THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM DARLINGTON COUNTY
The Honorable Larry B. Hyman, Jr., Circuit Court Judge

Appellate Case No: 2018-001899

JAMECO ABDUL TONEY, RESPONDENT,

v.

STATE OF SOUTH CAROLINA, PETITIONER.

SUPPLEMENTAL APPENDIX

WANDA H. CARTER
Appellate Defense

S.C. Commission on Indigent Defense
Division of Appellate Defense
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ATTORNEYS FOR PETITIONER

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1

2003 09/13
TIMOTHY SANCERS

CXXXXXXXXXXXX7241 2100 TERMINAL DRIVE FLORENCE,SC,29506,US 02036

RA DOCUMENT 595405484 F-133C 0407 RENTED: 06NOV10/1257 AT: FLORENCE, SC APT PHONE: F 390440
CAR# 1 0 9 9 7 1 7 3 GRP E DUE IN: 08NOV10/1200 AT: FLORENCE, SC APT RATE CODE: 08/E

T.S.

MI OUT:15514
PLATE# NC ZSZ7500 FUEL OUT: 8/8
TAN CHEV MALI 4DR

MOP: VISA AUTH: 55808/350 L
DRIVERS LIC# I'
BCDH U257068
ESTIMATED RENTAL CHARGES $ 134.85
* * * R A 5 9 5 4 0 5 4 8 4

*******OPTIONAL SERVICES*******

LDW:	24.99/DAY	DECLINED
PAE:		UNAVAIL
ESP:		UNAVAIL
SLI:		UNAVAIL

T.S.

<>BY MY INITIALS I ACCEPT OR DECLINE OPTIONAL COVERAGES AS SHOWN ABOVE. X_____

*MIN 1 DAY
*MAX DAY

HOURLY:	38.26
DAILY:	51.00
WEEKLY:	306.00
MONTHLY:	1224.00
MILEAGE CHG:	UNLIMITED
FUEL SERVICE:	.3385/MI
	7.449/GAL

T S

$ 3.00/DY CUST FAC CHG
11.11% CONCESSION RECOVERY FEE
TAX: 8.000%
SC SURCHARGE 5% NON-TAX

TRUE CERTIFIED COPY,
Scott B. Suggs
CLERK OF COURT/RMC
DARLINGTON COUNTY, SC

SANDERS,TIMOTHY
SELF

no glass or Body Damage
X T.S.

----NOTICES----BUDGET SYSTEM LICENSEE-----NOTICES----BUDGET SYSTEM LICENSEE----NOTICES----BUDGET SYSTEM LICENSEE-----NOTICES

***RENTERS ARE NOT REQUIRED TO PURCHASE LOSS DAMAGE WAIVER (LDW). IT IS NOT MANDATORY. BEFORE PURCHASING LDW, RENTER SHOULD CHECK IF OWN INSURANCE COVERS DAMAGE TO AND LOSS OF THE CAR, THE LIMIT OF COVERAGE AND DEDUCTIBLE. IF THE RENTER DECLINES LDW, RENTER MAY BE LIABLE FOR UP TO THE RETAIL FAIR MARKET VALUE (LESS SALVAGE) OF THE CAR, REGARDLESS OF FAULT, UNLESS ORDINARY NEGLIGENCE IS EXCLUDED BY LAW. REPAIRS ARE AT BUDGET'S COST. READ LDW TERMS ON THE RENTAL DOCUMENT JACKET TERMS AND CONDITIONS, INCLUDING EXCLUSIONS FROM LDW.
***FUEL SERVICES ADD'L IF CAR IS RETURNED WITH LESS FUEL THAN WHEN RENTED.
***MINIMUM CHARGE IS 1 DAY (24 HRS) PLUS MILEAGE.

X T.S.

***IF I RETURN THE CAR PRIOR TO THE DUE IN TIME SET FORTH ABOVE, I MAY BE CHARGED A HIGHER RATE.
***NO ADDITIONAL OPERATORS ARE AUTHORIZED OR PERMITTED WITHOUT BUDGET'S PRIOR WRITTEN APPROVAL IN ACCORDANCE WITH THE TERMS AND CONDITIONS OF THE RENTAL AGREEMENT OR APPLICABLE STATE LAW.
***YOU MAY BILL ALL CHARGES, PARKING/TRAFFIC TICKETS INCLUDED, TO THE CARD I USE FOR PAYMENT, WITHOUT ADDITIONAL SIGNATURE BY ME ON A VOUCHER.
***BY MY SIGNATURE, I ACKNOWLEDGE RECEIPT OF ALL NOTICES WHICH APPEAR ON THIS RENTAL AGREEMENT. I AGREE TO THE TERMS AND CONDITIONS INCLUDING WHO MAY DRIVE THE CAR, WHICH IS STATED ON THE RENTAL DOCUMENT JACKET PROVIDED.

RES #37100949-US-2E
PREPARED BY:04184
JE4C/4889/10310/12:58/0 RENTAL# 5 9 5 4 0 5 4 8 4

[redacted]

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOURTH JUDICIAL CIRCUIT
COUNTY OF DARLINGTON	)	C/A NO: 2017-CP-16-470
	)	
Jameco Toney, #299774,	)	
	)	
Applicant,	)	
	)	**MEMO IN SUPPORT OF PCR**
v.	)	
	)	
State of South Carolina,	)	
	)	
Respondent.	)	

PROCEDURAL HISTORY

The records before this Court indicate that the Applicant is currently confined in the South Carolina Department of Corrections pursuant to the Darlington County Clerk of Court's orders of commitment. Applicant was indicted by the Darlington County Grand Jury for trafficking in marijuana, between 10 and 100 pounds, 2nd offense (2011-GS-16-811). Applicant was tried by jury before the Honorable R. Ferrell Cothran on November 20, 2013. Applicant was represented by Christie Wise Henderson, Esq. The jury found Applicant guilty of all charges and Judge Burch sentenced the Applicant to imprisonment for nine years.

A timely notice of appeal was filed and an appeal perfected on the Applicant's behalf. Jeffrey S. Stephens, Esq,, represented Applicant on appeal. The issue on appeal was whether the trial court erred by finding that that Applicant lacked standing to challenge both the search o the rental car he was driving and the length of the detention. The South Carolina Court of Appeals affirmed the Applicant's conviction and sentence ruling that the issue was not preserved for appellate review. State v. Toney, Op. No. 2016-UP-428 (S.C. Ct. App. 2016). The Remittitur was issued on November 4, 2016.

Applicant proceeded to a PCR hearing on the following allegation:

1. Ineffective assistance of counsel:
    1. "Counsel was ineffective for failing to preserve for appeal whether trial court erred in finding Applicant lacked standing to challenge search of rental car and length of detention."

STANDARD OF REVIEW

In a post-conviction relief action, the Applicant bears the burden of proving the allegations in the application. *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985). Where ineffective assistance of counsel is alleged as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." *Strickland v. Washington*, 466 U.S. 668 (1984); *Butler*, 268 S.C. 441, 334 S.E.2d 813 (1985).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. *Butler*, 286 S.C. 441, 334 S.E.2d 813 (1985). The Applicant must overcome this presumption to receive relief. *Cherry v. State*, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the Applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." *Cherry*, 300 S.C. at 117, 385 S.E.2d at 625 (citing *Strickland*). Second, counsel's deficient

performance must have prejudiced the Applicant such that "there is reasonable probably 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.

ARGUMENT

For the sake of brevity, Applicant incorporates and refers this Court to the prior Final Brief submitted to the S.C. Court of Appeals on January 25, 2016, in his direct appeal and already a part of this Court's records. Applicant adopts the background and arguments contained in the Final Brief for purposes of this memorandum and the law as it existed at the time of Applicant's trial. Applicant concedes that Byrd v. U.S., 138 S.Ct. 1518, 1531 (2018), would not apply for purposes of this PCR proceeding. However, Applicant would be entitled to certainly raise any challenges available at a new trial pursuant to Byrd.

The testimony and evidence presented at the PCR hearing as well as the Court of Appeals' opinion from Applicant's direct appeal all reveal trial counsel failed to properly preserve the issues of whether the trial court erred in finding Applicant lacked standing to challenge both the search of the rental car and the length of the detention. Had counsel properly raised and obtained final rulings on those issues, the Court of Appeals would have been able to consider Applicant's appellate arguments which Applicant contends would have been meritorious as more fully discussed in the Final Brief. Due to counsel's ineffectiveness, the Court of Appeals was unable to consider and rule on these arguments and issues.

CONCLUSION

For these reasons and those contained in the Final Brief, Applicant respectfully requests that this Court grant Applicant's Application for PCR.

Respectfully submitted,

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THE BOOZER LAW FIRM, LLC

August 29, 2018

Columbia, South Carolina.

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE FOURTH JUDICIAL CIRCUIT
COUNTY OF DARLINGTON	)	
Jameco Abdul Toney, S.C.D.C. No. 299774,	)	Case No.: 2017-CP-16-00470
Applicant,	)	**RESPONDENT'S MEMO IN OPPOSITION**
v.	)	
State of South Carolina,	)	
Respondent.	)	

This matter comes before the Court by way of an application for post-conviction relief filed by Jameco Abdul Toney ("Applicant") on June 16, 2017, and amended by filing on October 27, 2017. Respondent made its return on or about September 1, 2017. The Court convened an evidentiary hearing into the matter on Monday, July 23, 2018, at the Darlington County Courthouse in Darlington, South Carolina. Applicant was present at the hearing and represented by Lance S. Boozer, Esq. Johnny Ellis James Jr. (undersigned), of the South Carolina Attorney General's Office, represented Respondent.

Applicant did not testify at the evidentiary hearing. Applicant's trial counsel, Christie Wise Henderson, Esq. ("Counsel") briefly testified. Upon the conclusion of testimony and brief remarks by counsels, the Court directed the parties to submit filings addressing Counsel's failure to preserve for appeal the issue of the Applicant's standing to challenge law enforcement's search of the rental car and Applicant's length of detention. Respondent's memo follows:

Procedural History

Applicant is confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Darlington County Clerk of Court. Applicant was indicted at the July

2011 term of the Darlington County Grand Jury for trafficking in marijuana, between 10 and 100 pounds, 2nd offense (2011-GS-16-00811). Christie Wise Henderson, Esq. represented Applicant, and Zack Farr, Esq., of the Fourth Circuit Solicitor's Office, prosecuted the case. Applicant proceeded to trial before the Honorable R. Ferrell Cothran and a jury. The jury found Applicant guilty as indicted on November 20, 2013. Judge Cothran sentenced Applicant to imprisonment for a term of nine years.

Applicant filed a timely notice of appeal and a direct appeal was perfected by Jeffrey S. Stephens, Esq., who 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?

Respondent argued that the issue was not preserved because defense counsel only objected during the hearing on the motion *in limine*, and further that the suppression motion was properly denied. By opinion decided October 19, 2016, the South Carolina Court of Appeals found the issue not preserved, did not comment on the merits, and affirmed Applicant's convictions. State v. Toney, Op. No. 2016-UP-428 (S.C. Ct. App. 2016). The Remittitur was issued on November 4, 2016.

The present application for post-conviction relief follows. At the evidentiary hearing, Applicant proceeded only on the following allegation:

1. Ineffective assistance of counsel, in that:
   a. "Counsel was ineffective for failing to preserve for appeal whether trial court erred in finding Applicant lacked standing to challenge search of rental car and length of detention."

Ineffective Assistance of Counsel, Generally

In a post-conviction relief action, an applicant has the burden of proving the allegations in his or her application. Rule 71.1(e), SCRCP; Butler v. State, 286 S.C. 441, 334 S.E.2d 813

(1985). When an applicant alleges ineffective assistance of counsel as a ground for relief, he or she must prove "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Butler at 442, 334 S.E.2d 441 (quoting Strickland v. Washington, 466 U.S. 668, 686 (1984)). The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. Id.

"[C]ounsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Butler at 442, 334 S.E.2d 441 (quoting Strickland at 690). The applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989). "Judicial scrutiny of counsel's performance must be highly deferential, as it is all too tempting for a defendant to second-guess counsel's assistance after conviction or an adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." Strickland, 466 U.S. at 689; Edwards v. State, 392 S.C. 449, 456-57, 710 S.E.2d 60, 64 (2011). "[W]hen counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel." Smith v. State, 386 S.C. 562, 567, 689 S.E.2d 629, 632 (2010) (citing Caprood v. State, 338 S.C. 103, 110, 525 S.E.2d 514, 517 (2000)).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry at 117, 386 S.E.2d at 625 (citing Strickland at 688). Second, counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that,

but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry at 117-18, 386 S.E.2d at 625 (citing Strickland at 694).

The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. Strickland at 696. A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies; if it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Strickland, 466 U.S. at 696-97.

Applicant Had No Standing to Challenge the Search

Applicant cannot show any prejudice from Counsel's failure to preserve the issue for appeal because he had no expectation of privacy in the rental car (1) categorically under the prevailing law in effect at the time of trial or (2) given the particular facts of this case under the prevailing law at the time of the evidentiary hearing.

The Law at Trial

Before a criminal defendant can challenge the propriety of a search or seizure, the defendant seeking to raise such a challenge must establish that his own personal Fourth Amendment rights were violated by that search or seizure in order to be entitled to the benefits of the exclusionary rule. State v. McKnight, 291 S.C. 110, 114, 352 S.E.2d 471, 473 (1987); see also Rakas v. Illinois, 439 U.S. 128, 132, n.1 (1978) ("The proponent of a motion to suppress has the burden of establishing that his own Fourth Amendment rights were violated by the challenged search or seizure."). That is true because rights protected by the Fourth Amendment are personal rights and cannot be vicariously asserted. Alderman v. U.S., 394 U.S. 165, 174 (1969).

The "capacity to claim the protection of the Fourth Amendment depends not upon a property right in the invaded place but upon whether the person who claims the protection of the Amendment has a legitimate expectation of privacy in the invaded place." Rakas, 439 U.S. at 143 (citing Katz v. U.S., 389 U.S. 347, 353 (1967)). A legitimate expectation of privacy is both subjective and objective in nature. State v. Missouri, 361 S.C. 107, 112, 603 S.E.2d 594, 596 (2004). In order to establish a legitimate expectation of privacy, an individual must show: (1) the individual had a subjective expectation that the area searched would remain free from intrusion; and (2) the individual's subjective expectation is one that society recognizes as reasonable. Id.; see also Minnesota v. Olsen, 495 U.S. 91, 95-96 (1990) (instructing a subjective expectation of privacy can be considered legitimate if it is one society accepts and recognizes as reasonable).

Leading into the November 18, 2013, trial, the prevailing law in South Carolina, as well as other jurisdictions, was that the unauthorized driver of a rental vehicle had no reasonable expectation of privacy because he had no legitimate claim to the vehicle itself, no lawful right to control the vehicle, and no right whatsoever to possess the vehicle. See U.S. v. Hargrove, 647 F.2d 411, 412 (4th Cir. 1981) ("[O]ne who can assert no legitimate claim to the car he was driving cannot reasonably assert an expectation of privacy in a bag found in that automobile. . . . A person who cannot assert a legitimate claim to a vehicle cannot reasonably expect that the vehicle is a private repository for his personal effects, whether or not they are enclosed in some sort of a container[.]"); see also U.S. v. Kennedy, 638 F.3d 159, 165 (3rd Cir. 2011) ("An authorized driver on the rental agreement has lawful possession of the vehicle and, within the scope of the rental agreement, may legitimately exclude others from using it. In contrast, an authorized driver has no cognizable property interest in the rental vehicle and therefore no

accompanying right to exclude. The lack of such an interest supports the position that it is objectively unreasonable for an unauthorized driver to expect privacy in the vehicle."); U.S. v. Luster, 324 F.App'x 224, 225 (4th Cir. 2009) ("An unauthorized driver of a rented car has 'no legitimate privacy interest in the car' and, therefore, a search of the car 'cannot have violated his Fourth Amendment rights.'"). "This conclusion is not altered where the authorized lessee allows the unauthorized driver to drive the rental vehicle, as an unauthorized driver still does not have permission of the rental company, the owner of the vehicle." Luster, 324 F.App'x at 225; see also U.S. v. Wellons, 32 F.3d 117, 119 (4th Cir. 1994) ("[A]ppellant, as an unauthorized driver of the rented car, had no legitimate privacy interest in the car and, therefore, the search of which he complains cannot have violated his Fourth Amendment rights.").

The undisputed facts provide that Applicant was not listed as an authorized driver on the rental agreement, but rather Applicant claimed that he obtained the rental car from one Timothy Sanders, who was the authorized renter of the vehicle. (Tr. 28-29; Tr. 32-33; Tr. 41-46; Tr. 60-61). Under Wellons, good law at the time of trial, the time of appeal, and until May 14, 2018, those facts are dispositive—Applicant had no standing to assert an expectation of privacy as the unauthorized driver of a rental car. As such, Counsel's failure to renew the objection at trial is of no consequence because it was meritless under long-standing and broadly accepted precedent.

The Law Today

Given the particular facts of this case, Applicant still could not assert a reasonable expectation of privacy in the rental car if trial were held today. On May 14, 2018, the Supreme Court of the United States abrogated the long-standing and broadly accepted precedent articulated in Wellons, and held "that the mere fact that a driver in lawful possession or control of a rental car is not listed on the rental agreement will not defeat his or her otherwise reasonable

expectation of privacy." Byrd v. U.S., 138 S.Ct. 1518, 1531 (2018). The Supreme Court distinguished an unauthorized driver of a rental car from a mere passenger, who would have little expectation of privacy, by observing an unauthorized driver would have complete dominion and control over the vehicle and could exclude others from it. Id. at 1528 (citing Rakas, 439 U.S. at 149). The Supreme Court acknowledged that the inquiry turned on lawful possession, and noted "a person present in a stolen automobile at the time of the search may not object to the lawfulness of the search of the automobile. No matter the degree of possession and control, the car thief would not have a reasonable expectation of privacy in a stolen car." Id. at 1529 (quoting Rakas, 439 U.S. at 141, n.9). The Supreme Court left for remand the question of whether Byrd was "no better situated than a car thief" and whether "probable cause justified the search in any event." Id. at 1531.

Given the facts of the present case, even post-Byrd, Applicant was no better situated than a car thief and had no lawful right to exclude others from the rental car. During the traffic stop, law enforcement contacted the rental car company, confirmed Applicant was an unauthorized driver, confirmed that the rental contract was expired, and confirmed the return of the car was two days overdue. The rental company representative directed law enforcement to reclaim their vehicle, tow it, and authorized law enforcement's search. (Tr. 69, ll. 8-20; Tr. 80-82; Tr. 133-37, 168-69). In light of these facts, law enforcement had every right to take possession of the overdue rental car, arrange for its towing, and conduct an inventory search, and Applicant had no standing to contest the rental company's consent thereto. See, e.g. State v. Miller, 423 S.C. 95, 814 S.E.2d 166 (2018) (affirming tow and inventory search of vehicle where defendant was arrested for driving with a suspended license, and the car was neither his nor that of anybody present at the apartment complex at which it was parked); see also U.S. v. Bullette, 854 F.3d

261, 265 (4th Cir. 2017) ("An inventory search of an automobile is lawful (1) where the circumstances reasonably justified seizure or impoundment, and (2) law enforcement conducts the inventory search according to routine and standard procedures designed to secure the vehicle or its contents."); U.S. v. Brown, 787 F.2d 929, 932 (4th Cir. 1986) ("The question . . . is . . . whether the police officer's decision to impound was reasonable under the circumstances."). The alternative position offered by Applicant—that the unauthorized driver of an overdue rental car has standing to object to a search over the consent of the rental company which rightfully owns the car—is facially absurd.[1]

Applicant's Stop and Detention was Reasonable Irrespective of Standing

Applicant also cannot show prejudice from Counsel's failure to preserve the issue of the validity of the stop and search because it was entirely reasonable and appropriate under the law. "The touchstone of the Fourth Amendment is reasonableness." Florida v. Jimeno, 500 U.S. 248, 250 (1991). Consequently, only unreasonable searches and seizures are constitutionally prohibited, and law enforcement officers are not required to be perfect or mistake-free in order to be incompliance with the requirements of the Fourth Amendment. State v. Foster, 269 S.C. 373, 378, 237 S.E.2d 589, 591 (1977).

Pursuant to the Fourth Amendment, "[a] police officer may stop and briefly detain and question a person for investigative purposes, without treading upon his Fourth Amendment rights, when the officer has a reasonable suspicion supported by articulable facts, short of probable cause for arrest, that the person is involved in criminal activity." State v. Blassingame,

[1] If absurdity did prevail, law enforcement couldn't have known that it needed a warrant to search the overdue rental car driven by a thief. Excluding the evidence would not have deterred any conduct, but would have served no purpose but to frustrate and confuse law enforcement which must already operate an infinite tangle of conditions precedent to any search—as such, application of the exclusionary rule would have been inappropriate, and the lower court's ruling would have been affirmed on the merits. See, e.g. State v. Brown, 401 S.C. 82, 92, 736 S.E.2d 263, 268 (2012) (discussing Davis v. U.S., 564 U.S. 229 (2011)) ("[T]he exclusionary rule does not apply when the police conduct a search in accordance with existing appellate precedent.").

338 S.C. 240, 248, 525 S.E.2d 535, 539 (Ct. App. 1999). For Fourth Amendment purposes, an automobile stop, 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). However, the initiation of an automobile stop is *per se* reasonable when either probable cause exists to believe a traffic violation has occurred or reasonable suspicion exists to believe the occupants of the vehicle are involved in criminal activity. See Knight v. State, 284 S.C. 138, 141, 325 S.E.2d 535, 537 (1985) ("[A] police officer may stop an automobile and briefly detain its occupants, even without probable cause to arrest, if he has a reasonable suspicion that the occupants, even without probable cause to arrest, if he has a reasonable suspicion that the occupants are involved in criminal activity."); State v. Williams, 351 S.C. 591, 598, 571 S.E.2d 703, 707 (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."); Whren v. U.S., 517 U.S. 806, 810 (1996) ("An automobile stop is thus subject to the constitutional imperative that it not be 'unreasonable' under the circumstances. As a general matter, the decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred.").

A lawful traffic stop begins at the point an officer stops a vehicle to investigate a traffic violation and "ordinarily continues, and remains reasonable, for the duration of the stop." Arizona v. Johnson, 555 U.S. 323, 333 (2009). Once a lawful traffic stop is initiated, an officer may order the driver and any passengers out of the vehicle pending completion of the stop and "may request a driver's license and vehicle registration, run a computer check, and issue a citation." State v. Pichardo, 367 S.C. 84, 98, 623 S.E.2d 840, 847 (Ct. App. 2005) (citing U.S. v. Sullivan, 138 F.3d 126 (4th Cir. 1998)). "Normally, the stop ends when the police have no

further need to control the scene, and inform the driver and passengers they are free to leave." Johnson, 555 U.S. at 333.

During the course of the stop, an officer can inquire into matters unrelated to the initial justification for the stop without converting the stop into something other than a lawful seizure so long as the unrelated questioning does not measurably extend the duration of the stop. Id.; see also Muehler v. Mena, 544 U.S. 93, 100-101 (2005) (instructing additional questioning during a detention unrelated to the original purpose of the detention does not constitute an additional seizure or independent Fourth Amendment violation). Such an investigatory traffic stop must be temporary and last no longer than necessary to effectuate its purpose. Pichardo, 367 S.C. at 98, 623 S.E.2d at 848; see also U.S. v. Branch, 537 F.3d 328, 336 (4th Cir. 2008) ("The maximum acceptable length of a routine traffic stop cannot be stated with mathematical precision. Instead, the appropriate constitutional inquiry is whether the detention lasted longer than was necessary, given its purpose."). Continued questioning beyond the time reasonably necessary required to complete a traffic stop is lawful and permissible where (1) the officer has a reasonable articulable suspicion of other illegal activity, or (2) the traffic stop becomes a consensual encounter. Id., 367 S.C. at 99, 623 S.E.2d at 848.

Reasonable suspicion consists of "'a particularized and objective basis' that would lead one to suspect another of criminal activity." State v. Lesley, 326 S.C. 641, 644, 486 S.E.2d 276, 277 (Ct. App. 1997) (quoting U.S. v. Cortez, 449 U.S. 411, 417 (1981)). "Reasonable suspicion 'is not readily, or even usefully, reduced to a neat set of legal rules, but, rather, entails common sense, nontechnical conceptions that deal with factual and practical considerations of everyday life on which reasonable and prudent persons, not legal technicians, act.'" State v. Provet, 391 S.C. 494, 500, 706 S.E.2d 513, 516 (Ct. App. 2011) (quoting U.S. v. Foreman, 369 F.3d 776,

781 (4th Cir. 2004)). "In this highly fact-specific inquiry, reasonable suspicion 'is a fluid concept which takes its substantive content from the particular context in which the standard is being assessed.'" State v. Wallace, 392 S.C. 47, 51-52, 707 S.E.2d 451, 453 (Ct. App. 2011) (quoting Foreman, 369 F.3d at 781). The reasonable suspicion standard "is a less demanding standard than probable cause and requires a showing considerably less than preponderance of the evidence[.]" Illinois v. Wardlow, 528 U.S. 119, 123 (2000).

In determining the existence of reasonable suspicion, the totality of the circumstances must be considered. Pichardo, 367 S.C. at 104, 623 S.E.2d at 85. All of the circumstances of the stop, including the officer's own experience and specialized training, must be considered as a whole to determine whether the officer's actions were reasonable in light of all the information available to him at the time. See U.S. v. Mason, 628 F.3d 123, 129 (4th Cir. 2010) ("[J]ust as one corner of a picture might not reveal the picture's subject or nature, each component that contributes to reasonable suspicion might not alone give rise to reasonable suspicion."); see also U.S. v. Arvizu, 534 U.S. 266, 273 (2002) ("[W]e have said repeatedly that [reviewing courts] must look at the 'totality of the circumstances' of each case to see whether the detaining officer has a 'particularized and objective basis' for suspecting legal wrongdoing. The process allows officers to draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them that 'might well elude an untrained person.'" (citations omitted)). Thus, the presence of several factors individually consistent with innocent travel can establish reasonable suspicion when viewed together in totality. U.S. v. Sokolow, 490 U.S. 1, 9 (1989).

In the present matter, law enforcement pulled Applicant over after observing Applicant make an unsafe lane change—a traffic violation. See S.C. Code Ann. § 56-5-1900. Therefore,

the traffic stop of the rental vehicle was reasonable and proper. Law enforcement promptly discovered Applicant was not authorized to possess or drive the vehicle after reviewing the rental contract provided by Applicant, and further discovered the vehicle was two days overdue. Those two facts immediately constituted reasonable suspicion of criminal activity and necessitated an extension of the traffic stop. Law enforcement also detected numerous other indicators which, taken together, provided for reasonable suspicion of criminal activity:

(1) The rental vehicle's windows were partially rolled down while it was travelling along the interstate, which the officer knew was commonly used to mask the odor of illegal drugs;

(2) Applicant exhibited signs of excessive nervousness above and beyond those exhibited by drivers during routine traffic stops conducted by the officer;

(3) Applicant's nervousness increased over time, which law enforcement identified as unusual;

(4) Applicant provided inconsistent information about where he had been and did not know where the place he claimed to have been coming from in Columbia was located;

(5) The responses Applicant provided did not make sense based on the fact he lived in close proximity to an unemployment office and rental agency he bypassed for ones much farther away; and

(6) Applicant reacted differently and suspiciously looked back at the rental vehicle when asked if there was any marijuana hidden in it.

Given these factors and the considerable experience of the investigating officer, law enforcement had reasonable suspicion to believe Applicant was involved in criminal activity independent of the traffic violation he committed and, as a result, was fully justified in expanding the scope of the investigation and the length of the traffic stop. Accordingly, because law enforcement had

probable cause to initiate the traffic stop and detected numerous factors providing for reasonable suspicion that Applicant was involved in criminal activity during the course of the stop, law enforcement's seizure of Applicant during the stop was entirely reasonable and did not violate any of his constitutional rights.

Finally, Applicant abandoned the property. "Abandoned property has no protection from either the search or seizure provisions of the Fourth Amendment." State v. Dupree, 319 S.C. 454, 457, 462 S.E.2d 279, 281 (1995) (citing California v. Greenwood, 486 U.S. 35 (1988)). The same applies when the abandonment is in response to lawful police action. Id., 319 S.C. at 460, 462 S.E.2d at 283 (citing Greenwood). After law enforcement popped the trunk of the rental car and touched a bag contained therein, Applicant fled and abandoned the rental car and its contents, and upon his immediate capture volunteered that there was fifteen pounds of marijuana in the package in the trunk. (Tr. 52-54). Therefore, Applicant can show no prejudice from Counsel's failure to preserve the matter for appeal because even if Applicant had standing to challenge the search, he had *no chance* of invalidating the search and excluding the evidence at trial or otherwise prevailing on appeal.

Counsel's Fleeting Clairvoyance Does Not Obligate Continuing Clairvoyance

Applicant also cannot prevail because Counsel was not deficient in her failure to preserve for appeal the issue of Applicant's standing to challenge the search because defense attorneys are not required to be clairvoyant. It is a long-standing rule that an attorney is not required to be clairvoyant and anticipate or discover changes in the law which were not in existence at the time of trial. Harden v. State, 360 S.C. 405, 409, 602 S.E.2d 48, 50 (2004) (citing Gilmore v. State, 314 S.C. 453, 457, 445 S.E.2d 454, 456 (1994)). Typically the rule arises in PCR matters where an applicant alleges defense counsel was ineffective for failing to present *at all* an argument or

law not recognized or in effect until after trial. See, e.g. Robinson v. State, 308 S.C. 74, 417 S.E.2d 88 (1992) (counsel not deficient in failing to argue battered spouse syndrome six years before its recognition in State v. Hill[2]); Teamer v. State, 416 S.C. 171, 183, 786 S.E.2d 109, 115 (2016) (counsel not deficient in failing to object to "reach the truth" jury instruction five years before its prohibition in State v. Daniels[3]); Winkler v. State, 418 S.C. 643, 653-54, 795 S.E.2d 686, 692 (2016) (counsel not deficient in failing to object to trial court's refusal to answer jury question about what would happen if they failed to reach a unanimous sentencing verdict, where no precedent existed at the time of trial to support such an objection).

The present facts are somewhat unique, insofar as Counsel briefly "held the crystal ball" and offered an argument for Applicant's Fourth Amendment standing in the pre-trial hearing that channeled elements of the holding in Byrd years later. However, there is no precedent in our law of which Respondent is aware to provide that a defense attorney who is temporarily prescient must at all points thereafter be held to the continued maintenance of his or her foresight. Counsel should not be held to the standard of an oracle after evidently and unknowingly divining the legal future. Had Counsel not made the prophetic argument at all, there would certainly be no deficiency, so it would be nonsensical to provide greater relief to Applicant by virtue of the fact that Counsel went above and beyond the level of competence expected of attorneys in this state and made an extraordinary, if imperfectly preserved, argument against the tide of precedent.[4] Accordingly, the Court should not only find Applicant cannot show prejudice, but should further firmly find no deficiency on the part of Counsel.

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[2] 387 S.C. 398, 339 S.E.2d 121 (1986)
[3] 401 S.C. 251, 737 S.E.2d 473 (2012)
[4] It is tangential to the rights of the Applicant at issue in a PCR action, but given the concurrent exposure of Counsel to liability that may come with any finding of ineffectiveness, it is reasonable to expect that such a finding could have a chilling effect on the sort of long-shot arguments of defense counsels in the future, to the detriment of defendants and the development of the law generally.

Conclusion

WHEREFORE, Respondent respectfully requests that this Court find no deficiency on the part of Counsel, nor prejudice therefrom, and deny the application for post-conviction relief.

Respectfully submitted,

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22 Aug, 2018

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF DARLINGTON	)	
	)	
	)	2017-CP-16-0470
JAMECO A. TONEY, #299774,	)	
	)	
	)	
Applicant,	)	
	)	
vs	)	AFFIDAVIT OF SERVICE BY MAIL
	)	
STATE OF SOUTH CAROLINA,	)	
	)	
Respondent.	)	
	)	

1. I am an employee of the Respondent in the above-captioned action.

2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.

3. I have this day served a copy of the **Respondent's Memo in Opposition** in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

Lance S. Boozer, Esquire
Boozer Law Firm, LLC
1419 Pendleton Street
Columbia, SC 29201

DATED this 22nd day of August, 2018.

Mallory Morris, Legal Assistant
For Respondent