STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Lancaster County

Brooks P. Goldsmith, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

DERRICK A. MCILWAIN,

APPELLANT

APPELLATE CASE NO. 2013-000373

INITIAL BRIEF OF APPELLANT

WANDA H. CARTER
Deputy Chief 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

[1] Sikes v. State, 323 S.C. 28, 448 S.E. 2d 560 (1994)

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

STATEMENT OF ISSUES ON APPEAL

The trial judge erred in denying appellant's motion to suppress the drugs seized per an unlawful search of a vehicle in which appellant was a passenger because the illegal search occurred after appellant had been detained beyond the scope and purpose of the traffic stop, which led police on a Sikes[2] "fishing" expedition where warrants were found, when there was no reasonable suspicion of criminal activity in existence prior to or soon after the traffic stop.

The trial judge erred in denying appellant's motions for directed verdicts of acquittal on the drug charges emanating from the traffic stop in the case because appellant was merely present in the vehicle at that time and neither in actual nor constructive possession of the drugs seized by police after the traffic stop.

[2] Sikes v. State, 323 S.C. 28, 448 S.E. 2d 560 (1994)

STATEMENT OF THE CASE

Appellant Derrick A. McIlwaine was indicted for possession with intent to distribute crack cocaine and possession with intent to distribute marijuana, but convicted of possession of cocaine and possession of marijuana per jury trial held during the February 2013 term of the Lancaster County General Sessions Court before Judge Brooks P. Goldsmith. Appellant was sentenced to imprisonment for an aggregate period of eight years. William Frick represented appellant at trial.

Appellant appealed his convictions and sentences. This brief follows.

QUESTION I

The trial judge erred in denying appellant's motion to suppress the drugs seized per an unlawful vehicle search of a vehicle in which appellant was a passenger as the illegal search occurred after appellant had been detained beyond the scope and purpose of the traffic stop, which led to a Sikes[3] "fishing" expedition where warrants were found, when there was no reasonable suspicion of criminal activity in existence prior to or soon after the traffic stop.

The state presented five witnesses at trial: two police officers, the evidence custodian, a SLED forensic technician, and a SLED chemist. The vehicle that police stopped for a traffic violation in the case contained three occupants, crack cocaine, and marijuana. Neither appellant, who was a back seat passenger, nor Matthew Sims, who was the car driver, testified at trial. Christina Stevens, who was the front passenger in the vehicle, was the only defense witness presented at trial. Note that appellant and Sims were jointly tried in this case.

Prior to trial, defense counsel moved to suppress drugs and other items (notebook, money, and digital scales) seized per a vehicle search as tainted evidence because of the illegal search and seizure that occurred during the traffic stop in this case. An in camera hearing followed. During the hearing, Officer Bowers testified that he initiated a traffic stop of a vehicle with no brake/tail lights on October 22, 2012, after 6:00 p.m. on 12th Street in Lancaster County. Officer Bowers stated that Sims was the driver, and that Christina Stevens was a front seat passenger, and that appellant sat in the backseat behind the driver. Then, after Sims produced his license and insurance papers and the tag was found to be valid, Officer Bowers stated that he decided to issue a warning ticket for the non-functioning brake/tail lights. Pretrial Hearing Transcript p. 4, l. 21 – p. 18, l. 11.

[3] Sikes v. State, 323 S.C. 28, 448 S.E. 2d 560 (1994)

Thereafter, Officer Barnes added that he walked to his patrol car and commenced writing the ticket when Officer McLemore arrived on the scene. Pretrial Hearing Transcript p. 18, lines 10-19. Officer Bowers explained that he was told by Officer Lemore, who recognized appellant, that appellant had warrants out against him. Minutes later, Officer Bowers ran a check on appellant and found out that there were warrants outstanding against him. Pretrial Hearing Transcript p. 18, l. 20 – p. 20, l. 9.

Shortly after the warrants were discovered, Officer Bowers and McLemore went to the stopped vehicle and asked appellant to exit the vehicle. Appellant was arrested immediately thereafter. Pretrial Hearing Transcript p. 20, l. 20 – p. 22, l.1. At this point, Officer Bowers saw a notebook in the back seat containing names and money amounts listed, (presumably drug transactions) and after the driver consented to a search, a zipper bag containing marijuana and cocaine were found, and then more marijuana was found in the console. Also, cash money and digital scales were found inside the vehicle as well. Pretrial Hearing Transcript p. 21-p. 41, l. 4.

Defense counsel argued that the detention of appellant was beyond the scope of the traffic stop and that this prolonged detention that was used to check for warrants resulted in an unreasonable seizure and search because the traffic violation for bad brake/tail lights, which was the purpose or initiation behind the stop, had ended when the traffic ticket was being written by Officer Bowers. This meant that any activity beyond the brake/tail light, which had been resolved, rendered appellant's extended, i.e. second detention, and the search that followed unlawful. Pretrial Hearing Transcript p. 64, l. 2-p. 67, l. 2; Tr. 68, l. 22-p. 69, l. 1; Tr. 69, l. 3-p. 71, l. 23; Tr. 73 lines 2-20.

The trial judge ruled that the intervening warrant information that led to the extended detention of appellant did not render the seizure and search illegal and denied appellant's pretrial

motion to suppress the drugs and items seized from the vehicle. Pretrial Hearing Transcript p.73, l. 21-p. 74, l.25.

The temporary detention of an individual by police during an automobile stop, even if it is only for a brief period and a limited purpose, i.e. an investigative purpose, would constitute a seizure of that person within the meaning of the Fourth Amendment; and as a result, an automobile stop is subject to the constitutional imperative that it not be unreasonable under the circumstances. McHam v. State, 404 S.C. 465, 746 S.E. 2d 41 (2013), citing to Whren v. United States, 517 U.S. 806 (1996). State v. Butler, 353 S.C. 383, 577 S.E. 2d 498 (2003), citing to Delaware v. Prouse, 440 U.S. 648 (1979). The detainment of an individual after a traffic stop may occur if supported by reasonable suspicion. State v. Butler, supra. In determining whether reasonable suspicion exists, the totality of the circumstances must be considered to assess the validity of an officer's suspicions. State v. Corley, 383 S.C. 232, 679 S.E.2d 187 (Ct. App 2009), aff'd as modified, State v. Corley, 392 S.C. 125, 708 S.E.2d 217 (S.C. 2011).

Also, note that although the scope of the stop may be enlarged, the scope and duration of the seizure must be strictly tied to and justified by the circumstances which rendered its initial undertaking proper. State v. Morris, 395 S.C. 600, 720 S.E2d 468 (2011); Sikes v. State, 323 S.C. 28, 448 S.E. 2d 560 (1994). A lawful traffic stop can become unlawful if it is prolonged beyond the time reasonably required to complete its mission. State v. Adams, 397 S.C.481, 725 S.E.2d 523 (2012), citing to State v. Morris, supra, and Illinois v. Caballes, 543 U.S. 405 (2005). Once the purpose of that stop has been fulfilled, the continued detention of the vehicle and occupants would result in a second detention. State v. Morris, supra, citing to State v. Pichardo, 367 S.C. 84, 623 S.E.2d 840 (2005). The encounter can only continue if the police have a reasonable suspicion that

other criminal activity would be afoot. State v. Adams, supra; State v. Morris, supra, State v. Pichardo, supra.

In Sikes, a vehicle was stopped because the paper tags aroused suspicion of it being stolen, but after receiving the requested identification information from the driver and the passenger; nonetheless, the passenger was taken from the car while police ran a warrant check on him. The Court reversed in Sikes and held that the officer's further detention of the passenger while going "fishing" for evidence of a crime, i.e., looking for warrants, was unlawful because the scope and duration of the initial seizure must be **tied to and justified by the circumstances which rendered its initiation proper**. In Sikes, the belief that the car was stolen ended upon the receipt of proper identifications. Therefore, there was no reasonable suspicion in existence thereafter to extend the seizure of the passenger by detaining him any further. Also, the Sikes Court cited to State v. Johnson, 805 P.2d 761 (Utah 1991), where the Court held that the leap from asking a passenger's name and date of birth to running warrant checks on the passenger was unlawful as such was an attempt to gather information in support of an unparticularized suspicion or hunch. Compare, State v. Williams, 351 S.C. 591, 571 S.E.2d 703 (2003), where the Court held that since the officer had written the traffic ticket and the traffic stop was complete, it was error for the officer to continue to question the defendant until he (officer) believed the answers were inconsistent as a basis to search the vehicle because there was no prior reasonable suspicion that criminal activity had been afoot.

Going on a "fishing" expedition to find evidence in support an unparticularized hunch of inchoate criminal activity is unlawful because reasonable suspicion is an objective assessment of the circumstances at trial. See State v. Provet, 405 S.C. 101, 747 S.E. 2d 453 (2013), citing to Whren V. United States, supra. Reasonable suspicion is more than an inchoate or unparticularized hunch, but rather it is an objective basis that would lead to a suspicion of criminal activity under the

probability of the circumstances. State v. Rogers, 368 S.C. 529, 6219 S.E. 2d 679 (2006) citing to State v. Butler, supra. Moreover, once the purpose of the traffic stop has ended, the officer may not extend the duration of the traffic stop without reasonable suspicion that would justify an additional or prolonged seizure. State v. Provet, 405 S.C. 101, 747 S.E. 2nd 453 (2013) citing to Pennsylvania v. Morris, 403 U.S. 106 (1977) and Arizona v. Johnson, 555 U.S. 323 (2009).

In the case at bar, Officer Bowers found no reasonable suspicion of criminal activity after obtaining the proper information from the driver identifications of the occupants and had already walked to his patrol car to write a warning ticket for the traffic violation. Thus, the initial undertaking regarding the traffic stop (non-operating brake/tail lights) was complete in purpose and Officer Bowers had no new suspicion of criminal activity. Hence, the decision to write a warning ticket. At this point, appellant's detention via the traffic stop should have ended. The following is Officer Bower's testimony at the in camera hearing establishing that the purpose of the stop (tail/brake light malfunction) had been fulfilled:

> DEFENSE COUNSEL: Now, I think your statement was – and make sure I got this right – you recognized Mr. McIlwaine when you had a name to put with the face.
>
> OFFICER BOWERS: Yes.
>
> DEFENSE COUNSEL: When you first saw huh did you go, "Ah, there are pending warrants on him".
>
> OFFICER BOWERS: No. I didn't know there was a warrant.
>
> DEFENSE COUNSEL: So you weren't looking for him.
>
> OFFICER BOWERS: No.
>
> Pretrial Hearing Transcript p. 44, lines 2-11.
>
> DEFENSE COUNSEL: Was there anything in the car in plain view that was illegal?

OFFICER BOWERS: No.

Pretrial Hearing Transcript p. 44, lines 21-23.

CO-DEFENDANT'S COUNSEL: Well, in this particular case you said that you were headed back to write the ticket after getting the names of everybody in the car, correct?

OFFICER BOWERS: Yes.

CO-DEFENDANT'S COUNSEL: But you did not write that ticket until later after everything –

OFFICER BOWERS: I was in the process of writing it when [he learned from Officer Lemore] that Mr. McIlwaine had outstanding warrants. Pretrial Hearing Transcript p. 46, l. 17 – p. 47, l. 3.

In other words, Officer Bowers' purpose for the traffic stop was complete, but then Officer McLemore arrived suggesting that there were warrants out on appellant. At this juncture, the "fishing" expedition commenced. Clearly, no reasonable suspicion existed in this case (save what was subsequently uncovered (warrants) as a result of the "fishing" expedition), to support appellant's extended or second detention and arrest, and ultimately, the search of the vehicle. The search of the vehicle that followed yielded the presence of drugs.

This fishing expedition that uncovered the warrants against appellant and led to his illegal second detention violated the Fourth Amendment to the United States Constitution and article 1, §10 of the South Carolina State Constitution because the extended detention exceeded the scope of the stop and the drugs obtained from the seizure and search that followed rendered them tainted fruit of the poisonous tree. Wong Sun v. United States, 371 U.S. 471 (1963). Thus, the lower court erred in denying appellant's motion to suppress the drugs and other items as evidence in the case.

QUESTION II

The trial judge erred in denying appellant's motions for directed verdicts of acquittal on the drug charges emanating from the traffic stop in this case because appellant was merely present in the vehicle at that time and neither in actual nor constructive possession of the drugs seized by police after the traffic stop.

At the close of the state's case, appellant's counsel moved for directed verdicts on the charges because there was insufficient evidence presented to establish that appellant had actual or constructive possession of the drugs found in the vehicle searched. Tr. 147, l. 18 – p. 148, l. 24. The trial judge denied appellant's directed verdict motions. Tr. 157, l. 23 – p. 158, l. 9.

Actual possession occurs when the drugs are found in the actual physical custody of a defendant and constructive possession arises a defendant has dominion and control or the right to exercise dominion and control over the drugs. State v. Heath, 370 S.C. 326, 635 S.E.2d 181 (2006). In Heath, supra, the Court held that there was insufficient evidence that the defendant, who lived with his mother at the time of the arrest, was in constructive possession of crack found in a car washing mitt in a recycling bin outside at the back of a house owned by the defendant's mother.

Here, there was no evidence presented establishing that appellant had any possessory control either actually or constructively in the cocaine and marijuana found in neither the back seat nor in the console of this vehicle. The state's evidence proved that appellant was merely a passenger in the back seat of Sims' vehicle. The vehicle belonged to Sims. Also, Sims, who was the driver, was arrested on drug charges, which was understandable because the drugs obviously belonged to him. Note that Sims actually admitted to police that the drugs belonged to him. Tr. 37, lines 19-20; Tr. 91, l. 13 – p. 95, l.1. In addition, Sims claimed that the money found was for

the power bill. App. 95, lines 16-18. Tr. 99, lines 15 -20. Finally, third passenger Christina Stevens testified that Sims (driver) smoked marijuana every day and that the drugs in the vehicle belonged to him (Sims). Tr. 176, l. 9 – p. 180, l. 21.

Hence, appellant's presence as a passenger in the vehicle at issue was not tantamount to any possessory interest in the drugs found therein. Mere presence at the crime scene does not translate into one having dominion and control or the right to exercise dominion and control over any drugs via constructive possession. State v. James, 386 S.C. 689 S.E.2d 643 (2012).

Compare following vehicle cases where the defendants were found not to have been in actual or constructive possession of the drugs found pursuant to police searches. In State v. Pradubsri, 403 S.C. 270, 743 S.E.2d 98 (2013), where a traffic stop of the defendant's vehicle resulted in a search where crack cocaine was found only on his girlfriend (actual possession) who was a passenger in the vehicle, the Court held that there was insufficient evidence that the defendant was in constructive possession of the drugs found on his girlfriend without his girlfriends' testimony to that effect. Also, in State v Jackson, 395 S.C. 250, 717 S.E.2d 609 (2011), the Court held that the State's evidence was insufficient to establish that the defendant had actual or constructive possession of the marijuana found under the center console of the vehicle where the drugs were not visible and where the defendant was merely a passenger in the vehicle who had only met the driver once at his (defendant's) grandchild's party and rode to Greenville, South Carolina, to promote a music gig. Compare, State v. Brown, 267 SC 311, 227 S.E. 2d 674 (1976), where the defendant was merely a passenger in the vehicle, who had neither ownership rights to the vehicle nor a relationship with the driver of the vehicle, and could not have seen or known of the opaque bag of marijuana found under the rear floorboard of the vehicle, and thus had no dominion and control over the marijuana. Compare also, State v. Hernandez 382 S.C. 620, 677 S.E.2d 603 (2009), where

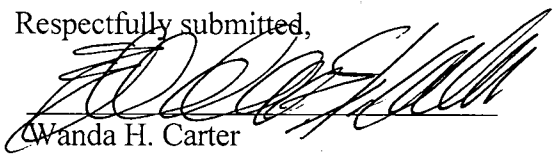
the Court held that the defendants who occupied a rental moving truck following a trailer were only present and had no knowledge that drugs were in the trailer they followed, and that as a result, the state's evidence of trafficking was insufficient and "merely speculation."

Here, the state failed to prove that appellant was in actual or constructive possession of the drugs found in Sims' vehicle; and since possession was a material element of the crime charged, the conclusion is the same as reached in Heath, i.e., that the state "failed to establish an essential element of the crime charged." In reviewing a denial of a motion for a directed verdict motion, an appellate court must review the evidence in the light most favorable to the state, and a case can only be submitted to the jury if there is any direct or circumstantial evidence in existence that reasonably tends to prove the guilt of the accused or from which his guilt maybe fairly or logically deduced. State v. Jackson, supra. In the case at bar, the state's case was lacking in competent evidence of drug possession against appellant, which in turn meant that the trial judge erred in failing to grant appellant's motions for directed verdicts in the case. The state failed to prove every element of the offense charged as required via the Fourteenth Amendment due process clause and article 1, §3 of the South Carolina State Constitution. See Jackson v. Virginia, 443 U.S. 307 (1979). The trial judge erred in denying appellant's motions for directed verdicts of acquittal on the drug offenses charged against him.

CONCLUSION

Based on the foregoing argument, appellant requests that the Court reverse appellant's convictions and enter directed verdicts of acquittals on the charges, or in the alternate, reverse and remand for a new trial on the Fourth Amendment violation.

Respectfully submitted,



Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR APPELLANT

This 2nd day of December, 2013.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Lancaster County

Brooks P. Goldsmith, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

DERRICK A. MCILWAIN,

APPELLANT

APPELLATE CASE NO. 2013-000373

DESIGNATION OF MATTER TO BE INCLUDED IN RECORD ON APPEAL

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

(1) Entire Pretrial Hearing Transcript dated February 15, 2013
(2) Trial Transcript dated February 19-20, 2013
Tr. 43-152, Tr. 176-200, Tr. 211-200, Tr. 240-241
3.) Entire Sentencing Transcript dated February 21, 2013
4.) Indictments

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

December 2, 2013.

Wanda H. Carter
Deputy Chief Appellate Defender

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

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Lancaster County

Brooks P. Goldsmith, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

DERRICK A. MCILWAIN,

APPELLANT

APPELLATE CASE NO. 2013-000373

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 Donald J. Zelenka, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Mr. Derrick A. McIlwain, #313696, at Allendale Correctional Institution, PO Box 1151, Hwy. 47, Fairfax, SC 29827, this 2nd day of December, 2013.

Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 2nd day of December, 2013.

(L.S.)
Notary Public for South Carolina
My Commission Expires: October 30, 2022.