STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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JUL 15 2013
S.C. Supreme Court

Appeal From Spartanburg County
Roger L. Couch, Circuit Court Judge

THE STATE,

Respondent,

vs.

JAMES D. TINSLEY, JR.,

Petitioner.

RETURN TO PETITION FOR WRIT OF CERTIORARI

ALAN WILSON
Attorney General

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ATTORNEYS FOR RESPONDENT

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STATEMENT OF THE CASE

Appellant Tinsley was indicted by the Spartanburg County Grand Jury for knowingly receiving or possessing stolen goods valued at more than five thousand dollars. Tinsley represented himself *pro se* at trial which started November 8, 2011 and ended on November 10, 2011 with the jury finding Tinsley guilty as charged. The Honorable Roger L. Couch sentenced Tinsley to ten years imprisonment, suspended to three years imprisonment and five years probation, all to run consecutive to Oconee County convictions.

Tinsley appealed his conviction and sentence and was represented on appeal by Dayne C. Phillips, Esquire. The conviction and sentence were affirmed. 2012-UP-639. Tinsley's *pro se* petition for rehearing was denied on February 27, 2013. Tinsley then filed a *pro se* petition for writ of certiorari to this Court. This return follows.

STATEMENT OF FACTS

Appellant Tinsley hid a stolen trailer on his Father's and eighty-six year old grandmother's property. Tinsley's grandmother was worried she would get in trouble.

Paul Thomas, Service Manager for Holiday Camper, testified as the first witness before the jury. Two camper trailers were discovered missing on the morning of October 13, 2006. The gate was crushed open and the lock was cut. One of these trailers was a 2007 Fleetwood Nitrous toy hauler. It had a bumper poll, which was uncommon. Thomas had sold only about five such trailers in six years time. The trailer has a unique design. ROA. p. 83-86.

By the time a Holiday Camper truck driver picked the trailer up, all the decals were changed on the trailer. The trailer was not admitted into evidence at trial. Holiday Camper subsequently sold the recovered trailer. The VIN number on the bill of sale of this recovered trailer matched the VIN number that Holiday Camper reported to the Sheriff's Office when it went missing. ROA. pp. 88-92; pp. 103-104.

Tinsley's father, James D. Tinsley, Sr. (Father), testified. Father testified he lived on South Welcome Road in Greenville. Tinsley's eighty-six year old grandmother lives next door. Tinsley called Father on December 2, 2006 and asked if he could bring a trailer over to store on the property. Father never saw the trailer before -- it was a different one from the one Father last saw at Tinsley's residence. Tinsley brought the trailer over on December 2, 2006. The trailer had his stickers all over it and a sticker for Dirty South Motor Sports with his name and telephone number on it. ROA. pp. 108-113.

Thomas Lindler, who worked the third shift with Tinsley at the Ina Bearing, U.S.A. plant, testified Tinsley asked him if he knew how to hot-wire an RV. On a later occasion,

Tinsley asked Lindler if he would steal a dual purpose camper that Tinsley wanted to use when traveling for his go-cart racing. Tinsley would be able to haul his equipment and have somewhere to stay when he raced out of state. Lindler declined to steal a trailer for Tinsley. Then one night, Tinsley told Lindler that Tinsley was having two guys steal a trailer for him that night while he was working. That same night, Tinsley left work early. Lindler went over to Tinsley's house in Spartanburg the next morning following his shift and saw two men he had never seen before. ROA. pp. 130-133; p. 154 (Lindler telling Tinsley on cross-examination: "I don't know when exactly you received it because I was not there. All I know is when you told me you were receiving it . . .").

Sargent Danny Shields was looking for an enclosed trailer for his own use and a friend told him about one he had seen. So Sargent Shields, along with Deputy Tim Tucker went to look at the trailer that was located behind a commercial building. They were wearing clothing that clearly identified them as being with the Sheriff's Office. A man named "Bill" met them, but said he thought the trailer was already sold and said it belonged to James Tinsley. It was a dual purpose trailer designed for go-carts or motorcycles. It bore a sticker that read "James Tinsley Racing" on the side. Sargent Shields left his business card with Bill. Sargent Shields identified a photo of the trailer as being the trailer he saw behind the commercial building. ROA. pp. 172-176.

Shields and Tucker seemingly provided Detective White a break in the case. Shields and Tucker told him they saw a trailer matching the description of one of the stolen trailers about five days earlier. However, it was moved when Detective White checked the location. The trailer then showed up at Tinsley's grandmother's house. Tinsley's father called them and asked them to look at a trailer on the grandmother's property -- his

father thought it might be stolen. It matched all the descriptions given by Holiday Camper. Holiday Camper sent a representative who identified the camper and Detective White released the camper to them. The camper was worth in excess of $20,000. ROA. pp. 186-190. On cross-examination, Tinsley asked Investigator White if it was possible that Tinsley stole the trailer himself and Shields answered: "It is possible." Investigator White agreed with Tinsley's statement: "I mean the camper was at my grandmother's in Greenville". ROA. p. 198.

Detective Henry Beck assisted Detective White in the investigation and actually received the phone call from Tinsley's father about the possibly stolen camper on December 12, 2006. They went to the property on December 13, 2006. A Holiday Camper representative looked at the trailer, identified it as theirs, and towed it away. Tinsley's father said that Tinsley brought the trailer to the property on December 2, 2006. It so happens, Detective Beck already spoke with Tinsley on December 5, 2006. Detective Beck asked Tinsley if he knew anything about the campers at Bill Dotson's. Tinsley said he saw them there. But he did not tell Detective Beck that he traded or bought a trailer from Bill Dotson, which was one of Tinsley's defenses at trial along with the apparent defense that the State failed to prove that he did not steal the trailer himself rather than receive it. ROA. pp. 201-206. Tinsley's cross-examination yielded testimony from Detective Beck that he was investigating the theft of multiple campers, that altogether four campers were recovered, and also an RV was recovered in North Carolina. ROA. p. 207.

Tinsley recalled his father to the stand to help explain further about his father's call to the Sheriff's Office:

> Well, we had some conversation with a law enforcement officer in another jurisdiction and the question came up about the camper and it was that officer that told me that I should get in contact with Detective Beck and ask him. You and I talked about that and I told ya that I felt like we needed to find out for sure, you know, the provenance or whatever you wanna call it of that camper and you agreed with that and after I had the discussion with the other officer I told you what the officer had relayed to me that I should contact Detective Beck about it and you told me well go ahead and do whatever you need to do and that's how I came to call Detective Beck, that's how I knew that Detective Beck existed is because I learned it from another source.

2d ROA. p. 17, lines 2-14.

ARGUMENT

The bill of sale produced from resale of the stolen trailer and testimony concerning the VIN number on the bill of sale was properly admitted at trial, where the bill of sale was not seized by law enforcement but instead created by the victim after the trailer was recovered, where to the extent a search occurred to produce the VIN number on the bill of sale, it was the product of a private search; and further, if any evidence was the result of an improper search, then any taint was attenuated sufficiently so that the bill of sale was not the fruit of an illegal search.

Appellant Tinsley complains that the trial court erred in allowing the State to admit into evidence and publish the bill of sale for the trailer that was sold after it was recovered from Father's property. However, at most, the VIN number found on the bill of sale was the result of a private search, and further, it would not be considered fruit of the poisonous tree to the extent it could be considered the result of an illegal search because the taint would be attenuated.

Evidence secured by private searches, even if arbitrary, will not be excluded from a criminal trial. Coolidge v. New Hampshire, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971); Burdeau v. McDowell, 256 U.S. 465, 41 S.Ct. 574, 65 L.Ed 1048 (1921); State v. Cohen, 305 S.C. 432, 409 S.E.2d 383 (1991). "The Fourth amendment does not bar a search and seizure, even an arbitrary one, effected by a private party on his own initiative." State v. Brockman, 339 S.C. 57, 528 S.E.2d 661 (2000). It does, however, bar evidence arising from such intrusions if the private party acted as an instrument or agent of the government. Id.

In Cohen, this Court further stated the following:

> it may be said that pre-search contacts between a

> government official and private citizen, whether or not apparently intended by the government to prompt the citizen to render some type of assistance, are not deemed sufficient to make a search by the private citizen other than a 'private' search. Even where the government encouragement was rather strong and specific, yet short of an explicit request for a search, courts have been inclined to declare the search private nonetheless if there was in addition a legitimate private purpose behind the search. [citation omitted].

Id. at 385. Circumstances in the "totality of the circumstances" may include, but are not limited to: "the citizen's motivation for the search or seizure; the degree of governmental involvement, such as advice, encouragement, knowledge about the nature of the citizen's activities, and the legality of the conduct encouraged by the police." Id. In other words, more than the mere presence of a police officer or even subtle encouragement is necessary to constitute the government action. See Peters v. State, 302 S.C. 59, 393 S.E.2d 387 (1990) (sister-in-law first discovered LSD hidden in the defendant's home on her own while visiting; that the police later directed her to go back and retrieve some of it for them was not a government search). "The party challenging admission of evidence has the burden to show sufficient government involvement in the private citizen's conduct to warrant fourth amendment scrutiny." Cohen, 305 S.C. at 435, 409 S.E.2d at 385.

In the instant case, detectives responded to Father's request to go to Father's property and view the camper. Detective White attempted to find a VIN number on the outside of the trailer, but there was not one. Detective White testified he believed the trailer could have been seized at that point. However, they gained access to the trailer by having a locksmith remove the lock. Detective White determined it matched the description of the stolen camper and called a Holiday Camper representative. The representative looked at the trailer and determined it was the company's property. The

Sheriff's investigators allowed Holiday Camper to pull their own trailer away.[1] ROA. pp. 15-21; pp. 85-91; pp. 188-190; pp. 202-203.

Paul Thomas, the service manager for Holiday Camper testified that after the trailer was recovered, Holiday Camper subsequently sold the trailer, and a bill of sale was prepared. The bill of sale was put into evidence and had a VIN number. ROA. pp. 103-105.

Tinsley's arguments for suppression fail because the trailer was not put into evidence, and the bill of sale was prepared after the trailer was recovered by Holiday Camper and therefore was not subject of a search. "[T]he well-settled common-law rule is that a thief in possession of stolen goods has an ownership interest superior to the world at large, save one with a better claim to the property." United State v. Haqq, 278 F.3d 44, 50 (2d Cir. 2002).

To the extent Holiday Camper employees performed a "search" of their own property to determine the VIN number for the sale of their own property, this search was a private search outside the confines of a government search. The act of preparing a bill of sale for sale of the trailer was under Holiday Camper's initiative and not at law enforcement's behest. Accordingly, the search was a private search not protected by the Fourth Amendment. Cohen, supra.

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[1] Paul Thomas testified that the camper was recovered from Whitehorse Road (ROA. p. 88), but then admitted he did not go there himself. Based on testimony of the officers that the representative was allowed to take the trailer after coming to the scene and identifying it, and the absence of testimony that law enforcement towed the trailer themselves, it appears that testimony the trailer was recovered from Whitehorse Road is erroneous.

The trial court correctly found the seizure of the trailer was proper. Father contacted law enforcement to come to his property because of his own suspicions that the trailer left on his property was stolen. The record reflects Tinsley was a suspect in thefts of other trailers, and stickers bearing his name were on the trailer. Given the absence of a VIN number on the outside of the trailer and the fact that the trailer met the description of the stolen trailer, law enforcement had probable cause to seize the trailer.

Further, the search inside the trailer was proper also. State v. Moore, 377 S.C. 299, 659 S.E.2d 256 (Ct. App. 2008) (finding law enforcement had justification under the automobile exception to seize and search vehicle on Moore and his brother's property that matched the description of vehicle involved in a fatal hit and run accident, based on a combination of information). In the instant case, the same exigent circumstances that apply to a motor vehicle exist, because the trailer was readily mobile by virtue of being in a state where it would be easily towed away.

Further, even assuming the search inside the trailer and even the "seizure" of the trailer were illegal, the claim fails because publication of the bill of sale would not be considered fruit of the poisonous tree. The "fruit of the poisonous tree" doctrine holds that evidence produced by or directly derived from an illegal search is generally inadmissible against the defendant due to its original taint. Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963). However, in Wong, "the United States Supreme Court has declined to hold that all evidence is 'fruit of the poisonous tree' simply because it would not have come to light but for the illegal actions of the police." State v. Nelson, 336 S.C. 186, 519 S.E.2d 786 (1999).

"Even if the evidence is the product of an unconstitutional search, it is nonetheless

admissible if the causal connection between the evidence and the illegal conduct is attenuated." United States v. Gray, 491 F.3d 138, 154 (4th Cir. 2007) (citing Hudson v. Michigan, 547 U.S. 586, 126 S.Ct. 2159, 2164, 165 L.Ed.2d 56 (2006)).

"The question is thus whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." Wong Sun, 371 U.S. at 488.

In the instant case, the trailer was returned to the rightful owner and the rightful owner recorded the VIN number in the course of business. It is apparent from the record that this was done without any intention of law enforcement exploiting whatever illegality occurred from their previous search inside the trailer. Accordingly, the record does not support that the publication of the bill of sale may be considered fruit of the poisonous tree.

Accordingly, the conviction and sentence should be affirmed.

CONCLUSION

For all of the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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July 18, 2013

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Spartanburg County

The Honorable Roger L. Couch, Circuit Court Judge

THE STATE,

RESPONDENT,

v.

JAMES D. TINSLEY,

PETITIONER.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the **Return to Petition for Writ of Certiorari**, has been served upon opposing party by mailing two (2) copies in the United States mail, postage prepaid:

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This 15th day of July, 2013

Norma Bigbee
NORMA BIGBEE
LEGAL ASSISTANT