ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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SC Court of Appeals

Appeal from Spartanburg County

Roger L. Couch, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

KENNETH ODELL JACKSON,

APPELLANT

APPELLATE CASE NO. 2012-212700

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Did the evidence at the suppression hearing support the trial court's finding that reasonable suspicion existed to detain the driver for a drug sniff beyond the initial traffic stop where the driver exhibited no concealing behavior and where the officer's only specific and arousing observations were that the car was registered to a third party, two air fresheners were in the car, and the driver had left from an area of suspected drug activity?

STATEMENT OF THE CASE

The Spartanburg County grand jury indicted Appellant on one count of possession with intent to distribute cocaine, one count of possession with intent to methamphetamine, one count of possession with intent to distribute hydrocodone, and one count of possession with intent to distribute clonazepam. Tr. July 23, p. 9, l. 12 – Tr. July 23, p. 11, l. 17; R. *. On July 23, 2012, Appellant proceeded to trial before a jury and the Honorable Roger L. Couch. Ricky Keith Harris represented Appellant and Scott Spivey represented the State. Tr. July 23, p. 1.

In the course of the trial, the State dropped the charges for hydrocodone and clonazepam. Tr. July 24, p. 211, ll. 3-25. At the conclusion of the trial on July 25, 2012, the jury found Appellant guilty on the count of possession with intent to distribute methamphetamine. The jury found Appellant not guilty on the count of possession with intent to distribute cocaine but guilty on the lesser included offense of simple possession. Tr. July 24, p. 854, ll. 3-16. For the methamphetamine charge, Judge Couch sentenced Appellant to ten years imprisonment suspended to service of four years with three years of probation. For the cocaine charge, the Judge sentenced Appellant to three years concurrent. Tr. July 24, p. 350, ll. 12-17.

This appeal follows.

ARGUMENT

THE EVIDENCE DID NOT SUPPORT THE TRIAL COURT'S FINDING THAT REASONABLE SUSPICION EXISTED TO DETAIN THE DRIVER FOR A DRUG SNIFF BEYOND THE INITIAL TRAFFIC STOP BECAUSE THE DRIVER EXHIBITED NO CONCEALING BEHAVIOR AND BECAUSE REASONABLE SUSPICION OF SERIOUS CRIME DID NOT EXIST MERELY BECAUSE THE DRIVER DROVE ANOTHER'S VEHICLE HAVING TWO AIR FRESHENERS AWAY FROM AN AREA OF SUSPECTED DRUG ACTIVITY.

STATEMENT OF FACTS

On the evening of November 9, 2011, shortly before 8:30 p.m., Officer Daniel with the Spartanburg County Sheriff's Office received communication from Investigators Roger Luther and Dan Swad, who had been surveilling a gray Dodge Magnum at a local gas station. The investigators asked Officer Daniel to follow the car on the highway and try to find grounds to stop it. Tr. July 23, p. 55, l. 10 – Tr. July 23, p. 56, l. 17; Tr. July 23, p. 61, ll. 7-8; Tr. July 23, pp. 64, ll. 8-12. Outside of the investigators' request, Officer Daniel had no reason to be suspicious of the car:

> Q: They just said find some reason to stop this car, correct?
>
> A: That's what they asked, yes sir.
>
> Q: And did you yourself know why they wanted you to find some reason to stop the car?
>
> A: No, sir.
>
> Q: You just know that they wanted the car to get stopped and they didn't have a reason to do it themselves, correct?
>
> A: Correct.

Tr. July 23, p. 64, l. 22 – Tr. July 23, p. 65, l. 5.

> Q: But just to be clear, investigators Luther and Swad never relayed to you any information about any alleged criminal activity afoot involving the vehicle of [Appellant], did they?

A: I don't recall.

Tr. July 23, p. 68, l. 24 – Tr. July 23, p. 69, l. 3.

After acquiring and trailing the car, Officer Daniel said it "swerved to the left and failed to maintain its lane like the driver may have been reaching over to the right and leaning over." Tr. July 23, p. 56, ll. 21-23. He closed to within about 35 feet, turned his headlights off, and saw that the tag light was too dim to illuminate the license plate. Tr. July 23, p. 58, ll. 1-18. Officer Daniel stopped the car. He approached Appellant and asked for registration and identification; Appellant handed him a valid provisional license and the registration for the car in the name of another person. Around the same time he noticed two air fresheners hanging from the rearview mirror. Officer Daniel then instructed Appellant to walk with him towards the patrol car. Aware that the area in which Appellant was being surveilled earlier was linked to drug activity, Officer Daniel asked Appellant if he had any narcotics in the car. Appellant allegedly "broke eye contact." Tr. July 23, p. 60, l. 19 – Tr. July 23, 63, l. 12; Tr. July 23, p. 70, ll. 1-23; Tr. July 23, p. 84, l. 23 – Tr. July 23, p. 85, l. 7.

Officer Daniel decided to detain Appellant for investigation beyond the tag-light violation and radioed for a canine to sniff the car. Tr. July 23, p. 139, ll. 18-23. A fourth officer eventually arrived with a canine, which alerted around the center console. Tr. July 23, p. 103, ll. 10-21. The officers found quantities of cocaine, methamphetamine, and a number of pills and tablets. Tr. July 24, p. 43, ll. 1-13.

Prior to the jury hearing, Appellant moved to suppress evidence arising from the search of Appellant's car on grounds that the officers' detention and investigation beyond issuing a tag-light citation violated the Fourth Amendment. Tr. July 23, p. 34, l. 14 – Tr. July 23, p. 35, ll. 7.

In the suppression hearing, Officer Daniel testified Appellant's provisional license was "suspicious" because the time was 8:30 p.m. and a provisional license is "normally used just to drive back and forth from work, to church, doctor's office, and stuff like that." Tr. July 23, p. 61, ll. 9-21. He reviewed the circumstances that led him to call in the canine:

> [T]he reason why I requested the drug dog is from the time I was asked to help the area he was coming from, the fact that he swerved over, I thought maybe he was hiding something, he had air fresheners hanging from his rear-view mirror when I question[ed] him, my knowledge of the area and drug activity, when I questioned him about drugs his reactions raised my suspicion.

Tr. July 24, p. 72, ll. 18-24.

Investigator Swad also testified, stating that when he caught up to the stop and parked behind Deputy Daniel, Appellant appeared "very nervous": "just non – I guess – confrontational with the – when he asked a question, he looked away and stuff like that." Tr. July 23, p. 85, l. 21 – Tr. July 23, p. 86, l. 3. He also testified that the he heard a report that another officer recently made undercover buys from him in the same make and model vehicle. Tr. July 23, p. 86, ll. 10-15.

Upon taking the stand a second time, Officer Daniel expressly conceded that he detained Appellant for a further investigation beyond the initial tag-light violation, and he kept Appellant detained until the canine could arrive at the scene and perform a sniff. Tr. July 23, p. 139, l. 18 – Tr. July 23, p. 140, l. 8.

After taking the evidence and arguments under consideration, the court found that reasonable suspicion existed to continue the detention. The court referenced the testimony that Appellant swerved the car while appearing to hide something; that Appellant was "overly, overly nervous"; that multiple air fresheners were in the car; that the car was

registered to another person; that the car matched the description of another used in controlled drug buy; and that the car came from what officers considered a high crime area. Tr. July 24, p. 9, l. 5 – Tr. July 24, p. 10, l. 21.

During the jury hearing, Appellant again objected to the admission of evidence arising from the continued stop. Tr. July 24, p. 70, l. 14 – Tr. July 24, p. 71, l. 19.

DISCUSSION

The evidence did not support the trial court's finding that a reasonable suspicion existed to detain Appellant for a drug sniff because he exhibited no concealing behavior and because the officer's only specific and arousing observations were that Appellant drove another person's vehicle with two air fresheners away from an area of suspected drug activity. "The purpose of the Fourth Amendment is . . . '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, 553–54 (1980) (quoting *United States v. Martinez–Fuerte*, 428 U.S. 543, 554 (1976)). The Fourth Amendment guarantees "[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. "[T]he underlying command of the Fourth Amendment is always that searches and seizures be reasonable." *Wilson v. Arkansas,* 514 U.S. 927, 931 (1995). The Fourth Amendment is applicable to the States through the Due Process Clause of the Fourteenth Amendment. *Mapp v. Ohio,* 367 U.S. 643 (1961).

Traffic stops are reviewed under the standard set forth in *Terry v. Ohio*, 392 U.S. 1 (1968), because a traffic stop is more analogous to an investigative detention than a custodial arrest. *See United States v. Rusher,* 966 F.2d 868, 875 (4th Cir. 1992).

Consequently, *Terry* outlines a two-prong test for analyzing the constitutionality of a traffic stop: (1) whether the police officer's action was justified at the inception of the traffic stop; and (2) whether the police officer's subsequent actions were reasonably related in scope and duration to the circumstances that justified the stop. *Rusher,* 966 F.2d at 875.

"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." *State v. Butler*, 343 S.C. 198, 201, 539 S.E.2d 414, 416 (Ct. App. 2000) (citations omitted). "An investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop and the scope of the detention must be carefully tailored to its underlying justification." *State v. Pichardo*, 367 S.C. 84, 99, 623 S.E.2d 840, 847-48 (Ct. App. 2005) (citing *Florida v. Royer,* 460 U.S. 491 (1983)).

Once the initial purpose of a stop has been fulfilled, further detention is beyond the scope of the stop and therefore illegal unless the officer has reasonable suspicion that a serious crime is afoot. *State v. Tindall*, 388 S.C. 518, 521, 698 S.E.2d 203, 205 (citing *U.S. v. Sullivan*, 138 F.3d 131 (4th Cir. 1998)). "'Reasonable suspicion' requires a 'particularized and objective basis that would lead one to suspect another of criminal activity.'" *State v. Khingratsaiphon*, 352 S.C. 62, 69, 572 S.E.2d 456, 459 (2002) (quoting *United States v. Cortez*, 449 U.S. 411, 418 (1981)). In determining whether reasonable suspicion exists, the court must consider the totality of the circumstances. *State v. Rogers*, 368 S.C. 529, 534, 629 S.E.2d 679, 682 (Ct. App. 2006).

Nervousness alone is not a reasonable basis for suspicion of criminal activity. *State v. Provet*, 391 S.C. 494, 502, 706 S.E.2d 513, 517 (Ct. App. 2011) (discussing *State*

v. Rivéra, 384 S.C. 356, 682 S.E.2d 307 (Ct. App. 2009); *see also Delaware v. Prouse*, 440 U.S. 648, 657 (1979) (recognizing that "law enforcement officers signaling a moving automobile to pull over [entails] a possibly unsettling show of authority" that "may create substantial anxiety"). Additionally, "[j]ust as an officer's knowledge of a suspect's past arrests or convictions is inadequate to furnish reasonable suspicion; so too is knowledge that a suspect is merely under investigation, which is an even more tentative, potentially innocuous step towards determining criminal activity." *U.S. v. Foster,* 634 F.3d 243, 247 (4th Cir. 2011).

In *State v. Provet*, 391 S.C. at 504-505, 706 S.E.2d at 518-519, this Court held that reasonable suspicion of a serious crime existed when the driver's behavior was deceptive and nervous and when the officer observed several specific indicators that the driver could have been illegally transporting drugs over a long haul in the vehicle. The driver said that he was visiting girlfriend while driving another girlfriend's vehicle; that he had just left a Holiday Inn even though the officer observed the traffic violation prior to the hotel's exit on the interstate; that he was staying in Greenville for two days but had no luggage; and the driver also had extremely shaky hands and accelerated breathing. *Id.* The indicators of criminal activity included the third-party registration of the vehicle; "numerous" fast food bags in the vehicle; and the presence of "several" air fresheners in the vehicle that "produced a strong odor." *Id*

In contrast, in *State v. Tindall*, 388 S.C. 518, 523, 698 S.E. 2d 203, 206 (2010), the South Carolina Supreme Court held that reasonable suspicion of a serious crime did not exist when the driver did not exhibit concealing behavior although he was slightly nervous and the officer observed a few specific signs of potential illicit activity. The driver was

going to Durham, a known drug hub; the vehicle was rented the previous day to another person and was due in Atlanta on the day of the stop; the driver did a felony stretch upon exiting the vehicle; and the driver seemed nervous. *Id.* The driver was also initially stopped for speeding, following too closely, and failing to maintain a lane, but the Court did not discuss the violations in its analysis of reasonable suspicion. *Id.* at 522, 698 S.E.2d at 205. *See also State v. Rivera*, 384 S.C. at 363, 682 S.E.2d at 311 (affirming no reasonable suspicion because "Respondents' nervousness, standing alone, did not create a suspicion of criminal behavior [and] the 'stories' the respondents told [w]ere not so inconsistent as to indicate criminal activity . . . .").

In this case, the record does not support the trial court's finding of reasonable suspicion first and foremost because the court's inferences were not supported by the evidence. In its ruling, the court stated there was testimony that Appellant appeared to reach and hide something when he swerved. However, no grounds existed for the court to infer that Appellant was aware a patrol car was behind him or that he had a reason in general to reach and hide something. Further, the Court found that Appellant was "overly, overly nervous." However, Officer Daniel was the investigating officer and his testimony was merely that Appellant "broke eye contact" when the subject of drugs arose. Investigator Swad did testify that Appellant was very nervous, but the allegation was flimsy: he was observing from inside a vehicle parked behind Deputy Daniel's vehicle, and his description of the specifics of the nervousness was merely that Appellant was "just non – I guess – confrontational with the – when he asked a question, he looked away and stuff like that." Finally, the trial court found reasonable suspicion was support by the ongoing investigation of Appellant, which disclosed that he was previously involved in a deal using a

vehicle with a matching description. However, no testimony in the record supports the conclusion that Officer Daniel was aware of the investigation or prior drug deal in a matching vehicle. The testimony shows Investigators Swad and Luther knew of these facts, but they never relayed that information to Officer Daniel. Officer Daniel specifically stated he detained Appellant and called in the canine based on Appellant's swerve, the two air fresheners, his knowledge of the area's drug activity, and Appellant's reactions to questioning.[1]

Second, the record does not support the existence of a reasonable suspicion because like in *Tindall* and unlike in *Provet*, Appellant exhibited no concealing behavior or excessive nervousness. The record contains no evidence that in the course of the traffic stop, Officer Daniel was cognizant of any deceptive statements or attempts at concealment made by Appellant. At most, Officer Daniel could only speculate that when Appellant swerved, he was reaching to possibly hide something. He also said Appellant broke eye contact when the topic of drugs came up. Putting aside the fact that most people acquire and break eye contact repeatedly throughout most conversations, a momentary break in eye contact is far less suggestive to a reasonable observer of feelings of fear, guilt, or anxiety than the extreme shaking of hands coupled with the accelerated breathing discussed in *Provet*.

Thus, only four observations by Officer Daniel were relevant to arouse suspicion: two air fresheners were in the car; the car was registered to another person; the car came from what Officer Daniel considered a high crime area; and the car swerved while appellant

[1] Importantly, even if Officer Daniel had been aware of the investigation, under *Foster* the knowledge would have been inadequate to furnish reasonable suspicion and would have properly been accorded very little weight alongside with any other factors.

car swerved while appellant appeared to reach for something. Looking closer, having two air fresheners in a vehicle is not uncommon and generally innocuous. Officer Daniel did not testify they emitted a strong odor or that he recalled their scent at all; therefore, suspecting they were intended to mask the smell of drugs from a nosy officer or a canine was not reasonable. And suspecting someone possesses drugs because he steered momentarily outside of a lane while appearing to reach for something is beyond tenuous. Indeed, under *Tindall*, the traffic violation probably should not have been considered at all. Plainly, the facts of *Tindall*—the third-party registration of the vehicle, the driver's "numerous" fast food bags and air fresheners, and the renting and driving of a car from one place a to a faraway drug hub and back the same day—present a much more compelling case for reasonable suspicion; nonetheless, the indicators were insufficient to surmount the protections of the Fourth Amendment.

In applying standards for the protection of Constitutional rights, it is important to view the facts of a case through the lens of a hypothetically innocent person in the same circumstances. *See, e.g.*, *United States v. Foreman*, 369 F.3d. 776, 781 (4th Cir. 2004) (holding "[t]he articulated factors together must serve to eliminate a substantial portion of innocent travelers before the requirement of reasonable suspicion will be satisfied"). Here, the trial court held that the Fourth Amendment permits a law enforcement officer to detain and investigate an innocent person whenever he drives another person's vehicle having two air fresheners away from an area of suspected drug activity if the driver momentarily crosses the yellow line.

The Fourth Amendment authorizes a law enforcement officer to make a further investigation upon entertaining how particularized, identifiable facts and circumstances

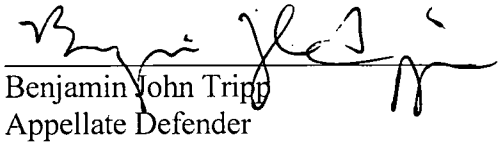
reasonably suggest that the public welfare is in peril. It is not a license for a law enforcement officer to make a bet—even if it to him it feels like a winnable one.

The exclusionary rule prohibits the use of evidence obtained directly or indirectly through an unlawful search or seizure under the fruits of the poisonous tree doctrine. *See Wong Sun v. United States*, 371 U.S. 471, 484 (1963); *see also State v. Nelson*, 336 S.C. 186, 519 S.E.2d 786 (1999) (finding evidence is not admissible under the "fruit of the poisonous tree" doctrine when the police exploit an unlawful search to seize evidence that would not have otherwise come to light). The Fourteenth Amendment incorporates the rule of excluding evidence obtained through an illegal search or seizure and makes it applicable to the states. *Mapp v. Ohio*, 367 U.S. 643, 655 (1961). Accordingly, the trial court should have excluded the evidence arising from Appellant's continued detention after the traffic stop.

CONCLUSION

For the foregoing reasons, Appellant requests that the Court reverse the decision of the trial court and dismiss the charges against Appellant.

Respectfully submitted,



Benjamin John Tripp
Appellate Defender

ATTORNEY FOR APPELLANT

This 31st day of July, 2013.

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APPELLATE CASE NO. 2012-212700

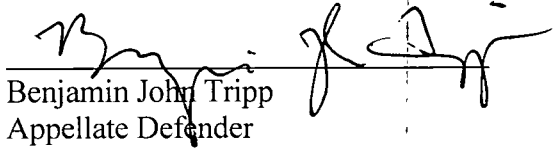
DESIGNATION OF MATTER TO BE INCLUDED IN RECORD ON APPEAL

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

(1) True–billed indictment(s);
(2) Transcript of July 23, 2012;
(3) Transcript of July 24 & 25, 2012.

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

July 31st, 2013



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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Initial Brief of Appellant and Designation of Matter in the above referenced case has been served upon Salley W. Elliott, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 31st day of July, 2013.

Benjamin John Tripp
Appellate Defender

ATTORNEY FOR APPELLANT

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

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