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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Lexington County

Honorable Walton J. McLeod, IV, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

MAXIE P. WAGNER,

APPELLANT

APPELLATE CASE NO. 2022-000658

INITIAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE

Appellant Maxie Paul Wagner was indicted by the Lexington County Grand Jury for possession with intent to distribute methamphetamine, and trafficking cocaine (28g—100g) on October 12, 2020. Tr. * (Indictments). His case proceeded to trial on May 9th, 11th, and 12th, 2020, before the Honorable Walton J. McCleod, IV, and a jury. Tr. 1. Appellant was represented by Robert Theodore Williams, Sr., and Anna Williams; Luke Pincelli and Jordan Cox represented the State. Tr. 1. The charges stemmed from the traffic stop and subsequent arrest of Appellant on February 10, 2020. Tr. 146, lines 3-21.

The jury found Appellant guilty of both possession with intent to distribute methamphetamine, and trafficking cocaine (28g—100g). Tr. 378, lines 14-25. The trial court imposed concurrent sentences of 12 years incarceration for each charge. Tr. 389, line 20—Tr. 390, line 2; Tr. * (Sentence Sheets).

STANDARD OF REVIEW

"[A]ppellate review of a motion to suppress based on the Fourth Amendment involves a two-step analysis." State v. Frazier, 437 S.C. 625, 633, 879, S.E.2d 762, 766 (2022). The trial court's factual findings are reviewed for any evidentiary support, while the ultimate legal conclusion is a question of law subject to *de novo* review. Id. 437 S.C. at 634, 879, S.E.2d at 766.

STATEMENT OF THE FACTS

On January 29, 2020, Lexington County Sheriff's Office Investigator John Gietz (Inv. Gietz) received a call on his cell phone from another investigator. The information he received was that the license plate on a vehicle frequently driven by Appellant Maxie Paul Wagner (Appellant) was allegedly suspended. Inv. Gietz did not verify the information at that time. Tr. 42, lines 5-24; Tr. 78, line 3—Tr. 79, line 2.

On February 10, 2020—twelve days later—Appellant was driving his Volkswagen Passat with his wife and child on Platt Springs Road in Lexington, South Carolina. At approximately 5:00 pm, a black, unmarked Chevrolet Silverado turned on its blue lights behind him. Appellant pulled over into a nearby gas station parking lot, and Inv. Gietz walked up to the passenger door window while wearing plain clothes and no body camera. The stated basis for stopping Appellant was that his license plate was suspended. Tr. 152, lines 15-20; Tr. 203, line23—Tr. 210, line 20. Approximately ten (10) minutes into the traffic stop, Inv. Gietz finally checked with dispatch to confirm the plate was still suspended. Tr. 65, lines 2-27.

Gietz had Appellant and the other occupants exit the vehicle based upon what he purportedly smelled coming from the vehicle, and saw within it. Tr. 153, line 19—Tr. 154, line 22; Tr. 162, lines 15—Tr. 163, line 5. When initially asked by Inv. Gietz, Appellant denied that there were any narcotics in the vehicle. However, with Appellant's wife and child still standing near the car, Inv. Gietz indicated he was going to search it. At that time, Appellant admitted to the presence of drugs and claimed they were his. Tr. 163, lines 10-24. A subsequent search of the vehicle yielded quantities of cocaine, methamphetamine, and other paraphernalia. Tr. 164, lines 1-15; Tr. 170, line 13—Tr. 171, line 4; Tr. 213, line 2—Tr. 218, line 18; Tr. 220, line 2—Tr. 222, line 15.

Appellant's case proceeded to trial, whereupon Appellant's trial counsel (Counsel) moved to suppress all items from the search as tainted fruits due to the initial traffic stop/seizure being unlawful. During the hearing on the matter, the State unabashedly admitted the traffic stop was pretextual. The State also conceded that Appellant made no other traffic violations, and the sole basis for the stop was for a suspended license plate. Further, Inv. Gietz's testimony revealed that the only time he received information indicating the license plate for the vehicle was suspended was indeed on January 29, 2020, from another investigator, and that he did not independently confirm the information until after he stopped Appellant on February 10, 2020, through dispatch. Tr. 101, line 9—Tr. 102, line 10.

Counsel argued that the State lacked probable cause that Appellant committed a traffic offense, and to the extent applicable that the investigator likewise lacked reasonable articulable suspicion. Specifically, Counsel asserted that the 12-day old information relied upon Inv. Gietz was stale, and that it is not unreasonable to believe that a citizen could have remedied the situation within that 12-day time period. Additionally, Counsel acknowledged that although most other officers may have been able to cure the deficiency by running the license plate through dispatch before stopping the vehicle, Inv. Gietz did not. As such, the stop made at the time was unconstitutional as it was unlawfully based upon stale information, and all evidence derived therefrom should be suppressed. Tr. 94, line 2—Tr. 99, line 12; Tr. 105, line 12—Tr. 106, line 15; Tr. 123, line 22—Tr. 124, line 14.

The State argued staleness did not apply to traffic stops, but that if it did then the information was still not stale under the facts. Tr. 99, line 16—Tr. 103, line 4; Tr. 121, line 18—Tr. 122, line 19. The trial court denied Appellant's motion, ruling the stop was based upon reasonable suspicion that Appellant was committing a traffic infraction at the time. Tr. 125, line

9—Tr. 127, line 17. Appellant was ultimately found guilty of the charged offenses and sentenced to two concurrent terms of 12 years. Tr. 378, lines 14-25; Tr. 389, line 20—Tr. 390, line 2; Tr. * (Sentence Sheets).

This appeal follows.

ARGUMENT

The trial court reversibly erred by failing to suppress evidence from the search of Appellant's vehicle where the basis of the traffic stop was for a suspended license plate, yet where the information regarding the license plate was provided to the narcotics investigator making the stop 12 days earlier, and where the investigator did not run the plate to verify if it was still suspended prior to the stop.

Appellant's rights against unreasonable search and seizure pursuant to both the Fourth Amendment of the United States Constitution and Article 1, section 10 of the South Carolina Constitution, were violated when a narcotics investigator engaged in a pretextual stop for a misdemeanor traffic offense based upon 12-day old information which he himself never verified until 10 minutes after initiating the stop of a suspended license plate. Due to the age of the information, and the fact that the misdemeanor was of a nature that could easily have been remedied in the 12-day intervening time period, the information upon which the pretextual stop was stale. Accordingly, the subsequent warrantless traffic stop was an unreasonable seizure, and all evidence gleaned therefrom should have been suppressed as tainted fruit from the poisonous tree.

"The Fourth Amendment to the Constitution of the United States grants citizens the right to be secure against unreasonable search and seizure." Ornelas v. United States, 517 U.S. 690, 698-99, 116 S.Ct. 1657, 1662-63 (1996) (citing U.S. Const. amend IV). Further, it is well settled that "stopping an automobile and detaining its occupants constitute a 'seizure' within the meaning of [the Fourth and Fourteenth] Amendments, even though the purpose of the stop is limited and the resulting detention quite brief." Deleware v. Prouse, 440 U.S. 648, 653, 99 S.Ct. 1391 (1979). "An automobile stop is thus subject to the constitutional imperative that it not be 'unreasonable' under the circumstances." Wren v. United States, 517 U.S. 806, 809-10, 116 S.Ct. 1769, 1772 (1996). Therefore, "as a general matter, the decision to stop an automobile is reasonable where the

police have probable cause to believe that a traffic violation has occurred." Id. 517 U.S. at 810, 116 S.Ct. at 1772.

Although an investigatory stop of a vehicle is permissible under the Fourth Amendment, it must at least be supported by reasonable suspicion. Ornelas, 517 U.S. at 693, 116 S.Ct. at 1660. "The principle components of a determination of reasonable suspicion or probable cause will be the events which occurred leading up to the stop or search, and then the decision whether these historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to reasonable suspicion or to probable cause." Id. 517 U.S. at 696, 116 S.Ct. at 1661-62. Because independent review is necessary for the courts to maintain control of and clarify these legal principles, "determinations of reasonable suspicion and probable cause should be reviewed *de novo* on appeal." Id. 517 U.S. at 698-99, 116 S.Ct. at 1662-63.

An officer's articulated factors "collectively must serve to eliminate a substantial portion of innocent travelers before the requirement of reasonable suspicion will be satisfied." United States v. Digiovanni, 650 F.3d 498, 511 (4th Cir. 2011) (internal quotation marks omitted). In the present case, Inv. Gietz's articulated factors to initiate the traffic stop on Appellant consisted solely of his telephone conversation with another officer 12-days beforehand. Specifically, Inv. Gietz was told by yet another investigator that Appellant's license plate—not his driver's license—was suspended. Thus, the traffic stop was made only on the basis of violating S.C. Code Ann. § 56-10-240 (West, Westlaw current through 2022 Act No. 268).[1]

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[1] Although not argued at trial, it is notable that the basis for Inv. Gietz's seizure of Appellant—S.C. Code § 56-10-240—was a misdemeanor. Under longstanding South Carolina law, "[w]hile generally an officer cannot arrest, without a warrant, for a misdemeanor not committed in his presence, an officer can arrest for a misdemeanor when the facts and circumstances observed by the officer give him probable cause to believe that a crime has been freshly committed." State v. Martin, 275 S.C. 141, 145-46, 268 S.E.2d 105, 107 (1980); see also Fradella v. Town of Mt. Pleasant, 325 S.C. 469, 475, 482 S.E.2d 53, 56 (Ct. App. 1997). Here, Inv. Gietz had no

Although South Carolina has relatively scant case law touching upon the matter of staleness of information used by police to initiate a traffic stop, other jurisdictions reaching the issue frequently examine the nature of the basis of the stop, as well as the recency of the officer's knowledge, to determine whether it was reasonable to conduct an investigatory stop under the reasonable suspicion standard.

For example, in State v. Spillner, 116 Hawai'i 351, 173 P.3d 498 (2007), the defendant was originally stopped and cited for driving with dark tinted windows; however, he was also found to be driving without a license or insurance. Id. 116 Hawai'i at 353-55, 173 P.3d at 500-02. The following week, the same officer saw the vehicle driving again and the tint was still not yet removed from the windows. Id. When the officer stopped the car this time, the defendant's girlfriend was driving; however, the officer again learned that the defendant had still not obtained insurance on the vehicle. Id. Finally, when the same officer saw the same car driving on the road the following third week, the window tint had been removed; however, now the officer could clearly see the defendant driving the vehicle, and the officer suspected the defendant was still driving without a license or insurance based on his personal knowledge from the prior two stops. Id. Faced with these facts, the Spillner court squarely addressed the question of whether the officer had reasonable suspicion to initiate the third stop, and succinctly stated: "In sum, articulated facts that indicate that an offense is ongoing in nature support reasonable suspicion that criminal activity continues to be afoot and, therefore, help justify a brief investigatory stop to confirm or dispel those suspicions." Id. 116

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confirmation whatsoever prior to stopping Appellant as to whether the license plate was indeed suspended. In fact, the only information regarding the legality of the tag facially apparent to someone observing the vehicle from behind would have been the registration sticker, which was apparently not out of conformity with the law in the present case. Tr. 89, line 8—Tr. 90, line 25.

Hawai'i at 360, 173 P.3d at 507. The Supreme Court of Hawai'i further guided its reasoning as follows:

> Under circumstances in which the freshness of the officer's information, when combined with the nature of the license revocation or suspension, has precluded—or all but precluded—a defendant from obtaining the required credentials, courts have concluded that the stop was supported by reasonable suspicion. . . .
>
> Conversely, where the information relied upon by the officer was so "stale" that, when considered in light of the length of the license suspension or the ease in obtaining the proper credentials, the logical link between the former illegal activity and any suspicion of current, ongoing criminal activity had dissolved with the passage of time, courts have concluded that investigatory stops were unreasonable. . . .
>
> Within these extremes lies a range where reasonable suspicion generally resides.

Id. 116 Hawai'i at 362-63, 173 P.3d at 509-10 (citations and parentheticals omitted) (finding reasonable suspicion existed to support a traffic stop based on combined knowledge where: (1) the officer's knowledge of defendant's lack of license was two weeks old; and (2) knowledge that the truck driven was without insurance was one week old, and unremedied between the first two stops).

Similarly, in State v. Decoteau, 2004 ND 139, 681 N.W.2d 803 (2004), the North Dakota Supreme Court addressed the issue of whether an officer's knowledge of the defendant's suspended license from the week prior amounted to reasonable suspicion in support of his subsequent investigatory stop. In Decoteau, the defendant was stopped by an officer for a suspended license. Id. 2004 ND 139, 681 N.W.2d at 804. When the same officer saw him driving again the following week, he stopped the defendant upon suspicion that his license was still suspended based upon his personal knowledge from the week before. Id. The North Dakota Supreme Court acknowledged that "[a]ppellate courts in other jurisdictions have consistently held that an officer's knowledge that a driver's license was suspended at some relatively recent time is sufficient to create

reasonable suspicion of unlawful activity and support an investigatory stop of the vehicle." Id. 681 N.W.2d at 806-07 (citations and parentheticals omitted). However, the Decoteau Court still recognized "that, at some point, the length of time which has passed may render knowledge of a prior suspension too stale to support a reasonable suspicion of unlawful activity." Id. 2004 ND 139, 681 N.W.2d at 807. (concluding the officer had reasonable suspicion to stop based on his knowledge from stopping the same defendant the previous week and citing him for a suspended license).

Thus, two common threads run through other case law on the issue of whether an officer's knowledge was too stale to support reasonable articulable suspicion for a traffic stop. Specifically, other courts look to (1) the nature of the offense—e.g., whether it was of an ongoing nature, or if it was immediately or quickly remedied—and (2) the relative recency of the officer's knowledge.

In the present case, the information used as the basis for the stop was stale, thus rendering the stop itself illegal. First, Inv. Gietz's knowledge of Appellant's suspended license plate was only tangential as it was relayed to him through another investigator. In other words, unlike either Spillner or Decoteau, Inv. Gietz did not previously encounter Appellant regarding the suspected misdemeanor traffic offense in question, and Inv. Gietz never once sought to verify the third-party information until 10 minutes after he made the traffic stop.

Moreover, the information relied upon by Inv. Gietz was of an evanescent nature. Suspension of a license plate pursuant to § 56-10-240 is based solely upon a failure of the vehicle owner to maintain insurance during the period for which the vehicle itself is licensed.[2] Also, the

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[2] Interestingly, when Counsel asked "[w]ould it stun you that [Appellant] had insurance at that time," Inv. Gietz responded, "I'm not sure what bearing that has. The tag was suspended. I didn't pull him over for no insurance. I pulled him over for the tag being suspended." Tr. 57, lines 10-14. Inv. Gietz later confirmed during trial that the license plate was not suspended due to the registration sticker on it being out of date either. Tr. 234, lines 2-7.

vehicle owner can quickly remedy a deficiency when notified. Specifically, subsection (A) of the code provides as follows:

> If, during the period for which it is licensed, a motor vehicle is or becomes an uninsured motor vehicle, *then the vehicle owner immediately shall obtain insurance on the vehicle* or within five days after the effective date of cancellation or expiration of his liability insurance policy surrender the motor vehicle license plate and registration certificate issued for the motor vehicle.

S.C. Code Ann. § 56-10-240(A) (West, Westlaw current through 2022 Act No. 268) (emphasis added). As such, the law provides an *immediate* remedy for a vehicle owner by obtaining and showing proof of insurance on it.

Additionally, subsection (B) of the code allows for the Department of Motor Vehicles (DMV) to reissue registration certificates and license plates after suspensions once "satisfactory evidence has been filed by the owner or the insurer who gave the cancellation . . . that the vehicle is insured." S.C. Code Ann. § 56-10-240(B) (West, Westlaw current through 2022 Act No. 268). In fact, the law even allows for a person who actually possessed insurance on the vehicle in question to immediately appeal the DMV's decision:

> A person who has had his driving privileges, vehicle license plate, and registration certificate suspended by the department, but who at the time of suspension possesses liability insurance coverage sufficient to meet the financial responsibility requirements as set forth in this chapter, has the right to appeal the suspension *immediately* to the Director of the Department of Insurance. If the Director of the Department of Insurance determines that the person has sufficient liability insurance coverage, *he shall notify the department and the suspension is voided immediately.*

S.C. Code Ann. § 56-10-240(B) (West, Westlaw current through 2022 Act No. 268) (emphasis added). Therefore, under the terms of § 56-10-240, Appellant—or any citizen with a vehicle registered in South Carolina—could remedy a license plate suspension in relatively short order.

Furthermore, the fact that a license plate suspension both easily cured and does not last for a definite period of time—as opposed to most driver's license suspensions—is critical to a staleness analysis. Often, once a driver's license is suspended—be it for too many points on the license, or for violation of other specific offenses such as failure to stop for a blue light or driving while intoxicated—it is suspended for a definite time period.[3] Also, in many instances a driver may also go through courses in order to lower the number of points on their license, or attend required classes in order to get it back—all of which necessarily take time to complete.[4] In other words, unlike the process for curing a suspended license plate, the time and procedures for restoring privileges to operate a vehicle after a driver's license is suspended or revoked are far more lengthy and involved, and understandably so—a person who lost their privilege to drive due to dangerous driving behavior will necessarily have to show they are indeed able and qualified to drive before being permitted to do so again, whereas the driver whose license plate is suspended under § 56-10-240 for merely failing to maintain proper insurance simply needs to show his proof of insurance to the proper authorities.

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[3] See, e.g. § 56-1-740 (West, Westlaw current through 2022 Act. No. 268) (listing definite periods of license suspension for accumulation of twelve or more points); see also S.C. Code § 56-5-750(B) and (D) (West, Westlaw current through 2022 Act. No. 268) (describing license suspension periods for failure to stop for a blue light); S.C. Code § 56-5-1620 (West, Westlaw current through 2022 Act. No. 268) (definite one-year license suspension for racing); S.C. Code § 56-5-2920 (West, Westlaw current through 2022 Act. No. 268) (definite three-month suspension for reckless driving, send offense); S.C. Code § 56-5-2951(I)(1) and (2) (West, Westlaw current through 2022 Act. No. 268) (definite license suspension periods for second or subsequent DUI violations); S.C. Code § 56-5-2990 (West, Westlaw current through 2022 Act. No. 268) (describing license suspension periods for alcohol or drug related driving offenses).

[4] See, e.g., § 56-1-770 (West, Westlaw current through 2022 Act. No. 268) (providing a four-point reduction on a license for drivers completing a defensive driving course); see also S.C. Code § 56-5-750(G) (describing and programs to possibly permit temporary restricted licenses for FSBL); S.C. Code § 56-5-2951(H)(1) through (3), and (I)(3) (providing for temporary limited license, and ignition interlock devices); S.C. Code § 56-5-2990 (providing for programs to reduce the duration of suspension).

As such, when an officer sees the same person he cited for driving under a revoked or suspended license the previous week once again operating a vehicle on the road, it is understandable for him to believe the driver did not likely have his license reinstated in such a truncated time frame. However, under the terms of § 56-10-240, Appellant—or any citizen with a vehicle registered in South Carolina—could remedy a license plate suspension in relatively short order. Accordingly, the nature of the offense of driving with a suspended license plate or registration is of a different nature than driving under a revoked or suspended driver's license. Simply stated, it is much more reasonable to expect that a person could and would cure the defect for a suspended license plate in a far shorter period of time than for a suspended or revoked driver's license.

Thus, Inv. Gietz's 12-day old, third-party information did not amount to reasonable suspicion in support of his pretextual stop of Appellant. Rather, due to the staleness of the information, it should properly have been categorized as "hunch." See State v. Butler, 343 S.C. 198, 202, 539 S.E.2d 414, 416 (Ct. App. 2000) (quoting Nebraska v. Soukharith, 253 Neb. 310, 570 N.W.2d 344, 354 (1997) ("Reasonable suspicion entails some minimal level of objective justification for detention, something more than an inchoate and unparticularized suspicion or 'hunch,' but less than the level of suspicion required for probable cause."). Therefore, the traffic stop of Appellant violated his constitutional rights against unreasonable seizure, and the fruits from the subsequent search should have been suppressed.

CONCLUSION

For the foregoing reasons, Appellant Maxie Paul Wagner respectfully request reversal of his convictions, and remand for a new trial.

Breen Richard Stevens
Appellate Defender

ATTORNEY FOR APPELLANT

This 24th day of January, 2023.