STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Greenville County

Honorable Letitia H. Verdin, Circuit Court Judge

Appellate Case No. 2018-001958

KARACUS K. FREEMAN,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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Petitioner's Issue Presented

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

Respondent's Issue Presented

Did the PCR court properly find trial counsel was not constitutionally ineffective in failing to preserve his objection to the admission of evidence seized from Petitioner's vehicle during an investigatory stop because Petitioner failed to demonstrate he would have prevailed on the issue on direct appeal when officers had reasonable suspicion to conduct the stop after getting reliable information from a non-confidential informant that was corroborated by the observations of police before the stop was initiated?

A. The PCR court properly found the officers reasonably relied on the information provided by the informant in conducting the investigatory stop.

B. The PCR court properly found the offices reasonably conducted an investigatory stop due to their corroboration of the information provided by the informant.

STATEMENT OF THE CASE

During its June of 2015 term, the Greenville County Grand Jury indicted Karacus K. Freeman (Petitioner) for trafficking heroin. Scott D. Robinson, Esquire, (trial counsel) represented Petitioner, and Assistant Solicitors Hunter Christopher Blouin and Stanford Lee Overby, Jr., of the Thirteenth Circuit Solicitor's Office prosecuted the case. On April 5, 2016, Petitioner proceeded to a jury trial with the Honorable Edward W. Miller, (trial court) presiding. At the conclusion of trial, the jury convicted Petitioner as indicted. The trial court sentenced Petitioner to imprisonment for ten years. Trial counsel filed a timely notice of appeal on Petitioner's behalf, and Petitioner's appeal was perfected by Appellate Defender Lara M. Caudy (appellate counsel) of the South Carolina Commission on Indigent Defense – Office of Appellate Defense. On appeal, Petitioner argued the trial court erred in denying Petitioner's motion to suppress the evidence seized from the automobile Petitioner was driving at the time of his arrest. In an unpublished opinion, the South Carolina Court of Appeals affirmed Petitioner's conviction, finding the issue had not been preserved for appellate review. State v. Freeman, Op. No. 2017-UP-100 (S.C. Ct. App. filed on March 8, 2017). The Remittitur was issued on March 24, 2017.

Petitioner then filed a timely application for post-conviction relief on September 18, 2017, alleging trial counsel was constitutionally ineffective for failing to properly suppress evidence and failing to investigate. App. 129-38, 141. Respondent made its return on January 17, 2018, requesting therein the convening of an evidentiary hearing regarding the allegations. App. 143. An evidentiary hearing was convened before the Honorable Letitia H. Verdin (PCR court) on June 20, 2018, at the Greenville County Courthouse. Rodney W. Richey, Esquire, was present on behalf of Petitioner, and Assistant Attorney General Deshawn H. Mitchell represented

Respondent. The PCR court found Petitioner failed to establish any constitutional violations requiring the grant of post-conviction relief and dismissed the action with prejudice in an Order of Dismissal issued on October 19, 2018. App. 173-91. With respect to Petitioner's claim that trial counsel was constitutionally ineffective for failing to preserve for appellate review his objection to the admission of the evidence seized from Petitioner's vehicle, the PCR court found Petitioner failed to demonstrate any prejudice from trial counsel's performance because he did not establish that the issue would have been successful on appeal, the arresting law enforcement officer's decision to conduct an investigatory stop of the automobile Petitioner was driving was reasonable under the totality of the circumstances and supported by a reasonable suspicion of criminal activity, and Petitioner's challenge to the stop is meritless. App. 181. Petitioner's appeal follows.

STATEMENT OF FACTS

Trial counsel moved in limine to suppress evidence found during the warrantless search of an automobile being driven by Petitioner. App. 25. Robert Arnold (informant) testified he had knowledge of Petitioner from seeing him on the streets. App. 26. He testified he did not remember being arrested in March of 2014 because he suffers from seizures. App. 27. Officer Andrew Sturman testified he arrested informant for trespassing on March 26, 2014, and later discovered prescription pills in informant's pocket. App. 29-30. He testified he told informant he would help him with his charges if he would call his heroin supplier. App. 31. Informant then called an individual he identified as "K" on speakerphone and set up a drug buy on Joe Louis Street, and described K's car as being a white Monte Carlo with blue racing stripes and rims. App. 32-33. He did not have a confidential informant agreement with informant and had never before used him as a confidential informant, knew of informant's history of marijuana and heroin use, but testified informant had always been honest with him. App. 33-34. He shared the information about the drug buy and car with Officer Mauricio Reyes. App. 35. Upon questioning from the trial court, Sturman testified informant had been honest with him in their past conversations. App. 36-37.

Reyes testified he received the information about the drug buy on Joe Louis Street and that K would be driving a white Monte Carlo from Sturman, but did not know how Sturman acquired the information. App. 37-39. After seeing a distinctive, white Monte Carlo turning off of Joe Louis Street, Reyes stopped the car and cuffed the driver, who did not have identification, refused to give his name to the officers, and withheld his consent for a search of the car. App. 40-41. A drug dog alerted for drugs, and Reyes testified he found an open beer and bag of a chalky

brown substance in the car after the subsequent search. App. 41-42. He testified that bag was lodged in the opening of the car's gear shifter, where he could see it sticking out. App. 46. A field test of the substance was inconclusive, so Reyes sent the substance for testing. App. 42. The officers discovered that the driver was Petitioner. App. 42. Petitioner became angry that the officers arrested his female passenger, who denied being the owner of the bag, and admitted that the bag was his. App. 43. On cross-examination, Reyes testified he did not see Petitioner engage in any illegal activity in the form of drug possession of traffic offenses and did not know anything of informant. App. 45-46.

Officer Eric Koepke testified he responded to the stop of Petitioner when called by Reyes. App. 47-48. Reyes told him Petitioner had refused to give consent to a search of his car, and also told him he had reasonable suspicion that drugs were present therein. App. 49-50. Petitioner told the officers during questioning that he had smoked marijuana before getting into the car. App. 50. His canine alerted for the presence of drugs in the car. App. 50. Trial counsel argued there was nothing Reyes observed that would have given him reasonable suspicion to conduct a warrantless search of Petitioner's car, there was nothing to corroborate informant's reliability as an informant, and there was no reasonable suspicion to justify Reyes' stop of Petitioner. App. 52-53. The trial court denied trial counsel's motion to suppress the evidence, finding there was a particularized, objective basis for Reyes' reasonable suspicion. App. 56. At trial, forensic chemist Kelly Dixon identified the brown, chalky substance discovered in Petitioner's car by Reyes as heroin. App. 100. When the State moved to admit the bag of heroin, trial counsel did not object. App. 100.

At the PCR hearing, Petitioner testified trial counsel did not object to the admission of the heroin during his trial. App. 150-52. Trial counsel testified he believed the trial court should have suppressed the evidence found during the search of Petitioner's car, but that he does not believe that Petitioner would have been successful on the issue if it had been preserved for appellate review. App. 160, 167. Respondent argued in closing that Petitioner did not suffer prejudice from trial counsel's failure to preserve his objection to the admission of the evidence from the search because the issue would not have been resolved in Petitioner's favor on appeal. App. 167-68. Petitioner argued in closing that the suppression issue should have been heard by the appellate courts. App. 170.

STANDARD OF REVIEW

The standard of review for post-conviction relief matters depends on the specific issues before the appellate court. Smalls v. State, 422 S.C. 174, 180, 810 S.E.2d 836, 839 (2018). When reviewing factual findings, the appellate courts defer to the PCR court's factual findings and will uphold them if there is probative evidence in the record to support them. Buckson v. State, 423 S.C. 313, 320, 815 S.E.2d 436, 440 (2018); Smalls, 422 S.C. at 180-81, 810 S.E.2d at 839-40 (citing Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016); Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013)). However, pure questions of law will be reviewed *de novo* without deference to the lower court. Smalls, 422 S.C. at 180-81, 810 S.E.2d at 839-40. Appellate courts will reverse the decision of the PCR court when it is controlled by an error of law. Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

ARGUMENT

The PCR court properly found trial counsel was not constitutionally ineffective in failing to preserve his objection to the admission of evidence seized from Petitioner's vehicle during an investigatory stop because Petitioner failed to demonstrate he would have prevailed on the issue on direct appeal when officers had reasonable suspicion to conduct the stop after getting reliable information from a non-confidential informant that was corroborated by the observations of police before the stop was initiated.

Petitioner argues the PCR court erred in finding Petitioner failed to establish trial counsel's failure to preserve his objection to the introduction of the evidence seized from Petitioner's automobile during the traffic stop was prejudicial because the police lacked reasonable suspicion to stop Petitioner's car. The PCR court properly denied Petitioner's application for relief because Petitioner failed to demonstrate that he would have been successful on appeal if trial counsel's objection to the admission of the evidence seized had been preserved for appellate review in light of the reliability of the informant's information and the officers' ability to corroborate the information's allegations by observing Petitioner's car.

Petitioner has a right to the assistance of effective counsel as provided by the Sixth Amendment to the United States Constitution. Strickland v. Washington, 466 U.S. 668 (1984); Lomax v. State, 379 S.C. 93, 665 S.E.2d 164 (2008). Petitioner has the burden of proving the allegations in his PCR action, and when alleging that trial counsel was constitutionally ineffective, he must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that it cannot be relied upon as having produced a just result." Strickland, 466 U.S. at 686.

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland, 466 U.S. 668. First, Petitioner must prove that Counsel's performance was deficient. Id.; Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624,

625 (1989). Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 690). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Id. (citing Strickland, 466 U.S. at 690). Petitioner must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625. Second, Counsel's deficient performance must have prejudiced Petitioner such that "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. When a PCR court is determining whether an application for post-conviction relief was prejudiced by trial counsel's failure to object to the introduction of evidence, the court should consider whether the appellate court would have reversed the conviction due to trial court error and granted a new trial if the issue had been preserved. Milledge v. State, 422 S.C. 366, 374, 811 S.E.2d 796, 800-01 (2018). "[T]he PCR court must view the trial court's ruling through the same lens that would be applied on appeal, which here requires giving appropriate deference to the trial court's findings." Id. at 366, 380, 811 S.E.2d at 804 (citing State v. Khingratsaiphon, 352 S.C. 62, 572 S.E.2d 456 (2002)).

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 does not require a finding of ineffectiveness merely for deviation from some rigid rule of representation. Rather, Strickland requires the PCR applicant to prove "counsel made errors so serious that

counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Id. at 697.

"[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 probably cause for arrest, that the person is involved in criminal activity." State v. Blassingame, 338 S.C. 240, 248, 525 S.E.2d 535, 539 (Ct. App. 1999). An officer's stop of an automobile is reasonable per se when probably cause exists to believe a traffic violation has occurred or reasonable suspicion exists to believe the vehicle's occupant is 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 are involved in criminal activity."). When a court is determining whether reasonable suspicion existed to support a stop, it must consider the totality of the circumstances as a whole in order to ascertain whether the officer's actions were reasonable in light of everything available to him at the time of the stop. See United States 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)). The reasonable suspicion standard is "less demanding . . . than probable cause and requires a showing considerably less than preponderance of the evidence . . . ." Illinois v. Wardlow, 528 U.S. 119, 123 (2000).

A. The PCR court properly found the officers reasonably relied on the information provided by the informant in conducting the investigatory stop.

Petitioner argues the PCR court erred in finding the officers reasonably relief upon the information provided by the informant because the information was inherently unreliable.

The informant was initially arrested for trespassing on private property, but agreed to assist Sturman in his investigation into the informant's heroin supplier after a prescription pills for a scheduled substance were found in the informant's pocket. App. 30-31. The informant was potentially exposing himself to greater criminal liability by admitting to Sturman that he had previously purchased heroin, despite the fact that the officer had not discovered heroin in the informant's person, and the PCR court properly found that the informant's admission imbued his information with inherent credibility. See State v. Pope, 410 S.C. 214, 224, 763 S.E.2d 814, 819 (Ct. App. 2014) (noting non-confidential informants possess a higher level of credibility than confidential informants because they expose themselves to public view and possible criminal and civil liability if their information turns out to be false), cert. denied, State v. Pope, S.C. Sup. Ct. Order dated February 20, 2015. The informant in this case went so far as to inform police that Petitioner was "one of his drug dealers for heroin . . . ", indicating that the informant had been buying heroin for multiple sources. App. 68. Had the informant given false information to the police, his chances of getting aid from Sturman in assisting him with his pending charges would likely had disappeared. Cf. United States v. Greenburg, 410 F.3d 63, 67 (1st Cir. 2005) ("[The special agent] knew the informant's identity and therefore could hold the informant responsible if he provided false information. This tends to establish an incentive for the informant to tell the truth."). Under these circumstances, police justifiably relied upon the informant's allegations

about the heroin they would find in Petitioner's car and the other details about the scheduled drug buy.

Sturman testified he had never used the informant as a confidential informant before; however, he testified the informant had always been honest with him during their previous encounters. App. 33-34, 37. Although Sturman had not been able to establish an opinion as to the informant's reliability as an informant due to his never having used information from the informant in a previous investigation, Sturman testified he believed the informant had provided good information "[b]ased on the phone call and . . . what [the informant] was telling [Sturman], and describing the car and everybody, and where [K's] supposed to be . . . ." App. 34. Sturman's testimony on this point indicated he believed the specific and verifiable nature of the information provided by the informant was able to corroborated and therefore worth passing onto another officer for investigation.

Given the informant's incentive to provide police with truthful information and exposure to jeopardy if he gave false information, and given the informant's general truthfulness in dealing with Sturman in the past, it was reasonable for police to conclude that the information was passing on reliable information. The PCR court properly found that police justifiably relied on the informant's statements and that their reliance was entirely reasonable.

B. The PCR court properly found the offices reasonably conducted an investigatory stop due to their corroboration of the information provided by the informant.

The PCR court found the police had reasonable suspicion to conduct an investigatory stop of Petitioner's automobile because they were able to corroborate significant aspects of the

informant's information before they acted on the information by stopping Petitioner. App. 186-87. Petitioner argues the PCR court erred because the information given to police by informant did not allow for police to corroborate it and test the informant's credibility.

The PCR court cited State v. Willard, 374 S.C. 129, 647 S.E.2d 252 (2007), while considering the ability of the police to corroborate the informant's story about Petitioner having heroin. App. 187. In Willard, a non-confidential informant arranged a drug buy with Willard using a police officer's phone. Id. at 131, 647 S.E.2d at 253-54. The Court of Appeals held that the trial court had not erred in finding police had reasonable suspicion to conduct a stop of Willard's car because the informant had "correctly identified Willard's vehicle, knew Willard's telephone number, and mentioned drugs during the conversation with Willard." Id. at 134-35, 647 S.E.2d at 255. The Court specifically noted that a non-confidential informant is given a higher level of credibility, even when his reliability has not previously been tested, because he exposes himself to legal jeopardy if he provides false information to police. Id. at 135, 647 S.E.2d at 255 (citing State v. Bellamy, 323 S.C. 199, 473 S.E.2d 838 (S.C. Ct. App. 1996)). Petitioner argues the information provided to police by this informant, unlike the information provided to police in Willard, was not predictive or able to be verified by police.

In this case, the informant in this case provided police with information that they were able to corroborate. The informant used his speakerphone to call "K" with Sturman listening in. App. 32. While on the phone call, the informant asked K for the chance to buy some heroin from him, learned that the dealer would meet the informant in the vicinity of Joe Louis and Queen Streets at approximately 9:15 p.m. App. 33, 69. The informant told Sturman that K would be driving a white Monte Carlo with blue racing stripes and large, chrome rims. App. 33, 70. Reyes

testified Sturman had alerted him to the informant's description of a two-door, white Monte Carlo with blue racing stripes and twenty-four-inch rims, which could be found on Joe Louis Street, and was supposedly engaged in drug trafficking. App. 38, 75. Reyes observed the vehicle described by Sturman turning off of Joe Louis Street and onto Queen Street at 9:18 p.m., did not observe any other vehicles in the area that had a similar appearance, and noted that the vehicle was distinctive. App. 39-40, 75-76. Reyes then conducted his stop of Petitioner's car based upon his observation and the information he had received from Sturman. App. 76. The informant gave information to police that they were able to corroborate upon their observation of Petitioner's car: the model, color of the base paint, color and presence of racing stripes, and material and size of its rims; additionally, the car was located turning off one of the streets and onto the second mentioned by the informant, three minutes after the meeting time established by the informant and his heroin dealer. There are striking similarities between this case and Pope, in which the Court of Appeals concluded the trial court properly denied Pope's motion to suppress evidence because police were able to corroborate aspects of the informant's information regarding Pope's vehicle, the vehicle's direction of travel, the vehicle's preserve at a particular location at a particular time, and the fact that multiple people were inside the vehicle, which thereby established reasonable suspicion for an investigatory stop. Pope, at 225, 763 S.E.2d at 820. The PCR court recognized this similarity, in its analysis of the unlikelihood that Petitioner would have prevailed on the issue on appeal; notably, Petitioner does not reference Pope at all in his petition.

The PCR court properly found Reyes easily verified the informant's details once he saw the distinctive car in the precise location at the precise time described by the informant, and that

Reyes was reasonable in concluding the informant's prediction that Petitioner's car would contain heroin would likewise prove correct upon an investigatory stop. The precision of the informant's details gave Reyes a particularized and objective basis for suspecting illegal drugs would be found in Petitioner's car. See Alabama v. White, 496 U.S. 325, 331-32 (1990) (concluding that it is not unreasonable to conclude that police corroboration of significant aspects of an informant's statement indicated his accusation that White was engaged in illegal activity was reliable) (citing Illinois v. Gates, 462 U.S. 213 (1983).

Contrary to Petitioner's assertions, the officers conducting the investigatory stop of Petitioner's car had reasonable suspicion because they were able to confirm all other aspects of the specific details they received from the informant, and they reasonably concluded that the informant's allegation that they would find heroin in Petitioner's car was likewise credible. The PCR court properly found that the ability of officers to plainly corroborate all aspects of the informant's information helped to establish reasonable suspicion that Petitioner had heroin inside his car.

CONCLUSION

Petitioner has failed to demonstrate that trial counsel was deficient in failing to preserve his objection to the admission of the evidence seized from Petitioner's automobile after an investigatory stop because he has failed to show that Petitioner would have prevailed on the issue had it been preserved for appellate review. The PCR court properly found trial counsel was not constitutionally ineffective for failing to preserve the objection. This Court should deny the petition for a writ of certiorari.

Respectfully submitted,

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By: _____
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December 10, 2019

STATE OF SOUTH CAROLINA

In The Supreme Court

CERTIORARI TO GREENVILLE COUNTY
Court of Common Pleas
Honorable Letitia H. Verdin, Circuit Court Judge

Appellate Case No. 2018-001958

Karacus K. Freeman, 312428,.....Petitioner,

v.

State of South Carolina, ... Respondent.

CERTIFICATE OF SERVICE

I, Taylor Z. Smith, certify that I have today served the within **Return to Petition for Writ of Certiorari** upon Petitioner by depositing a copy of the same in the United States mail, postage prepaid, addressed to:

Robert M. Dudek, Esquire
SC Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, SC 29211-1589

I further certify that all parties required by Rule to be served have been served.
This 10th day of December, 2019.

TAYLOR Z. SMITH
SC Bar #103282

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ATTORNEY FOR RESPONDENT

ALAN WILSON
ATTORNEY GENERAL

December 10, 2019

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

Re: **Karacus K. Freeman, 312428 v. State of South Carolina**
Appellate Case No. 2018-001958
Lower Court Case 2017-CP-23-5952

Dear Mr. Shearouse:

Enclosed for filing please find an original and six (6) copies of the **Return to Petition for Writ of Certiorari** in the above-captioned case. If there are any questions or comments, please do not hesitate to contact me at any time.

Sincerely,

Taylor Z. Smith
Assistant Attorney General
SC Bar #103282

TZS/jacc
Enclosures

cc: Robert M. Dudek, Esquire
Victim Advocacy Division (without enclosure)