STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Greenville County
Hon. Perry W. Gravely, Circuit Court Judge
Appellate Case Tracking No. 2017-002411

Daniel Lopez, Petitioner,

v.

State of South Carolina, Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF QUESTIONS PRESENTED

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STATEMENT OF THE CASE

Procedural History

Applicant was indicted by the March 2005 term of the Greenville County Grand Jury for one (1) count of Possession of a Firearm with an Obliterated Serial Number (2005-GS-23-01956) and one (1) count of Trafficking Cocaine (2005-GS-23-01957). Christopher Scalzo, Esquire, represented him at trial. On October 12-13, 2009, Applicant was tried in his absence before the Honorable C. Victor Pyle, Jr. and a jury. The jury found him guilty as indicted. The Honorable C. Victor Pyle, Jr. sentenced Applicant and sealed the sentence. On May 7, 2013, the sealed sentences were read in Applicant's presence by the Honorable Letitia H. Verdin. Judge Pyle sentenced Applicant to twenty-five (25) years imprisonment for the count of trafficking cocaine and confinement for five (5) years for the count of possession of a firearm with an obliterated serial number. The sentences were set to run concurrently.

A notice of appeal was filed on Applicant's behalf and an appeal perfected.[1] The South Carolina Court of Appeals affirmed Applicant's conviction and sentence. State v. Lopez, Op. No. 2015-UP-216 (filed on April 29, 2015). The Remittitur was issued on July 30, 2015.

Petitioner filed his Application for Post-Conviction Relief on February 29, 2016. The State filed a Return on August 16, 2016. After an evidentiary hearing on April 18, 2017, the Honorable Perry W. Gravely denied Petitioner's claims and entered an Order of Dismissal on October 6, 2017. Petitioner filed a Motion to Alter or Amend. On November 3, 2017, Judge Gravely denied the Motion to Alter or Amend. After having this case dismissed twice and reinstated, Petitioner served his Petition for Writ of Certiorari and Appendix.

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[1] The Order of Dismissal incorrectly states the appeal was pursuant to Anders v California 378 U.S. 738, 87 S. Ct. 1396 (1967).

Factual Background

At trial, Officer Chris Hines with the Greenville County Sheriff's Office testified he was on patrol along I-85 in Greenville County with his partner, a K-9 officer. He exited the interstate to turn around at the county line and pulled through a gas station. As he pulled through, he noticed a man at the pay phone with a white Dodge Intrepid parked nearby. (App.156).

After pulling off to the side of the interstate, Officer Hines was passed by the same white Dodge Intrepid travelling at a high rate of speed. He was unable to register the vehicle's speed, so he began following and attempted to overtake the vehicle. The Intrepid then made an abrupt change onto the next exit ramp. (App.156-157). At the time, he was travelling 72 miles per hour when the speed limit for the interstate was 60 miles per hour and the exit ramp recommended speed was 45 miles per hour. (App.157). Officer Hines activated his blue lights and siren. After turning on another road, Petitioner finally pulled over. (App.157-158).

After approaching the vehicle, Officer Hines saw two cell phones in Petitioner's vehicle. One appeared to be on. He believed this suspicious because he had just seen Petitioner at the pay phone off the prior exit. (App.158). Officer Hines asked for Petitioner's paperwork and while doing so asked him where he was headed. Petitioner indicated he was heading to Georgia from North Carolina; however, he was travelling in the opposite direction heading towards North Carolina from Georgia. (App. 159).

When Petitioner presented his license, registration and insurance, Officer Hines noticed each had a different address. Petitioner's license was out of Louisiana, and his registration and insurance were two different addresses in Georgia. Officer Hines asked him for his current address and he gave a fourth address, another one in Georgia. (App.159-160).

At trial, Officer Hines testified Petitioner was confused about who he had been to see in North Carolina and could not keep his story straight. Further, he indicated Petitioner was attempting to befriend him by talking about what Petitioner did as a bouncer. Officer Hines indicated the statements and discussion with Petitioner were "nervous chatter." (App.160-161). He testified at trial that Petitioner stumbled on his words and would not make eye contact. (App.161). Finally, when asked where he was planning to eat, Officer Hines testified Petitioner told him McDonalds which raised his suspicion because there was a McDonalds at the exit Petitioner left where he used the pay phone. (App.162).

At trial, Officer Hines also testified his vehicle was equipped with video recording equipment and the stop with Petitioner was recorded. He indicated he left the unit and his video recordings were kept by the supervisor in a locked vault. After he left, there was a supervisor change and he was told to pick up his videos. He indicated only half of his videos were there for him to retrieve and he did not know what happened to the remaining videos, including the one showing Petitioner's stop. (App.225-226).[2]

Prior to the PCR hearing, the video was located. Officer Hines testified that the unit moved buildings. During the packing and cleaning of the old building, more items previously belonging to Officer Hines were located. Sometime between 2010 and 2012 a box containing more video recordings was delivered to Officer Hines. (App.121). He was asked in 2016 by the Solicitor's Office to again search for the video and this time it was located in the items delivered to Officer Hines after Petitioner's trial when they were cleaning the old building. (App.121-122). As a result, the video was played at the PCR hearing. (Plaintiff's Exhibit 1).

[2] At the PCR hearing, Officer Hines similarly testified that he left the unit he was with at the time of the stop, the unit subsequently changed commanders, and when he went to retrieve his items stored by the previous commander the video was not included. (App.117-119).

ARGUMENT

I. The court properly found there was no constitutional discovery violation by the State for failing to turn over the missing video. Further, the court properly determined the results of the suppression hearing and trial would not have been different if the video was presented at trial.

The PCR court properly found there was no constitutional discovery violation by the State for failing to turn over the video of the traffic stop when it was missing at the time of trial, the State provided a valid reason for its inability to turn over the video, and there is no evidence of bad faith on the part of the State in failing to turn over the video. Additionally, Petitioner has failed to demonstrate the video would have resulted in a different determination by the trial court on the motion to suppress because key aspects of Officer Hines' determination of reasonable suspicion were not called into question by the video and the video was merely impeaching and would have simply allowed for additional cross-examination.

Constitutional Brady Violation

First, the PCR Court correctly determined there was no constitutional Brady[3] violation in this case by the State. "The Brady disclosure rule requires the prosecution to provide to the defendant any evidence in the prosecution's possession that may be favorable to the accused and material to guilt or punishment." Porter v. State, 368 S.C. 378, 384, 629 S.E.2d 353, 356 (2006). "A Brady claim is based upon the requirement of due process. Such a claim is complete if the accused can demonstrate (1) the evidence was favorable to the accused, (2) it was in the possession of or known to the prosecution, (3) it was suppressed by the prosecution, and (4) it was material to guilt or punishment." Gibson v. State, 334 S.C. 515, 524, 514 S.E.2d 320, 324

[3] Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

(1999) (citing Kyles v. Whitley, 514 U.S. 419, 432–42 (1995); Brady, 373 U.S. at 87; State v. Von Dohlen, 322 S.C. 234, 241, 471 S.E.2d 689, 693 (1996)) (internal footnotes omitted).

As this Court explained:

> In "specific request" and "general- or no-request" situations, "favorable evidence is material, and constitutional error results from its suppression by the government, if there is a reasonably probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. . . . A reasonable probability of a different result is accordingly shown when the Government's evidentiary suppression undermines confidence in the outcome of the trial."

Gibson, 334 S.C. at 525, 514 S.E.2d at 325 (quoting Kyles, 514 U.S. at 432–36).

In the instant case, Petitioner has failed to show the videotape was "suppressed by the prosecution." Instead, as specifically found by the PCR Court, the videotape was misplaced and Officer Hines provided a "valid" explanation for the failure to produce the video. The Solicitor indicated she learned of the missing video prior to trial and informed defense counsel of the fact prior to trial. (App. 109-110). At trial, Officer Hines testified he left the unit he belonged to at the time of the traffic stop and the video recording in this case, along with all of his video recordings, were stored in a supervisor's office. Subsequently, the supervisor changed and Officer Hines was given back some of his video recordings but not all. He indicated he did not know what happened to the remaining tapes, whether they were misplaced or destroyed. (App.225-226). Later at the PCR hearing, he specifically indicated the video resurfaced at a later date when the unit he was part of at the time of the traffic stop moved out of the building it was in and into another building. A box of his video recordings and other items was located and returned to him. In it, he located the video recording and it was given to counsel for use at the PCR hearing. (App.121-122). Officer Hines' explanation, which was accepted as valid by the

PCR Court and is uncontradicted, demonstrates the State did not suppress the video, but instead believed it to be lost at the time of trial.

Additionally, the PCR Court properly found the evidence provided by the video recording would not have resulted in a different outcome. As will be discussed in more detail, the video recording did not materially contradict any of the testimony by Officer Hines at trial and did not contradict any of the significant facts and circumstances demonstrating he had reasonable suspicion to extend the traffic stop to conduct a dog sniff on Petitioner's vehicle. As a result, Petitioner has failed to establish a Brady violation because he has failed to establish the evidence, even if suppressed, was material.

Destruction of Evidence

Even if the loss of the video tape is analyzed under due process considerations of destroyed evidence, there is no constitutional violation. As this Court explained:

> The Due Process Clause of the Fourteenth Amendment to the United States Constitution guarantees a defendant's fundamental right to a fair trial. U.S. Const. amend. XIV. Where a defendant's right to a fair trial due to missing or destroyed evidence is at issue, the applicable standard is derived from the United States Supreme Court's opinion in Arizona v. Youngblood, 488 U.S. 51, 109 S.Ct. 333, 102 L.Ed.2d 281 (1988).

State v. Reaves, 414 S.C. 118, 125, 777 S.E.2d 213, 216 (2015). In Youngblood, the United States Supreme Court required the defendant show bad faith in the destruction or loss of the evidence in order to establish a due process violation occurred. Youngblood, 488 U.S. at 58. The Court acknowledged the difficulty in determining the import of materials lost or destroyed when their contents are unknown or disputed. The Court then explained:

> We think that requiring a defendant to show bad faith on the part of the police both limits the extent of the police's obligation to preserve evidence to reasonable bounds and confines it to that class of cases where the interests of justice most clearly require

> it, *i.e.*, those cases in which the police themselves by their conduct indicate that the evidence could form a basis for exonerating the defendant. We therefore hold that unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law.

Id.

In the instant case, the unchallenged explanation for the loss of the video recording by Officer Hines, both at trial and at the PCR hearing, demonstrates no bad faith on the part of law enforcement. The missing video came to light after Officer Hines left the unit and after a change in the supervisor. During these transitions, the video recording was lost as Officer Hines only received part of his recordings. It was ultimately determined the video was not lost, but misplaced and found only when a full emptying of the building occurred as part of a move. As a result, any motion pursuant to Youngblood or Reaves would clearly have not been required and counsel would not be deficient.

After-discovered Evidence

Petitioner contends the video would have changed the result of his motion to suppress because it would have demonstrated the extension of the traffic stop was not reasonable. The primary focus of the officer's suspicion would not have been altered in any way by the video. Many of the facts, which clearly established reasonable suspicion of criminal activity, were established without reference to subjective opinions of the officer which may or may not have been contradicted by the video.

> Traditionally, in South Carolina, to obtain a new trial based on after discovered evidence, the party must show that the evidence: (1) would probably change the result if a new trial is had; (2) has been discovered since trial; (3) could not have been discovered before trial; (4) is material to the issue of guilt or innocence; and (5) is not merely cumulative or impeaching.

Jamison v. State, 410 S.C. 456, 467, 765 S.E.2d 123, 128 (2014) (internal quotations and corrections omitted).

"In general, a police officer 'may [ ] stop and briefly detain a vehicle if they have a reasonable suspicion that the occupants are involved in criminal activity.' " Robinson v. State, 407 S.C. 169, 182, 754 S.E.2d 862, 868 (2014) (quoting State v. Pichardo, 367 S.C. 84, 97, 623 S.E.2d 840, 847 (Ct. App. 2005)). "If, during the stop of the vehicle, the officer's suspicions are confirmed or further aroused—even if for a different reason than he initiated the stop—the stop may be prolonged, and the scope of the detention enlarged as circumstances require." Id. at 182, 754 S.E.2d at 869. "Lengthening the detention for further questioning beyond that related to the initial stop is acceptable in two situations: (1) the officer has an objectively reasonable and articulable suspicion illegal activity has occurred or is occurring; or (2) the initial detention has become a consensual encounter." State v. Provet, 391 S.C. 494, 500, 706 S.E.2d 513, 516 (Ct. App. 2011), aff'd, 405 S.C. 101, 747 S.E.2d 453 (2013); see also, State v. Moore, 415 S.C. 245, 252, 781 S.E.2d 897, 901 (2016) ("The officer may detain the driver for questioning unrelated to the initial stop if he has an objectively reasonable and articulable suspicion illegal activity has occurred or is occurring." (citation and internal quotation marks omitted)).

"'Reasonable suspicion' requires a 'particularized and objective basis that would lead one to suspect another of criminal activity.'" State v. Khingratsaiphon, 352 S.C. 62, 69, 572 S.E.2d 456, 459 (2002) (quoting United States v. Cortez, 449 U.S. 411, 418, 101 S.Ct. 690, 695, 66 L.Ed.2d 621, 629 (1981)). "The test whether reasonable suspicion exists is an objective assessment of the circumstances; the officer's subjective motivations are irrelevant." Provet, 405 S.C. at 108, 747 S.E.2d at 457 (citing Ohio v. Robinette, 519 U.S. 33, 38, 117 S.Ct. 417, 136 L.Ed.2d 347 (1996)). "[C]ourts must give due weight to common sense judgments reached by

officers in light of their experience and training." State v. Taylor, 401 S.C. 104, 113, 736 S.E.2d 663, 667 (2013) (citing United States v. Perkins, 363 F.3d 317, 321 (4th Cir. 2004)).

As the United States Supreme Court has explained:

> Reasonable suspicion is a less demanding standard than probable cause not only in the sense that reasonable suspicion can be established with information that is different in quantity or content than that required to establish probable cause, but also in the sense that reasonable suspicion can arise from information that is less reliable than that required to show probable cause.

Alabama v. White, 496 U.S. 325, 330 (1990). The United States Supreme Court also articulated: "Although a mere 'hunch' does not create reasonable suspicion, the level of suspicion the standard requires is '**considerably less** than proof of wrongdoing by a preponderance of the evidence,' and '**obviously less**' than is necessary for probable cause." Navarette v. California, 134 S. Ct. 1683, 1687 (2014).

In this case, Officer Hines had clear articulable reasonable suspicion without resort to any of the subjective opinions he formulated regarding Petitioner's responses or behaviors. First, Officer Hines saw Petitioner using a pay phone even though he later found out Petitioner had two cell phones in his vehicle, including at least one that was on and working. Next Petitioner was speeding and when Officer Hines pulled in behind him, Petitioner made an abrupt turn onto the next exit ramp. Then, in discussing his travels, Petitioner indicated he was heading home to Georgia from North Carolina even though he was actually heading in the opposite direction on Interstate 85, a known drug path heading out of Atlanta. Finally, when asked for his paperwork, license and address, Petitioner provided four different addresses. His license was from Louisiana, which did not match the home address he gave the officer. His insurance and registration each had different addresses listed. These factors, notwithstanding any subjective opinions the officer formulated, were sufficient to establish reasonable suspicion to extend the

stop and conduct the walk around of the drug dog. As a result, the video, which at best only provides "additional cross-examination" regarding the officer's subjective determinations, would not have altered the calculus on whether reasonable suspicion existed and does not satisfy the requirement for reversal based on after-discovered evidence because it would not have altered the outcome at trial.

Accordingly, this Court should deny the Petition for Writ of Certiorari because Petitioner has failed to demonstrate how his counsel was deficient as it related to the handling of the missing video and has failed his burden of proof in establishing the outcome of the suppression motion and trial would have been different had the video been found prior to trial.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that this Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

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May 13, 2019

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Greenville County
Hon. Perry W. Gravely, Circuit Court Judge
Appellate Case Tracking No. 2017-002411

Daniel Lopez, Petitioner,

v.

State of South Carolina, Respondent.

PROOF OF SERVICE

I, Judy A.C. Carey, certify that I have served the within Return to Petition For Writ of Certiorari by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

William G. Yarborough, III, Esquire
Lauren C. Hobbis, Esquire
William G. Yarborough III, Attorney at Law, LLC
522 North Church Street
Greenville, South Carolina 29601

I further certify that all parties required by Rule to be served have been served.
This 13th day of May, 2019.

JUDY A.C. CAREY
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ALAN WILSON
ATTORNEY GENERAL

RECEIVED
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S.C. SUPREME COURT

May 13, 2019

William G. Yarborough, III, Esquire
Lauren C. Hobbis, Esquire
William G. Yarborough III, Attorney at Law, LLC
522 North Church Street
Greenville, South Carolina 29601

Re: Daniel Lopez v. State of South Carolina
Appellate Case Tracking No. 2017-002411

Dear Mr. Yarborough

I am enclosing two (2) copies of the Return to Petition for Writ of Certiorari in the above-referenced case.

If you have any questions concerning this matter, please contact me.

Sincerely,

William M. Blitch, Jr.
Assistant Attorney General
S.C. Bar No. 15608

cc: Honorable Daniel E. Shearouse (original and six enclosed)
Victim Advocacy Division (enclosure)