

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Greenville County

Honorable Letitia H. Verdin, Circuit Court Judge

KARACUS K. FREEMAN,

RECEIVED
JUN 28 2019
S.C. SUPREME COURT
PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2018-001958

PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Whether the PCR court erred by ruling petitioner was not prejudiced by the undisputed failure of his trial attorney to preserve the Fourth Amendment issue that the police lacked reasonable suspicion to make an investigatory stop of petitioner's vehicle, where the "informant" had never given police information before, had never proven reliable, and where the information provided by the "informant" was objectively unreasonable to suspect petitioner of being engaged in illegal conduct at the time of the "traffic" stop?

STATEMENT

Petitioner was indicted at the June 30, 2015 term of the Greenville County Grand Jury for trafficking in heroin. App. 192-193. His case was called to trial on April 5, 2016, before the Honorable Edward W. Miller, and a jury. Scott Robinson represented petitioner. Hunter Blouin and Stan Overby were the assistant solicitors. App. 1.

Defense counsel Robinson made a pre-trial motion to suppress the drugs, stating, “We’re basing it on a [lack of] reasonable suspicion as far as the stop itself.” App. 25, ll. 21-23. The “informant,” Robert Arnold, was the state’s first witness. He ended up being a net negative for the state. Although there would later be a vague claim later that Arnolds seemed “honest” he either was not being honest in court under oath, or the state’s reasonable suspicion case should have fell with Arnold’s testimony.

Arnold testified during the pre-trial hearing that he knew petitioner “a little bit,” but that he did not know petitioner’s full name or his nickname. App. 26, l. 15 – 27, l. 5. Arnold said he had been arrested multiple times in the past but he did not remember speaking with Officer Sturman after his arrest on May 26, 2014 (the day of petitioner’s stop and arrest). App. 27, ll. 12-21. Arnold also did not recall placing a phone call to petitioner with Officer Sturman listening to their conversation. App. 27, l. 22 – 28, l. 18.

Officer Andrew Sturman then testified that on May 26, 2014, he was on “routine patrol at Shemwood Crossing” when he noticed Robert Arnold, who he knew to “be on trespass [notice] . . .” He arrested Arnold for trespassing at approximately 7:42 pm. that evening. App. 29, l. 9 – 30, l. 21.

Sturman found three pills that he “identified to be a scheduled substance” in Arnold’s pocket. Sturman said he discussed with Arnold “[a]ssisting me in a further investigation for my

assistance with his charges on these pills.” Sturman said Arnold “[a]greed to make a phone call to a known supplier of his [for] heroin.” App. 31, ll. 8-23.

Sturman said he allowed Arnold to go outside the detention center so Arnold could call “an individual he identified as ‘K.’” App. 32, ll. 1-16. Sturman claimed the call was on “speaker phone” so he could hear their conversation. App. 32, ll. 22-25.

Arnold allegedly talked to “K” about purchasing heroin, and he asked “K” where he was currently located. Sturman testified that he learned “K” was in the “area of Joe Lewis Street.” Arnold allegedly told Sturman “K” would be driving a white Monte Carlo with blue racing stripes and large rims. App. 32, l. 24 – 33, l. 11. This telephone call was not recorded and Sturman did not even document what phone number Arnold had called. Sturman had “no idea” who the person was on the other end of the telephone call. App. 35, l. 25 – 36, l. 8.

Arnold had never been a confidential informant for Sturman or any other officer with the Greenville City Police Department for that matter. App. 33, ll. 18-23. All Sturman knew was that Arnold had been caught with marijuana and heroin in his possession on previous occasions. App. 34, l. 23 – 35, l. 1. Sturman even admitted he had **no idea whether Arnold or the information he provided was reliable.** App. 34, l. 15 – 36, l. 20. Sturman could only claim Arnold “[h]ad always been honest with [him].” App. 34, ll. 6-22. Sturman did not provide any details of his alleged prior encounters with Arnold to justify his assertion that Arnold had always been honest with him.

Around nine pm, Sturman relayed the information he learned from Arnold to Officer Mauricio Reyes, who was on patrol near Joe Lewis Street. App. 35, l. 10 – 38, l. 22. Reyes then contacted Officer Eric Koepke, a K-9 handler. App. 36, ll. 6-13.

Shortly thereafter, Reyes observed a vehicle matching the description given by Arnold. The car turned right off of Joe Lewis Street, and Officer Reyes immediately stopped the car. The stop occurred at 9:18 pm. Reyes admitted he did not observe the occupants of the car engaged in any illegal activity, nor did he see the driver commit any traffic violations. The stop was based solely on the information Sturman related to him. App. 39, l. 6 – 45, l. 23.

There were two occupants in the vehicle, a man and a woman. Officer Reyes asked the driver, the man, to step outside and he placed him in handcuffs immediately. Petitioner was the driver. Petitioner told Officer Reyes the car belonged to his mother. App. 39, l. 1 – 41, l. 6.

Petitioner refused to consent to a search of the car. Officer Koepke, who arrived at the time of the traffic stop, “ran his K-9 around the vehicle” for a “narcotics sniff.” Koepke asked petitioner if there was any reason to believe the dog would alert to the presence of narcotics in the vehicle, and petitioner allegedly said he had “[j]ust smoked reefer before he got in the car.” App. 50, ll. 7-16.

The K-9 allegedly “alerted to the presence of narcotics,” and Officer Reyes searched the vehicle. He claimed he found a bag containing “a chalky brown substance” in the “gear shift” that he suspected was heroin. However, a field test was inconclusive. App. 46, l. 12 – 47, l. 7.

Neither petitioner nor the woman in the front seat “claimed ownership” of the alleged heroin. After the woman was arrested, petitioner allegedly “claimed ownership of the bag.” App. 42, l. 21 – 43, l. 9. The chalky substance later tested positive as heroin. App. 100, l. 10 – 112, l. 1. The heroin weighed 7.54 grams. App. 102, ll. 1-4.

Defense counsel Robinson argued that Arnold had never proved to be reliable and that Officer Sturman admitted he had never worked with Arnold before and he had no idea about his reliability. Police did not know what number Arnold called, they did not know who he talked to;

they only knew the person on the other end of the call allegedly as “K.” App. 52, l. 17 – 54, l. 6. Judge Miller ruled there was a particularized objective basis for the police to have reasonable suspicion in this case and he denied the motion to suppress. App. 56, ll. 21-23. Petitioner was sentenced to ten years imprisonment following his conviction. App. 127, ll. 19-20.

Appellate defender Lara Caudy raised this Fourth Amendment lack of reasonable suspicion for the traffic stop issue for petitioner on direct appeal. However, the Court of Appeals in State v. Karacus Korean Freeman, 2017-UP-100, (filed March 8, 2017), found the issue unpreserved because trial counsel Robinson failed to object when the drugs were introduced at trial. App. 196 – 197. The Court cited State v. Schumpert, 312 S.C. 502, 507, 435 S.E.2d 859, 862 (1993); State v. Burton, 326 S.C. 605, 613, 486 S.E.2d 762, 766 (Ct. App. 1997) in support of its ruling. App. 196 – 197.

Appellate counsel informed petitioner he could raise the procedurally barred issue as a post-conviction issue. Petitioner then filed an application for post-conviction relief on September 18, 2017. App. 129 – 140. The state filed a return to this application dated January 17, 2018. The return noted that petitioner alleged ineffective assistance of counsel for failing to properly “have the evidence of the drugs suppressed.” App. 141.

An evidentiary hearing was convened on June 20, 2018, before the Honorable Letitia H. Verdin. Rodney W. Richey represented petitioner. Deshawn H. Mitchell was the assistant attorney general. App. 145.

Petitioner testified during the PCR hearing that his suppression issue was found not preserved for appellate review by the Court of Appeals because defense counsel Robinson failed to object when the drugs were admitted into evidence. App. 152, ll. 8-24.

Defense counsel Robinson testified that Arnold was not a reliable “non-confidential informant.” App. 158, l. 21 – 159, l. 15. Robinson said the police did not even know what phone number Arnold called when they claimed that “K” was on the other end of the phone, and while they maintained that “K” was petitioner. App. 159, ll. 9-22. Robinson said he believed that the judge should have suppressed the drug evidence. App. 159, ll. 23-25.

Robinson repeated that his trial assertion that there was “no reasonable suspicion in this case” for the police to have stopped petitioner on the evening they found the drugs. App. 160, ll. 2-6. When asked whether Robinson knew he was obligated to object again when the solicitor introduced the drugs into evidence before the jury, Robinson answered, “I am now.” App. 160, ll. 7-15.

As seen, Robinson testified he believed that Judge Miller should have suppressed the drugs. Strangely, on cross-examination by the assistant attorney general, Robinson said he did not believe petitioner would have been successful on appeal if he had properly preserved the issue. App. 166, l. 22 – 167, l. 4.

Judge Verdin took the issue under advisement and issued an order of dismissal dated October 19, 2018. App. 173 – 191. The PCR court concluded, “This Court finds that Applicant cannot show that he was prejudiced by Counsel’s failure to preserve the issue for appeal because he has failed to prove the issue would have been successful on appeal.” App. 181. The order also stated that: “The appropriate inquiry for determine (sic) [is] whether an applicant was prejudiced by counsel’s failure to contemporaneously object to the introduction of evidence is not merely whether the issue would have been preserved for appellate review, but rather, whether the appellate court would have reversed Applicant’s convictions based on trial court error and granted him a new trial.” App. 182.

From this order, petitioner is seeking a writ of certiorari pursuant to Rule 243 of the SCACR.

ARGUMENT

The PCR court erred by ruling petitioner was not prejudiced by the undisputed failure of his trial attorney to preserve the Fourth Amendment issue that the police lacked reasonable suspicion to make an investigatory stop of petitioner's vehicle, where the "informant" had never given police information before, had never proven reliable, and where the information provided by the "informant" was objectively unreasonable to suspect petitioner of being engaged in illegal conduct at the time of the stop.

"The decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred." Whren v. United States, 517 U.S. 806, 810 (1996). A traffic stop is not unreasonable if conducted with probable cause to believe a traffic violation has occurred, or when the officer has a reasonable suspicion the occupants are involved in criminal activity. State v. Vinson, 400 S.C. 347, 352, 734 S.E.2d 182, 184 (Ct. App. 2012). "An officer may stop and briefly detain the occupants of a car without treading on Fourth Amendment rights, even without probable cause to arrest, if he has a reasonable suspicion that the occupants are involved in criminal activity." State v. Rogers, 368 S.C. 529, 533-534, 629 S.E.2d 679, 681-682 (2006). "Reasonable suspicion requires a particularized and objective basis that would lead one to suspect another of criminal activity." State v. Khingratsaphon, 352 S.C. 62, 69, 572 S.E.2d 456, 459 (2002).

Defense counsel Robinson was respectfully reasonable in testifying at PCR that he expected Judge Miller to suppress the fruits of the traffic stop, given that there was not reasonable suspicion for the stop. However, Robinson strangely said he did not think petitioner would have prevailed on appeal if he had preserved the issue for appellate review.

The Court of Appeals properly found this issue was not preserved for appellate review since “A ruling in limine is not a final ruling on the admissibility of evidence” and “unless an objection is made at the time the evidence is offered and a final ruling is made, the issue is not preserved for review.” *citing State v. Burton*, 326 S.C. 605, 613, 486 S.E.2d 762, 766 (Ct. App. 1997). Therefore, there should respectfully be no serious argument that defense counsel was not deficient in his performance under the first prong of *Strickland v. Washington*, 466 U.S. 668 (1984).

As for the appellate issue, here, that the Court of Appeals did not rule on, law enforcement did not have a reasonable suspicion to justify the traffic stop. While Arnold was not an anonymous informant, Officer Sturman admitted neither he nor any other officer with the Greenville City Police Department had ever worked with Arnold as an informant before. App. 33, ll. 18-23. All Sturman knew about Arnold was that Arnold had been “caught” with marijuana and heroin in his possession on previous occasions. Sturman admitted he had no idea whether Arnold or the information Arnold provided was reliable. App. 34, l. 15 – 36, l. 20.

The specific information Arnold provided was insufficient to justify an investigatory stop. All that law enforcement learned from Arnold was that a person -- who he identified only as “K” -- had allegedly sold him heroin in the past, a description of the car “K” would allegedly be driving, and “K’s” general location of Joe Lewis Street. These items do not supply sufficient indicia of reliability to justify the stop. Arnold provided no predictive information from which law enforcement could test his credibility and corroborate the information through personal observation. Arnold did not even provide the individual’s name so that officers could verify whether this person was known to drive the vehicle Arnold described or, for example, so they could check and see whether this individual had prior drug convictions or was known by law

enforcement to be involved in drugs. Officer Sturman failed to even learn what phone number Arnold had called so that they could verify the identity of the person on the other line.

The following was argued verbatim to the Court of Appeals in Petitioner's (then Appellant's) final brief at 10-12, Supp.App. 10-12:

“In Florida v. J.L., 529 U.S. 266 (2000), “the police received an anonymous tip that a young black male, standing at a particular bus stop, wearing a plaid shirt, was carrying a gun.¹ Officers went to the bus stop and observed three black males, one of whom was wearing a plaid shirt. They frisked all three males, based only on the anonymous tip, and found a gun in J.L.’s pocket. The [United States Supreme] Court found that the tip provided no predictive information and therefore left the police no way to test the knowledge or credibility of the anonymous caller.” State v. Green, 341 S.C. 214, 217 532 S.E.2d 896, 897 (Ct. App. 2000) (citing J.L., 529 U.S. at 271).

In State v. Green, an anonymous caller told police a black male by the name of Alonzo Green was leaving the area of Bayside Manor. The caller also reported Green was driving a gray four-door Maxima and had just left a residence in Bayside Manor with a large sum of money and narcotics. Immediately upon receiving this information, an officer saw Green, whom he knew by sight, driving a gray Maxima traveling away from Bayside Manor. Based solely on the anonymous tip, the officer pulled Green over. Id. at 216, 532 S.E.2d at 896. This Court held that the information the anonymous caller provided, specifically Green’s name, a description of the car he was driving, and the location he would be departing, were readily observable and did not supply sufficient indicia of reliability to establish reasonable suspicion to justify an investigatory stop. Id. at 218, 532 S.E.2d at 897. Moreover, the Court held the officer made no personal

¹ This verbatim quote from the Final Brief of Appellant in the Court of Appeals is not indented so it is easier to read.

observations and had no reason, aside from the anonymous tip, to suspect Green of illegal conduct. Id. at 218, 532 S.E.2d at 897-898.

Like in J.L. and Green, Arnold, while not an anonymous informant, provided Officer Sturman with no predictive information from which law enforcement could test his credibility. Additionally, Officer Reyes failed to corroborate the information through personal observation. Reyes merely saw a vehicle matching the description given by Arnold turn right off of Joe Louis Street. R. 18, II. 14-23. These facts failed to establish reasonable suspicion to justify an investigatory stop.

At trial, the state relied on State v. Rogers, 368 S.C. 529, 629 S.E.2d 679 (Ct. App. 2006) and State v. Willard, 374 S.C. 129, 647 S.E.2d 252 (Ct. App. 2007), both of which are easily distinguishable from this case.

In Rogers, a confidential informant, *who was working with the Kingstree Police Department on various cases*, told an officer in person about a robbery that was to take place that afternoon at Cash U.S.A. The informant named four individuals, including Rogers, who were involved in the armed robbery and told the officer the men were supposed to use a white Honda automobile that Rogers had been seen driving. *The officer had worked with this informant on numerous prior occasions and testified that the past information the informant had provided proved to be reliable.* As the officer was driving the confidential informant home, a call came over the radio indicating there had been an armed robbery at the Cash U.S.A. After dropping the informant off, the officer drove to Rogers' house and observed a white Honda with four occupants pull up to a stop sign and eventually pulled the car over. Rogers, 368 S.C. at 532-533, 629 S.E.2d at 681.

In holding that the officer had reasonable suspicion to justify the investigatory stop, this Court emphasized that the information came “from a known, accountable informant whose reputation could be assessed.” This Court also stated that officers were not investigating the possibility that a crime may be occurring, but were investigating a crime that had occurred and had been independently reported. Lastly, the Court noted that *law enforcement verified the information through personal observation*. Specifically, the Court stated the officer drove to the area where Rogers lived, observed a white Honda with four occupants, and recognized the vehicle as the one Rogers had been seen driving. *Id.* at 534-536, 629 S.E.2d at 682-683 (emphasis added).

Here, not only was Arnold’s reliability unknown since he had never worked with the Greenville City Police Department before, but Officers Sturman and Reyes did not conduct any independent investigation or corroborate the information Arnold provided through personal observation.

In Willard, a confidential informant, who had been arrested on a family court bench warrant and found with a quantity of methamphetamine, told an officer he and Willard were related, that he had purchased drugs from Willard before, and that he intended to purchase drugs from Willard that day. In exchange for help with his drug charge, the informant called Willard from the officer’s cellular telephone and arranged to meet Willard at a local movie theater parking lot at an agreed upon time. The conversation was recorded. While the officer had never worked with this individual as an informant before, *he knew the informant had accurately described Willard’s black Honda Civic with dark tinted windows.*² Later that day, another

² While the opinion does not specifically state that law enforcement was familiar with Willard and knew what vehicle he drove, it certainly suggests so. See Willard, 374 S.C. at 132, 647 S.E.2d at 254.

officer observed Willard within a half mile of the movie theater. At that same time, the officer's telephone rang reporting a call from the number the informant had called earlier. After Willard pulled into the movie theater parking lot, officers stopped him and blocked his vehicle from leaving.

This Court noted that although the informant was not previously proven reliable, he correctly identified Willard's vehicle and knew Willard's telephone number. The Court ultimately held there was reasonable suspicion for the stop. While not discussed in the Court's opinion, the information supplied by the informant in Willard was predictive, which allowed the officers to corroborate it through personal observation. Specifically, the officers first observed Willard within a half mile of the movie theater, then received a telephone call from the number the informant had called earlier, and finally observed Willard pull into the movie theater parking lot at the agreed upon time.

In this case, on the other hand, law enforcement had no means to determine if Arnold was reliable, unlike in Willard where officers knew the informant had correctly identified Willard's vehicle. Additionally, as mentioned, Officer Reyes was unable to verify any of the information Arnold provided through personal observation unlike the officers in Willard.

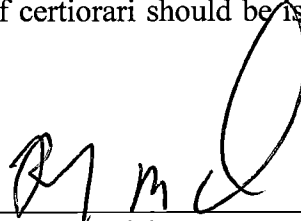
Consequently, the court erred by denying Appellant's motion to suppress when Officer Reyes did not have reasonable suspicion that Appellant was involved in criminal activity to justify an investigatory stop. Respectfully, this Court should hold the evidence should have been suppressed and, since the charge against Appellant cannot be sustained without this evidence, reverse Appellant's conviction. See Green, 341 S.C. at 219, 532 S.E.2d at 898." Final Brief of Appellant at 9-12. Supp.App. 10-12.

“The decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred.” Whren v. United States, 517 U.S. 806, 810 (1996); Milledge v. State, 422 S.C. 366, 375, 811 S.E.2d 796, 801 (2018). The police targeted petitioner here and no traffic violation occurred.

Therefore, the police had to have a reasonable suspicion the occupants were involved in criminal activity. State v. Vinson, 400 S.C. 347, 352, 734 S.E.2d 182, 184 (Ct. App. 2012). There was no reliable informant in this case, and the officer stopping petitioner’s car did not have a reasonable suspicion, as argued above, that petitioner was engaging in illegal conduct. If this issue had been preserved for appeal, petitioner submits the Court of Appeals would have reversed finding a lack of evidence to support the trial court’s finding that the officer had reasonable suspicion. Milledge v. State, 422 S.C. 366, 380, 811 S.E.2d 796, 804 (2018). Consequently, petitioner should be granted a new trial based upon the ineffective assistance of trial counsel in failing to preserve this issue for appeal, and the resulting prejudice. Strickland v. Washington, 466 U.S. 668 (1984).

CONCLUSION

By reason of the foregoing arguments, a writ of certiorari should be issued to allow full briefing on this issue.



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR PETITIONER

This 28th day of June, 2019.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Greenville County

Honorable Letitia H. Verdin, Circuit Court Judge

KARACUS K. FREEMAN,

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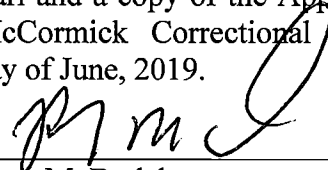
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STATE OF SOUTH CAROLINA,

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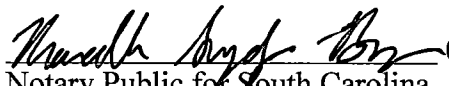
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon Taylor Z. Smith, 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 Karacus K. Freeman, #312428, at McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29899, this 28th day of June, 2019.



Robert M. Dudek
Chief Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 28th day of June, 2019.

 (L.S)
Notary Public for South Carolina
My Commission Expires: July 26, 2028