

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Darlington County

Honorable Larry B. Hyman, Circuit Court Judge

JAMECO ABDUL TONEY,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2018-001899

PETITION FOR WRIT OF CERTIORARI

WANDA H. CARTER
Deputy Chief Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR PETITIONER

ORIGINAL
RECEIVED

MAY 31 2019

S.C. SUPREME COURT

INDEX

INDEX i

ISSUE PRESENTED2

STATEMENT3

ARGUMENT

Trial counsel erred in failing to enter the proper objections at trial in order to preserve for appellate review petitioner’s Fourth Amendment issue from his trial (illegal seizure), and also his standing issue raised at trial as well in light of the holding in Byrd v. United States, 138 S.Ct. 1518 (2018).4

CONCLUSION10

ISSUE PRESENTED

Trial counsel erred in failing to enter the proper objections at trial in order to preserve for appellate review petitioner's Fourth Amendment issue from the trial (illegal seizure), and also his standing issue raised at trial as well in light of the holding in Byrd v. United States, 138 S.Ct. 1518 (2018).

STATEMENT

Petitioner Jameco Abdul Toney was convicted of trafficking in marijuana between 10 and 100 pounds, second offense, during the November 2013 term of the Darlington County General Sessions Court before Judge R. Ferrell Cothran and sentenced to imprisonment for a period of nine years. Attorney Christie Wise represented petitioner at trial and Assistant Solicitor Zack Farr appeared on behalf of the state. App. 1-261. Petitioner appealed, but his conviction and sentence were affirmed on October 19, 2016, by the South Carolina Court of Appeals. See State v. Toney, Unpublished Opinion No. 2016-UP-428 (S.C. Ct. of Appeals October 19, 2016) at Supp. App. 15-16. Petitioner was represented on appeal by Jeffrey S. Stephens, Esquire. See Supp. App. 1-14.

On June 16, 2017, petitioner filed a PCR application with the Darlington County Office of the Clerk of Court. App. 263-269. The respondent filed a return dated September 1, 2017.

A PCR hearing was convened on July 23, 2018, at the Darlington County Courthouse before Judge Larry B. Hyman, Junior. Petitioner was present at the hearing and represented by Lance S. Boozer, and Assistant Attorney General Johnny E. James appeared on behalf of the state. On October 1, 2018, Judge Hyman issued an Order of Dismissal in the case. App. 296-311.

Petitioner appealed Judge Hyman's Order of Dismissal. This petition follows.

ARGUMENT

Trial counsel erred in failing to enter the proper objections at trial in order to preserve for appellate review petitioner's Fourth Amendment issue from his trial (illegal seizure), and also his standing issue raised at trial as well in light of the holding in *Byrd v. United States*, 138 S.Ct. 1518 (2018).

During the pretrial hearing, Officer Lawson testified that he stopped petitioner on I-20 due to an improper lane change, and that during the traffic stop, he learned that petitioner was driving a rental car (which was past due for return) that was rented by someone else other than petitioner. Then, Officer Lawson testified that he started writing a warning ticket after checking petitioner's license and began asking petitioner questions regarding where he was traveling, and if he had a criminal record, and if he had a drug history, and if there were drugs in the car. Next, Officer Lawson stated that he called the rental company for consent to search, which was granted, but he added that he was in effect stalling as he was waiting for back-up police officers to appear. Ultimately, Officer Lawson searched the car and found marijuana inside. Officer Lawson added that petitioner made a statement that he has been "set up." App. 37, l. 11 – p. 57 l. 19. Petitioner explained during the *in camera* pretrial hearing that he did not know that drugs were in the car and that the rental car did not belong to him. Tr. 13, l. 5 – p. 36, l. 21.

At the close of this pre-trial hearing, trial counsel moved to suppress because the officer had all the evidence needed to write the warning ticket, but continued to pursue questioning and stalled to lengthen the duration of the stop, which continued beyond the purpose of the traffic violation and morphed into a type of fishing expedition condemned in *Sikes v. State*, 323 S.C. 28, 448 S.E.2d 560 (1994). App. 88 – p. 96, l. 18; App. 104, l. 15 – p. 106, l. 25. The Court denied the motion to suppress. App. 98, ll. 5-6; App. 101, l. 23 – p. 102, l. 22. Later on at trial,

trial counsel failed to object (review objection) when the marijuana was admitted into evidence.

App. 173, l. 20 – p. 176, l. 25. On appeal, appellate counsel raised the following issue:

Did the trial court err by finding that the appellant lacked standing to challenge both the search of the rental car he was driving and the unreasonable length of his detention as a 4th amendment seizure? See Supplemental Appendix.

The Court of Appeals held as follows:

PER CURIAM: Affirmed pursuant to Rule 220(b), SCACR, and the following authorities: State v. Moses, 390 S.C. 502, 511, 702 S.E.2d 395, 400 (Ct. App. 2010) (“[M]aking a motion *in limine* to exclude evidence at the beginning of trial does not preserve an issue for review because a motion *in limine* is not a final determination.”) The moving party, therefore, must make a contemporaneous objection when the evidence is introduced” (alteration in original) (quoting State v. Forrester, 343 S.C. 637, 642, 541 S.E.2d 837, 840 (2001)); 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.”); *id.* At 646-47. 725 S.E.2d at 733 (providing exceptions to the rule that a contemporaneous objection be made at the time evidence is offered to preserve the matter (1) when the motion in limine is made immediately prior to the introduction of the evidence in question and (2) when the trial court clearly indicated its ruling is final); Mcham v. State, 404 S.C. 465, 470, 473-75, 746 S.E.2d 41, 44, 46-47 (2013) (holding in a post-conviction relief action following dismissal of an *Anders* appeal from trial in which trial counsel moved in an in limine motion to suppress drugs as the product of an illegal search and seizure in violation of the Fourth Amendment, but failed to renew the objection on that basis when the drugs were actually admitted into evidence at trial, it was clear the Court of Appeals did not consider the merits of the Fourth Amendment issues on direct appeal because it was not preserved by trial counsel); State v. Dicapua, 373 S.C. 452, 455, 646 S.E.2d 150, 152 (Ct. App. 2007) (holding trial counsel’s statement to the trial court that he had “no objection” to the introduction of evidence, even though he previously made a motion to exclude the evidence, waived any issue with admission of that evidence). Affirmed. See Supplemental Appendix.

During the PCR hearing, petitioner’s allegation was that counsel was ineffective in failing to object at the appropriate time at trial in order to preserve his Fourth Amendment claims for appellate review. App. 28, l. 2 – 25. Petitioner did not testify at the PCR hearing. Counsel

testified at the PCR hearing and admitted that she failed to take the proper steps via a timely objection to preserve for appellate review petitioner's Fourth Amendment claims raised at pretrial. App. 284, l. 16- p. 289, l. 21.

The PCR judge ruled that counsel's failure to preserve the Fourth Amendment issue for appellate review by making proper and timely objections at trial did not result in any prejudice because petitioner had no standing to raise the violations as he had no expectation of privacy in the rental car he drove at the time, and that counsel had no duty to be clairvoyant regarding any future changes in the law on this standing issue, and that the traffic stop and detention were nonetheless reasonable in the case. App. 296-311.

To the contrary, it was obvious that a Fourth Amendment violation occurred in the case because the traffic stop exceeded the scope and duration of the purpose, and note that the present law today is that an unauthorized driver of a rental car can assert a Fourth Amendment violation claim per Byrd v. United States, 138 S.Ct. 1518 (2018).

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.E.2d 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.

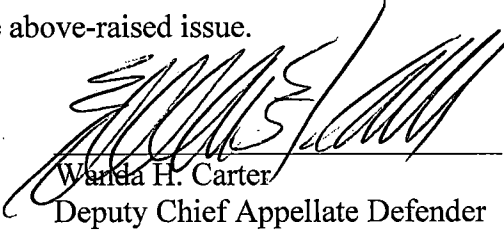
Compare State v. Rivera, 384 S.C. 356, 682 S.E.2d 307 (Ct. App. 2009), where the Court upheld the trial judge's ruling that the defendant was unlawfully detained on a continued detention when the defendant was stopped for following too closely and asked to exit the car and asked a series of questions 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.

Here, petitioner should have been ticketed for improper lane change, which was the purpose of the stop, and the stop should have ended there; but the stop continued and morphed nonetheless into a fishing expedition that exceeded the purpose of the stop, which led to the illegal detention of petitioner and the illegal search of his vehicle was a result. This violated the Fourth Amendment, and 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 and the standing issue as well, which was later resolved in petitioner's favor in Byrd v. United States, 138 U.S. 1518 (2018). The error denied petitioner the right to effective legal assistance at trial in violation of the 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 appeal.

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 31st day of May, 2019.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Darlington County

Honorable Larry B. Hyman, Circuit Court Judge

JAMECO ABDUL TONEY,

PETITIONER

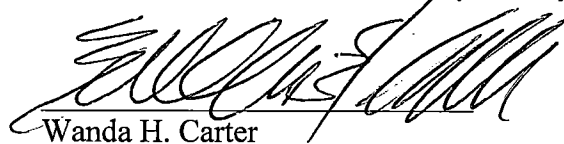
V.

STATE OF SOUTH CAROLINA,

RESPONDENT

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 Johnny Ellis James, Jr., 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 have been served on Jameco Abdul Toney, #299774, at Kirkland Correctional Institution, 4344 Broad River Road, Columbia, SC 29210, this 31st day of May, 2019.



Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 31st day of May 2019.

 (L.S)
Notary Public for South Carolina

My Commission Expires: September 27, 2028.

