STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenville County
Honorable D. Garrison Hill, Circuit Court Judge
Appellate Case Tracking No. 2012-210306

The State, Respondent,

vs.

Erick E. Hewins, Appellant.

FINAL BRIEF OF RESPONDENT

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I. The trial court correctly ruled Appellant was collaterally estopped from challenging the propriety of the search in which the crack cocaine was found because he waived that issue in his prior municipal court open container case resulting from the same search. Further, any error is harmless because the search was valid.

II. Appellant's prior conviction and sentence to time served did not violate Appellant's Sixth Amendment right to counsel.

STATEMENT OF THE CASE

The State agrees with Appellant's procedural Statement of the Case.

STATEMENT OF FACTS

At approximately 11:45 on the evening of September 15, 2009, Officer Cothran stopped Appellant after he made an illegal left turn. Officer Cothran requested Appellant's license, registration, and insurance. Officer Cothran noted Appellant was extremely nervous. (T.54-56; R. pp. 26-28). Appellant's breathing was "very deep, and heavy, and very rapid." (T.56; R. p. 28). As a result, Officer Cothran asked for a second officer while he stood by Appellant's vehicle.

Officer Cothran noticed the papers shaking "violently" as Appellant searched for his insurance and registration information. Officer Cothran stood by Appellant's vehicle while he unsuccessfully searched his glove compartment for his insurance and registration information. (T.57; R. p. 29). Officer Cothran indicated he would be giving Appellant a warning in an attempt to have him calm down, but Appellant did not relax. Instead, Appellant "stayed nervous, very amped up." (T.59-60; R. pp. 31-32).

Significantly, Officer Cothran testified he saw Appellant driving the same Cadillac on two prior occasions that evening. The sightings were in an area known through his training and experience to be a high drug traffic area. (T.59; R. p. 31).

Officer Loftis arrived as backup within approximately two minutes, while Officer Cothran was still in his vehicle completing his check of Appellant and completing the warning. (T.58-59; R. pp. 30-31). Officer Loftis, a K-9 handler, responded from his office which was less than a block from where Officer Cothran stopped Appellant. (T.86-87; R.pp. 58-59).

Officer Cothran went back to the vehicle to talk to Appellant. When he arrived, Appellant was still very nervous and had not calmed down. For his safety, Officer

Cothran had Appellant exit his vehicle and conducted a quick pat down. (T.61; R. p. 33). Officer Cothran again explained the basis for the stop, and then asked Appellant if he had any guns, drugs, or explosives. Appellant was "really quick . . . very quick, very noticeable" to answer he did not have any drugs. Officer Cothran indicated this made him suspicious because Appellant made no response in regard to the guns or explosives which in his training and experience meant Appellant was hiding something about drugs. (T.61-62; R. pp. 33-34).

Officer Cothran then asked for permission to search Appellant's vehicle, which he refused. Officer Cothran then asked Officer Loftis to walk his K-9 around the vehicle. Officer Cothran indicated this took somewhere between two and five minutes total. Officer Loftis indicated he can walk a dog around a vehicle in less than a minute. (T.63; 88; R. pp. 35; 60). The dog alerted to the presence of contraband in the vehicle. (T.64; R. p. 36).

Officer Cothran conducted a search of the vehicle. Inside the console, he located a mini-bottle of vodka and a Tylenol bottle which was found to contain two rock-like white pebbles that he recognized as crack-cocaine. (T.64-65; R. pp. 36-37). Officer Cothran arrested Appellant and also gave him a warning citation for the illegal turn. Additionally, Officer Cothran cited Appellant for open container for the vodka and charged with possession of crack-cocaine or cocaine base. Officer Cothran wrote the ticket shortly after midnight, approximately fifteen minutes after the traffic stop began. (T.66; R. p. 38).

In 2009, Appellant appeared in municipal court on his open container charge. He either pled guilty or was found guilty after a bench trial. As a result, the municipal court

sentenced him to time served and a $262.50 fine. (Uniform Traffic Ticket, State's Exhibit 1; R.p. 75).

ARGUMENT

I. The trial court correctly ruled Appellant was collaterally estopped from challenging the propriety of the search in which the crack cocaine was found because he waived that issue in his prior municipal court open container case resulting from the same search. Further, any error is harmless because the search was valid.

Appellant contends the trial court erred in finding he was collaterally estopped from arguing the crack cocaine was found during an illegal search and seizure. Appellant presented no evidence the issue was challenged prior to his conviction for open container which resulted from the same search. Additionally, the search was not illegal and was a valid search.

"Collateral estoppel prevents a party from relitigating in a subsequent suit an issue actually and necessarily litigated and determined in a prior action." Koon v. State, 358 S.C. 359, 364-365, 595 S.E.2d 456, 459 (2004) (overruled on other grounds by State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005)) (citing Jinks v. Richland County, 355 S.C. 341, 585 S.E.2d 281 (2003)). "Collateral estoppel can be used in a criminal proceeding." State v. Snowdon, 371 S.C. 331, 334 n.2, 638 S.E.2d 91, 93 n.2 (Ct. App. 2006) (citing State v. Brown, 201 S.C. 417, 424, 23 S.E.2d 381, 383 (1942)). "A judgment is conclusive as to facts . . . assumed by the decision, where they were essential to the judgment, and were such that the judgment could not legally have been rendered without them." 50 C.J.S. Judgments § 1087.

In Snowdon, this Court found collateral estoppel would apply to prevent relitigation of an issue after a guilty plea. Snowdon, 371 S.C. at 334, 638 S.E.2d at 93. Snowdon pled guilty to breach of peace. In a subsequent trial for possession of marijuana

stemming from a search incident to Snowdon's arrest, he maintained his arrest for breach of the peace was illegal and the marijuana was the fruit of an illegal search. This Court found he was collaterally estopped from arguing the validity of the arrest, and the subsequent search on the grounds of an invalid arrest, because the guilty plea waived all non-jurisdictional defects, which would include the validity of the arrest. Id. at 333-334, 638 S.E.2d at 92-93.

In the instant case, the trial court applied Snowdon and found it was conclusive as to Appellant's challenge to the validity of the search under the Fourth Amendment. In making its ruling, it is clear the trial court considered Appellant's conviction for open container to have resulted from a guilty plea. The State presented evidence Appellant pled guilty to the open container charge. The record custodian indicated the records related to Appellant's conviction indicated he pled guilty. (T.29; R. p. 14) While the ticket may have the guilty box checked in the section with heading "VERDICT OF TRIAL IF ANY," there is no trial date listed. The ticket does not conclusively establish a trial occurred as opposed to Appellant showing for trial and instead entering a plea of guilty as testified to by the records custodian.

Because Appellant pled guilty to the open container charge, he waived all non-jurisdictional defects, including the validity of the underlying search in which the open container was found. See Gibson v. State, 334 S.C. 515, 523, 514 S.E.2d 320, 324 (1999) ("A defendant who pleads guilty usually may not later raise independent claims of constitutional violations."). Accordingly, there is evidence to support the trial court's determination Appellant's conviction for open container resulted from a plea of guilty,

and the holding of Snowdon is directly applicable to bar relitigation of the validity of the search based on that guilty plea.

In the event this Court finds the only evidence in the record indicated Appellant went to trial and was convicted of open container, and he did not plead guilty, the doctrine of collateral estoppel still applies. Appellant presented no evidence of a successful challenge to the validity of the search performed by Officer Cothran. He either never contested the issue and thereby waived it, or he failed in his challenge of the issue. Appellant's failure to challenge at the trial level or on appeal, the trial court's determination the search was valid rendered it the law of the case. State v. Cheeks, 400 S.C. 329, 338-339, 733 S.E.2d 611, 616 (Ct. App. 2012) (finding unchallenged ruling is the law of the case); see also, State v. Black, 400 S.C. 10, 732 S.E.2d 880 (2012) (finding unchallenged ruling, right or wrong, is the law of the case).

In order to be convicted for open container, the search in which the container was found had to be legally valid. The determination it was legally valid, either by virtue of Appellant's waiver of the issue or a litigation of the issue, is the law of the case. Therefore, even if Appellant's guilt of possessing an open container was adjudicated at a trial, the litigation still collaterally estops him from relitigating the validity of the search in the current case. See 50 C.J.S. Judgments § 1087.

As an additional sustaining ground, even if this Court finds the trial court improperly applied the doctrine of collateral estoppel, the evidence at trial demonstrated the search by Officer Cothran was validly based on reasonable suspicion and did not measurably extend the traffic stop. "A police officer may 'stop and briefly detain a person for investigative purposes' if he 'has a reasonable suspicion supported by

articulable facts that criminal activity 'may be afoot'....'" State v. Provet, Op. No. 27297 (S.C.Sup.Ct. filed August 14, 2013) (quoting United States v. Sokolow, 490 U.S. 1, 7, 109 S.Ct. 1581, 104 L.Ed.2d 1 (1989)). "A traffic stop supported by reasonable suspicion of a traffic violation remains valid until the purpose of the traffic stop has been completed. The officer may not extend the duration of a traffic stop in order to question the motorist on unrelated matters unless he possesses reasonable suspicion that warrants an additional seizure of the motorist." Id. (internal citations omitted).

In the instant case, Officer Cothran had reasonable suspicion to extend the traffic stop to have the drug dog circle the vehicle. First, saw Appellant on two prior occasions that same night driving through a known drug area. Appellant was extremely nervous, even after Officer Cothran tried to calm him by telling him he would only receive a warning. Finally, Appellant's very quick answer he had no drugs in response to the question regarding whether he had guns, drugs, or explosives in the vehicle justified Officer Cothran's heightened suspicion.

In addition, Officer Cothran specifically testified Appellant was not free to go because he could not produce his insurance information and they can detain an individual until they are able to verify their insurance information. (T.60-61; R. pp. 32-33) The fact Officer Cothran had Officer Loftis walk the drug dog around the car did not turn the lawful detention into an unlawful one. "If an officer uses a drug dog to sniff the exterior of a defendant's car during a lawful traffic stop, the sniff does not make the traffic stop unlawful, even without any evidence of drug activity, so long as the sniff does not extend the length of the stop beyond that time necessary to complete the stop's purpose." State v. Adams, 397 S.C. 481, 492, 725 S.E.2d 523, 529 (Ct. App. 2012) (citing Illinois v.

Caballes, 543 U.S. 405, 407, 125 S.Ct. 834, 160 L.Ed.2d 842 (2005)). As a result, the continued detainment of Appellant was reasonable and not in violation of the Fourth Amendment. Accordingly, whether based on the doctrine of collateral estoppel or on Fourth Amendment analysis, the trial court properly admitted the drugs as fruit of a valid search.

II. Appellant's prior conviction and sentence to time served did not violate Appellant's Sixth Amendment right to counsel.

Appellant maintains the trial court erred in finding the evidence was properly admitted under the doctrine of collateral estoppel because the prior conviction in municipal court for open container was uncounseled and therefore could not be used in any way against Appellant in his crack cocaine case. The prior conviction did not violate the constitutional right to counsel because it did not result in a term of confinement or the possibility of confinement.

In Argersinger v. Hamlin, the United States Supreme Court held "absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial." Argersinger v. Hamlin, 407 U.S. 25, 37 (1972). The United States Supreme Court later clarified that actual imprisonment, not just the possibility of imprisonment, is the demarcation line and there is no abrogation of the right to counsel unless the defendant is sentenced to a term of imprisonment. Scott v. Illinois, 440 U.S. 367, 373-374 (1979). In Nichols v. United States, the Court held "that an uncounseled misdemeanor conviction, valid under Scott because no prison term was imposed, is also valid when used to enhance punishment at a subsequent conviction." Nichols v. United States, 511 U.S. 738, 748-49 (1994).

The South Carolina Supreme Court analyzed the United States Supreme Court cases as they relate to a defendant sentenced to time served, as Appellant was in this case. In State v. Glaze, the defendant served ten days in jail awaiting trial on a misdemeanor marijuana possession charge. State v. Glaze, 366 S.C. 271, 273, 621 S.E.2d 655, 656

(2005). He was later convicted and sentenced as a third-time drug offender relying in part on the uncounseled misdemeanor possession charge for the enhancement. The South Carolina Supreme Court found the uncounseled conviction did not violate the right to counsel stating:

> The proper inquiry under Scott is whether the uncounseled misdemeanor conviction actually resulted in confinement. The reason that Petitioner spent ten days in jail is he was charged with a misdemeanor and could not post bail. He was subjected to no period of confinement as a result of his uncounseled marijuana conviction, so his time-served sentence did not violate the constitution.

Glaze, 366 S.C. at 275, 621 S.E.2d at 657. Appellant only received time served and a fine. (Uniform Traffic Ticket, State's Exhibit 1; R. p.75). As a result, his conviction did not violate his right to counsel and may be used in a subsequent proceeding.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

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October 9, 2013

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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Honorable D. Garrison Hill, Circuit Court Judge
Appellate Case Tracking No. 2012-210306

The State, Respondent,

vs.

Erick E. Hewins, Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled, "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings.

Respectfully submitted,

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October 9, 2013

STATE OF SOUTH CAROLINA

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PROOF OF SERVICE

I, Sally Ellison, certify that I have served the within Final Brief of Respondent by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Carmen V. Ganjehsani, Esquire
S.C. Commission on Indigent Defense
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I further certify that all parties required by Rule to be served have been served.
This 9th day of October, 2013.

Sally Ellison

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October 9, 2013

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RE: State v. Erick Hewins
Appellate Case Tracking No. 2012-210306

Dear Ms. Ganjehsani:

I am enclosing two (2) copies of the Final Brief of Respondent in the above-referenced case.

Sincerely,

William M. Blitch, Jr.
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WMB/erd
Enclosures

cc: Honorable Jenny A. Kitchings (original and 9 copies enclosed)
Victim Services