20-6716 ORIGINAL

No.

IN THE

SUPREME COURT OF THE UNITED STATES

Mack Calvin Martin — PETITIONER
(Your Name)

vs.

David Shinn — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Mack Calvin Martin #72274
(Your Name)

ASPC-Safford / Graham Unit
(Address)

896 S. Cook Rd. Safford, AZ 85546
(City, State, Zip Code)

N/A
(Phone Number)

QUESTION(S) PRESENTED

Petitioner alleged that his trial counsel was ineffective for failing to introduce, at his suppression hearing, a key piece of evidence (a bicycle light). Of whom Petitioner made him aware. The Petitioner was convicted, in large part. Upon the testomy of police officer. The omitted evidence would have prove That the bicycle light worked and that police officer had no reason to stop me. The stop by police was and illegal stop and search. The case thus present the following question.

Did the trial Court abuse its discrection when it found that Petitioner's Lawyer failure to introduce a key piece of evidence as legitimate Stratgy?

Also, in the context of a traffic stop. Did the trial court abuse its discrection when it denied Petitioner's motion to suppress the evidence seized pursuant to an patdown search?

LIST OF PARTIES

[✓] All parties appear in the caption of the case on the cover page.

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

RELATED CASES

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INDEX TO APPENDICES

TABLE OF AUTHORITIES CITED

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[X] For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

[ ] reported at ___; or,
[X] has been designated for publication but is not yet reported; or,
[X] is unpublished.

The opinion of the United States district court appears at Appendix A to the petition and is

[ ] reported at ___; or,
[X] has been designated for publication but is not yet reported; or,
[X] is unpublished.

[X] For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix B to the petition and is

[ ] reported at ___; or,
[X] has been designated for publication but is not yet reported; or,
[X] is unpublished.

The opinion of the Supreme Court of Ariz. court appears at Appendix B to the petition and is

[ ] reported at ___; or,
[X] has been designated for publication but is not yet reported; or,
[X] is unpublished.

JURISDICTION

[ ] For cases from **federal courts:**

The date on which the United States Court of Appeals decided my case was SEP. 15, 2020.

[X] No petition for rehearing was timely filed in my case.

[ ] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: ____________, and a copy of the order denying rehearing appears at Appendix ____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including ____________ (date) on ____________ (date) in Application No. __A____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

The original opinion of the Ninth Circuit of Appeals was entered September 15, 2020

[✓] For cases from **state courts**:

The date on which the highest state court decided my case was May 4, 2020.
A copy of that decision appears at Appendix B.

[X] A timely petition for rehearing was thereafter denied on the following date: May 4, 2020, and a copy of the order denying rehearing appears at Appendix B.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including ____________ (date) on ____________ (date) in Application No. __A____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

Memorandum and Order of the District Court

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The following statutory and constitutional provisions are involved in this case.

U.S. CONST., AMEND. IV

U.S. CONST., AMEND. V

U.S. CONST., AMEND. VI

U.S. CONST., AMEND. XIV
section 1.

28 U.S.C § 2254

(a) The Supreme Court, a Justice therof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that —

(A) the applicant has exhausted the remedies available in the courts of the State; or
(B)(i) there is an absence of available State corrective process; or
(ii) Circumstances exist that render such process ineffective protect the rights of the applicant.

(2) An application for a writ of habeas corpus may be denied on the merits notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

(C) An applicant shall not be deemed to have exhausted the remedies available in the court of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure the question presented.

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgement of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim -
(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumtion of correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that-
(A) the claim relies on-
(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and
(B) the fact underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(f) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination

(g) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

(h) Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel for an applicant who is or becomes financially unable to afford counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

(i) The ineffectiveness or incompetence of Counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254.

Petitioner was engaged in a crime or was a threat. (Record on Appeal at 41; Tr. 11-20-2015.)

Petitioner was convicted on all chargers and Appealed.

STATEMENT OF THE CASE

Petitioner appeals from his convictions and sentences after a bench trial. the state charged Petitioner with one count of possession of narcotic drugs, one count of possesson of drug paraphernalia, and one count of tampering with physical evidence Petitioner filed a motion to suppress all evidence seized in the case. An evidentiary hearing was held at which the following facts were adduced. According to Detectives Rosky and Snow were on routine patrol in an unmarked Tahoe. The patrol was known for "high crime" and was know for gang and drug activity. The detectives were driving southbound when they noticed a bicyclist headed northbound who they believed at first was riding his bike without a light. Believing this to be a traffic violation, they followed the bike, though Rosky admitted they had no intention of stopping him for the alleged infraction. Snow, who was driving, asked the bicyclist through the window if everything was all right, though petitioner did not appear to be sick or falling or otherwise in distress. According to Rosky, he thought is was unusual that the bicyclist was meandering as opposed to someone with a purpose or a particular destination in mind. The Petitioner did not respond verbally, though he looked in their direction, and then pedaled away from the car quickly. Rosky interpreted this as recognition of the unmarked car as a Police car and an attempt to flee. He explained that, in his experience, "people don't typically try to get away from police in a quick manner unless they're involved in some sort of criminal activity. They either are polite, acknowledge you, or they just simply don't respond, which is also fine, but they don't usually try to get away." The detectives turned their vehicle around to follow him and Rosky said through the window, "Stop". There was no testimony or evidence that the officers put on their lights or siren, or otherwise indicated they were police officers conducting a traffic stop. The Petitioner did not stop, so the officers pulled in front of petitioner to cut him off. Once Rosky exited their car, the bicyclist - later identified as Mr. Martin - was fully cooperative and compliant.

According to Rosky, though he believed a traffic infraction had been committed, the only reason they decided to stop Petitioner was because it was a dangerous neighborhood and they perceived not making eye contact, then pedaling away from an unmarked police car, to be suspicious. He did not articulate why, other than the time of day and the neighborhood, that pedaling away was suspicious, just generally testifying that he was "concerned for our safety" and it was suspicious "of anything" because he ignored them and kept pedaling. Indeed, Rosky testified that he never saw Petitioner commit and offense or engage in any criminal conduct after the alleged bike light infraction and, once Petitioner stopped, Petitioner did not try to fight, or pull a weapon, or present any kind of danger. He testified that after Snow pulled in front of Petitioner, at that point he was not free to leave. After the stop. Rosky conducted a pat down search of Petitioner, claiming he was concerned for his safety "and for weapons," and found paraphernalia.

Upon questioning from the court, Rosky explained that "fleeing" is an indication that there is likely to be a fight or the person has a hidden weapon. Rosky also admitted that, because their vehicle was unmarked, "[w]e're not necessarily obvious to people that we're the police until they're close enough that they look in our windshield, or maybe they recognize our vehicles or something like that."

At the close of testimony, Mr. Martin argued that even if the traffic stop was justified, it was a Fourth Amendment violation to conduct the patdown search, as the officers had not articulated that there was any reason to believe

REASONS FOR GRANTING THE PETITION

The trial court erred when it denied Petitioners motion to suppress because the detectives did not have reasonable suspicion that Petitioner was armed. Accordingly, the frisk violated the Fourth Amendment and the evidence seized therefrom should have been suppressed.

The Fourth Amendment protects the rights of people to be free from unreasonable search and seizures and this right is guaranteed to the States through the Fourteenth Amendment. U.S. Const. amend. IV; U.S. Const. amend. XIV. § 1. An encounter will not trigger Fourth Amendment Scrutiny unless it not consensual. State v. Serna, 235 Ariz. 270, 272, ¶ 8, 331 P.3d 405, 407 (2014) (citing Florida v. Bostick, 501 U.S. 429, 434 111 S. Ct. 2382, 115 L.Ed. 2d 389 (1991)).

A police officer is justified in frisking individuals for weapons if the officer can reasonably conclude that criminal activity may be afoot and that the person with whom he is dealing may be armed presently dangerous. Terry v. Ohio, 392 U.S. 1, 30, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). In the context of a traffic stop, the first Terry prong is met, and officers need not have additional cause to believe an individant is engaged in criminal activity Arizona v. Johnson, 555 U.S. 323, 327 129 S.Ct. 781, 784, 172 L.Ed.2d 694 (2009).

"To justify a patdown, ... however, just as in the case of a pedestrian reasonably suspected of criminal activity, the police must harbor reasonable suspicion that the person subjected to the frisk is armed and dangerous."

When an encounter between a police officer and an individual is not consensual, the officer may conduct a Terry frisk if the officer has a reasonable suspicion that the individual is armed. Gastelum v. Hegyi, 237 Ariz. 211, 214, ¶ 11, 348 P.3d 907, 910 (App. 2015) Because the holding in Serna, by its express language only applies to consensual encounter, and officer need not determine that the suspect is both armed and presently dangerous to justify a frisk in the context of a traffic stop. Id. at ¶ 10 (citing Serna, 235 Ariz. at 276, ¶ 28, 331 P.3d at 411).

In this case, it was undisputed that when Snow pulled his ~~[illegible]~~ unmarked police car in front of Petitioner bicycle, he was not free to leave. Tr. 11-20-2015, pp. 19-20).

The trial court erred when it concluded that the totality of circumstances justified the detectives's belief that Petitioner was armed. (ROA at 50) But that speculation is not supported by the record.

As Rosky conceded, a person could not

tell the unmarked Tahoe was a police car; (Tr. 11-20-2015, p.25) The fact that a person says through an open window, "Are you all right?" does not convey that the occupants are police officers. Nor does a one-word command to "stop". In fact, as Rosky testified, it was not only a comment from an open window, at the time of the encounter it was dark and the encounter occurred in a "high crime" neighborhood (Id., pp. 67, 25). The detective never announced that they were police officers, and they employed no lights, no sirens, nor any other method to indicate they were police officers attempting to engages in a lawful traffic stop. Accordingly, there was no "fleeing" or disobedience of a lawful command. As Rosky made clear, once Petitioner was aware it was a traffic stop, he was cooperative and compliant. (Id., pp. 7, 11, 20) The courts acceptance of Rosky's speculation that Petitioner disobeyed a police officer's command to stop was clearly erroneous and unsupported.

In it's ruling the trial court also found the frisk was justified because of the "limited visibility occasioned by the time of day", the languid manner in which Petitioner was riding his bicycle prior to the encounter, and the fact that it took place in a "high crime neighborhood" (ROA at 50) But none of those facts suggest, let alone support, a reasonable suspicion that Petitioner was armed. In fact, Rosky could only testify to other encounters with other individuals under unknown other circumstances to support his contention that Petitioner have had a weapon (Tr. 11-2015 p.23)

Officers must have a reasonable, articulable suspicion that the subject of a traffic stop is armed before that person may be frisked. Here as the trial court found, Rosky never articulated reason he believed Petitioner was armed, and the trial court noted that Petitioner behaviors, taken in isolation, were not uncommon. But even taken together, riding away from an unknown vehicle at night in a "high crime neighborhood" does not in any way communicate possession of a weapon. The resulting frisk of Petitioner violated the Fourth Amendment and trial court erred in denying Petitioner's motion to suppress evidence seized therefrom.

Certainly officer safety is an important consideration but where there is no articulable threat to officers, a patdown search is a violation of the Fourth Amendment. see Arizona v. Johnson, 555 U.S. 323, 331, 129 S.Ct. 781, 784, 785 172 L.Ed. 2d (2009) In order to justify a patdown search there must be more than a basis for an investigatory stop the police must also have a reasonable suspicion that the person subjected to the frisk is armed Id at 327, 129 S.Ct at 784.

Additional Facts

From the beginning of the case, Petitioner insisted that the light he was using was brighter than officer Rasky Claimed, and the light was sufficiently bright to comply with the law, Petitioner told that to his lawyer, Lloyed Tate [Id.] moreover, Petitioner explained to Mr. Tate that the light had been impounded by the police and that he wanted Mr. Tate to remove the light from impound and to present it at the evidentiary hearing in order to show that police did not have reason to stop him [Id]. Petitioner did not want to concede that police had cause to stop him due to a violation involving the bicycle light. [Id.] Instead, he wanted to testify at the suppression hearing and indicated his desire to do so to Mr. Tate [Id]. Petitioner wanted to explain to the Court that the officers were in an unmarked car and that he thought they were criminals who were going to do a drive-by shooting when they approached

Petitioner and yelled "there he is!"

B. Mr. Tate Was Ineffective for Failing to Present Key Evidence at the Evidentiary Hearing and Improperly Conceding an Issue.

Pursuant to Arizona Rule of Criminal Procedure 32.1(a) Petitioner's conviction "was in violation of the Constitution of the United States [and] the State of Arizona" because a defendant is entitled to the effective assistance of counsel by the Fifth, Sixth, and Fourteenth Amendments to the United State Constitution and Art. II §§ 4 and 24 of the Arizona Constitution. State v. Ysea, 191 Ariz. 372, 376, 956 P.2d 499, 503 (1998); State v. Nash, 143 Ariz. 392, 396 694 P.2d 222, 257 (1985); Strickland v. Washington, 466 U.S. 668, 687 (1984). To prove ineffective assistance of Counsel, a defendant must show that 1) his counsel's performance fell below an objective standard of reasonableness as defined by the prevailing professional norms, and 2) this deficient performance resulted in prejudice to his defense. Strickland, 466 U.S. at 687; State v. Salazar, 173 Ariz. 399, 414, 844 P.2d 566, 581 (1992). "A colorable claim of post-conviction relief is 'one that, if the allegations are true, might have changed the outcome.'" State v. Jackson, 209 Ariz. 13, ¶ 2, 97 P.3d 113, 114 (App. 2004) quoting State v. Runningeagle, 176 Ariz. 59, 63, 859 P.2d 169, 173 (1993)).

In addressing a claim of ineffective assistance of counsel, the Court must presume counsel's conduct falls within the wide range of reasonable professional assistance that might be considered sound trial strategy. Strickland, 466 U.S. at 689 (quoting Michel v. Louisiana, 350 U.S. 91, 101, 76 S.Ct. 158, 100 L.Ed. 83 (1955)) A defendant must show counsel's decisions were not tactical in nature, but were instead the result of "ineptitude, inexperience or lack of preparation" State v. Goswick 142 Ariz. 582, 586, 691 P.2d 673, 677 (1984). Thus, disagreements about trial strategy will not support an ineffective assistance claim, if "the challenged conduct has some reasoned basis," State v. Gerlaugh, 144 Ariz. 449, 455, 698 P.2d 694, 700 (1985), even if the tactics counsel adopt are unsuccessful. see. State v. Farni, 112 Ariz. 132, 133, 539 P.2d 889, 890 (1975).

Strategic decisions are "conscious reasonably informed decisions made by an attorney with an eye to benefitting his client." Pavel v. Hollins, 261 F.3d 210, 218 (2d Cir. 2001). The decision whether to call a particular witness is normally a strategic decision to be made by counsel State v. Mata 185 Ariz. 319, 335, 916 P.2d 1035, 1051 (1996) Strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation Sims v. Livesay, 970 F.2d 1575, 1580 (6th Cir. 1992). "In other words, counsel has a duty to make reasonable investigation or to make a reasonable decision that makes particular investigations unnecessary." Id.

Here, Mr. Tate initially raised two issue in his motion to suppress, yet he abandoned one of them completely for no reason. Petitioner told Mr. Tate the light was bright enough to be legally sufficient. Petitioner even told Mr. Tate that the light was in police impound and that Mr. Tate could get it any time. Indeed, Petitioner's wife was later able to not just obtain it, but verify that it worked and that it was bright even year later.

Mr. Tate should have at the very least obtained the light to investigate whether it was indeed sufficiently bright so that police should not have stopped Petitioner. There is simply no way that Mr. Tate's failure to obtain a key piece of evidence - even if he believed it might not benefit his client - could have been a strategic decision. Not presenting the light at the hearing might have been a reasonable strategy had it not worked as Petitioner claimed, but not even obtaining the light to see if that was the case is simply not effective lawyering. Given Petitioner's insistence that the stop was wrongful because the light was fine, not presenting the light was no conscious, reasonably informed decision capable of benefiting Petitioner. No reasonable professional judgment could have supported Mr. Tate limiting his investigation to not include a key piece of evidence that supports an argument he had already made.

On top of that, the fact Mr. Tate conceded the issue is even more problematic. Mr. Tate clearly thought the initial police contact due to the supposedly inadequate light was an issue, as he included it in his motion to suppress. Mr. Tate therefore should have conducted a reasonable investigation and obtained the light, as there is no conceivable way that he could have made a reasonable decision that that particular investigation was unnecessary. While Mr. Tate theoretically could have at some point determined that obtaining the light might have hurt his chance of success on the motion to suppress, by conceding that issue he made it so that Petitioner would have had nothing to lose by presenting it even if it was not helpful.

In reality, the light was brighter than police claimed. Petitioner can could have prove that, and could have proven it in 2015 had Mr. Tate obtained the light. Mr. Tate's performance clearly fell below an objective stand of reasonableness as defined by the prevailing professional norms when he did not obtain that key piece of evidence. Prejudice was obvious enough given that officer Rosky's testimony went essentially unchallenged, but it became indisputable when Mr. Tate conceded the issue. That could not fall even close to the wide range of reasonable professional assistance that might be considered sound trial strategy. Whether it was ineptitude, inexperience or lack of preparation specifically is unclear, but it was certainly not effective assistance.

For these reason a Writ of Certiorari should issue to review the judgment and opinion of the Ninth Circuit Court of Appeals. The trial court erred when it denied Petitioner's motion to suppress because the officer had no reasonable suspicion that Petitioner was armed, which was necessary to justify the patdown search and the conviction in this case was obtained in Violation of petitioner's rights as guaranteed by the Arizona and United States Constitutions; due to the fact Petitioner's Lawyer failed to introduce at suppresion hearing the bicycle light or Petitioner's testimony and than improperly conceded the issue he was deprived the right to effective assistance of Counsel.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Mark C. Martinez

Date: December 9th 2020