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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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CERTIORARI TO CHARLESTON COUNTY
Deadra L. Jefferson, PCR Judge

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Appellate Case No. 2018-001880

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ELLIOTT JUDON,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

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**RETURN TO PETITION FOR A WRIT OF CERTIORARI**

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## RESPONDENT'S STATEMENT OF ISSUE ON APPEAL

The PCR Court correctly found trial counsel was not ineffective for failing to object to the admissibility of the statement and drugs obtained in the case to preserve the matter for appellate review because, here, the search and seizure did not violate the Fourth Amendment as the detention and search were not unreasonable.

## STATEMENT OF THE CASE

Petitioner was indicted by the December 2013 term of the Charleston County Grand Jury for trafficking in cocaine base. (App. 702-03). Petitioner was originally represented by Assistant Public Defender Luke J. Malloy, III, but later retained trial counsel, Melisa Gay. The case was prosecuted by Assistant Solicitors Lauren Mulkey Frierson and E. Culver Kidd, IV.

On March 13, 2015, pre-trial motions convened before the Honorable Kristi L. Harrington. Judge Harrington denied Petitioner's motion to dismiss based on the purported *Brady*[1] and Rule 5, SCRCrimP, violations; and Petitioner's motions to suppress the drug evidence and his statements. Thereafter, on March 16, 2015, Petitioner proceeded to a jury trial before Judge Harrington. The jury convicted Petitioner as indicted, and Judge Harrington sentenced Petitioner to life without possibility of parole (LWOP) pursuant to section 17-25-45 of the South Carolina Code.[2] Petitioner appealed his conviction and sentence.

Appellate Defender LaNelle Durant perfected Petitioner's appeal and filed a brief on his behalf, arguing the trial court erred: (1) in denying his motion to dismiss based on the lack of a video of the traffic stop, (2) in denying his motion to suppress the drug evidence, and (3) in denying his motion to suppress his statement. The Court of Appeals affirmed Petitioner's conviction and sentence in *State v. Judon*, Op. No. 2017-UP-308 (S.C. Ct. App. filed July 26, 2017), finding the trial court properly denied Petitioner's motion to dismiss, and finding the denial of his motions to suppress the drugs and statements were not preserved for appellate review. Specifically these

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[1] *Brady v. Maryland*, 373 U.S. 83 (1963).

[2] Petitioner has two "serious" convictions: a 1999 conviction for distribution of cocaine in the proximity of a school, and a 2005 conviction for possession with intent to distribute cocaine base—second offense. (App. 186).

arguments were unpreserved because trial counsel failed to contemporaneously object to the evidence at trial. The case was remitted back to the circuit court on August 11, 2017.

Petitioner timely commenced a post-conviction relief (PCR) action on October 20, 2017. Rodney D. Davis was appointed to represent Petitioner. Senior Assistant Deputy Attorney General Megan Harrigan Jameson represented the State. An evidentiary hearing convened July 24–25, 2018, before the Honorable Deadra L. Jefferson. After a review of the record and all evidence presented, the PCR court denied relief and dismissed the action with prejudice. Petitioner appealed, and filed a petition for a writ of certiorari on April 29, 2019.

## STATEMENT OF THE FACTS

Petitioner's drug charge stems from a traffic stop initiated by Officers John Stott, Jr., and Matthew Kirk. Stott testified at the motions hearing he was on patrol when he observed Petitioner driving a vehicle with extremely dark tinted windows. (App. 67-75). Stott did not notice any validation stickers on the vehicle's windows, which are required for any window that has after-market window tint. (App. 74). Stott also believed the car was a rental, based on several factors: "It was a new model. It was cleaned. It was well maintained. There was no personal items on it, no plate border, no indication of a - - no dealership decal, no stickers, or anything that indicated that it was somebody's personal vehicle." (App. 75). Stott testified it was unusual for a rental car to have tinted windows and testified "it can go hand in hand with criminal activity." (App. 75). Stott explained at trial "the rental car . . . having window tint on it, that's an indicator [of criminal activity] in and of itself." (App. 264). He noted, "Major rental companies do not put any window tint on their vehicles." (App. 264). At trial, Officer Stott opined that since major rental companies do not put window tint on their vehicles, that would be something done by the lessee. (App. 386).

Based on these observations, Stott's partner, Kirk, initiated blue lights to effect a traffic stop. (App. 75). However, Petitioner did not immediately pull over his vehicle. (App. 76). At trial, Stott explained:

> We were on Meeting Street road, which is a busier road than any of the side roads, and we passed a side road that would have afforded him a safer place to pull over. And we went - - we proceeded past that turn, and I would say approximately a hundred yards past that turn, and then pulled over on the right shoulder.

(App. 373–74).

Stott asked Petitioner to roll down his window so he could ask for Petitioner's license, registration, proof of insurance, and so Stott could explain why he pulled Petitioner over. Stott

immediately noticed Petitioner's pants-zipper was down and his belt was open and undone. (App. 76; 374). Petitioner provided Stott with the rental agreement kept in the glove box of the car. (App. 257).

Simultaneously, Kirk used a tint-meter to determine whether the tint was lawful. Kirk determined the tint was unlawful. (App. 77; 405-06). Thereafter, Stott asked Petitioner to exit the vehicle, and Petitioner willingly complied. (App. 77). However, Stott noticed Petitioner attempting to conceal something in his pants as he exited the vehicle. Stott then questioned Petitioner. While questioning Petitioner, Stott observed Petitioner evade answering where he was coming from, and where he was going. When Stott questioned Petitioner why his pants were undone, Petitioner said he had used the bathroom. (App. 78-79; 258). At that point, Stott asked Petitioner for consent to search the vehicle, and Petitioner consented to the search and volunteered that Stott could also search his person. (App. 79). Stott estimated he asked Petitioner for consent to search the car a couple of minutes after the stop initiated. (App. 258). Stott described Petitioner's initial demeanor as "overly cooperative." (App. 262). However, once asked to exit the car, Petitioner took a concealing stance, which Stott noticed as "keep[ing] us from noticing that his pants were undone." (App. 262–63).

Stott explained Petitioner's change in demeanor after exiting the car prompted him to ask for consent to search the vehicle. Stott also explained, "I wanted to gauge his response and see if that put him in a sense of relief that I was taking the attention off of him and [that] was obvious to me." (App. 264).

In the car, Stott found a digital scale with a white powder substance that field-tested positive for cocaine. Stott also found crumbs of crack cocaine, and a field utility knife with cocaine residue on it. The scale and most of the crumbs were in the center-console, but the crumbs were

also scattered in the coin tray and the driver's seat. The knife was in the coin tray. (App. 82; 376).

Stott reasoned Petitioner may have consented the search of the vehicle was to divert attention from him and towards the car. (App. 83). Stott further noted Petitioner did not seem overly concerned about what Stott was doing while searching the car, suggesting to Stott Petitioner was more concerned about what was concealed in his pants. (App. 263). Stott explained that if Petitioner had not consented to the search, Petitioner would not have been free to leave because "[he] was aware that a drug dog was working and after these indications that [he] had, [he] would have requested a K-9 to respond." (App. 86). Stott explained the significance of the items he found in Petitioner's car:

> [S]cales are commonly used to weigh illegal drugs so they can be sold. The knife, in and of itself, is just a utility knife but the fact that it had residue on it led me to believe that it had been used to cut what's referred to as a cookie of crack cocaine. Once [cocaine is] cooked, it settles and hardens at the bottom of usually a glass dish like a Pyrex jar and when that is removed, in order to break it up into smaller pieces for sale, a lot of times a sharp object like a utility knife would be used to do that.

(App. 87–88).

Stott then read Petitioner his *Miranda*[3] rights, and Petitioner indicated he understood his rights and wished to speak with Stott and answer his questions. (App. 88). Stott asked Petitioner if he kept more drugs in his underwear and advised Petitioner that since he was under arrest, the jail would require a strip search for any drug arrest. (App. 88-89; 261). Although initially denying he had drugs on his person, Petitioner ultimately indicated drugs were concealed in his crotch area. (App. 381). Thereafter, Stott donned plastic gloves and removed a plastic bag containing 11.5 grams of crack cocaine. (App. 90-91; 380-82). Stott explained he did not need to reach far into

[3] *Miranda v. Arizona*, 384 U.S. 436 (1966).

Petitioner's pants to retrieve the crack. (App. 267). Law enforcement also found two cell phones, which is common for drug dealers. (App. 383-84). Stott estimated it took ten minutes from the time the officers initiated the stop until they arrested Petitioner. (App. 85; 397). The forensic chemist who later weighed the substance determined the substance was 10.1 grams of crack cocaine. (App. 432).

## STANDARD OF REVIEW

In a PCR case, appellate courts will uphold the PCR court's factual findings if there is any evidence of probative value in the record to support them. *Sellner v. State*, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016). However, appellate courts give no deference to the PCR court's conclusions of law and reviews those conclusions de novo. *Jamison v. State*, 410 S.C. 456, 465, 765 S.E.2d 123, 127 (2014).

To establish ineffective assistance of counsel, the PCR applicant must prove (1) counsel's performance fell below an objective standard of reasonableness, and (2) the applicant sustained prejudice as a result of counsel's deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687–88 (1984); *Cherry v. State*, 300 S.C. 115, 117–18, 386 S.E.2d 624, 625 (1989). To establish prejudice, the applicant must prove "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Cherry*, 300 S.C. at 117–18, 386 S.E.2d at 625 (quoting *Strickland*, 466 U.S. at 694).

## ARGUMENT

**The PCR Court correctly found trial counsel was not ineffective for failing to object to the admissibility of the statement and drugs obtained in the case to preserve the matter for appellate review because, here, the search and seizure did not violate the Fourth Amendment as the detention and search were not unreasonable based on the circumstances surrounding the traffic stop.**

Petitioner argues the PCR court incorrectly found trial counsel not ineffective for failing to contemporaneously object to the admission of Petitioner's statement and the drugs obtained during the search—leaving the issues unpreserved for appellate review. Because the issue was unpreserved, the Court of Appeals did not rule on the merits of whether the search and seizure violated Petitioner's Fourth Amendment rights because Petitioner's detention exceeded the scope of the traffic stop. Petitioner's argument is without merit, and, therefore, certiorari should be denied on this issue.

The State concedes trial counsel was deficient for not contemporaneously objecting to the admission of the statement and drugs; however, leaving an argument unpreserved does not deem trial counsel's conduct constitutionally ineffective because in this case, no prejudice resulted from the issue being unpreserved. In this case, the PCR court correctly concluded Petitioner failed to show prejudice resulted from trial counsel's deficiency because there was ample evidence in the record to support the trial court's decision to admit the statement and drugs into evidence. Therefore, Petitioner did not receive ineffective assistance of counsel.

In *Millidge v. State*, this Court stated a PCR applicant must prove both deficiency and prejudice to establish ineffective assistance of counsel for failing to preserve an issue for appellate review. 422 S.C. 366, 374, 811 S.E.2d 769, 800-01 (2018). This Court clarified "the appropriate inquiry is whether the search conducted . . . was lawful under the Fourth Amendment, as that issue would have controlled the outcome on direct appeal." *Id.* at 375, 811 S.E.2d at 801. "When

reviewing a Fourth Amendment search and seizure case, an appellate court must affirm the trial court's ruling if there is any evidence to support it; the appellate court may reverse only for clear error." *State v. Brown*, 401 S.C. 82, 87, 736 S.E.2d 263, 265 (2012). Therefore, "[T]he proper inquiry for determining prejudice . . . is whether there is evidence in the record to support the trial court's finding the officer had reasonable suspicion. If so, an appellate court would necessarily have affirmed the trial court's denial of the motion to suppress." *Milledge*, 422 S.C. at 380, 811 S.E.2d at 804.

Petitioner contends the officers should have ticketed Petitioner for the illegal window tint and allowed Petitioner to continue on his way. Petitioner argues the officers' detention of Petitioner went beyond the scope of the traffic stop and the officers went on a "fishing expedition." However, there is ample evidence in the record to support the trial court's finding that the officers had reasonable suspicion to ask Petitioner to exit the car and for consent to search the car.

For Fourth Amendment purposes, a traffic stop of a vehicle, along with the detention of individuals during the stop, constitutes a seizure. *State v. Maybank*, 352 S.C. 310, 315, 573 S.E.2d 851, 854 (Ct. App. 2002). "Where probable cause exists to believe that a traffic violation has occurred, the decision to stop the automobile is reasonable per se." *State v. Adams*, 377 S.C. 334, 338, 659 S.E.2d 272, 274 (Ct. App. 2008) (citing *Whren v. United States*, 517 U.S. 806, 810 (1996)). "When a vehicle has been lawfully detained for a traffic violation, a police officer may order the driver to get out of the vehicle without violating the Fourth Amendment's proscription of unreasonable searches and seizures." *Adams*, 377 S.C. at 338, 659 S.E.2d at 274-75 (citing *Pennsylvania v. Mimms*, 434 U.S. 106, 111 (1977)).

"The constitutional immunity from unreasonable searches and seizures may be waived by valid consent." *Palacio v. State*, 333 S.C. 506, 514, 511 S.E.2d 62, 66 (1999). A warrantless

search and seizure is reasonable if conducted with voluntary consent. *Id.* Consent is determined from the totality of circumstances. *Id.* This totality of circumstances approach applies in both non-custodial and custodial situations. *State v. Mattison*, 352 S.C. 577, 584, 575 S.E.2d 852, 855 (Ct. App. 2003). The question of the voluntariness of consent to search is solely a question of fact and will not be reversed absent clear error. *State v. Brockman*, 339 S.C. 57, 66, 528 S.E.2d 661, 666 (2000). The ruling will be affirmed if supported by any evidence. *Id.* Law enforcement may request permission to search at any time. *State v. Tindall*, 388 S.C. 518, 523, 698 S.E.2d 203, 206 (2010). "However, when an officer asks for consent to search after an unconstitutional detention, the consent procured is per se invalid unless it is both voluntary and not an exploitation of the unlawful detention." *Adams*, 377 S.C. at 339, 659 S.E.2d at 275.

Here, the trial court found the stop of Petitioner's car was proper, as the officers had probable cause to stop the car based on the unlawful tint. The trial court also found the officers acted properly in asking Petitioner to exit his vehicle. The trial court's finding of reasonable suspicion is supported by Stott's testimony Petitioner rolled down his illegally tinted window, allowing Stott to observe Petitioner sitting in the driver seat with his zipper unzipped and his belt and pants undone. Therefore, Stott asking Petitioner to exit the vehicle was reasonable. Because Petitioner appeared to be attempting to conceal something in his pants, Stott reasonably requested if Petitioner would consent to a search of the car. Arguably, Stott's observation of Petitioner attempting to conceal something in his pants while exiting the car could have allowed him to immediately conduct a *Terry*[4] frisk of Petitioner. Instead, Stott requested consent to search the car. Petitioner consented and the search occurred promptly and during the normal course of the stop and did not impermissibly extend the duration of the stop. Further, the search rendered a scale

[4]*Terry v. Ohio*, 392 U.S. 1 (1968).

and knife that tested positive for cocaine residue and crumbs of crack strewn throughout the car. Finding these items led to Petitioner's arrest. Thereafter, Petitioner reluctantly informed the officers he had crack in his crotch.

The trial court's denial of Petitioner's motion to suppress the admission of the drugs was supported by the evidence presented. Therefore, had the issue been preserved for appellate review, the Court of Appeals would have found the trial court properly admitted the drugs into evidence.

There is also ample evidence in the record to support the trial court's ruling that Petitioner's statement was admissible, as the evidence presented established Petitioner was properly *Mirandized* and he was not coerced by law enforcement. In accordance with the Fifth Amendment's protection against self-incrimination, "[T]he prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards." *Miranda v. Arizona*, 384 U.S. 436, 444 (1966). Before the accused is subjected to custodial interrogation, he or she must be informed of the right to remain silent; any statement made may be used as evidence against him or her; the right to the presence of an attorney; and if he or she cannot afford an attorney one will be appointed prior to questioning. *State v. Kennedy*, 325 S.C. 295, 303, 479 S.E.2d 838, 842 (Ct. App.1996). However, volunteered exculpatory or inculpatory statements arising from custodial interrogation are not barred by the Fifth Amendment. *Id.* "Where there is conflicting evidence as to whether a defendant's statement is voluntary, it is, in the first instance the province of the trial court to determine this factual issue by the preponderance of the evidence." *State v. Miller*, 375 S.C. 370, 383, 652 S.E.2d 444, 451 (Ct. App. 2007) (quotations and citations omitted). "In order to determine whether a statement is voluntary, the trial court must inquire whether under the totality of the circumstances the suspect's will was overborne." *State v. Carmack*, 388 S.C. 190, 199, 694

S.E.2d 224, 228 (Ct. App. 2010). "Our courts have recognized that the appropriate factors to consider in the totality of circumstances analysis include: background, experience, conduct of the accused, age, length of custody, police misrepresentations, isolation of a minor from his or her parent, threats of violence, and promises of leniency." *State v. Dye*, 384 S.C. 42, 47, 681 S.E.2d 23, 26 (Ct. App. 2009) (citations omitted).

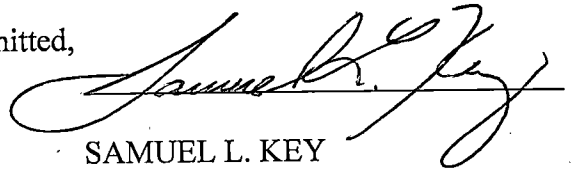
Here, the trial court properly weighed the pretrial testimony presented by the officers and Petitioner, and determined the officers properly read Petitioner his Miranda rights and Applicant voluntarily made the statements. As the evidence supports the trial courts findings, the Court of Appeals would have affirmed the trial court's ruling the statements were admissible. Therefore, Petitioner fails to show any prejudice resulted from the trial counsel's deficiency in failing to preserve the issue for appellate review.

Because the Court of Appeals would have affirmed the trial court's rulings on the admissibility of the drugs and Petitioner's statements, the PCR court correctly concluded Petitioner failed to establish prejudice resulted from trial counsel's deficiency; therefore, Petitioner did not receive ineffective assistance of counsel. Accordingly, certiorari should be denied on this issue.

## CONCLUSION

Based on the foregoing argument, trial counsel was not ineffective. The State concedes trial counsel rendered deficient performance in failing to contemporaneously object to the admission of the statement and drugs; however, Petitioner suffered no prejudice from trial counsel's failure to preserve Petitioner's Fourth Amendment challenges for appellate review because the trial court's pretrial ruling was supported by the evidence in the record. Therefore the State requests certiorari be denied.

Respectfully submitted,



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ATTORNEY FOR RESPONDENT

STATE OF SOUTH CAROLINA
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CERTIORARI TO CHARLESTON COUNTY
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ELLIOTT JUDON,

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RESPONDENT

## CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the **Return to Petition for a Writ of Certiorari** has been served upon the applicant by hand-delivering two copies addressed to:

**Wanda H. Carter, Esquire**
**S.C. Commission on Indigent Defense**
**1330 Lady Street, Suite 401**
**Columbia, SC 29201**

This 13th day of September, 2019.

Eva Cook
Legal Assistant for Respondent

ALAN WILSON
ATTORNEY GENERAL

RECEIVED
SEP 13 2019
S.C. SUPREME COURT

September 13, 2019

The Honorable Daniel E. Shearouse
Clerk of Court — SC Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

**RE: Elliott Judon v. State of South Carolina**
**Appellate Case No.: 2018-001880**

Dear Mr. Shearouse:

Enclosed please find the original and six copies of the **Return to Petition for a Writ of Certiorari** in the above matter for filing. Please let me know if anything additional is needed.

Sincerely,

Samuel L. Key
Assistant Attorney General
S.C. Bar # 103206

BHL/jaj
Enclosures

cc: Wanda H. Carter, Esquire
Victim Advocacy Division