STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to York County

Honorable William A. McKinnon, Circuit Court Judge

DEVIONNE MCCLAIN,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2018-002196

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

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ISSUE PRESENTED

Trial counsel erred in failing to object based on the proper standard to challenge petitioner's Fourth Amendment traffic stop claim because this resulted in petitioner's wrongful conviction on the offense of failure to stop for a blue light, which followed as a result of the unlawful traffic stop, and precluded appellate review of the issue on appeal.

STATEMENT

Petitioner Devionne McClain was found guilty of failure to stop for a blue light during a jury trial held at the October 2015 term of the York County General Sessions Court before Judge Daniel DeWitt Hill, and sentenced to imprisonment for a period of five years. Also, petitioner's probation sentence was revoked at that sentencing from a prior PWID crack cocaine conviction and a prior PWID crack cocaine within proximity of a school conviction, which resulted in a nine-year sentence to be served concurrently with his five-year sentence. App. 1-122. Jessica Russo represented petitioner at trial, and Assistant Solicitor Hannah Grove appeared on behalf of the state. Petitioner appealed, but his conviction was affirmed. See State v. McClain, Unpublished Opinion No. 2017-UP-400 (filed October 18, 2017). See Supp. Appendix 22-23.

On December 5, 2017, petitioner filed a PCR application with the York County Office of the Clerk of Court. App. 124-130. The respondent filed a Return dated April 11, 2018. App. 131-136.

A PCR hearing was convened on October 2, 2015, at the York County Courthouse before Judge William A. McKinnon. Petitioner was present at the hearing and represented by Leah B. Moody, and Assistant Attorney General Christian Saville appeared on behalf of the state. App. 138-182.

On November 26, 2018, Judge McKinnon signed an Order of Dismissal therein denying petitioner's allegations of ineffective assistance of trial counsel in the case. App. 184-191.

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

ARGUMENT

Trial counsel erred in failing to object based on the proper standard to challenge petitioner's Fourth Amendment traffic stop claim because this resulted in petitioner's wrongful conviction on the offense of failure to stop for a blue light, which followed as a result of the unlawful traffic stop, and precluded appellate review of the issue on appeal.

This case consisted of the testimony of only two witnesses: Officers Spencer McNeely and Nicholas Harris. Officer McNeely testified that he was patrolling Kings Mountain Street in York County on April 30, 2015, when he observed petitioner driving his vehicle at 45 mph in a 35 mph zone based on his visual tracking of the speed, which was not mentioned in his incident report, as being confirmed by radar. Tr. 8, l.1-p.21, l.20. Counsel moved to dismiss the FTSBC on the ground that Officer McNeely did not have "reasonable suspicion" to believe without radar confirmation in effect that petitioner was speeding. App. 7, 11-12. The Court denied the motion. App. 20, lines 1-12.

Appellate counsel raised the following issue on appeal:

The trial court reversibly erred in ruling that Officer McNeely had probable cause to believe that appellant was speeding where there was no evidence that McNeely had the necessary training or experience to visually estimate a passing vehicle's speed with sufficient accuracy and where there was no independent corroboration of Officer McNeely's visual speed estimate providing the requisite additional indicia of reliability necessary to support an objectively reasonable finding of probable cause to believe that Appellant was speeding. Note that petitioner did not testify or present witnesses in his defense at trial.

The appellate court ruled on this issue on direct appeal as follows:

PER CURIAM: Devionne Devaughn McClain appeals his conviction for failure to stop for a blue light, arguing the trial court erred in finding a police officer had probable cause to believe McClain was speeding. At trial, McClain moved to dismiss the indictment based on a lack of reasonable suspicion to initiate the traffic stop. McClain never argued to the trial court that its use of the reasonable suspicion standard was erroneous or that probable cause was the correct standard. Accordingly, the issue of whether the police officer had probable cause to initiate the traffic stop is not preserved. We affirm pursuant to Rule 220(b), SCACR, and the following

authorities: *State v. Passmore*, 363 S.C. 568, 583, 611 S.E.2d 273, 281 (Ct. App. 2005) ("The general rule of issue preservation states that if an issue was not raised and ruled upon below, it will not be considered for the first time on appeal."); *State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 694 (2003) ("A party need not use the exact name of a legal doctrine in order to preserve it, but it must be clear that the argument has been presented on that ground. A party may not argue one ground at trial and an alternate ground on appeal." (citation omitted)); *State v. Burgess*, 391, S.C. 15, 20, 703 S.E.2d 512, 515 (CT. App. 2010) ("The rules of issue preservation impose on counsel a duty to challenge a statement of law made by the trial [court] which counsel believes to be erroneous."). See Supp. Appendix.

AFFIRMED.

During the PCR hearing held in the case, petitioner testified that he asked counsel to argue in effect that the police officer merely believed he was speeding, but never confirmed via radar that he was speeding, and that therefore no probable cause existed for the traffic stop, but and that counsel argued lack of reasonable suspicion rather then lack of probable cause to make the stop. App 150, l.2 – p. 162, l.25.

Trial counsel testified at the hearing and explained that petitioner wanted the case dismissed for lack of probable cause, but that the motion was made under the reasonable suspicion standard. App 178, l.18-p. 179, l.15.

The PCR judge ruled as follows:

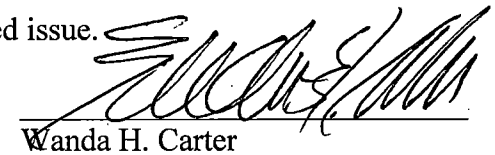
> [Petitioner] alleges trial counsel was ineffective for arguing law enforcement lacked reasonable suspicion to initiate a traffic stop of [petitioner] when trial counsel should have argued law enforcement lacked probable cause. This Court finds this allegation to be meritless as [petitioner] has failed to satisfy his burden of proving prejudice.
>
> [T]here is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even address both components of the inquiry if the defendant makes an insufficient showing on one…If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed. Strickland 466 U.S. at 697.
>
> First, after hearing testimony from trial counsel, arguments from both parties, and allowing opportunity for briefing in the event relevant case law is found, this Court observes that both probable cause and reasonable suspicion for the stop existed because Officer McNeely observed [petitioner] travelling above the posted speed limit and confirmed his visual speed estimation with his radar gun.

> As an alternative ground, lack of probable cause or reasonable suspicion to initiate a traffic stop is not a legal defense to the charge of failure to stop for a blue light. As trial counsel correctly testified, the defense would have been required to make new law for such a defense to be successful even if the trial court somehow found Officer McNeely lacked probable cause to initiate the stop. The fruits of an unlawful stop would be suppressed, but the lack of basis for traffic stop is not a defense to failure to stop.
>
> There is no reasonable probability the outcome of the proceedings would have been different had trial counsel argued to dismiss the FTSBL based on a lack of probable cause, because probable cause did exist for the stop, and even if it did not, the absence of a basis for the stop is not a defense to this charge. Accordingly, this application is dismissed with prejudice. App. 184-191.

To the contrary, trial counsel's error was ineffective legal assistance and prejudice resulted. Counsel erred in applying the wrong standard, i.e. reasonable suspicion, while arguing an improper traffic stop under the Fourth Amendment. Probable cause is the standard to argue when objecting to a traffic stop based on a traffic violation. See State v. Banda, 371 S.C. 245, 639, S.E.2d 36 (2006). Reasonable suspicion is the standard required to argue when objecting to investigative actions (search) after a traffic stop has occurred. State v. Corley, 383 S.C. 232, 697, S.E.2d 1871 Ct. App. 2009). Here, counsel's error in arguing the incorrect standard for the objection to the traffic stop (reasonable suspicion) rather than the proper standard (probable cause) constituted deficient representation, and counsel's ineffectiveness prejudiced petitioner because but for counsel's error, there is a reasonable likelihood that the fruit of the stop (FTSBL) would have been suppressed based on the Fourth Amendment violation and the preservation of the issue for appellate review in the end. See Sixth Amendment and Strickland v. Washington, 466 U.S. 668 (1984).

CONCLUSION

Based on the forgoing argument, counsel for petitioner requests 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 14th day of June, 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 has been served upon Janell Gregory, 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 Devionne Devaughn McClain, #243860, at Ridgeland Correctional Institution, PO Box 2039, Ridgeland, SC 29936, this 14th day of June, 2019.

Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 14th day of June, 2019.

_____ (L.S)
Notary Public for South Carolina
My Commission Expires: September 27, 2028.