ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Laurens County

Honorable Brian M. Gibbons, Circuit Court Judge

RECEIVED
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S.C. SUPREME COURT

JAKEIVAN A. PULLEY,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2019-000371

JOHNSON PETITION FOR WRIT OF CERTIORARI

Robert M. Dudek
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

Did the PCR court err in finding defense counsel was not ineffective for failing to file a motion to suppress the fruits of the illegal traffic stop which was based on race alone, absent reasonable suspicion of criminal wrongdoing, since counsel's failure to challenge the traffic stop constituted deficient performance which prejudiced petitioner?

STATEMENT

Petitioner was indicted at the July 15, 2011, term of the Laurens County Grand Jury for the offenses of armed robbery of the Guatemex store and criminal conspiracy. App. 756 – 759. Petitioner's case and that of co-defendant Davoris Tanyata Smiley was called to trial on February 28, 2012 before the Honorable Roger L. Couch, and a jury. Scarlet Moore represented petitioner. Chad Mitchell represented co-defendant Smiley. The assistant solicitors were Warren Mowry and Rosemary Fielder-Commander. App. 1.

The robbery of the Guatemex store, in a "hispanic neigbborhood" occurred on April 24, 2011, in Laurens. The clerk in the store, Anna Sebastian, testified a man, whom she identified in court as petitioner, entered the store about 8:45 p.m. She said the man asked if there was something he could buy for a dollar. Sebastian's niece, Diana Melendez, showed the man where he could buy a Coke in a can for seventy-five cents. App. 88, l. 5 – 89, l. 25. She said petitioner then left the store.

After that, a woman came in and was in the process "of sending some money and she points to the two gentlemen in the court [petitioner and Smiley] and said they came in with a pistol and took all the money that they [her and her child] were sending." Sebastian said she recognized petitioner as being one of the robbers because he was "the same man that came in before, and the other fellow came in and he had his face covered around his mouth." App. 90, ll. 5-25.

Sebastian testified petitioner went to take the money from the customer and "the other boy was pointing the pistol at me." Sebastian opened the register and "between the two of them they took out the money." App. 92, l. 3 – 93, l. 3. Sebastian attempted to set off the alarm, and she said petitioner grabbed her in a failed attempt to stop her. Once the men realized the alarm

had been set off, "they took off." App. 93, l. 2 – 97, l. 8. The DVD of the robbery was then played for the jury. Petitioner's trial counsel, Moore, later testified the DVD "unfortunately" was very clear. App. 97, ll. 9-10.

Christy Cofield of the Laurens City police department responded to the alarm call from the store. Cofield viewed the video from the surveillance cameras and recognized petitioner as being the person who went in the store, bought something, and left. She watched the surveillance videotape of the robber, and she identified petitioner "J Rock" as one of the men robbing the store. App. 141, l. 13 – 142, l. 19. Cofield said petitioner was a distant family member. App. 136, l. 4 – 138, l. 25.

Cofield told the officers under her supervision "to be on the lookout for a black male wearing blue jeans with some type of orangy red looking emblem on the back pockets." App. 143, ll. 9-14.

Based on this description of the robbers only being black males, two black males and two black females were later stopped by Greenwood City police officer Patrick Durkin. Defense counsel Moore later admitted that she could have filed a motion to suppress the fruits of the traffic stop as being illegal on the basis that there was no reasonable articulable suspicion for the traffic stop. However, she did not file such a motion.

Officer Durkin testified he was working the night shift on April 24, 2011, the night of the robbery. App. 269, ll. 16-23. Around 9 p.m. that evening, Durkin saw two men that were walking down the street get into a car as it came to a stop, and then the vehicle drove away. Durkin said he became suspicious because two males had been involved in an armed robbery that night. Durkin claimed he was told over the police dispatch radio to stop the car. App. 272, l. 15 – 273, l. 6.

Durkin remembered, "I was able to get behind them. I initiated blue lights, performed a traffic stop, which ended in a pull-off of a used car parking lot." Petitioner and Lakasion Robinson were the two men in the car. App. 274, ll. 7-14. The other two occupants were women. App. 274, ll. 14-16.

Once petitioner stepped outside the car, Durkin saw petitioner was wearing "a light colored or white or gray tank top with blue jeans with some orange sort of type shape on the rear pockets and black shoes." App. 275, ll. 13-17. Defense counsel Moore only objected that the state needed to lay a better foundation when the solicitor attempted to introduce petitioner's clothes into evidence. Defense counsel Moore withdrew her objection after the state quickly laid a better foundation. App. 276, l. 2 – 277, l. 25; app. 278, ll. 8-10.

On cross-examination, Durkin admitted his only suspicion was that two men got into a car, and that two men had earlier been involved in an armed robbery. App. 279, ll. 8-20. Petitioner was arrested after the traffic stop because the clothes he was wearing at the time of the traffic stop matched the clothes one of the robbers was wearing. App. 280, l. 21 – 281, l. 4.

Based on information provided by Robinson following the traffic stop, Smiley was arrested at a different location. App. 338, l. 6 – 339, l. 7. Robinson testified that he knew Davoris Smiley as "Debo" and petitioner as "J Rock." App. 213, ll. 12-16.

Robinson claimed earlier that evening he was walking down the street with petitioner and Smiley, and "they were talking about robbing the store." App. 218, ll. 5-19. Robinson maintained that petitioner went into the store but "he didn't tell me why he was going into the store." [1] App. 219, ll. 5-24.

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1 Defense counsel earlier tried to get the judge to rule that Robinson was not a competent witness to testify. The judge overruled the objection, stating Robinson was able to understand and answer questions.

Robinson identified petitioner and Smiley as being the men on the store surveillance camera. App. 220, l. 15 – 222, l. 11. Robinson maintained petitioner changed clothes just before the robbery. App. 221, l. 14 – 222, l. 11.

Robinson allegedly told the police that Smiley had a gun that evening, a .40 caliber pistol. However, at trial, Robinson said, "I don't know if he had a gun on him or not. I don't know." App. 228, ll. 12-15. Robinson also testified he did not remember telling the police that petitioner had a stolen gun in his possession. App. 239, ll. 16-23. Robinson said he later pled guilty to misprision of a felony for his "role" in the robbery so "I wouldn't go to jail." App. 232, l. 14 – 233, l. 3.

On March 1, 2012, the jury found petitioner and Smiley both guilty of armed robbery and criminal conspiracy. App. 568, ll. 2-19. While petitioner did ask for forgiveness following the verdict, he later stated he was only apologizing for the inconvenience the trial caused people. App. 573, ll. 1-16. The judge sentenced petitioner to twelve years' imprisonment for armed robbery and five years' concurrent for the weapons charge. [2] App. 575, ll. 10-22.

Petitioner's conviction was affirmed pursuant to the Anders v. California, 386 U.S. 738 (1967), procedure in State v. Jakeivan Pulley, 2014-UP-008 (filed January 8, 2014). Petitioner filed an application for post-conviction relief on February 9, 2014. App. 578-591.

The state filed a return to this application dated June 13, 2014. App. 600-607. Petitioner filed amendments to his PCR application on July 1, 2016. [3] App. 609-621; Supp. App. 1

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[2] At the PCR hearing, defense counsel later said petitioner refused to accept a plea offer of ten years imprisonment to dispense with the charges.

[3] The printing in the original appendix on petitioner's amendments was not sufficiently clear so the amendment is reproduced in the supplemental appendix. Supp.App. 1-14. Also included in the supplemental appendix are the PCR exhibits, Supp.App. 15-23. In addition, another copy of

An evidentiary hearing was convened on October 16, 2018, before the Honorable Brian M. Gibbons. Carson M. Henderson represented petitioner. Janell Gregory was the assistant attorney general. App. 622.

Petitioner testified at PCR that the traffic stop was illegal. Petitioner explained that this occurred on the Easter Sunday weekend. He got into a car with Deloris Byrd and Sierra Cunningham, who were both family members. His friend, Robinson, was with him at the time. They were taking him to his mother's house to spend Easter Sunday with his children. App. 643, l. 4 – 644, l. 3.

Petitioner remembered hearing and seeing a Laurens County police officer slamming on his brakes when he and Robinson got in the car that night. The police officer, Durkin, followed their car down the road. App. 643, l. 21 – 644, l. 24. After about a mile and a half, Durkin activated his blue light and stopped the car. Petitioner said they were not speeding, they observed all traffic laws including making proper turn signals. In fact, Durkin never accused anyone of a committing a traffic violation. App. 644, l. 25 – 645, l. 18.

Petitioner testified that Durkin admitted he stopped the car because he saw two black men get in the car. App. 645, l. 19 – 647, l. 12. Petitioner said he talked to his trial lawyer, Moore, about making a motion to exclude evidence from the illegal traffic stop "and she was like, well, no, he can't do that [stop the car because black men were seen in it] but when we get to trial we'll deal with that once we get there." However, no motion to suppress or motion in limine was ever made pertaining to the illegal traffic stop. App. 647, l. 13 – 649, l. 18.

Petitioner asserted that the traffic stop was pretextual since the purpose of the car was stopped solely because two black men were seen getting into an automobile on the same night a

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the order of dismissal is included since page 4 of that order, Supp.App. 27, was missing from the Appendix.

store had been robbed across town. App. 649, l. 4 – 653, l. 2. Petitioner said defense counsel was ineffective for failing to move to exclude the fruits of that illegal stop, which included the clothes that petitioner was wearing that evening. App. 654, l. 3 – 655, l. 25.

Defense counsel Moore maintained at PCR she did not see any viable way to challenge the traffic stop that petitioner desired to challenge. App. 694, l. 17 – 695, l. 23. Moore maintained that petitioner admitted committing the crime to her and she therefore worried about her "ethical obligations" given that admission. App. 697, l. 10 – 698, l. 7. Moore offered that petitioner wanted to be a government informant in return for the armed robbery charges being dropped but the solicitor refused that offer, stating, "The evidence was very compelling in this case." App. 697, l. 10 – 698, l. 21.

Moore also said that she had no recollection of the police officer admitting he made the stop merely because he saw "two black guys get into a car." However, she admitted "the transcript speaks for itself" on that issue. Further, Moore acknowledged she did not remember any evidence of the traffic stop being based on a traffic infraction. App. 709, l. 21 – 711, l. 21. Moore also admitted that she did not "try to suppress the stop" by filing a proper motion based on the stop not being based on reasonable suspicion. App. 710, l. 23 – 718, l. 18. Moore also acknowledged her "ethical obligations" did not prohibit her from filing a motion to suppress the fruits of the traffic stop. App. 718, ll. 8-18.

PCR counsel Henderson argued the traffic stop was illegal because it was made solely on the basis of two black males getting into a car. The traffic stop was nothing more than "a hunch." It was "racial profiling." The stop was illegal and Moore would have challenged it if she was providing effective representation. App. 729, l. 18 – 732, l. 19. The judge took the matter under advisement.

On February 23, 2019, the judge issued an order of dismissal. App. 738-754. In the order, the judge wrote that:

> At trial, Officer Durkin testified he responded to the robbery call and was told to be on the lookout for two males. He also testified he observed two males getting into a car that barely stopped and then immediately took off again. This suspicious activity was observed shortly after the robbery and within close proximity of the robbery location. As Officer Durkin relayed what he observed over the radio as he initiated a stop on the vehicle. Capt. Cofield, who had observed the video surveillance of the robbery and is a relative of Applicant, came to the traffic stop location and was able to identify Applicant as one of the suspects involved in the robbery.
>
> This Court finds credible Counsel's testimony that she did not see a legal basis to file a motion suppress as she believed the traffic stop was investigatory and valid. After a review of the record and testimony provided during the post-conviction relief hearing, this Court finds Applicant has failed to establish how Counsel was deficient for failing to file a motion to suppress the traffic stop or how he was prejudiced by her decision since, based on information before this Court, it is unlikely that motion would have been successful. Therefore, Applicant has failed to meet his burden and this allegation must be denied and dismissed with prejudice.

App. 748.

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

ARGUMENT

The PCR court err in finding defense counsel was not ineffective for failing to file a motion to suppress the fruits of the illegal traffic stop which was based on race alone, absent reasonable suspicion of criminal wrongdoing, since counsel's failure to challenge the traffic stop constituted deficient performance which prejudiced petitioner.

As seen, Officer Durkin saw two black males getting into a car. He thought this was suspicious merely because two black males, had earlier robbed a store in a Hispanic neighborhood somewhere in Laurens. The assertion in the order of dismissal that the robbery and traffic stop were close in time and location is not supported by this record.

PCR counsel correctly argued that seeing two black males getting into an automobile did not provide a reasonable articulable suspicion to stop the vehicle merely because two black men had earlier robbed a store. The United States Supreme Court held in Terry v. Ohio, 392 U.S. 1 (1968), a police officer must have a reasonable suspicion that a person is armed and dangerous before conducting a pat down or frisk of that person. The Supreme Court extended the Terry doctrine to frisks pursuant to valid automobile stops for traffic violations in Pennsylvania v. Mimms, 434 U.S. 106 (1977).

Similarly, the police must have a reasonable suspicion that a person in an automobile has violated a traffic law or has otherwise been involved in a crime or is currently engaged in crime activity to justify stopping a car. See, State v. Vinson, 400 S.C. 347, 351-52, 734 S.E.2d 182 (Ct.App. 2012); Cf. State v. Tindall, 388 S.C. 518, 698 S.E.2d 203 (2010). PCR counsel correctly argued the police cannot stop a car based on a mere "hunch", and then investigate or frisk the occupants. See Sikes v. State, 323 S.C. 28, 30, 448 S.E.2d 560, 562 (1984).

Here, Officer Durkin admitted he stopped the vehicle because two black males got into the car and he thought that was suspicious since there had been a robbery involving two males at some time earlier in Laurens. PCR counsel correctly argued that the stop was based on racial profiling of petitioner and Robinson as black males, and that defense counsel was ineffective for not making a motion to suppress the results of the illegal traffic stop which included the clothes petitioner was wearing at the time of the traffic stop which allegedly matched those of the robber on the store videotape.

Since the officer did not have a reasonable suspicion that the occupants were involved in criminal activity, the racial stop in this case was an illegal pretext. See Sikes v. State, 323 S.C. 28, 30, 448 S.E.2d 560, 562 (1984); State v. Woodruff, 344 S.C. 537, 544 S.E.2d 290 (2001). Counsel provided deficient performance for not challenging the traffic stop by way of a proper motion, and petitioner was prejudiced, since the fruits of the illegal stop were used to convict petitioner. [4] See Strickland v. Washington, 446 U.S. 668 (1984).

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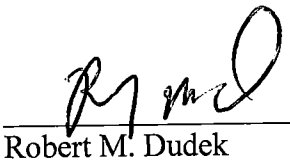
[4] Co-defendant Smiley was granted post-conviction relief by the Honorable Eugene Griffith in his order dated August 9, 2013. The PCR judge found Smiley's attorney was ineffective for not objecting to the introduction of his clothes as the fruit of the poisonous tree, not objecting to the introduction of pictures from Smiley's cell phone, not investigating co-defendant Robinson, not investigating Diana Melendez before calling her as a witness, and not meeting with Smiley in order to investigate and prepare for the trial. This Court affirmed the grant of post-conviction relief in Davoris Smiley v. State, 2015-MO-043 (filed July 22, 2015). Defense counsel Moore, at petitioner's PCR hearing, maintained that the seizure of co-defendant Smiley and his clothes was based on different facts and that that apparently justified her failure to make a similar motion on petitioner's behalf.

CONCLUSION

By reason of the foregoing argument, a petition for writ of certiorari should be granted to allow full briefing on this issue.



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR PETITIONER

This 18th day of October, 2019.

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for Jakeivan Pulley states:

1. He is Chief Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent petitioner.

2. He has reviewed the record of petitioner's post-conviction relief hearing before Judge Brian M. Gibbons, which was held on October 16, 2018, and, in his opinion, the appeal is without legal merit sufficient to warrant a new trial.

3. He has, pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), briefed an arguable legal issue which arose during the post-conviction relief process.

Therefore, counsel requests that the Court relieve him as counsel for Jakeivan Pulley.

Respectfully Submitted,

Robert M. Dudek
Chief Appellate Defender
ATTORNEY FOR PETITIONER

This 18th day of October, 2019.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of his ability this Johnson Petition for Writ of Certiorari complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

Robert M. Dudek
Chief Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
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ATTORNEY FOR PETITIONER

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Johnson 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 Johnson Petition for Writ of Certiorari and a copy of the Appendix and Supplemental Appendix have been served on Jakeivan Pulley, #344247, at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 18th day of October, 2019.

Robert M. Dudek
Chief Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 18th day of October, 2019.

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