STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO YORK COUNTY
Honorable William A. McKinnon, Post-Conviction Relief Judge

Appellate Case No. 2018-002196

DEVIONNE MCCLAIN,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

RETURN TO PETITION FOR A WRIT OF CERTIORARI

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ATTORNEYS FOR RESPONDENT

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RESPONDENT'S STATEMENT OF ISSUE ON APPEAL

Whether the PCR Court correctly found Trial Counsel was not ineffective for failing to object based on a probable cause standard, where Petitioner was not entitled to have the trial court consider a motion to dismiss, and where Petitioner was not prejudiced by this alleged deficiency because the officer had probable cause to conduct a traffic stop and because even if the officer lacked probable cause to make the initial traffic stop, Petitioner's subsequent traffic violations supported a traffic stop and his failure to stop charge.

STATEMENT OF THE CASE

Petitioner was indicted by the York County Grand Jury for failure to stop for a blue light ("FTSBL") (2015-GS-46-3842) in December 2015. On December 15, 2015, Petitioner's jury trial commenced before the Honorable Daniel D. Hall. Petitioner was represented by Jessica Russo, Esquire ("Trial Counsel"). Assistant Solicitor Hannah Grove of the Sixteenth Circuit Solicitor's Office prosecuted the case. Petitioner was found guilty as indicted and sentenced to imprisonment for twelve years.

Following the sentencing on that charge, Petitioner was served with Probation Citation #CC-46-15-51, alleging that his arrest and conviction for FTSBL violated conditions of his probation stemming from prior convictions of Possession of Cocaine Base with Intent to Distribute ("PWID") (2010-GS-46-3705), and PWID Cocaine Base within proximity of a school (2010-GS-46-3706). Judge Hall found Petitioner to be in violation of the conditions of his probation. For 2010-GS-46-3705, Petitioner's probation was revoked in its entirety leaving him to serve nine years. For 2010-GS-46-3706, his probation was revoked for nine years and the balance terminated, leaving him to serve nine years.

Petitioner filed a notice of appeal from his conviction for failure to stop for a blue light (2015-GS-46-3842). Appellant Defender John Strom argued the police officers did not have probable cause to believe Petitioner was speeding. The South Carolina Court of Appeals affirmed Petitioner's convictions by an unpublished opinion filed October 18, 2017. State v. Devionne McClain, 2017-UP-400 (Ct. App. filed October 18, 2017). The Court of Appeals ruled the issue was not preserved for appellate review because, at trial, Petitioner moved to dismiss the indictment based on lack of reasonable suspicion but never argued the reasonable suspicion standard was

erroneous or that probable cause was the correct standard. The remittitur was sent November 6, 2017.

Petitioner filed an application for post-conviction relief on December 5, 2017, alleging:

1. Ineffective assistance of counsel
2. "Constitutional, statutory, and rule violations."
3. "Unlawful restraint."
4. "See addendum after appointment of counsel."

An evidentiary hearing into the matter was convened into the matter on July 31, 2018, at the Moss Justice Center in York County. Applicant was present at the hearing and was represented by Leah B. Moody, Esquire ("PCR Counsel"). Respondent was represented by Assistant Attorney General Christian Saville of the South Carolina Attorney General's Office. At the PCR hearing, Applicant informed the Court he would be proceeding only on the allegation that Trial Counsel was ineffective for arguing law enforcement lacked reasonable suspicion to initiate the traffic stop which led to Applicant fleeing the police as opposed to lack of probable cause, and therefore failing to preserve the issue for appeal. By Order dated November 26, 2018, and filed November 27, 2018, The Honorable William A. McKinnon denied Applicant's application for post-conviction relief.

Petitioner subsequently filed a timely notice of appeal. Petitioner, through Deputy Chief Appellate Defender Wanda H. Carter, filed a Petition for Writ of Certiorari on June 14, 2019. This Return follows.

STATEMENT OF THE FACTS

At approximately 3:00 a.m. on April 30, 2015, Officer McNeely ("McNeely"), currently of the Clover Police Department, observed a vehicle speeding on Kings Mountain Street. McNeely testified the vehicle was the only vehicle on the road and it was traveling in the opposite direction of him. (App. 51, l. 6-10). McNeely testified he estimated the vehicle was traveling at a rate of forty-five miles per hour, ten miles per hour over the speed limit. (App. 51, l. 6-22). McNeely testified he verified his visual observation by using a radar unit. (App. 51, l. 6-22). McNeely testified it is the usual practice of patrol officers to use visual observations to detect speeding and subsequently use a radar to confirm the visual observation. (App. 51, l. 13-22). McNeely testified the radar confirmed that the vehicle was traveling at forty-five miles per hour. (App. 51, l. 23-App. 52, l. 3). McNeely testified when he attempted to pull the vehicle over, it began to accelerate its speed, and he was "quickly" losing sight of the vehicle. (App. 52, l. 15). McNeely testified the vehicle was "cutting corners" and leaving tread marks due to its speed and the fact that it did not slow down when making turns during the pursuit. (App. 53, l. 1-6). McNeely testified Petitioner eventually crashed into an RV thereby preventing Petitioner from being able to drive further. (App. 54, l. 3-11). McNeely testified Sergeant Harris arrived at the scene thereafter to assist McNeely in a foot pursuit. (App. 54-58). The pursuit ended after Petitioner jumped a fence, dislocated his shoulder, and was tased by Officer Harris. (App. 58, l. 4-9).

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 Petitioner must prove (1) counsel's performance fell below an objective standard of reasonableness, and (2) the Petitioner 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 Petitioner 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 based on a probable cause standard, where Petitioner was not entitled to have the trial court consider a motion to dismiss, and where Petitioner was not prejudiced by this alleged deficiency because the officer had probable cause to conduct a traffic stop and because even if the officer lacked probable cause to make the initial traffic stop, Petitioner's subsequent traffic violations supported a traffic stop and his failure to stop charge.

Petitioner argues the PCR court incorrectly found trial counsel was not ineffective for failing to challenge Petitioner's traffic stop based on a probable cause standard rather than a reasonable suspicion standard—leaving the issue unpreserved for appellate review, and because the issue was unpreserved, the Court of Appeals did not rule on the merits of whether Petitioner's Fourth Amendment rights were violated. Petitioner's argument is without merit, and, therefore, certiorari should be denied.

A. Trial Counsel Was Not Deficient Because Petitioner Received a Motion Hearing For Which He Was Not Entitled

First, Trial Counsel was not deficient because Applicant effectively received a motion to dismiss hearing for which he was not entitled[1]. The Court heard and considered Trial Counsel's motion to dismiss the FTSBL charge despite the fact that the trial court did not have the power to dismiss Petitioner's indictment or charges. See State v. Needs, 333 S.C. 134, 146, 508 S.E.2d 857, 863 (1998) ("[A] trial court generally has no power to dismiss a properly drawn indictment issued by a properly constituted grand jury before trial unless a statute grants that power to the court. The prosecutor may, of course, request the dismissal of an indictment or charge."); State v.

[1] Petitioner made a pre-trial motion to dismiss his FTSBL charge on the basis that law enforcement did not have reasonable suspicion to initiate the traffic stop. This was not a motion to suppress evidence. (App. 7).

Ridge, 269 S.C. 61, 65, 236 S.E.2d 401, 402 (1977) (In the absence of a statute, "a court has no power . . . to dismiss a criminal prosecution except at the instance of the prosecutor.").

In South Carolina, an indictment issued by a grand jury is generally required before an individual can be held to answer in any court for a criminal offense. See S.C. Const. art. I, § 11 ("No person may be held to answer for any crime the jurisdiction over which is not within the magistrate's court, unless on a presentment or indictment of a grand jury of the county where the crime has been committed, except in cases arising in the land or naval forces or in the militia when in actual service in time of war or public danger."); see also S.C. Code Ann. § 17-19-10 ("No person shall be held to answer in any court for an alleged crime or offense, unless upon indictment by a grand jury, except [under certain circumstances]."). Generally speaking, an indictment is a "notice document." State v. Gentry, 363 S.C. 93, 102, 610 S.E.2d 494, 500 (2005). The primary purpose of an indictment is " 'to put the defendant on notice of what he is called upon to answer, *i.e.*, to [apprise] him of the elements of the offense and to allow him to decide whether to ple[a]d guilty or stand trial.' " State v. Smalls, 364 S.C. 343, 346-347, 613 S.E.2d 754, 756 (2005) (citation omitted).

When evaluating an indictment, the indictment shall be considered to be sufficient if "the offense is stated with sufficient certainty and particularity to enable the court to know what judgment to pronounce, the defendant to know what he is called upon to answer, and acquittal or conviction to be placed in bar to any subsequent conviction." State v. Crenshaw, 274 S.C. 475, 477, 266 S.E.2d 61, 62 (1980); see S.C. Code Ann. § 17-19-20 ("Every indictment shall be deemed and judged sufficient and good in law which, in addition to allegations as to time and place, as required by law, charges the crime substantially in the language of the common law or of the statute

prohibiting the crime or so plainly that the nature of the offense charged may be easily understood and, if the offense be a statutory offense, that the offense be alleged to be contrary to the statute in such case made and provided."). "[T]he true test of an indictment's validity is not whether it could be made more definite and certain, but whether it contains the necessary elements of the offense intended to be charged and sufficiently apprises the defendant of what he must be prepared to meet." State v. Smalls, 336 S.C. 301, 307, 519 S.E.2d 793, 796 (Ct. App. 1999).

Based on those principles, a motion challenging the sufficiency or validity of the indictment raises "a question of whether a defendant properly received notice he would be tried for a particular crime." State v. Tumbleston, 376 S.C. 90, 96, 654 S.E.2d 849, 852 (Ct. App. 2007). Critically, what it does *not* do is raise a question of whether the State's evidence is sufficient. See State v. Garrett, 305 S.C. 203, 206, 406 S.E.2d 910, 911 (Ct. App. 1991) ("A motion to quash an indictment addresses the sufficiency of the indictment, not the sufficiency of the State's evidence."), overruled on other grounds by State v. Ramsey, 311 S.C. 555, 430 S.E.2d 511 (1993); see also Costello v. United States, 350 U.S. 359, 363 (1956) ("If indictments were to be held open to challenge on the ground that there was inadequate or incompetent evidence before the grand jury, the resulting delay would be great indeed. The result of such a rule would be that before trial on the merits a defendant could always insist on a kind of preliminary trial to determine the competency and adequacy of the evidence before the grand jury.").

Therefore, when a timely and proper challenge to the sufficiency of an indictment has been raised, what the trial judge is called upon to determine is solely: (1) whether the offense is stated with sufficient certainty and particularity to enable the court to know what judgment to pronounce and the defendant to know what he is called upon to answer; and (2) whether the defendant is

apprised of the elements of the offense intended to be charged. Tumbleston, 376 S.C. at 96-97, 654 S.E.2d at 852. If an indictment satisfies the requisite conditions and, thus, is facially valid, the trial judge must deny the defendant's motion to quash or dismiss the indictment. See State v. Williams, 301 S.C. 369, 371, 392 S.E.2d 181, 182 (1990) (holding a motion to dismiss an indictment was properly denied because the indictment was facially valid and instructing the validity of an indictment is not affected by the character of the evidence considered by the grand jury); see also United States v. Wills, 346 F.3d 476, 488 (4th Cir. 2003) ("[C]ourts lack authority to review the sufficiency of evidence supporting an indictment, even when a mistake was mistakenly made."). Accordingly, Trial Counsel was not deficient as Petitioner was not entitled to have the Trial Court consider Petitioner's motion to dismiss.

B. Petitioner Was Not Prejudiced Because Officer McNeely Had Probable Cause To Initiate A Traffic Stop

Second, Petitioner was not prejudiced by any deficiency of Trial Counsel because, even if Trial Counsel had attempted to challenge Petitioner's charges based on a probable cause standard, Officer McNeely had probable cause to initiate a traffic stop.

The Fourth Amendment guarantees "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const., amend. IV. "Temporary detention of individuals by the police during a vehicle stop constitutes a 'seizure' of an individual within the meaning of the Fourth Amendment." State v. Banda, 371 S.C. 245, 639 S.E.2d 36 (2006); Delaware v. Prouse, 440 U.S. 648 (1979). "Therefore, a vehicle stop implicates the Fourth Amendment prohibition against unreasonable searches and seizures, imposing a

standard of "reasonableness" upon the exercise of discretion by state law enforcement officials." See id.

Similar to reasonable suspicion, probable cause is a fluid concept. Probable cause is a "commonsense, nontechnical conception[] that deal[s] with the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." Ornelas v. United States, 517 U.S. 690, 695 (1996).

Probable cause exists if, given the totality of the circumstances, the officer "had reasonably trustworthy information . . . sufficient to warrant a prudent [person] in believing that the petitioner had committed or was committing an offense." Beck v. Ohio, 379 U.S. 89, 91 (1964). The court must examine the events leading up to the stop and decide "whether these historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to probable cause." Maryland v. Pringle, 540 U.S. 366, 371 (2003) (internal quotation marks omitted). Therefore, determining whether an officer has probable cause to conduct a warrantless search depends on the totality of the circumstances. State v. Brannon, 347 S.C. 85, 92, 552 S.E.2d 773, 776 (Ct. App. 2001). Of course, the requisite showing is less than that required by a preponderance of the evidence standard, Illinois v. Gates, 462 U.S. 213, 235 (1983), and the probable cause standard does not even "require that the officer's belief be more likely true than false." United States v. Humphries, 372 F.3d 653, 660 (4th Cir. 2004).

In U.S. v. Sowards, 690 F.3d 583 (4th Cir. 2012), the Fourth Circuit Court of Appeals found a police officer's uncorroborated visual speed estimate did not provide probable cause to initiate a traffic stop for speeding. Deputy James Elliott stopped Sowards for speeding after visually estimating that Sowards's vehicle was traveling 75 mph in a 70 mph zone. Deputy Elliott

was unable to confirm Sowards's speed, as he had positioned his patrol car at an angle that prevented him from obtaining an accurate radar reading. During the traffic stop, a canine trained in drug detection sniffed the outside perimeter of Sowards's vehicle, which led officers to discover approximately ten kilograms of cocaine. Id. at 585.

Sowards moved to suppress the cocaine evidence, arguing Deputy Elliott lacked probable cause to initiate the traffic stop. At the suppression hearing, Deputy Elliott testified he was certified in the use of radar equipment in North Carolina, and as a condition of that certification he was required to estimate the speeds of 12 vehicles, and the sum total of his estimates had to be within 42 mph of the sum speeds of the vehicles. Id.

Over the objection of trial counsel, Deputy Elliott was permitted to testify that he had visually estimated Sowards's vehicle was traveling 75 mph in a 70 mph zone. On cross examination, Deputy Elliott admitted he did not attempt to verify or otherwise corroborate his visual speed estimate by pacing Sowards's car, consulting a radar gun, or utilizing other outside tools. He also stated: (1) he did not use a "technique" for measuring speed; (2) there are 12 feet in a yard; [2] (3) 12 inches in a yardstick; (4) his visual estimation of speed was not dependent on his ability to estimate the distance Sowards's vehicle traveled. Id. at 585–86.

The Fourth Circuit found Deputy Elliott did not have probable cause when he stopped Sowards, noting Deputy Elliott's lack of training and difficulty with measuring distances were material to determining whether his observation, by itself, was reliable enough to create probable cause. The court also noted several items which could have corroborated his observation, but were

[2] Eventually, Deputy Elliott changed his answer to 4 feet in a yard. Sowards, 690 F.3d at 586.

not present in this case. These "indicia of reliability" commonly found in other speeding situations were tools and observations such as: (1) a vehicle traveling in significant excess of the speed limit, so much that it is plainly obvious the vehicle is speeding; (2) use of a radar gun; (3) officers "pacing" a car; (4) other readily apparent observations.[3] Id. at 588–94.

First, in Petitioner's case, Officer McNeely's visual observation was sufficient to form probable cause as Petitioner's speed was plainly obvious. As stated by the Sowards Court, the percentage difference between an estimated speed and the legal speed limit may, by itself, serve as the foundation for an officer's probable cause determination. In Sowards, the court found Deputy Elliott's estimation that the defendant was traveling 75 mph in a 70 mph zone was too minor to serve as sufficient information to establish probable cause. The 5 mph difference constitutes approximately a 7 percent increase in speed over the posted speed limit, an admittedly insubstantial amount. However, in the instant case, Officer McNeely observed Appellant traveling 45 mph in a 35 mph zone. Here, the 10 mph difference constitutes approximately a 29 percent increase in speed, meaning Appellant was traveling at approximately 130% of the posted speed limit. Such a difference in speed is easily discernable by the human eye. See, e.g., State v. Butts, 269 P.3d 862, 873 (Kan. Ct. App. 2013) (finding an estimated speed of 45 mph in a 30 mph zone was significantly higher than the posted speed limit and, as a result, easily discernable as speeding to a law enforcement officer). Thus, Officer McNeely's observations alone were sufficient to create probable cause.

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[3] In its opinion, the cited cases in which: (1) a defendant tapped on his brakes; (2) an officer's patrol car shook as a defendant drove past; (3) the roaring engine of a speeding vehicle. Sowards, 690 F.3d at 592–93.

Second, even if Officer McNeely's visual observations were not sufficient to establish probable cause, McNeely still had probable cause to stop Petitioner because McNeely's visual observations were confirmed by his radar unit. (App. 9, 8-12). As noted in Sowards, the use of a radar gun is a recognized method for confirming that a vehicle is speeding. See Sowards, 690 F.3d at 592. Thus, McNeely had probable cause to stop Petitioner for speeding.

C. Petitioner's Subsequent Intervening Traffic Violations Provided Probable Cause To Stop Petitioner and Support Petitioner's Failure to Stop for a Blue Light Charge

Moreover, even if the initial initiating of the blue light was unlawful, Petitioner's subsequent intervening traffic violations provided probable cause to stop Petitioner and supported Petitioner's FTSBL charge. See State v. Nelson, 336 S.C. 186 (1996) ("[E]ven assuming [the officer's] initial attempt to stop Defendant would have violated the Fourth Amendment, [the officer] was nonetheless justified in making the stop after Defendant committed the subsequent traffic infractions."), citing U.S. v. Sprinkle, 106 F.3d 613, 619 (4th Cir. 1997) ("There is a strong policy reason for holding that a new and distinct crime, even if triggered by an illegal stop, is a sufficient intervening event to provide independent grounds for arrest.").

In Petitioner's case, Officer McNeely testified he noticed Petitioner accelerate in speed, "much faster" than the original 45 miles per hour, just prior to initiating his blue lights. (App. 52; l. 12-20). Officer McNeely testified after he initiated the traffic stop by turning on his blue lights, Petitioner continued to speed, and made turns by "cutting corners," "hitting curves," and "leaving tread marks because of the speed." (App. 53, l. 1-7). In fact, Officer McNeely testified he called for backup during the chase when he saw "smoke bellowing" because that was confirmation for him that Petitioner was in fact evading him. (App. 53; l. 17-20). Additionally, Petitioner

subsequently exited his car and a foot pursuit commenced between Officer McNeely, Petitioner, and Sergeant Harris. (App. 54-56). Accordingly, whether Officer McNeely had probable cause or reasonable suspicion to make the initial traffic stop was irrelevant based on the Petitioner's subsequent actions, and therefore, Petitioner's argument is without merit.

CONCLUSION

Based on the foregoing argument, Trial Counsel was not deficient and Petitioner was not prejudiced by any alleged deficiency. Therefore, the State requests certiorari be denied.

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Oct 28, 2019.

ATTORNEY FOR RESPONDENT

STATE OF SOUTH CAROLINA
In the Supreme Court

CERTIORARI TO CHARLESTON COUNTY
Court of Common Pleas
G. Thomas Cooper, Circuit Court Judge

Appellate Case No. 2019-000381

DEVIONNE MCCLAIN, PETITIONER,

v.

STATE OF SOUTH CAROLINA, RESPONDENT.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the **Return to Petition for Writ of Certiorari** has been served upon the applicant by placing one copy in the Inter Agency Mailbox, addressed to:

Wanda H. Carter, Esquire
SC Commission of Indigent Defense
1330 Lady Street; Ste. 401
Charleston, SC 29201

This 28th day of October, 2019.

John Grzymalski
Legal Assistant for Respondent

ALAN WILSON
ATTORNEY GENERAL

October 28, 2019

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

RE: Devionne McClain v. State of South Carolina
Appellate Case No.: 2018-002196

Dear Mr. Shearouse:

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

Sincerely,

Brianna L. Schill
Assistant Attorney General
S.C. Bar # 103380

BLS/jpg
Enclosures

cc: Wanda H. Carter, Esquire
Victim Advocacy Division