Corrected Appendix, pp. 14-15, 19-20, 68).

There is ample probative evidence in the record supporting the Post-Conviction Relief Judge's findings that Trial Counsel's performance was not deficient, and Petitioner was not prejudiced. Trial Counsel vigorously worked to suppress the video and other evidence, and as evidenced by the opinions from both South Carolina appellate courts, created an excellent record for appellate review of the issue. At Petitioner's trial, the jury had the officer's testimony about the time he stopped Petitioner's car, as well as the actual video of the stop with the time stamp displayed, and clearly found the officer's testimony was credible. Accordingly, this Court should deny the Petition for a Writ of Certiorari.

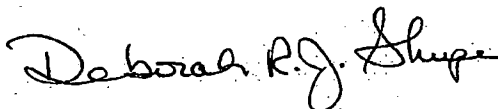
CONCLUSION

Based on the foregoing, the State submits this Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

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By: _____
Deborah R.J. Shupe

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March 8, 2019

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

On Petition for Writ of Certiorari
Appeal from Greenville County
The Honorable Daniel D. Hall, Post-Conviction Relief Court Judge
Appellate Case No. 2018-000480

Karriem Provet, Respondent,

v.

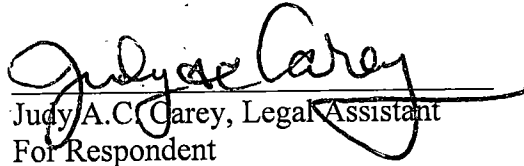
State of South Carolina, Petitioner.

CERTIFICATE OF SERVICE

I, Judy A.C. Carey, certify that I have today served the within **Return to Petition for Writ of Certiorari** upon Respondent by depositing a copy of the same in the United States mail, postage prepaid, addressed to:

William G. Yarborough, III, Esquire
522 North Church Street
Greenville SC 29601

I further certify that all parties required by Rule to be served have been served. This 8th day of March, 2019.


Judy A.C. Carey, Legal Assistant
For Respondent

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Post Office Box 11549
Columbia, SC 29211-1549



ALAN WILSON
ATTORNEY GENERAL

March 8, 2019

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MAR 08 2019

S.C. SUPREME COURT

The Honorable Daniel E. Shearouse
Clerk of Court — SC Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

Re: Karriem Provet v. State of South Carolina
Appellate Case No. 2018-000480
Lower Court Case 2014-CP-23-4666

Dear Mr. Shearouse:

Enclosed for filing please find an original and six (6) copies of the **Return to Petition for Writ of Certiorari** in the above-captioned case. If there are any questions or comments, please do not hesitate to contact me at any time.

Sincerely,

DR

Deborah R.J. Shupe
Senior Assistant Deputy Attorney General
SC Bar #5098

DRJS/jacc

cc: William G. Yarborough, III, Esquire
Victim Advocacy Division (without enclosure)