ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

RECEIVED
OCT 17 2013
SC Court of Appeals

Appeal from Greenville County

D. Garrison Hill, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ERICK E. HEWINS,

APPELLANT

APPELLATE CASE NO. 2012-210306

FINAL REPLY BRIEF OF APPELLANT

CARMEN V. GANJEHSANI
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

TABLE OF CONTENTS 1

TABLE OF AUTHORITIES 2

ARGUMENT IN REPLY 3

CONCLUSION 9

TABLE OF AUTHORITIES

Cases

Carrigg v. Cannon, 347 S.C. 75, 552 S.E.2d 767 (Ct. App. 2001) 4

State v. Adams, 397 S.C. 481 725 S.E.2d 523 (Ct. App. 2012) 5, 8

State v. Snowdon, 371 S.C. 331, 638 S.E.2d 91 (Ct. App. 2006) 3

State v. Tindall, 388 S.C. 518, 698 S.E.2d 203 (2010) 5, 6,7,8

ARGUMENT IN REPLY

The State first argues that Appellant Erick E. Hewins pled guilty to the open container charge and therefore waived all non-jurisdictional defects including the validity of the underlying search in which the open container was found. The State asserts that because of Hewins' guilty plea in the open container case, he cannot now seek to challenge the propriety of the search in which the crack cocaine was found. In asserting that Hewins pled guilty, the State relies upon the Uniform Traffic Ticket and contends this document is evidence of a guilty plea rather than a trial. The State claims the document does not even list a trial date. The State's description of this document is not a true representation of the document.

The Uniform Traffic Ticket shows there was a trial that occurred on October 8, 2009 at 8:00 a.m. in which Hewins appeared. The trial was conducted by a trial officer. The verdict of the trial was guilty. R.69. This document establishes that Hewins did not plead guilty to the open container charge and therefore did not waive all non-jurisdictional defects and defenses, including claims of constitutional violations. There is no evidence to support the Trial Court's determination that Hewins pled guilty to the open container charge and was thus precluded under State v. Snowdon, 371 S.C. 331, 638 S.E.2d 91 (Ct. App. 2006) from challenging the validity of the search from which the crack cocaine was seized.

The State next argues that even if the evidence establishes that Hewins did not plead guilty and was only found guilty after a trial on the open container charge, the doctrine of collateral estoppel still applies because "Appellant presented no evidence of a successful challenge to the validity of the search performed by Officer Cothran" and "[Appellant] either never contested the issue and thereby waived it, or he failed in his challenge of the issue." Respondent's Brief, p. 7.

The State misunderstands the doctrine of collateral estoppel. The State, who is asserting the doctrine of collateral estoppel in this case to preclude Hewins from challenging the validity of the search, has the burden of showing "that the issue was actually litigated and directly determined in the prior action and that the matter or fact directly in issue was necessary to support the first judgment." Carrigg v. Cannon, 347 S.C. 75, 79-80, 552 S.E.2d 767, 770 (Ct. App. 2001).

The State has not met its burden in showing that the validity of the search was actually litigated in Hewins' open container trial and that the validity of the search was necessary to support the open container conviction. The State makes the additional erroneous assertion that Hewins' failure to challenge at the trial level or on appeal the trial court's determination that the search was valid in the open container case is now law of the case. The State has not established that a court has ever determined that the search of Hewins' vehicle was valid. That is the very reason why Hewins is not estopped from challenging the search in this case. Accordingly, Hewins is not precluded from seeking suppression of the crack cocaine due to an illegal search and seizure in his trial for drug possession.

The State finally argues that even if the Trial Court improperly applied the doctrine of collateral estoppel and Hewins was not precluded from challenging the search in his drug possession trial, the search by Officer Cothran was nevertheless valid. First, where the Trial Court wrongly precluded Hewins from challenging the search, a remand for a suppression hearing is necessary for a lower court determination of whether the search was valid.

Furthermore, Officer Cothran's search of Hewins' vehicle violated the Fourth Amendment. The Fourth Amendment of the United States Constitution grants citizens the right to be secure against unreasonable search and seizure. "Temporary detention of an individual in the course of a routine traffic stop constitutes a Fourth Amendment seizure, but where probable cause exists to

believe that a traffic violation has occurred, such a seizure is reasonable per se." State v. Tindall, 388 S.C. 518, 521, 698 S.E.2d 203, 205 (2010). "In carrying out a routine traffic stop, a law enforcement officer may request a driver's license and vehicle registration, run a computer check, and issue a citation." Id. An officer may also order the driver to exit the vehicle. State v. Adams, 397 S.C. 481, 491, 725 S.E.2d 523, 529 (Ct. App. 2012). "Any further detention for questioning is beyond the scope of the stop and therefore illegal unless the officer has reasonable suspicion of a serious crime." Tindall, 388 S.C. at 521, 698 S.E.2d at 205.

In Tindall, this State's Supreme Court held that while the initial traffic stop of Tindall was legal, the officer exceeded the scope of the stop without reasonable suspicion that a serious crime was afoot. Id. at 521-22, 698 S.E.2d at 205. The Supreme Court found that the officer stopped Tindall for several traffic violations, including speeding, following too closely, and failing to maintain his lane. The officer obtained Tindall's driver's license, registration, proof of insurance, and a copy of the car rental agreement and asked Tindall to have a seat in the front passenger seat of the patrol car. When Tindall exited the vehicle, he apparently did a "felony stretch," raising his hands in a stress relief action which officers are taught to look for in criminal patrol classes. The officer patted down Tindall prior to Tindall sitting down in the patrol car. Id. at 522, 698 S.E.2d at 205.

Tindall informed the officer that he was driving to Durham to meet his brother. The officer called in Tindall's driver's license and vehicle information, and approximately three minutes later, a dispatcher reported there were no problems with either. The officer then informed Tindall that he would be writing him a warning ticket. Id.

The Supreme Court held that at that point, the purpose of the traffic stop was completed except for the issuance of the warning ticket. Id. The officer, however, rather than issue the

ticket, continued to question Tindall for six to seven minutes, asking him about his trip, whether he had ever been charged with drug crimes, and questions relating to his business. During this questioning, two other officers called in for back-up stood outside the patrol car door. Id. The officer ultimately searched the vehicle and found a large quantity of cocaine hidden beneath the rear bumper. Id. at 520-21, 698 S.E.2d at 204.

The Supreme Court held that the officer did not have reasonable suspicion to continue to detain Tindall after the purpose of the traffic stop was completed. During the traffic stop, the officer had ascertained the following information: "(1) Tindall was driving to Durham to meet his brother; (2) Tindall was driving a rental car rented the previous day by another individual which was to be returned to Atlanta on the day of the stop; (3) Tindall did a "felony stretch" on exiting the vehicle; and (4) Tindall seemed nervous." Id. at 523, 698 S.E.2d at 206. These facts, according to the Supreme Court, did not provide the officer with a reasonable suspicion that a serious crime was afoot and therefore the continued detention of Tindall was illegal and the drugs discovered during the search had to be suppressed. Id.

In the instant case, there are even less factors present than in the Tindall case. Officer Cothran stopped Hewins' vehicle after he made an illegal left turn. R. 26, ll. 8-20. Officer Cothran testified that he had also seen Hewins two earlier times that night driving through a high drug area. R. 31, ll. 8-15. Officer Cothran asked for Hewins' driver's license, insurance, and registration. Hewins handed Officer Cothran his license, but could not locate his insurance or registration. R. 28, ll. 8-14.

Officer Cothran noticed that Hewins was "extremely nervous," and called for another officer to come to the scene. Officer Loftis, a K-9 officer, arrived at the scene. R. 28, ll. 15-24; 30, l. 15; 34, ll. 5-6; 59, ll. 11-13.

During his initial contact with Hewins, Officer Cothran advised Hewins that he was only giving him a warning. R. 31, ll. 20-22. Officer Cothran said Hewins remained nervous after being told he was only going to receive a warning. R. 31, l. 20 -32, l. 7. Officer Cothran was actually in the process of issuing the warning when Officer Loftis arrived. R. 31, ll. 16-19. Officer Cothran completed writing the warning. R. 33, ll. 4-5.

At that point, just as in Tindall, the purpose of the traffic stop was accomplished. Tindall, 388 S.C. at 522, 698 S.E.2d at 205. However, Officer Cothran opted to continue to detain and question Hewins, asking Hewins to step out of the vehicle, patting Hewins down for weapons, and requesting Hewins for consent to search his vehicle which Hewins refused. R. 33, ll. 4-13; 35, ll. 2-6.

Officer Cothran then asked Officer Loftis to have his dog walk around Hewins' vehicle and the dog alerted to the driver's side door. R. 35, ll. 7-14; 36, ll. 3-9; 60, ll. 10-11; 61, ll. 13-24. Officer Cothran then searched Hewins' vehicle where he found in the center armrest console a mini vodka bottle opened and partially consumed, as well as a Tylenol bottle which he opened and found two small rock-like pebbles that Officer Cothran said he recognized as crack cocaine. R. 36, ll. 11-25; 37, ll. 1-6.

The question becomes whether Officer Cothran reasonably suspected a serious crime at the point at which he chose not to conclude the traffic stop, despite his issuance of a warning to Hewins, instead opting to continue to detain and question Hewins and have a dog sniff Hewins' vehicle. See Tindall, 388 S.C. at 523, 698 S.E.2d 206. At the point that Officer Cothran decided to issue a warning which for all purposes concluded the stop, Officer Cothran only had the following information:

1. Officer Cothran saw Hewins on two prior occasions that night driving through a high drug area; and

2. Hewins was extremely nervous during the stop, even after Officer Cothran informed him that he would only receive a warning.

Being seen in a high drug area and being extremely nervous are not sufficient facts to provide an officer with a reasonable suspicion that a serious crime is afoot. See Tindall, 388 S.C. at 523, 698 S.E.2d at 206. Consequently, the continued detention of Hewins was illegal and the drugs discovered during the search of his vehicle should be suppressed at his trial.

The State also argues that the walking of the drug dog around Hewins' vehicle did not turn the lawful detention into an unlawful one. However, "[i]f 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.*" Adams, 397 S.C. at 492, 725 S.E.2d at 529 (emphasis added).

Here, the stop's purpose was completed when Officer Cothran issued Hewins the warning. The drug dog was not walked around Hewins' vehicle until the illegal continued detention of Hewins.

Accordingly, Hewins will mostly likely prevail in the suppression hearing to which is he entitled. The Trial Court erred as a matter of law in determining that Hewins was collaterally estopped from challenging the validity of the search and seizure in his drug possession trial. The case should be remanded to the Trial Court for a determination of whether the crack cocaine unlawfully seized in violation of the Fourth Amendment should have been suppressed.

CONCLUSION

For the reasons set forth herein and in the Appellant's Brief, Appellant Erick Eton Hewins requests this Court to reverse the Trial Court's ruling that Hewins was collaterally estopped from challenging the legality of the search and seizure and remand for a ruling on Hewins' motion to suppress the evidence of the crack cocaine.

Respectfully submitted,

Carmen V. Ganjehsani
Appellate Defender

ATTORNEY FOR APPELLANT

This 17th day of October, 2013.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Reply Brief of Appellant 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."

October 17th, 2013

Carmen v. Ganjehsani
Appellate Defender

S.C. Commission on Indigent Defense
Division of Appellate Defense
1330 Lady Street, Suite 401
Post Office Box 11589
Columbia, South Carolina 29211-1589

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenville County

D. Garrison Hill, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ERICK E. HEWINS,

APPELLANT

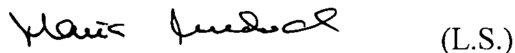
CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Reply Brief of Appellant in the above referenced case has been served upon William M. Blitch, Jr., Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 17th day of October, 2013.

Carmen V. Ganjehsani
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 17th day of October, 2013.


(L.S.)

Notary Public for South Carolina
My Commission Expires: July 3, 2023.