ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Greenville County
Court of Common Pleas

RECEIVED

MAR 19 2018

S.C. SUPREME COURT

The Honorable Daniel D. Hall, Circuit Court Judge

Appellate Case No. 2015-001459

TRAVELL LEVONE HILL,

Respondent/Petitioner,

v.

STATE OF SOUTH CAROLINA,

Petitioner/Respondent.

BRIEF OF PETITIONER/RESPONDENT

ALAN WILSON
Attorney General

DESHAWN H. MITCHELL
Assistant Attorney General
SC Bar No. 101813

Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3737

ATTORNEYS FOR
PETITIONER/RESPONDENT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Greenville County
Court of Common Pleas

The Honorable Daniel D. Hall, Circuit Court Judge

Appellate Case No. 2015-001459

TRAVELL LEVONE HILL,

Respondent/Petitioner,

v.

STATE OF SOUTH CAROLINA,

Petitioner/Respondent.

BRIEF OF PETITIONER/RESPONDENT

ALAN WILSON
Attorney General

DESHAWN H. MITCHELL
Assistant Attorney General
SC Bar No. 101813

Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3737

ATTORNEYS FOR
PETITIONER/RESPONDENT

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES .... ii, iii

STATEMENT OF ISSUE ON APPEAL 1

STATEMENT OF THE CASE 2

STANDARD OF REVIEW 10

ARGUMENT 12

The PCR Court erred in granting Hill a new trial by failing to make the requisite finding that Hill would have prevailed on appeal had the issue been preserved for appellate review as the prejudice prong cannot be satisfied by Hill as he is unable to meet his burden.... 12

CONCLUSION 20

TABLE OF AUTHORITIES

Cases

Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985) 10

Cherry v. State, 300 S.C.115, 386 S.E.2d 624 (1989) 10

Foye v. State, 335 S.C. 586, 518 S.E.2d 265 (1999) 13,16

Illinois v. Wardlow, 528 U.S. 119 (2000) 15

Katz v. United States, 389 U.S. 347 (1967) 17

McHam v. State, 404 S.C. 465, 746 S.E.2d 41 (2013) 13,16

McLaughlin v. State, 352 S.C. 476, 575 S.E.2d 841 (2003) 13

Minnesota v. Olsen, 495 U.S. 91 (1990) 16

Pennsylvania v. Mimms, 434 U.S. 106 (1977) 14

Rakas v. Illinois, 439 U.S. 128 (1978) 16,18

Rawlings v. Kentucky, 448 U.S. 98 (1980) 18

Sikes v. State, 323 S.C. 28, 448 S.E.2d 560 (1994) 12,13,16

State v. Brockman, 339 S.C. 57, 528 S.E.2d 661 (2000) 16

State v. McKnight, 291 S.C. 110, 352 S.E.2d 471 (1987) 16,18

State v. Missouri, 361 S.C. 107, 603 S.E.2d 594 (2004) 17

State v. Pichardo, 367 S.C. 84, 623 S.E.2d 840 (Ct. App. 2005) 14

State v. Provet, 405 S.C. 101, 747 S.E.2d 453 (2013) 14

State v. Robinson, 396 S.C. 577, 722 S.E.2d 820 (Ct. App. 2012) 18,19

State v. Tindall, 388 S.C. 518, 698 S.E.2d 203 (2010) 15

State v. Wallace, 392 S.C. 47, 707 S.E.2d 451(Ct. App. 2011) 15

Strickland v. Washington, 466 U.S. 668 (1984) 10,11

United States v. Branch, 537 F.3d 328 (4th Cir. 2008) 15

United States v. Luster, 324 Fed. App'x 224 (4th Cir. 2009) 18

United States v. Sakyi, 160 F.3d 164 (4th Cir. 1998)..14

United States v. Salvucci, 448 U.S. 83 (1980)..18

United States v. Wellons, 32 F.3d 117 (4th Cir. 1994)..17

United States v. Whitehead, 849 F.2d 849 (4th Cir. 1988)..15

PETITIONER'S STATEMENT OF ISSUE ON APPEAL

Did the post-conviction relief court erred as a matter of law by granting Hill a new trial, where it applied an incorrect standard and erroneously granted relief despite failing to make the requisite finding that Hill would have prevailed on appeal had the issue been preserved for appellate review and Hill failed to meet his requisite burden of proof?

STATEMENT OF THE CASE

Procedural History

Travell Levone Hill (hereinafter "Hill") is confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Greenville County Clerk of Court. During the October 2008 term, the Greenville County Grand Jury indicted Hill for trafficking cocaine in an amount greater than 400 grams (2008-GS-23-6996). (App.pp.316-18). Christopher T. Posey, Esquire represented Hill. On March 30, 2010, Hill proceeded to trial before the Honorable G. Edward Welmaker and a jury and was found guilty. On March 31, 2010, the Judge Welmaker sentenced Hill to twenty-seven years imprisonment. (App.p.181; p.315).

A notice of appeal was filed at the South Carolina Court of Appeals. Kathrine H. Hudgins, Esquire of the South Carolina Commission on Indigent Defense, Division of Appellate Defense perfected the appeal. (App.pp.183-97). On appeal, Hill argued two issues. First, was the officer's suspicion that he was engaged in serious criminal activity reasonable so as to warrant a continued detention after the issuance of a warning for the traffic stop under the Fourth Amendment. Second, did the trial judge err in finding that appellant lacked standing to challenge the unlawful search and seizure of the rental car he was driving. The Court of Appeals affirmed Hill's conviction and sentence. State v. Hill, Op. No. 2013-UP-198 (S.C. Ct. App. filed May 15, 2013). (App.pp.235-36). The Court of Appeals noted the issue was not preserved for review as a ruling in limine is not final unless an objection is made at the time the evidence is offered and a final ruling procured. The remittitur was sent on June 4, 2013.

Hill filed an application for post-conviction relief (PCR) on January 9, 2014 (2014-CP-23-0129) and later submitted an amended application signed by Hill on February 13, 2015. (App.pp.237-43; pp.249-56). The State made its return on May 28, 2014, requesting an

evidentiary hearing be convened. An evidentiary hearing was held on February 18, 2015, at the Greenville County Courthouse before the Honorable Daniel D. Hall. Hill was present and represented by C. Rauch Wise, Esquire. Karen C. Ratigan, Esquire of the South Carolina Attorney General's Office represented the State. Hill testified on his own behalf. Hill's trial counsel also testified. Following the evidentiary hearing, Judge Hall granted Hill's post-conviction relief on the single issue that trial counsel was ineffective for failing to object to the inclusion of the cocaine at trial and this failure prejudiced Hill as the Court of Appeals could not review this issue on appeal as it was not preserved. Judge Hill ordered a new trial by written order filed March 19, 2015. (App.pp.288-98). After each party filed post-trial motions pursuant to Rule 59(e), SCRCP, Judge Hall filed a supplemental order on June 8, 2015 in which he denied relief on all other issues raised at the PCR hearing. (App.pp.299-301; pp.302-05; pp.306-08; pp.309-14).

The State (hereinafter "Petitioner") filed a timely notice of appeal. On December 4, 2015, Petitioner filed his petition for writ of certiorari. On January 19, 2016, Hill filed his return to the petition for writ of certiorari. On November 15, 2017, this Court granted certiorari. This brief of Petitioner follows.

Factual History

Around 3:50 p.m. on February 19, 2008, Trooper Shannon Chasteen, a member of the South Carolina Highway Patrol's Aggressive Criminal Enforcement Unit, was patrolling Interstate 85 in Greenville County when he observed a burgundy Ford Expedition following another vehicle at an unreasonably close distance. (App.pp.33-35; pp. 56-58). In response, Trooper Chasteen immediately moved to initiate a traffic stop. (App.pp.35-36; p.58). When he did so, the driver of the Expedition rapidly shifted to the left lane and slowed his vehicle down to

a speed well below the posted speed limit. (App.pp.35-36; pp.58-59). Trooper Chasteen then caught up to the Expedition and activated his blue lights, and the driver of the vehicle pulled over and stopped in an emergency lane on the side of the highway. (App.p.36; pp.59-60).

After stopping the Expedition, Trooper Chasteen approached from the passenger side and looked into the vehicle. (App.p.37; p.41; pp.60-63). Inside, he observed two occupants, numerous large energy drinks and fast food containers, and a single small shopping bag, but he did not see any luggage. (App.pp.36-38; p.41; pp.60-63). He then greeted the driver of the vehicle, Hill, and the passenger, Tyra Rodgers, and noticed both Hill and Rodgers seemed extremely nervous. (App.p.38; pp. 61-62; pp.113-114). Trooper Chasteen noted Hill seemed to be "almost in a state of panic" and was repeatedly fidgeting in his seat like he could not remain still, his hands were visibly and noticeably shaking, and he appeared to be attempting to avoid making eye contact with the officer. (App.p.38; p.62). The officer also noticed Rodgers was holding her head like she was sick or had a headache, she would not make eye contact with him, and she had a visibly accelerated heart rate. (App.p.38; p.62). Trooper Chasteen then advised Hill of the reason for the stop, told him he would be receiving a warning citation, and asked for his driver's license and vehicle registration. (App.p.37; pp.41-42; p.61). Thereafter, Hill provided the officer with a driver's license and a rental agreement instead of a registration, but he continued to behave in an increasingly nervous manner even though he had been advised he would only be receiving a warning ticket, which Trooper Chasteen believed was unusual. (App.p.37; p.42; p.61). Trooper Chasteen then asked Hill to step out of the vehicle and returned to his patrol car to review Hill's documents. (App.p.39; p.63).

Upon reviewing the information, Trooper Chasteen discovered the vehicle was rented at the Norfolk International Airport in Virginia by Lenise Martin, who was the only authorized

driver identified in the rental agreement, on February 12, 2008, and was due to be returned on February 17, 2008, which was two days earlier. (App.pp.39-40; pp.44-45; pp.63-65). Based on Hill's drastic lane change prior to the stop, the nervousness displayed by the occupants of the vehicle, and the fact the vehicle was rented by a third party, Trooper Chasteen became suspicious something unlawful might be occurring and requested assistance from his partner, Trooper Brad Dowis. (App.p.39; pp.43-44; p.66).

After asking Trooper Dowis report to the scene, Trooper Chasteen inquired of Hill as to who rented the vehicle, and Hill stated Rodgers did. (App.p.40; pp.66-67). The officer then asked Hill who was responsible for the property in the vehicle, and Hill stated Rodgers was. (App.p.42). In response, Trooper Chasteen returned to the rental vehicle, requested Rodgers' information, and discovered she did not actually rent the vehicle. (App.p.40; pp.66-67). He then spoke with Rodgers about the purpose of their trip, and she claimed they went to Atlanta to purchase shoes and visit her family. (App.p.40; p.67). After speaking with Rodgers, the officer returned to his patrol vehicle and began writing the warning citation. (App.p.40; p.67). While he did so, Hill continued to exhibit nervous behavior, repeatedly crossed and uncrossed his arms, constantly moved and looked around, exhibited a visibly accelerated heart rate, and would not make eye contact with the officer. (App.p.42; pp.67-69). While Trooper Chasteen prepared the warning citation, he asked Hill about the purpose of their trip, and Hill claimed they went to Atlanta on the previous day to party and to visit one of his friends. (App.p.43; pp.67-68). Hill further claimed they slept in the vehicle and did not rent a hotel room. (App.p.43; p.68). Once again, Trooper Chasteen returned the rental vehicle, checked the vehicle's identification number, and spoke with Rodgers, who the officer noted was still behaving in a nervous manner. (App.p.43; p.69). Upon speaking with her again, Rodgers claimed they shopped while in Atlanta

but could not name a single store they visited. (App.p.40; p.43; p.69). She further claimed they stayed with her cousin and did not do anything else on the trip. (App.p.40; p.43; p.69).

After he finished speaking with Rodgers and approximately twelve minutes into the stop, Trooper Chasteen returned to his patrol car, completed the warning citation, and presented it to Hill. (App.p.70). Immediately after issuing the warning citation, Trooper Chasteen asked Hill for permission to search the vehicle, but Hill refused. (App.p.70). Meanwhile, approximately five minutes after Trooper Chasteen contacted Trooper Dowis for assistance, Trooper Dowis arrived at the scene with his drug detection dog, Chloe, who was trained to detect marijuana, cocaine, methamphetamines, and heroin. (App.p.70; pp.89-90; pp.94-95). After Hill denied Trooper Chasteen's request for consent to search, Trooper Chasteen had Rodgers step out of the vehicle so Chloe could perform a sniff search of the vehicle. (App.pp.70-71; p.96). Chloe conducted a brief sniff search and immediately alerted on the front passenger side of the vehicle. (App.p.71; p.96). Trooper Dowis then secured Chloe in his patrol vehicle and watched over Hill and Rodgers while Trooper Chasteen conducted a search of the vehicle based on Chloe's alert. (App.pp.71-72; p.97). Several minutes later, another officer arrived at the scene, and Trooper Dowis joined in the search. (App,p.73; p.97). He went to the area where Chloe alerted, immediately noticed a bulge underneath the carpet on the front passenger side of the vehicle, pulled the carpet back, and found a rectangular package of cocaine and a plastic bag of cocaine. (App.pp.73-75; pp.97-98). Thereafter, Trooper Chasteen arrested Hill and Rodgers. (App.pp.73-74; p.77).

Following his arrest, Hill was indicted for trafficking in cocaine, and he proceeded to trial. (App.p.10; pp.183-184). At the outset of trial, Hill moved to suppress the narcotics discovered during the traffic stop based on the alleged unconstitutionality of the search in which

they were discovered. (App.p.5). In support of the motion, defense counsel argued the officer did not develop a reasonable articulable suspicion of criminal activity during the traffic stop, the stop ended when Hill was given a warning ticket, and Hill should not have been asked for consent to search because the vehicle was not rented in his name. (App.p.6). In response, the State initially asserted Hill did not have standing to challenge the search because he was not authorized to drive the vehicle.(App.p.7). Furthermore, the State argued the officer developed a reasonable articulable suspicion of criminal activity during the course of the stop, which warranted Hill's detention and the use of the drug detection dog for the sniff search on the vehicle. (App.pp.7-8; pp.32-33). The trial judge then conducted an in camera hearing on Hill's suppression motion, and Trooper Chasteen detailed the circumstances of the traffic stop during the hearing.[1] (App.pp.34-47).

At the conclusion of the hearing, the trial judge concluded Hill did not have standing to challenge the search. (App.p.49). Furthermore, the trial judge determined Hill's detention was justified under the totality of the circumstances because he found the factors observed by the officer during the traffic stop established a reasonable articulable suspicion of criminal activity. (App.pp.50-51). Based on those findings, the trial judge denied Hill's suppression motion. (App.p.51).

Subsequently, during trial, Trooper Chasteen and Trooper Dowis testified about the circumstances of the traffic stop and their discovery of Hill's cocaine. (App.pp.58-75; pp.94-98). Following their testimony, Rodgers testified about traffic stop and the events leading up to it. (App.p.100). Rodgers stated Hill asked her if she wanted to leave Norfolk, Virginia, and go shopping in Atlanta on February 18, 2008, and suggested they begin the trip around midnight or

[1] During his testimony, he noted Interstate 85 was a well-known drug corridor and Atlanta was a source city for drugs. (R. p. 44).

2:00 a.m. on the morning of February 19, 2008, in the rental vehicle she was driving at the time. (App.pp.100-102). Rodgers indicated she then met with Hill at his residence at the agreed-upon time and followed behind him as he drove to another residence to drop off his car. (App. pp.103-104). After arriving at the other residence, Rodgers testified Hill went inside, came out with "two knots," which was a substantial quantity of money, and then began driving the rental vehicle to Atlanta. (App.pp.103-104). Rodgers stated she slept for the majority of the drive to Atlanta, which lasted approximately eight to nine hours, and they went directly to a mall when they arrived between 10:00 a.m. and 12:00 p.m. (App.pp.104-106). After they arrived, Rodgers testified Hill borrowed her phone to arrange a drug purchase and told her they were going to purchase some drugs. (App.pp.106-107). Rodgers claimed she protested and they went into the mall to purchase shoes. (App.pp.107-108). Rodgers stated Hill then met with his cousins at the mall and left her for several hours. (App. pp.107-110). While Hill was gone, Rodgers indicated the person who rented the rental vehicle called her and told her to immediately return the vehicle. (App.p.109). Rodgers claimed she then met back up with Hill, told him the rental vehicle had to be returned, and ate at the mall before returning to the rental vehicle. (App.pp.109-111). When she returned to the vehicle, Rodgers stated there was a new pair of shoes inside. (App. p.111). Rodgers testified Hill then drove them back, she developed a migraine headache, they were stopped by the law enforcement officer, and they both were arrested after the vehicle was searched during the stop. (App.pp.112-115).

Thereafter, James Armstrong, a forensic drug chemist with the Greenville County Department of Public Safety and a drug identification expert, testified he analyzed the drugs discovered during the traffic stop. (App. p.127; p.131). Armstrong testified his analysis revealed the items recovered during the stop were a block of cocaine weighing 971.81 grams and three

bags of cocaine weighing 215.98 grams. (App.p.132). The solicitor then moved to introduce the cocaine into evidence. (App.p.3;pp.133-134). In response, defense counsel asserted: "No objection." (App.p.134). The trial judge then admitted the drugs into evidence without objection. (App. p.134).

At the conclusion of trial, the jury convicted Hill of trafficking in cocaine. (App.pp.177-178). Defense counsel then moved for a judgment notwithstanding the verdict and for a new trial but did not provide any grounds in support of the motions. (App.p.179). The trial judge then sentenced Hill to a term of imprisonment of twenty-seven years. (App.p.181).

STANDARD OF REVIEW

The proper standard for reviewing a PCR 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). In a PCR proceeding, the petitioner bears the burden of proving the allegations in his or her application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the applicant 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." Strickland v. Washington, 466 U.S. 668 (1984); Butler, 286 S.C. at 441, 334 S.E.2d at 814.

The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. Courts presume counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. at 689. An applicant must overcome this presumption in order to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625.

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of counsel, and both prongs must be established by an applicant to receive relief. Strickland, 466 U.S. at 687. First, an applicant must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Cherry, 300 S.C. 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, 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.

ARGUMENT

The PCR Court erred in granting Hill a new trial by failing to make the requisite finding that Hill would have prevailed on appeal had the issue been preserved for appellate review as the prejudice prong cannot be satisfied by Hill as he is unable to meet his burden.

The PCR judge erred in finding Hill met his burden of establishing trial counsel was ineffective and that he was prejudiced as a result. The PCR court found but for defense counsel failing to object to the inclusion of the cocaine at trial, the issue would have been preserved on appeal, allowing the Court of Appeals the opportunity to review the issue of admissibility of the cocaine at Mr. Hill's trial. (App.pp.296). As the PCR court did not find Hill would have prevailed on appeal had trial counsel properly preserved his suppression argument for appellate review, this ultimate grant of relief is based on an error of law requiring reversal. See, e.g., Sikes v. State, 323 S.C. 28, 30, 448 S.E.2d 560, 562 (1994) ("When the defendant claims that counsel's failure to articulate a Fourth Amendment claim was ineffective assistance, defendant must show that such claim is meritorious and that the verdict would have been different absent the evidence that should have been excluded.") (citation omitted).

At the PCR hearing, Hill stated trial counsel did not properly preserve an issue regarding the search of the vehicle. (App.pp.262-63). Hill stated trial counsel did not object when the evidence was introduced. (App.pp.263-64).

Trial counsel testified he was appointed to represent Hill approximately five weeks before trial. (App.p.273). Trial counsel testified he met with Hill eight to ten times, reviewed the discovery materials, and formulated a defense. (App.p.274). Trial counsel testified the trial strategy was to argue Hill had no knowledge of the drugs and that they belonged to the vehicle's passenger. (App.pp.274-75). Trial counsel confirmed both that there was a full suppression hearing in this case, but he did not object contemporaneously when the cocaine was moved into

evidence. Trial counsel testified this was a mistake and that he believed he was planning his closing argument at that time. (App.p.275; p.279).

In granting Hill's application for post-conviction relief, the PCR judge found trial counsel's performance was deficient because he did not object to the introduction of the cocaine into evidence at trial. Additionally, the PCR judge found Hill had established prejudice because the result of the proceeding would have been different if trial counsel had objected. (App.pp.295-96).[2] Here the post-conviction relief court erred in finding Hill met his burden of establishing trial counsel was ineffective and that he was prejudiced as a result.

This Court has previously held an issue that was raised on direct appeal but found to be unpreserved may be raised in the context of a post-conviction relief claim alleging ineffective assistance of counsel. McHam v. State, 404 S.C. 465, 475, 746 S.E.2d 41, 47 (2013) (citing McLaughlin v. State, 352 S.C. 476, 575 S.E.2d 841 (2003); Foye v. State, 335 S.C. 586, 518 S.E.2d 265 (1999)). However, to be entitled to relief on such a claim, an applicant must establish the underlying claim is meritorious and would have resulted in a reversal on appeal to a reasonable probability. McHam, 404 S.C. at 475–76, 746 S.E.2d at 47 ("Since the Fourth Amendment issue was not considered on direct appeal because it was unpreserved, an examination of the merits of the issue is appropriate in analyzing the prejudice prong in McHam's PCR claim.") (citing Sikes, 323 S.C. at 30, 448 S.E.2d at 562 ("When the defendant claims that counsel's failure to articulate a Fourth Amendment claim was ineffective assistance, [the] defendant must show that such claim is **meritorious** and that the verdict would have been different absent the evidence that should have been excluded." (emphasis in McHam)).

[2] The PCR judge denied all other issues that were raised at the PCR hearing. (App.p.297; pp.309-14). Hill has now challenged these issues on appeal, and this Court granted certiorari on one of those issues.

Therefore, before a post-conviction relief court can find an applicant has prevailed on a claim of ineffective assistance of trial counsel for failing to preserve a ground for appellate review, the reviewing court must determine the underlying claim was meritorious and a reasonable probability that it would have resulted in reversal and a new trial.

The PCR court erred in granting relief because Hill's claim would not have been meritorious had it been preserved for appellate review. The trial judge correctly found the vehicle stop and subsequent search were lawful and properly denied trial counsel's motion to suppress. Corporal Chasteen was justified in effecting the traffic stop because Hill had been following another vehicle too closely and then, after moving to the far left lane, drove below the posted speed limit.[3] See State v. Provet, 405 S.C. 101, 108, 747 S.E.2d 453, 457 (2013) ("Violation of motor vehicle codes provides an officer reasonable suspicion to initiate a traffic stop."). Once this lawful traffic stop was initiated, Corporal Chasteen was then permitted to "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) (citation omitted). Upon observing Hill's demeanor (he was nervous, fidgety, did not make eye contact, and had trembling hands),[4] Corporal Chasteen was justified in asking Hill to exit the vehicle in order to ensure officer safety. See Pennsylvania v. Mimms, 434 U.S. 106, 110-11, 98 S. Ct. 330, 333 (1977) (holding that, based on "the inordinate risk" to his or her safety that an officer faces while conducting a traffic stop, the officer may order the driver and any passengers to exit the vehicle pending the completion of the stop); United States v. Sakyi, 160 F.3d 164, 168 (4th Cir. 1998) (finding traffic stops pose "a meaningful level of risk to the safety of police officers" and noting

[3] App.pp.35-36; pp.58-59.
[4] App.p.38; p.62; pp.68-69.

"the substantial risk to police officers during traffic stops is too plain for argument.") (citations omitted).

Furthermore, in his ruling upon the suppression motion, the trial judge clearly considered the totality of the circumstances in determining Corporal Chasteen had an articulate suspicion of criminal activity. See United States v. Branch, 537 F.3d 328, 337 (4th Cir. 2008); see also State v. Wallace, 392 S.C. 47, 52, 707 S.E.2d 451, 453 (Ct. App. 2011) ("In applying the concept of reasonable suspicion to the various facts of a case, '[i]t is the entire mosaic that counts, not single tiles.'") (quoting United States v. Whitehead, 849 F.2d 849 (4th Cir. 1988). The trial judge stated he had "weighed it all" and noted "there's enough factors that show" a reasonable basis for Corporal Chasteen's actions. (App.pp.49-51). Based on both Hill's and Rodgers' demeanors, that they had given conflicting statements, and that neither individual was listed on the vehicle's rental agreement, Corporal Chasteen had reasonable suspicion of criminal activity and properly asked his backup officer (who was a K-9 unit) to perform an exterior scan of the vehicle. See Illinois v. Wardlow, 528 U.S. 119, 124, 120 S. Ct. 673, 676 (2000) (noting "nervous, evasive behavior is a pertinent factor in determining reasonable suspicion").

Even assuming arguendo that trial counsel had objected to the introduction of the drug evidence during trial, the denial of the motion to suppress would not have been a meritorious issue on appeal. The trial judge was correct in finding Corporal Chasteen had an articulable suspicion of criminal activity that led to the detention and ultimate search of the vehicle. The trial judge's denial of the motion to suppress in this case was supported by the evidence and would not have been reversed on appeal. See State v. Tindall, 388 S.C. 518, 521, 698 S.E.2d 203, 205 (2010) ("On appeals from a motion to suppress based on Fourth Amendment grounds, this Court applies a deferential standard of review and will reverse if there is clear error."); see

also State v. Brockman. 339 S.C. 57, 66, 528 S.E.2d 661, 666 (2000) ("[W]e will review the trial court's ruling like any other factual finding and reverse if there is clear error. We will affirm if there is any evidence to support the ruling."). Accordingly, Hill cannot demonstrate he suffered prejudice from the lack of an objection when the cocaine was admitted into evidence during the trial. See Sikes, 323 S.C. at 30, 448 S.E.2d at 562.

Therefore, even if trial counsel had requested a specific ruling on the issue of the drugs being admitted into evidence, Hill has not shown that there is a reasonable probability the outcome of the trial would have been different because his underlying claim fails on its merits. Under these circumstances, Hill has not established the requisite prejudice to support his claim of ineffective assistance of counsel. McHam, 404 S.C. at 481–82, 746 S.E.2d at 50. See generally Foye, 335 S.C. 586, 518 S.E.2d 265 (holding PCR was properly denied where the applicant did not prove he was prejudiced by trial counsel's deficient performance in failing to preserve an issue at trial).

In addition, Hill had no standing to challenge the subsequent search of the vehicle. A criminal defendant asserting a challenge to an allegedly unreasonable search and seizure must establish his own personal Fourth Amendment rights were violated by that search or seizure. State v. McKnight, 291 S.C. 110, 114, 352 S.E.2d 471, 473 (1987). "[C]apacity 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 v. Illinois, 439 U.S. 128, 143 (1978) (citing Katz v. United States, 389 U.S. 347, 353 (1967)). A subjective expectation of privacy can be considered legitimate if it is one society accepts and recognizes as reasonable. Minnesota v. Olsen, 495 U.S. 91, 95-96 (1990).

Similarly in this case, Hill was not an authorized driver of the rental car and the trial judge properly found Hill had no constitutional standing to challenge the admission of the cocaine discovered during a search of the rental vehicle because Hill failed to establish he had a reasonable expectation of privacy in the area that was searched. During the course of the traffic stop, Trooper Chasteen spoke with Hill about the rental vehicle he was driving at the time of the stop, and Hill denied renting the vehicle while incorrectly claiming the passenger was responsible for doing so. Hill further informed the officer everything inside of the vehicle was the property of the passenger. Subsequently, Trooper Chasteen discovered neither Hill nor the passenger rented the vehicle or was authorized to drive the vehicle based on the information contained in the rental agreement. The officer further discovered the rental vehicle was due to be returned two days earlier to the rental company in Virginia from which it was rented.

Despite the fact Hill was driving the rental vehicle at the time of the traffic stop, Hill's statements to the officer that he did not rent the vehicle and was not responsible for the property inside of the vehicle demonstrated Hill did not have a subjective expectation of privacy in the vehicle.[5] See State v. Missouri, 361 S.C. 107, 112, 603 S.E.2d 594, 596 (2004) ("A legitimate expectation of privacy is both subjective and objective in nature: the defendant must show (1) he had a subjective expectation of not being discovered, and (2) the expectation is one that society recognizes as reasonable."). Furthermore, as Hill did not rent the vehicle he was driving or have any authorization from the owner of the vehicle to drive it or be in possession of it, Hill did not have an expectation of privacy in the rental vehicle that would be recognized or accepted by society as a reasonable one. See 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

[5] Notably, during trial, Hill demonstrated he did not believe he had a legitimate expectation of privacy in the rental vehicle by asserting he should not even have been asked for consent to search the vehicle since his name was not listed in the rental agreement. (R. p. 6).

the car and, therefore, the search of which he complains cannot have violated his Fourth Amendment rights."); see also Rakas, 439 U.S. at 134 ("A person who is aggrieved by an illegal search and seizure only through the introduction of damaging evidence secured by a search of a third person's premises or property has not had any of his Fourth Amendment rights infringed."). Instead, Hill's possession of a rental vehicle he had no authority to possess and which should have been returned to its owner several days earlier established he did not have a legitimate or reasonable expectation of privacy in the vehicle. See, e.g., United States v. Luster, 324 Fed. 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." (citations omitted)). Under those circumstances, Hill could not challenge the search of the vehicle as a violation of his own constitutional rights. See United States v. Salvucci, 448 U.S. 83, 85 (1980) ("[D]efendants charged with crimes of possession may only claim the benefits of the exclusionary rule if their own Fourth Amendment rights have in fact been violated."). Because Hill failed to meet his burden of establishing he had a legitimate expectation of privacy in the rental vehicle, the trial judge properly found Hill had no standing to challenge the evidence recovered in a search of that vehicle. See Rawlings v. Kentucky, 448 U.S. 98, 104 (1980) ("Petitioner, of course, bears the burden of proving not only that the search of Cox's purse was illegal, but also that he had a legitimate expectation of privacy in that purse."); McKnight, 291 S.C. at 114, 352 S.E.2d at 473 ("One who seeks to have evidence suppressed on this basis must establish that his *own* Fourth Amendment rights were violated." (italics in original)); see also State v. Robinson, 396 S.C. 577,

583, 722 S.E.2d 820, 823 (Ct. App. 2012) ("For Robinson to establish a Fourth Amendment violation, he must show a legitimate expectation of privacy on the porch."). As such, Hill did not have standing to challenge the officers' search of the vehicle. Trial counsel would have been unsuccessful in objecting to the admission of the drug evidence at trial and the appellate court would not have reversed Hill's conviction.

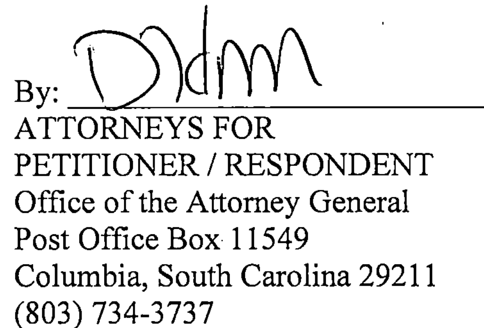
CONCLUSION

For the foregoing reasons, this Court should vacate the order granting post-conviction relief and affirm Hill's conviction because the post-conviction relief judge erred in finding Hill met his burden of proof.

Respectfully submitted,

ALAN WILSON
Attorney General

DESHAWN H. MITCHELL
Assistant Attorney General
SC Bar No. 101813



By: ______________________
ATTORNEYS FOR
PETITIONER / RESPONDENT
Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3737

March 19, 2018

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Greenville County
Court of Common Pleas

The Honorable G. Edward Welmaker, Trial Judge
The Honorable Daniel D. Hall, Post-Conviction Relief Judge

Appellate Case No. 2015-001459

TRAVELL L. HILL,

Respondent-Petitioner,

v.

STATE OF SOUTH CAROLINA,

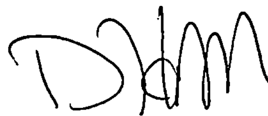
Petitioner-Respondent.

CERTIFICATE OF SERVICE

I, DeShawn H. Mitchell, certify that I have today served the within Petitioner-Respondent **Brief of Petitioner** upon Respondent-Petitioner by depositing a copy of the same in the United States mail, postage prepaid, addressed to:

C. Rauch Wise, Esquire
305 Main Street
Greenwood SC 29646

I further certify that all parties required by Rule to be served have been served. This 19th day of March, 2018.



DESHAWN H. MITCHELL
S.C. Bar # 101813

Office of Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3737

ATTORNEY FOR PETITIONER-RESPONDENT