

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Greenville County
Honorable G. Edward Welmaker, Circuit Court Judge
Appellate Case No. 2012-212499

THE STATE,

Respondent,

v.

DONALD MARQUICE ANDERSON,

Appellant.

INITIAL BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Senior Assistant Deputy Attorney General

MARY S. WILLIAMS
Assistant Attorney General

Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

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SC Court of Appeals

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STATEMENT OF ISSUES ON APPEAL

I.

The trial court correctly found that police officers had reasonable suspicion to stop Appellant where Appellant was present in a high drug area, was using a shortcut known from experience to be used by drug traders in connection with 106 Dobbs Street, a warrant was being executed at 106 Dobbs Street, the occupants of 106 Dobbs Street were known to be armed and dangerous, and Appellant immediately veered in the other direction after seeing police officers wearing clearly marked police vests.

II.

Because the officers had reasonable suspicion to conduct a Terry stop of Appellant, the frisk for weapons was appropriate and no additional basis to search for weapons was required. During the lawful pat-down, Detective Hyatt recognized the feel of the baggie containing rocks of crack cocaine from his experience. Therefore, the seizure was constitutionally valid.

STATEMENT OF THE CASE

Appellant was indicted during the May 2012 term of the Greenville County Grand Jury for Possession of Cocaine Base with Intent to Distribute (2011-GS-23-9939). On July 10, 2012, a jury was selected for trial. Testimony was taken pre-trial for purposes of Appellant's motion to suppress and admissibility of a statement pursuant to Jackson v. Denno.¹ Following this testimony and argument, the Honorable G. Edward Welmaker denied Appellant's motion to suppress drug evidence and found Appellant's statement admissible. (Tr. p. 63, line 9 – p. 65, line 22.) Following pre-trial motions, Appellant waived his right to a jury trial, opting to have the case heard by the bench. (Tr. p. 65, line 24 – p.74, line 20.) Judge Welmaker found Appellant guilty. (Tr. p. 108.) Appellant was sentenced to five (5) years, provided that upon the service of 90 days, the balance is suspended with probation for forty (40) months.² Conditions on probation included gainful employment or public service, substance abuse counseling, random drug and alcohol testing, and intensive probation for the first six (6) months. (Tr. p. 122, lines7-24.) This appeal follows.

¹ 378 U.S. 368 (1964).

² Appellant was also on probation for a prior drug conviction. (Tr. p. 104, line 20 – p. 105, line 6.) Judge Welmaker found a willful violation of probation and extended the probationary sentence for two (2) additional years.

STATEMENT OF THE FACTS

On August 4, 2011, at approximately 7:45 pm, the Greenville Police SWAT team executed a search warrant at 106 Dobbs Street. (Tr. p. 24.) The warrant was based on observations over time of drug transactions involving the home and the surrounding area, particularly nearby Sullivan Street. (Tr. p. 23, line 23 – p. 27, line 2.) A footpath, or “cut,” led from 106 Dobbs to Sullivan Street, passing by another home at 113 Sullivan Street. Several experienced officers had observed that the cut was used by “runners,” individuals who would purchase narcotics at 106 Dobbs Street and deliver them to buyers along Sullivan Street. (Tr. p. 24, line 17 – p. 25, line 6; p. 33, line 16 – p. 34, line 1; 48, lines 9-15.) Police officers felt that the raid of 106 Dobbs was particularly dangerous; individuals associated with the residence had prior convictions for murder, resisting arrest, and other violent acts. (Tr. p. 26, line 21 – p. 27, line 2.) Because of this enhanced concern for safety, officers secured a no-knock warrant and employed a distraction device at the moment of breach. During the raid, as planned, a team entered the home. Meanwhile, officers were placed in various points around the perimeter. (Tr. p. 28, lines 4-15.) Due to their observations of the cut between 106 Dobbs Street and Sullivan Street, police officers were placed there for security. (Tr. p. 28, line 18 – p. 29, line 7.)

Detective Kevin Hyatt, an officer with nine (9) years’ experience, three and a half (3 ½) of them in narcotics, positioned himself in the bend of Dobbs Street “right next to the cut.” (Tr. p. 33, lines 3-15; p. 34, lines 10-13.) Other officers fell into position on Sullivan Street at the end of the cut. (Tr. p. 34, lines 24-25.) Hyatt was personally familiar with the use of the cut path in the local drug trade. (Tr. p. 33, line 18 – p. 34, line 1.) While the search warrant was being executed, Detective Hyatt observed Appellant

“half-way up to the cut between Dobbs and Sullivan.” (Tr. p. 34, lines 15-16.) Appellant appeared to see the officers at Sullivan Street then looked back toward the officers on Dobbs Street. (Tr. p. 34, line 23 – p. 35, line 6.) Appellant then “veered to the right in a quick manner to go towards 113 Sullivan” as if to avoid contact with police. (Tr. p. 35, lines 3-6; p. 38, lines 22-24; p. 39, lines 1-20.)

Due to the safety concerns surrounding the raid, Hyatt ran toward Appellant with weapon drawn. Appellant and a female companion complied with Hyatt’s instructions to lie on the ground. (Tr. p. 35, lines 8-12.) Hyatt was then joined by Sergeant Gary Rhinehart, an officer with ten (10) years’ experience, four (4) of them in narcotics. (Tr. p. 41, lines 14-15.) Rhinehart was also personally familiar with the community and particularly with the cut, having received and responded to many complaints of drug trade along the cut between Dobbs and Sullivan Streets. (Tr. p. 41, lines 21-25; p. 42, lines 10-18.) Officers placed Appellant in handcuffs and then had him return to his feet. Hyatt then conducted a pat-down search for weapons. (Tr. p. 35, lines 16-24.) As Hyatt passed his hand over Appellant’s right pocket, Hyatt felt “plastic crumbling, felt multiple hard objects, rock-like objects in the bag.” (Tr. p. 36, lines 2-4.) Based on his experience, Hyatt surmised that this was crack cocaine. (Tr. p. 36, lines 4-15.) Hyatt told Rhinehart that he believed Appellant had drugs in his pocket, and Appellant immediately said, “man, these are not my shorts.” (Tr. p. 36, lines 21-22; p. 43, lines 17-25.) The bag of beige rocks recovered from Appellant’s pocket field tested positive for crack cocaine. (Tr. p. 44, lines 2-5.)

Appellant moved to suppress the crack cocaine found in his pocket for two reasons:

(1) The drugs were not found as part of a Terry³ stop but pursuant to the warrant executed at 106 Dobbs Street and its curtilage, and Appellant was outside the bounds of the warrant;

(2) Even if it was a Terry stop, it was improper because:

- a. Lack of reasonable suspicion to stop Appellant.
- b. Lack of reasonable suspicion that Appellant was armed.

(Tr. p. 52, line 10 – p. 53, line 6.) Judge Welmaker found this to be a legitimate stop and frisk under Terry, and denied Appellant’s motion to suppress.

Later in the trial, Appellant and neighbor Brunyesha Anderson asserted that Appellant had only been hanging out at Appellant’s relative’s property at 113 Sullivan Street. (Tr. p. 97, line 16 – p. 99, line 17; p. 100, line 20 – p. 102, line 20.) Appellant conceded that there was crack cocaine in his pocket but stated that he only had three (3), not eight (8), rocks. (Tr. p. 105, line 7-p. 106, line 18.) Appellant denied any connection to the occupants of 106 Dobbs Street. (Tr. p. 102, line 18 – p. 103, line 11.) Appellant maintained that he saw police arrive and was initially relieved but became worried that if shots were fired a gasoline tank in the back yard of 113 Sullivan Street could ignite. (Tr. p. 102, lines 1-20.) Appellant assumed the noise was a gunshot, a sound he was not surprised to hear from the vicinity of 106 Dobbs, thinking “it was one of his people going crazy again.” (Tr. p. 101, lines 9-25.)

³ Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868 (1968)

STANDARD OF REVIEW

In Fourth Amendment search and seizure cases, the appellate court is limited to determining if there is *any* evidence to support the trial court's findings and can only reverse due to clear error. State v. Flowers, 360 S.C. 1, 5, 598 S.E.2d 725, 727 (Ct. App. 2004). “[A]n appellate court may conduct its own review of the record to determine whether the trial judge’s ruling is supported by the evidence.” State v. Khingratsaiphon, 352 S.C. 62, 70, 572 S.E.2d 456, 460 (2002). However, an appellate court will not reverse merely because it would have reached a different conclusion than the trial judge. State v. Rivera, 384 S.C. 356, 361, 682 S.E.2d 307, 310 (Ct. App. 2009).

ARGUMENT

I.

The trial court correctly found that police officers had reasonable suspicion to stop Appellant where Appellant was present in a high drug area, was using a shortcut known from experience to be used by drug traders in connection with 106 Dobbs Street, a warrant was being executed at 106 Dobbs Street, the occupants of 106 Dobbs Street were known to be armed and dangerous, and Appellant immediately veered in the other direction after seeing police officers wearing clearly marked police vests.

Appellant contends that the trial court should have suppressed the evidence found on him as a result of his stop and frisk because the officers did not have reasonable suspicion to justify stopping him. However, looking at the totality of circumstances, the investigatory stop was justified because the officers had reasonable suspicion that criminal activity was afoot. Thus, Appellant's conviction and sentence should be affirmed.

The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. This guarantee protects against unreasonable searches and seizures, including those involving only a brief detention. State v. Pichardo, 367 S.C. 84, 97, 623 S.E.2d 840, 847 (Ct. App. 2005). However, "[t]he purpose of the Fourth Amendment is not to eliminate all contact between the police and the citizenry, but 'to prevent arbitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals.'" United States v. Mendenhall, 446 U.S. 544, 553-554 (1980) (quoting United States v. Martinez-Fuerte, 428 U.S. 543, 554 (1976)).

In United States v. Weaver the Fourth Circuit advised the following:

The Supreme Court has recognized three distinct types of police-citizen interactions: (1) arrest, which must be supported by probable cause; (2) brief investigatory stops, which must be supported by reasonable articulable

suspicion; and (3) brief encounters between police and citizens, which require no objective justification.

282 F.3d 302, 309 (4th Cir. 2002). Thus, a police officer may stop and briefly detain a person if the officer has “reasonable suspicion supported by articulable facts, short of probable cause for arrest, that the person is involved in criminal activity.” State v. Blassingame, 338 S.C. 240, 248, 525 S.E.2d 535, 539 (Ct. App. 1999) (citing Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868 (1968)). Reasonable suspicion is something more than an “inchoate and unparticularized suspicion” or “hunch.” Terry, 392 U.S. at 27. Instead, reasonable suspicion is founded upon “the specific reasonable inferences” the law enforcement officer “is entitled to draw from the facts in light of his experience.” Id; State v. Burton, 349 S.C. 430, 562 S.E.2d 668, 672 (Ct. App. 2002) , rev 'd on other grounds, 356 S.C. 259, 589 S.E.2d 6 (2003).

When deciding whether reasonable suspicion exists, courts look at the totality of the circumstances. State v. Corley, 383 S.C. 232, 240, 679 S.E.2d 187, 191 (Ct. App. 2009); United States v. Sokolow, 490 U.S. 1, 8, 109 S. Ct. 1581 (1989) (courts must look at the “whole picture” when determining whether or not reasonable suspicion exists). Furthermore, “[f]actors which alone may be ‘susceptible of innocent explanation’ can ‘form a particularized and objective basis’ for a stop when taken together.” United States v. Glover, 662 F.3d 694, 698 (4th Cir. 2011) (quoting United States v. Arvizu, 534 U.S. 266, 277–78 (2002)).

Once an officer has detained an individual based on a reasonable articulable suspicion, the officer is permitted to use whatever steps are reasonably necessary to effectuate the detention, ensure officer safety, and maintain the status quo throughout the course of the detention. See United States v. Hensley, 469 U.S. 221, 235 (1985) (“When

the Covington officers stopped Hensley, they were authorized to take such steps as were reasonably necessary to protect their personal safety and to maintain the status quo during the course of the stop.”); see also Adams v. Williams, 407 U.S. 143, 145-146 (1972) (“The Fourth Amendment does not require a policeman who lacks the precise level of information necessary for probable cause to arrest to simply shrug his shoulders and allow a crime to occur or a criminal to escape. On the contrary, [Terry] recognizes that it may be the essence of good police work to adopt an intermediate response. A brief stop of a suspicious individual, in order to determine his identity or to maintain the status quo momentarily while obtaining more information, may be most reasonable in light of the facts known to the officer at the time.”) (citations omitted).

In this case, officers only needed reasonable suspicion that criminal activity was afoot to detain Appellant. Factors which may be considered in determining whether there is a reasonable suspicion of criminal activity include: presence in a high crime area, the lateness of the hour, nervous or evasive behavior, flight, the existence of a tip and the quality thereof, and the officer’s experience and intuition. State v. Taylor, 388 S.C. 101, 694 S.E.2d 60 (Ct. App. 2009), rev’d based on finding that reasonable suspicion existed, 401 S.C. 104, 736 S.E.2d 663, (2013). The combination of various factors, which alone would be insufficient, may amount to reasonable suspicion. Id.

In the present case, as the trial judge noted, officers articulated several facts which, taken together, provide a reasonable suspicion:

- (1) Appellant was present in a community well-known to the officers to be rife with drug traffic;

- (2) The particular footpath being traversed had, in the officers' own personal experience, been frequently used by "runners" traveling between 106 Dobbs Street and Sullivan Street in drug transactions;
- (3) Execution of a search warrant at nearby 106 Dobbs Street had just begun, a location known to officers after thorough investigation to be used in the sale of drugs;
- (4) Based on the criminal records of the occupants of 106 Dobbs Street, it was feared that the occupants were armed and dangerous and may attempt to evade police;
- (5) After noticing officers clad in gear with "Police" clearly visible, Appellant veered to avoid contact with police.

While each factor standing alone may not provide reasonable suspicion, when these factors are taken together, the trial court correctly concluded that reasonable suspicion for a Terry stop existed. (See Tr. p. 63, line 15 – p. 64, line 12; p. 108, lines 1-15.)

II.

Because the officers had reasonable suspicion to conduct a Terry stop of Appellant, the frisk for weapons was appropriate and no additional basis to search for weapons was required. During the lawful pat-down, Detective Hyatt recognized the feel of the baggie containing rocks of crack cocaine from his experience. Therefore, the seizure was constitutionally valid.

Appellant also argues that the trial court should have suppressed the evidence found on him because the officers did not have reasonable suspicion to justify conducting a pat-down for weapons. However, since reasonable suspicion existed to justify Hyatt's investigatory stop, the subsequent Terry frisk of Appellant was justified. See United States v. Boone, 2012 WL 874832 at *6 ("Once reasonable suspicion exists to justify an

investigative stop, an officer may conduct a limited pat-down for officer safety.”) During a pat-down search for weapons, an officer may seize an item where the incriminating character of the item is immediately apparent. Minnesota v. Dickerson, 508 U.S. 366, 113 S.Ct. 2130 (1993) (contraband excluded from evidence because the officer had manipulated the object after determining that no weapons were present); see also State v. Smith, 329 S.C. 550, 495 S.E.2d 798 (Ct. App. 1998) (evidence admitted that was found during a pat-down of individual because it was apparent to officer from touch and feel of bag and from experience that it contained narcotics). Here, Hyatt felt crumpling plastic and what felt like rocks. In Hyatt’s experience, this was likely crack cocaine. Hyatt’s suspicions were only buttressed by Appellant’s exclamation that the pants he was wearing were not his own. Because Hyatt immediately recognized the criminal character of the plastic bag during his pat-down search, seizure of the bag and drugs in Appellant’s pocket was not unconstitutional.

CONCLUSION

For all the foregoing reasons, the State submits that Appellant's conviction and sentence be affirmed.


Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Senior Assistant Deputy Attorney General

MARY S. WILLIAMS
Assistant Attorney General

BY: 
MARY S. WILLIAMS

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3752

ATTORNEYS FOR RESPONDENT

July 23, 2013

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IN THE COURT OF APPEALS

Appeal from Greenville County
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Appellant.

**DESIGNATION OF MATTER
TO BE INCLUDED IN THE RECORD ON APPEAL**

Respondent joins Appellant's request for inclusion of the trial transcript (pages 1-3 and 21-122) and the true-billed indictment and has no further matters to add to the Record on Appeal.

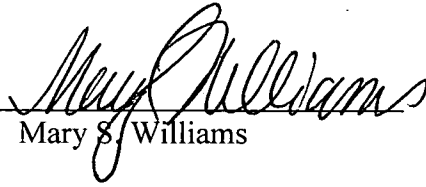
To facilitate the preparation of the Final Brief, Respondent requests that counsel for Appellant retain the page numbers of the trial transcript in the Record on Appeal, in addition to the new page numbers.

The undersigned hereby certifies this Designation contains no matter which is irrelevant to this appeal.

ALAN WILSON
Attorney General

MARY S. WILLIAMS
Assistant Deputy Attorney General

BY:


Mary S. Williams

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3752

ATTORNEYS FOR RESPONDENT

July 23, 2013

STATE OF SOUTH CAROLINA
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Appeal From Greenville County
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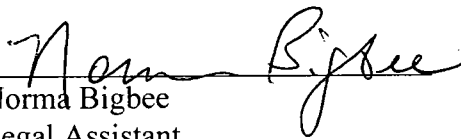
PROOF OF SERVICE

I, Norma Bigbee, certify that I have served the within **Initial Brief of Respondent and Designation of Matter** on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

**Carmen Ganjehsani, Esquire
South Carolina Commission on Indigent Defense
Division of Appellate Defense
P.O. Box 11589
Columbia, SC 29211**

I further certify that all parties required by Rule to be served have been served.

This 23RD day of July, 2013.


Norma Bigbee
Legal Assistant

Office of Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727



ALAN WILSON
ATTORNEY GENERAL

July 23, 2013

VIA HAND DELIVERY

The Honorable Jenny A. Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, SC 29211

Re: **State of South Carolina v. Donald Marquice Anderson**
Appellate Case No: 2012-212499

Dear Ms. Kitchings:

Enclosed please find the original of the **Initial Brief of Respondent and Designation of Matter** in the above matter for filing in your office. By copy of this letter we are serving opposing counsel with this brief today.

Sincerely,

Mary S. Williams
Assistant Attorney General
Bar No:

MSW/nb
Enclosures

cc: Carmen Ganjehsani, Esquire (2 copies enclosed)
Trisha Allen, Victim Services (1 copy enclosed)

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