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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM YORK COUNTY
Court of General Sessions

Daniel Dewitt Hall, Circuit Court Judge

Appellate Case No. 2020-000184

The State of South Carolina Respondent

Vs.

Ramona Gales, Appellant,

APPELLANT'S PETITION FOR REHEARING

Thurmond Brooker, Esq.
P. O. Box 1450
Florence, SC 29503-1450
(843) 679-0056 – telephone
Attorney for Appellant

I. Reasonable Suspicion

The Appellant Court's February 1, 2023 dated opinion overlooked or failed to consider the fact that the police officer making the reasonable suspicion determination, Detective Todd, failed to articulate at the suppression hearing or at trial specific facts he relied in reaching his decision, which is fatal to a reasonable suspicion analysis, and overlooked or failed to consider the fact that the dominate information Detective Todd relied upon in making the *Terry* stop determination was a grossly negligent interpretation of the facts at best, or a flat out fabrication as worst.

To justify a Fourth Amendment *Terry* stop, "**the police offer [making the stop] must be able to point to specific and articulable facts** which, taken together with rational inferences from those facts, reasonably warrant that [investigative] intrusion." *U.S. v. Foster*, 634 F.3d 243, 246 (4th Cir. 2011). "**The court must require the [police] agent [making the decision to *Terry* detain a person] to articulate the facts leading to the conclusion."** *State v. Taylor*, 694 S.E.2d 60, 64, 388 S.C. 101 (SC App. 2010), *quoting*, *U.S. v. Sokolow*, 490 U.S. 1, 10, 109 S.Ct. 1581 (1989). This is mandatory. The reasonable suspicion analysis must consider all the factors known to the officer making the reasonable suspicion stop at the time the decision was made. *See*, *State v. Anderson*, 415 S.C. 441, 447, 783 S.E.2d 51, 54 (SC 2016).

Detective Todd, the officer making the reasonable suspicion determination to stop Gales never articulated the specific facts he reliable upon in reaching his decision. When asked on direct examination what information he relied upon, Detective Todd said he relied on information related to him by Detective Grimsley. (Record on App. p. 102).

When asked on direct examination by the prosecutor what information Detective Grimsley communicated to him, Detective Todd answered as follows:

> I don't recall exactly everything that was said, but I do remember they advised me what they observed in Charlotte, and what they observed down in South Carolina as far as what they believed to be a hand-to-had drug transaction. (Record on App., pp. 89-90)

When asked again on cross examination to recall the information he received from Detective Grimsley before making the decision to *Terry* detain Gales, Detective Todd stated that, "I can't tell you the basis of what exactly was said, it was too long ago." (Record on App. p. 101-102). Frankly, Detective Todd's sole reason for *Terry* detaining Gales was because he was told by Detective Grimsley that his surveillance team believed they saw Gales conduct two hand-to-hand drug transactions, one at a gas station in North Carolina and the other in the parking lot of the dental office where Gales was detained after she existed the dental office after her appointment. However, Detective Grimsley was not the officer who observed Gale's conduct at the gas station or the dental office parking lot. (Record on App. pp. 33-35). Grimsley testified at the suppression hearing that he never saw the alleged conduct comprising reasonable suspicion; and that he simply relayed to Detective Todd the information given him by Detective Buehler. (Record on App. pp. 50, 56-57).

Detective Buehler, testified at the suppression hearing he believe he was the sole member of the surveillance team that observed Gale's conduct at the gas station and the dental office parking lot. (Record on App., pp. 33-35). He testified that he never saw any hand-to-hand contact between Gales and the unknown individual at the gas station or the unknown individual at the dental office parking lot. (Record on App. pp. 29, 32-33, 37). Also, Detective Buehler said that he never saw any items being exchanged between Gales

and the unknown individuals at the gas station or the dental office parking lot. (Record on App. pp. 29, 32-33, 37). Yet, he communicated to Detective Grimsley he believed the encounters to be "hand-to-hand" drug transactions. (Record on App. pp. 36-37). He admitted during his testimony he failed to tell Detective Grimsley that he never saw any hand-to-hand contact, or any items being exchange at either location, between Gales and the unknown persons. (Record on App. p. 37). This makes no sense; this is does not comport with logical or reasonable. You can't simply label conduct as a hand-to-hand transaction to make it so when hand contact was not seen, and no item was seen being exchanged. *See*, *U.S. V. Foster*, 634 F.3d 243, 248 (4th Cir. 2011). Police must be able to specifically articulate facts it relied in reaching such a conclusion. Buehler's translation to Detective Grimsley what he observed was either a grossly negligent misrepresentation of what occurred or a flat out lie.

The unsubstantiated belief that Appellant was observed conducting two hand-to-hand drug transaction was void of, and contrary to, specific facts. That very belief relied upon by Detective Todd to *Terry* stopping Gales was based upon the negligent communication of false information at best, or an intentionally withholding of the truth at worst. Detective Buehler, the sole member of the surveillance team that observed the "so called" hand-to-hand transactions, testify at the suppression hearing he never observed hand-to-hand contact at the gas station or the parking lot of the dental office, nor did he ever saw anything exchanged between Gales and the persons she met at either location. (Record on App. pp. 29, 32-33-37). How can an objective person develop a reasonable believe a drug transaction occurred if no hand-to-hand exchange was observed, let alone anything illegal or anything resembling an illegal item being exchanged? The *Foster*

court taught us, you can't just deem conduct to be suspicious because you have a sinister predisposition. *See*, *U.S. v. Foster*, 634 F.3d 243, 248 (4th Cir. 2011) ("[A]n officer and the Government must do more than simply label a behavior 'suspicious' to make it so.)

In the Appellant Court's opinion, the court stated that "[C]ourt must give due weight to common sense judgments reached by officers in light of their experience and training." *Citing*, *State v. Taylor*, 401 S.C. 104, 113, 736 S.E.2d 663, 667 (2013). This is true; however, Detective Buehler's characterization of what he observed and what was eventually related to Detective Todd, defy commonsense and logic. The courts have a *de novo* oversight obligation and can't abdicate that tremendous responsibility to the judgement of police officers in the field. Police officers in the field are not the most objective judgers of reasonable suspicion under circumstances where they are predisposed to believe that the target of their investigation is engaged in criminal activity. They are a far cry from neutral and objective. Although the experience and judgement of police are relevant, "**a wealth of experience will [not] overcome [or is a substitute for] a complete absence of articulable facts**." *State v. Taylor*, 694 S.E.2d 60, 68, 388 S.C. 101 (S.C. App., 2010), *quoting*, *U.S. v. McCoy* 513 F.3d 405, 415 (4th Cir. 2008). "**The Government 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**." *U.S. v. Foster,* 634 F.3d at 248. The government and specifically Detective Todd, the officer making the reasonably suspicion decision, neither articulated why Gales' behavior was suspicious, nor demonstrate the suspiciousness of the behavior due to the surrounding circumstances at the suppression hearing or at trial. These failures

can't be overlooked or forgiven, less we weak the Fourth Amendment by overly relying on the judgement and objective fairness of a police officers in the field who are not neutral or detached evaluators.

The Appellant Court's opinion failed to recognize or failed to address the fact that Respondent's argument that reasonable suspicion was established in part by tips from two informants who alleged Gales was actively selling drugs did not, nor could it have, supported the reasonable suspicion decision made by Detected Todd. First, the information from the two informants was never relayed to Detective Todd; therefore, he could not have considered such information as a part of his reasonable suspicion determination. (See, Record on App. pp. 59-60). The reviewing courts are limited to all the information known to Detective Todd at the time he made the reasonable suspicion detention of Gales. *See*, *U.S. v. Branch*, 537 F.3d 328, 339-340 (4th Cir. 2008).

Furthermore, the tips could not have satisfied reasonable suspicion in isolation, because the information was too vague and general to corroborate and there was no testimony that the informant information was corroborated by police. *See*, *Florida v. J.L.*, 529 U.S. 266, 120 S.Ct. 1375 (2000); *Alabama v. White*, 496 U.S. 325, 110 S.Ct. 2412 (1990). Additionally, no testimony was given at the suppression hearing or at trial regarding when the informant information was given. *See, State v. Winborne*, 273 S.C. 62; 254 S.E.2d 297 (SC 1979) (The age of evidence must be known to determine whether it is fresh enough to satisfy probable cause).

Detective Buehler testified at the suppression hearing that he and Detective Grimsley had received general information from two confidential informants who alleged Gales was actively selling drugs in the Charlotte, North Carolina area. (Record on App. p.

13). This information could not have constituted reasonable suspicion in isolation or collectively because Detective Grimsley and Buehler testify that on the day of Gales' detention, the surveillance was for general observation purposes only, and that they had no actional intelligence that Gales would be involved in a drug transaction. (Record on App. pp. 25-26, 48-49). Furthermore, no testimony was given regarding the age of this information. Stale information can't satisfy reasonable suspicion to detain a person for brief investigation under the Fourth Amendment, no more than it can satisfy probable cause to search or seize under the Fourth Amendment.

II. Preservation of Objection for Appeal

The Appellate court's decision that the issue of where the trial judge inappropriately relied on information not in the record was not preserved for review because, "Gales did not object to the court's reasoning in its initial ruling on the admissibility of the drug evidence," is a misunderstanding of the law.

"If an evidential ruling is pretrial, a contemporaneous objection must be raised during trial when the evidence is admitted, whereas a party need not renew an objection if the decision is final." *State v. Jones*, 435 S.C. 138, 144, 866 S.E.2d 558, 561 (S.C. 2021) "[W]e believe a different approach is warranted where a court rules after a hearing on a constitutional issue. Under those circumstances, the ruling is final, and unless something changes during trial that may reasonably cause the trial judge to alter the pretrial ruling, no further objection is required to preserve the issue for appellate review." *Id.* at 144, 855 S.E.2d at 561. "[R]equiring attorneys to continue to object when a ruling is clearly final would not serve the purpose of our rules of preservation; rather, it would merely foster a game of 'gotcha,' where form elevated over substance." *Id*. at 145, 866 S.E.2d at 561.

"Preservation rules are intended to ensure that appellate courts review considered decisions of our trial courts and that issues are not being raised for the first time on appeal. (Citation omitted). Their purpose is not to sabotage attorney's efforts to bring issues before the appellate court, particularly where…it was clear to all concerned that…counsel continued to object to the denial of his motion to suppress." Id.

It is undisputable that Gales moved by pretrial motion to suppress the introduction of drug evidence take from her vehicle due to an investigatory detention that led to the search of her vehicle and the discovery of drugs. (Record on App., p. 2-3). It is undisputable that Gales motion to suppress drug evidence seized from her vehicle immediately following Detective Todd's investigatory stop and detention of her is a constitutional issue. It is undisputable that Gales contemporaneously objected at trial to the admission of the drug evidence seized from her vehicle following her investigatory stop and detention by Detective Todd. (Record on App, pp. 260-261).

Gales properly preserved the trial judge's denial of her motion to suppress the introduction of the drug evidence at her trial by make a pretrial motion to suppress, and by contemporaneously objection to the admissibility of the evidence at trial, although such objection was not required because the motion to suppress was a constitutional issue which was finally decided at the pretrial hearing. There is no legal requirement that Gales object to each specific reasoning cited by the trial judge in support of his decision to deny her motion to suppress the drug evidence to preserve the issue for appeal.

Respectfully submitted,

Florence, SC

February 12, 2023

__/s/ *Thurmond Broker*_____

Thurmond Brooker, Esq.
Brooker Law Firm
238 Warley Street
Florence, SC 29501
(843) 679-0056 – phone
brookerlawfirm@aol.com - email

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that he served **Appellant Petition for Rehearing** on the following individuals by email on this 15th day of February 2023:

Persons Served	Address Served At
Alan Wilson	agwilson@scag.gov
Joshua Abraham Edwards	jedwards@scag.gov
Kevin Scott Brackett	kevin.brackett@yorkcountygov.com

/s/ Thurmond Brooker

Thurmond Brooker, Esq.
P. O. Box 1450
Florence, SC 29503-1450
(843) 679-0056 – telephone
Attorney for Appellant