STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Florence County
Michael G. Nettles, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ONTANEY V. JACKSON,

APPELLANT

APPELLATE CASE NO. 2012-207548

ANDERS BRIEF OF APPELLANT

LANELLE CANTEY DURANT
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
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STATEMENT OF ISSUE ON APPEAL

Did the trial court err in denying Appellant's motion to suppress the drugs found on the ground because the state did not prove that the police had probable cause to stop Appellant pursuant to the Fourth Amendment?

STATEMENT OF THE CASE

On June 3, 2010, the Florence County Grand Jury indicted Ontaney Ventrell Jackson on the charges of possession with intent to distribute cocaine base (crack); possession with intent to distribute cocaine; possession of marijuana. On August 10, 2010, a trial was held in Jackson's absence before the Honorable Michael G. Nettles and a jury. Jackson was represented by Carrington Wingard, and the state was represented by Fitzlee McEachin. Judge Nettles sealed the sentence.

On January 31, 2012, Jackson appeared before the Honorable Michael Nettles for sentencing. Jackson was represented by Vick Meetze, and the state was represented by Matthew Ozment. Judge Nettles opened the sealed sentence and sentenced Jackson to fifteen years on the PWID cocaine base (crack) third offense; to a concurrent fifteen years on the PWID cocaine; and to a concurrent one year sentence on the possession of marijuana. Jackson's attorney filed a notice of appeal. This appeal follows.

ARGUMENT

The trial court erred in denying Appellant's motion to suppress the drugs found on the ground because the state did not prove that police had probable cause to stop Appellant pursuant to the Fourth Amendment.

On November 26, 2009, Deputy Jake Chamberlain was patrolling a high crime area in Florence County where complaints of drug activity had been received by the Sheriff's office. The Club Ponderosa was one of those places so Deputy Chamberlain was there. R. 41, ll. 18 – R. 43, ll. 16.

As the Deputy approached the Club around ten o'clock at night, he saw a man leaning against the wall near the back corner of the Club. Deputy Chamberlain testified in the pretrial hearing that as soon as the person recognized his car as a patrol car, the person ran. The deputy followed the person with his patrol car. When the person rounded the corner of the building, Deputy Chamberlain's testimony was that the person then reached into his jacket pocket and threw multiple clear plastic bags on the ground. R. 43, ll. 17 – R. 44, ll. 9.

Deputy Chamberlain then got out of his patrol car and detained the man by putting him on the ground. After the deputy read the *Miranda* rights, the man agreed to speak with the deputy. The man told the deputy that he could search him. Deputy Chamberlain found a small clear plastic bag with a substance that turned out to be cocaine in the man's front jacket pocket. The man's driver's license was also found. R. 44, ll. 10 - R. 45, ll. 25;R. 50, ll. 18 – 21; R. 145, ll. 3 – 21.

As the deputy was walking Jackson to the patrol car, the deputy asked him what was in the bags he threw on the ground. Jackson replied that the deputy could not charge him

with the bags on the ground because they were not found in his pocket. R. 60, ll. 1 – 24. After Jackson was placed in the patrol car, then Deputy Chamberlain collected the bags from the ground. He admitted that he did not know what was in the bags. R. 63, ll. 5 – R. 64, ll. 5.

On cross examination, the deputy admitted that he had a video in his car, but it was not running during this incident because he never activated his blue lights. He did not have blue lights on the top of his patrol car. There was a stripe running down the side of the car which he described as "semi-marked." R. 46, ll. 18 – R. 47, ll. 17.

The deputy said there were two lights outside: one on the east side of the parking lot and one on the west side. However, he had his headlights on. R.46, ll. 1 – 9; R. 50, ll. 22 – R. 51, ll. 5.

Defense counsel made a pretrial motion to suppress the drugs, and a hearing was held. R. 41, ll. 6 – 25. Following the motions hearing, counsel argued that the drugs should be suppressed because the deputy had no probable cause as Jackson was just standing in the parking lot of the club. The judge stated that Jackson was running which was articulable suspicion. Defense counsel argued that the deputy did not have his blue lights on, and the car was only semi-marked. R. 51, ll. 12 – R. 52, ll. 15.

The state cited the case of California v. Hodari D., 499 U.S. 621 (1991) arguing that there was no seizure because the officer did not touch Jackson so the drugs on the ground were not subject to Fourth Amendment analysis. In California v. Hodari, Id., the United States Supreme Court held that to constitute a seizure under the Fourth Amendment, there must be either the application of physical force, however slight, or submission to an officer's

"show of authority: to restrain the subject's liberty." The trial judge denied the motion to suppress the drugs. R. 52, ll. 16 – R. 56, ll. 2.

During the trial, the SLED chemist testified that one plastic bag contained 1.32 grams of cocaine base or crack; the second bag contained 2.07 grams of powder cocaine; and the third bag contained .45 grams of cocaine. R. 145, ll. 1 – 21.

When the drugs were introduced into evidence, defense counsel objected and asked the judge for a continuing objection. Counsel again argued that the drugs were not properly or constitutionally seized. R. 146, ll. 7 – 22.

The Fourth Amendment to the United States Constitution provides that the people have a right to be secure in their persons and homes against unreasonable searches and/or seizures, and no warrants shall issue, but with probable cause, supported by oath and affirmation, describing the place to be searched and the things to be seized.

Defense counsel relied on State v. Fowler, 322 S.C. 263. 471 S.E.2d 706 (Ct. App. 1996), here the Court of Appeals affirmed the trial judge who ruled that there was not reasonable suspicion for the police to stop the defendant. The Court said that even though the officer saw Fowler come from the front yard of a suspected drug house, and knew he had a previous conviction for a drug offense, the officers did not see the drug transaction and did not see him throw anything.

In State v. Culbreath, 300 S.C. 232, 387 S.E.2d 255 (1990), the Supreme Court held that the police may briefly detain and question a person upon reasonable suspicion, short of probable cause for arrest, that he is involved in criminal activity, and if the officer's suspicions are confirmed or further aroused, the stop may be prolonged and the scope enlarged as required by the circumstances.

In State v. Blassingame, 338 S.C. 240, 525 S.E.2d 535 (Ct. App. 1999), the Court of Appeals held that a police officer may stop and briefly detain and question a person for investigative purposes, without treading upon his Fourth Amendment rights, when the officer has a reasonable suspicion supported by articulable facts, short of probable cause for arrest, that the person is involved in criminal activity; reasonable suspicion requires a particularized and objective basis that would lead one to suspect another of criminal activity. Also see State v. Rogers, 368 S.C. 529, 629 S.E.2d 679 (Ct. App. 2006).

In State v. Burgess, 394 S.C. 407, 714 S.E.2d 017 (Ct. App. 2011), the Court of Appeals cited U.S. v. Foster, 634 F.3d 243, 248 (4th Cir. 2011), stating that the Court was mindful of concerns regarding the state "using whatever facts are present, no matter how innocent, as indicia of suspicious activity" and that the state "must do more than simply label a behavior as 'suspicious' to make it so." The Court continued to say that the state "must be able to either articulate why a particular behavior is suspicious or logically demonstrate, given the surrounding circumstances, that the behavior is likely to be indicative of some more sinister activity than may appear at first glance." Id.

In State v. Lesley, 326 S.C. 641, 486 S.E.2d 276 (1997) this court wrote:

> The term "reasonable suspicion" requires "a particularized and objective basis" that would lead one to suspect another of criminal activity. Untied States v. Cortez, 449 U.S. 411, 417, 101 S.Ct. 690, 695, 66 L.Ed.2d 621, 629 (1981).

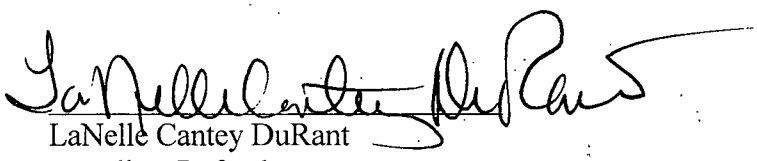
Reasonable suspicion is a lesser standard than probable cause and allows an officer to effectuate a stop when there is some objective manifestation of criminal activity involving the person stopped. State v. Padgett, 354 S.C. 268, 580 S.E.2d 159 (Ct. App. 2003). "Inarticulate hunches" do not support detentions. Delaware v. Prouse, 440 U.S. 648, 99 S.Ct. 99 S.Ct. 1391 (1979); Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868 (1968).

The trial court erred an admitting the drugs because the officer did not have reasonable suspicion or probable cause to stop Jackson. He had to have more than a hunch. The officer testified that when Jackson went around the corner of the building, he saw him throw the bags. There was not sufficient evidence that the bags the officer picked up were the ones that the officer allegedly saw Jackson throw. It was a public place. There was not sufficient evidence that Jackson ran because he thought this was a police car. The car was not well marked and did not have lights on top.

CONCLUSION

Based on the above, the convictions and sentences should be reversed, and the case remanded for a new trial.

Respectfully submitted,



LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR APPELLANT

This 31st day of May, 2013.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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THE STATE,

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ONTANEY V. JACKSON,

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APPELLATE CASE NO. 2012-207548

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Ontaney V. Jackson states:

1. She is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent appellant.

2. She has reviewed the record of appellant's trial before Judge Michael G. Nettles, which was held on January 31, 2012, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.

3. She has, pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967), briefed an arguable legal issue which arose during the course of the trial.

WHEREFORE, she asks the Court to relieve her as counsel for Ontaney V. Jackson.

Respectfully submitted,

LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR APPELLANT

This 31st day of May, 2013.

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ONTANEY V. JACKSON,

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APPELLATE CASE NO. 2012-207548

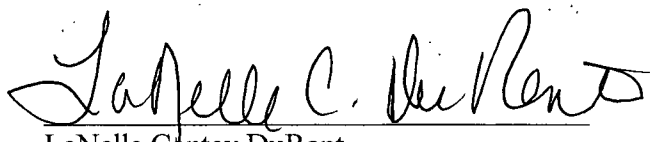
DESIGNATION OF MATTER TO BE INCLUDED IN RECORD ON APPEAL

Appellant proposes the following be included in the Record on Appeal:

(1) True–billed indictment(s);
(2) Trial Transcript August 10, 2010
(3) Sentencing transcript January 31, 2012
(4) State's Exhibit 2
(5) State's Exhibit 4
(6) Sentencing sheets

I certify that this designation contains no matter which is irrelevant to this appeal.

May 31st, 2013



LaNelle Cantey DuRant
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Attorney for Appellant

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Anders Brief of Appellant complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

May 31st, 2013

LaNelle C. Durant
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STATE OF SOUTH CAROLINA
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APPELLATE CASE NO. 2012-207548

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Anders Brief of Appellant and Designation of Matter in the above referenced case has been served upon Salley W. Elliott, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Anders Brief of Appellant and Designation of Matter and Record on Appeal have been served on Ontaney V. Jackson, #210570 at Broad River Correctional Institution, Columbia, SC 29210, on this 23rd day of May, 2013.

LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 31st day of May, 2013.

_____(L.S.)
Notary Public for South Carolina
My Commission Expires: October 2, 2013.