STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Charleston County

ORIGINAL

Honorable Deadra L. Jefferson, Circuit Court Judge

ELLIOTT JUDON,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2018-001880

PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Trial counsel erred in failing to properly object to the admissibility of the statement and drugs obtained in this case in order to preserve the matter for appellate review because the illegal search and seizure here violated the Fourth Amendment as the detention of petitioner exceeded the scope of the traffic stop.

STATEMENT

Petitioner Elliot Judon was convicted of trafficking in crack cocaine in excess of ten grams per jury trial held during the March 2015 term of the Charleston County General Sessions Court before Judge Kristi L. Harrington, who sentenced him to life imprisonment without parole. App. 1-553. Melissa Gay represented petitioner at trial and Assistant Solicitors Lauren B. Mulkey and Culver Kidd appeared on behalf of the state. Appellant appealed, but his appeal was dismissed by the South Carolina Court of Appeals. See State v. Judon, Unpublished Opinion No. 2017-UP-308 (filed July 26, 2017). LaNelle Cantey DuRant, of the South Carolina Office of Appellate Defense, represented petitioner on direct appeal.

On October 20, 2017, petitioner filed a PCR application with the Charleston County Office of the Clerk of Court. App. 555-561. On January 22, 2018, the respondent filed a Return requesting that a hearing be held in response to petitioner's PCR action. App. 562-565. PCR hearings were held on July 24, 2018, and July 25, 2018, at the Charleston County Courthouse before Judge Deadra L. Jefferson. App. 567-682. Petitioner was present at both hearings and represented by Rodney D. Davis, and Assistant Attorney General Megan Harrigan Jameson appeared on behalf of the state. On October 22, 2018, Judge Jefferson signed an Order of Dismissal denying and dismissing petitioner's allegations of ineffective assistance of trial counsel in the case. App. 685-701.

Petitioner appealed. This petition follows.

ARGUMENT

Trial counsel erred in failing to properly object to the admissibility of the statement and drugs obtained in the case in order to preserve the matter for appellate review because the illegal search and seizure here violated the Fourth Amendment as the detention of petitioner exceeded the scope of the traffic stop.

Police found crack cocaine on petitioner pursuant to a search that followed a traffic stop of his vehicle for a window tint violation. Prior to trial, trial counsel moved to suppress the drugs (and his statement made at the time of the stop) on the ground that the stop, search, and seizure were illegal. App. 33, l.4 – p. 136, l.11; App. 176, l. 2 -p. 189, l. 25App. 253, l. 1 – p. 325, l. 14. The motion to suppress was denied by the trial judge. App. 326, l. 1 – p. 330, l. 1. On appeal, appellate counsel raised the following issue:

> The trial court erred in denying [the] motion to suppress the drugs when the police officer's continued detention of [him] after stopping him for an illegal window tint and finding his driver's license valid, exceeded the scope of the stop and was a seizure pursuant to the Fourth Amendment.

With respect to this issue raised on appeal, the appellate court ruled as follows:

> As to whether the trial court erred in denying [petitioner's] motion to suppress his statements and motion to suppress the drugs: *State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 693-94 (2003) ("In order for an issued to be preserved for appellate review, it must have been raised to and ruled upon by the trial [court]. Issues not raised and ruled upon in the trial court will not be considered on appeal."); *State v. Atieh*, 397 S.C. 641, 646, 725 S.E.2d 730, 733 (Ct. App. 2012) ("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 issue is not preserved for review."); *State v. Dicapua*, 373 S.C. 452, 455, 646 S.E.2d 150, 152 (Ct. App. 2007) (holding defendant's statement that he had no objection to the admission of a video into evidence "amounted to a waiver of any issue [he] had with the [evidence]"). See Supp. Appendix.

When trial counsel was asked during the PCR hearing about her error in failing to preserve the motion to suppress issue on the record for appeal, counsel answered as follows:

> Q. As to the length of the stop and reading Miranda leading to a statement by [petitioner] do you recall whether you made a contemporaneous objection to any of that or not?
>
> A. Whether I made a contemporaneous objection at the time that they went to admit his statement in front of the jury I did not.
>
> Q. And then as to the admission of the drugs that were seized did you make any contemporaneous objection to that when it was being admitted?
>
> A. No. And I would say that I obviously didn't have my head on straight that day. I did not, I would normally do that in a trial but I did not in this case.

App. 628, lines 4-16. See also App. 637, l. 24-p. 639, l. 12.

At trial, an in-camera hearing was held in response to counsel's motion to suppress regarding the legality of the traffic stop, and the duration and scope of the traffic stop, and the tainted fruit confiscated afterwards (drugs and statement). Police Officer John Scott testified that on August 26, 2013, he initiated a traffic stop on the vehicle petitioner was driving based on an "equipment violation" because the window tint on the vehicle was "extremely dark," and lacked "validation decals," and because the car looked like a rental car which to him suggested criminal activity. Officer Scott added that after the stop, petitioner, who was the driver, had his pants zipped down, and although petitioner provided his license, he asked petitioner to exit the car and he believed something was being concealed in his (petitioner's) pants. Officer Scott stated he requested consent to search the vehicle and that petitioner gave consent to search. Officer Scott added that his search uncovered a digital scale, and little pieces of what looked like crack cocaine in the center console, and a knife that looked like cocaine was on it. App. 69, l. 18- p. 82,

l. 25, Then, petitioner was arrested. App. 88, l. 4-18. Officer Scott admitted that petitioner was not free to leave during the stop, and that petitioner admitted he had something in his pants. App. 86, l. 6-15. App. 90, l. 5-6. Ultimately, Officer Scott recovered crack cocaine from petitioner's pants. App. 90, l. 5- 18. App. 253, l. 1-p. 267, l. 9.

Petitioner testified in camera and explained that the officers never asked for consent to search the car, and that he never gave consent to search the car, and that no Miranda warnings were given to him after he was handcuffed. App. 272, lines 9- p. 277, l. 11; App. 50, l. 1-p. 57, l. 6. Petitioner stated that there was not a problem with his license. App. 277, l. 22- p. 278, l. 2.

The trial judge ruled that no Fourth Amendment violation occurred in connection with the traffic stop and in effect that the drugs and the statement were admissible. App. 326, l. 1-p. 330, l. 25. At trial, counsel erred in failing to object when the drug evidence was offered into evidence. App. 377, l. 8- p. 378, l. 11; App. 397, l. 15-25; App. 426, l. 14- p. 432, l. 23.

The PCR judge ruled that trial counsel erred in failing to properly and timely object property to the evidence in question, but that there was no prejudice to the omission as there was evidence to support the trial judge's denial of the motion to suppress based on the Fourth Amendment issues raised in the case. App. 694 - 697.

To the contrary, prejudice was shown due to trial counsel omission because the trial judge erred as a matter of law in denying the motion to suppress and a reasonable likelihood existed that the appellate court would have reversed on appeal had the issue been properly preserved for appellate review.

In the case at bar, petitioner should have been ticketed for the window tint violation and free to go after he showed a valid drier license, but the officer here detained him beyond the scope of the traffic stop and went on a fishing expedition.

The temporary detention of an individual by police during an automobile stop, even if it is only for a brief period and a limited purpose, i.e. an investigative purpose, would constitute a seizure of that person within the meaning of the Fourth Amendment; and as a result, an automobile stop is subject to the constitutional imperative that it not be unreasonable under the circumstances. McHam v. State, 404 S.C. 465, 746 S.E. 2d 41 (2013), citing to Whren v. United States, 517 U.S. 806 (1996). State v. Butler, 353 S.C. 383, 577 S.E. 2d 498 (2003), citing to Delaware v. Prouse, 440 U.S. 648 (1979). The detainment of an individual after a traffic stop may occur if supported by reasonable suspicion. State v. Butler, supra. In determining whether reasonable suspicion exists, the totality of the circumstances must be considered to assess the validity of an officer's suspicions. State v. Corley, 383 S.C. 232, 679 S.E.2d 187 (Ct. App 2009), aff'd as modified, State v. Corley, 392 S.C. 125, 708 S.E.2d 217 (S.C. 2011). Reasonableness is highly fact specific measured in objective terms by examining the totality of the circumstances. State v. Tindall, 388 S.C. 518, 698 S.E.2d 203 (2010).

Also, note that although the scope of the stop may be enlarged, the scope and duration of the seizure must be strictly tied to and justified by the circumstances which rendered its initial undertaking proper. State v. Morris, 395 S.C. 600, 720 S.E2d 468 (2011); Sikes v. State, 323 S.C. 28, 448 S.E.2d 560 (1994). A lawful traffic stop can become unlawful if it is prolonged beyond the time reasonably required to complete its mission. State v. Adams, 397 S.C.481, 725 S.E.2d 523 (2012), citing to State v. Morris, supra, and Illinois v. Caballes, 543 U.S. 405 (2005). Once the purpose of that stop has been fulfilled, the continued detention of the vehicle and occupants would result in a second detention. State v. Morris, supra, citing to State v. Pichardo, 367 S.C. 84, 623 S.E.2d 840 (2005). The encounter can only continue if the police have a reasonable suspicion that

other criminal activity would be afoot. State v. Adams, supra; State v. Morris, supra, State v. Pichardo, supra.

In Sikes, a vehicle was stopped because the paper tags aroused suspicion of it being stolen, but after receiving the requested identification information from the driver and the passenger; nonetheless, the passenger was taken from the car while police ran a warrant check on him. The Court reversed in Sikes and held that the officer's further detention of the passenger while going "fishing" for evidence of a crime, i.e., looking for warrants, was unlawful because the scope and duration of the initial seizure must be **tied to and justified by the circumstances which rendered its initiation proper**. In Sikes, the belief that the car was stolen ended upon the receipt of proper identifications. Therefore, there was no reasonable suspicion in existence thereafter to extend the seizure of the passenger by detaining him any further. Also, the Sikes Court cited to State v. Johnson, 805 P.2d 761 (Utah 1991), where the Court held that the leap from asking a passenger's name and date of birth to running warrant checks on the passenger was unlawful as such was an attempt to gather information in support of an unparticularized suspicion or hunch. Compare, State v. Williams, 351 S.C. 591, 571 S.E.2d 703 (2003), where the Court held that since the officer had written the traffic ticket and the traffic stop was complete, it was error for the officer to continue to question the defendant until he (officer) believed the answers were inconsistent as a basis to search the vehicle because there was no prior reasonable suspicion that criminal activity had been afoot.

Going on a "fishing" expedition to find evidence in support an unparticularized hunch of inchoate criminal activity is unlawful because reasonable suspicion is an objective assessment of the circumstances at trial. See State v. Provet, 405 S.C. 101, 747 S.E. 2d 453 (2013), citing to Whren V. United States, supra. Reasonable suspicion is more than an inchoate or unparticularized hunch, but rather it is an objective basis that would lead to a suspicion of criminal activity under the

probability of the circumstances. State v. Rogers, 368 S.C. 529, 6219 S.E. 2d 679 (2006) citing to State v. Butler, supra. Moreover, once the purpose of the traffic stop has ended, the officer may not extend the duration of the traffic stop without reasonable suspicion that would justify an additional or prolonged seizure. State v. Provet, 405 S.C. 101, 747 S.E. 2nd 453 (2013) citing to Pennsylvania v. Morris, 403 U.S. 106 (1977) and Arizona v. Johnson, 555 U.S. 323 (2009).

In Tindall, supra, the Court reversed and held that the officer lacked reasonable suspicion of a crime to continue detaining the defendant beyond the scope of the traffic stop where the officer stopped the defendant for speeding, obtained his license and registration and proof of insurance, did a "felony stretch," and pulled the defendant out and ordered him to sit in the patrol car, and continued to question him for 6 to 7 minutes, despite the fact that the report returned that there were no problems with the license or vehicle, and extended the process until backup arrived for a dog sniff due to his (defendant's) nervousness because "the purpose of the traffic stop was accomplished" after the report returned confirming all was well with the defendant's license and insurance, which meant the ticket should have been issued rather than engage in the continued detention of the defendant since this exceeded the scope of the traffic stop and constituted a seizure in violation of the Fourth Amendment.

Compare State v. Rivera, 384 S.C. 356, 682 S.E.2d 307 (Ct. App. 2009), where the Court upheld the trial judge's ruling that the defendant was unlawfully detained on a continued detention when the defendant was stopped for following too closely and asked to exit the car and asked a series of questions even though there was no evidence of criminal activity, and when the defendant was told he would receive a ticket, because this fishing expedition went on until back-up police arrived. Lengthening the detention for further questioning beyond that related to the

initial stop is acceptable only if the officer has an objectivity reasonable and articulable suspicion that illegal activity has occurred. State v. Provet citing to State v. Pichardo, supra. .

Clearly, the fishing expedition that occurred in the case sans probable case or reasonable suspicion led to an illegal detention of appellant and the illegal search of his vehicle based on an extended detention beyond the scope of the stop. This violated the Fourth Amendment to the United States Constitution and article 1 §10 of the South Carolina State Constitution; and as a result, the drugs and statement should have been suppressed as tainted fruit. Wong Sun v. United States, 371 U.S. 471 (1963).

Trial counsel erred in failing to object properly and timely at trial in order to preserve the Fourth Amendment issue as outlined above for appellate review. The error denied petitioner the right to effective legal assistance at trial, which is a Sixth Amendment violation. See Strickland v. Washington, 466 U.S. 668 (1094). Moreover, but for counsel's error in this regard, a reasonable likelihood exists that the appellate court might have handed down a reversal on this issue.

CONCLUSION

Based on the foregoing argument, counsel for petitioner would request that this Court grant the petition and allow full briefing on the above-raised issue.

Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER

This 29th day of April, 2019.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Petition for Writ of Certiorari and a copy of the Appendix and Supplemental Appendix in the above referenced case have been served upon Megan Harrigan Jameson, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Petition for Writ of Certiorari and a copy of the Appendix and Supplemental Appendix have been served on Elliott Judon, #263761, at Lee Correctional Institution, 990 Wisacky Hwy., Bishopville, SC 29010, this 29th day of April, 2019.

Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 29th day of April, 2019.

_____ (L.S)
Notary Public for South Carolina
My Commission Expires: July 5, 2027.