

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Charleston County

J. C. Buddy Nicholson, Jr., Circuit Court Judge

RECEIVED

DEC - 5 2013

S.C. Supreme Court

THE STATE,

RESPONDENT,

V.

ALFRED ADAMS,

APPELLANT

APPELLATE CASE NO: 2012-212779

BRIEF OF PETITIONER

ROBERT M. PACHAK
Appellate Defender

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

ATTORNEY FOR PETITIONER.

INDEX

INDEX.....	i
TABLE OF AUTHORITIES	ii
ISSUE PRESENTED	1
STATEMENT	2
ARGUMENT	3
CONCLUSION	7

TABLE OF AUTHORITIES

Cases

<u>Brown v. Illinois</u> , 422 U.S. 590, 95 S.Ct. 2254 (1975).....	3, 4, 6
<u>Clark v. United States</u> , 755 A.2d 1026 (D.C. 2000).....	5
<u>In re Jeremiah</u> , 361 S.C. 620, 606 S.E.2d 766 (2004).....	5
<u>State v. Adams</u> , 397 S.C. 481, 725 S.E.2d 523 (2012).....	2
<u>State v. Copeland</u> , 321 S.C. 318, 468 S.E.2d 620 (1996).....	3
<u>State v. Miskimins</u> , 435 N.W.2d 217 (S.D. 1989).....	5
<u>State v. Nelson</u> , 336 S.C. 186, 519 S.E. 2d 786 (1990).....	5
<u>State v. Windus</u> , 207 <u>Ariz.</u> 328, 86 P.3d 384 (App. 2004).....	5
<u>U. S. v. Nooks</u> , 446 F.2d 1283 (5 th Cir. 1971).....	5
<u>U.S. v. Sprinkle</u> , 106 F.3d 613 (4 th Cir. 1997).....	5
<u>United State v. Katzin</u> , 732 F.3d (C.A.3, 2013),.....	4
<u>United States v. Jones</u> , ___ U.S. ___, 132 S.Ct. 945 (2012)	2, 3, 4
<u>United States v. Waupekenay</u> , 973 F.2d 1533 (10 th Cir 1992).....	5
<u>Wong Sun v. United States</u> , 371 U.S. 471, 83 S.Ct. 407 (1963)	3, 4

Constitutional Provisions

U.S. Const. amend. IV	1, 2, 3, 4
-----------------------------	------------

ISSUE PRESENTED

Whether the Court of Appeals was correct to rule that an improper lane change violation trumps the exclusionary rule under the Fourth Amendment to the United States Constitution when the police placed a GPS device on petitioner's vehicle without first obtaining a search warrant?

STATEMENT

Petitioner was convicted of trafficking in cocaine after a bench trial held before the Honorable J. C. Buddy Nicholson, Jr., on January 27, 2010, in Charleston County. A sentence of twenty-five (25) years was imposed along with a fine of \$50, 000.

Petitioner appealed his conviction and submitted a final brief on December 9, 2010. Respondent submitted its final brief on December 2, 2010. On January 23, 2012, the United States Supreme Court issued the opinion of United States v. Jones, ____ U.S. ____, 132 S.Ct. 945 which dealt with the issue here, GPS devices and the Fourth Amendment. Petitioner notified the Court of Appeals of this case prior to oral arguments which were heard on February 14, 2012. On April 25, 2012, the Court of Appeals issued an opinion affirming petitioner's conviction: State v. Adams, 397 S.C. 481, 725 S.E.2d 523. A petition for rehearing was filed on May 9, 2012, and was denied on July 28, 2012. A petition for writ of certiorari was filed on August 23, 2012. Respondent filed a return on October 23, 2012. Petitioner filed a reply to the return on October 29, 2012. On November 6, 2013, this Court issued an order granting the petition and directing the parties to serve and file the appendix and briefs.

This brief of petitioner follows.

ARGUMENT

The Court of Appeals erred in holding that an improper lane change violation trumps the exclusionary rule under the Fourth Amendment to the United States Constitution when the police placed a GPS device on petitioner's vehicle without first obtaining a search warrant.

The Court of Appeals basically held in its opinion in this case that minor traffic lane change violations trump the exclusionary rule under the Fourth Amendment when police placed a GPS device on petitioner's vehicle without first obtaining a search warrant as mandated by United States v. Jones, ___ U.S. ___, 132 S.Ct. 945 (2012). As petitioner noted in the petition for rehearing, the test for excludability under the Fourth Amendment is whether the evidence "has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." Wong Sun v. United States, 371 U.S. 471, 488, 83 S.Ct. 407, 417 (1963). As this Court wrote in State v. Copeland, 321 S.C. 318, 323, 468 S.E.2d 620, 624 (1996) the "doctrine provides that evidence must be excluded if it would not have come to light but for the illegal actions of the police, and the evidence has been obtained by the exploitation of that illegality." The police in this case illegally placed a GPS device on petitioner's car to track his travels in order to find evidence of drug dealing. Significantly, the trial judge even noted that the police could never have gotten behind petitioner to get a traffic violation if they did not have the illegal tracking device. (ROA p. 96, lines 23-25).

In Brown v. Illinois, 422 U.S. 590, 95 S.Ct. 2254 (1975)¹ the Court said there are several factors that have to be looked at in determining if the taint has been purged from the illegal act. One has to look at the time between the illegal arrest, search, or seizure and the subsequent evidence

¹ In Lanier v. South Carolina, 474 U.S. 25, 106 S.Ct. 297 (1985) the South Carolina Court of Appeals was reversed because it had reasoning inconsistent with Brown v. Illinois.

sought to be suppressed, “the presence of intervening circumstances,” and, “particularly, the **purpose and flagrancy of the official misconduct.**” 422 U.S. at 603-604, 95 S.Ct. 2261-2262. In Brown there was a two hour lapse after an illegal arrest where the defendant gave a confession after Miranda warnings were given. The Court found no intervening event of any significance and the Fifth Amendment Miranda warnings did not purge the taint of the illegal arrest. 422 U.S. at 604, 95 S.Ct. at 2262. The Court noted that if “Miranda warnings, by themselves were held to attenuate the taint of an unconstitutional arrest...the effect of the exclusionary rule would be substantially diluted. 422 U.S. at 602, 95 S.Ct. at 2261. Brown’s illegal arrest was seen as continuing up to the time his statement was taken. In petitioner’s case the illegal search was the placing of the GPS device on petitioner’s car and its continued use to monitor the vehicle. United States v. Jones, ___ U.S. ___, 132 S.Ct. 945, 949 (2012). It should be noted that in Jones, the exclusionary rule did apply. In United State v. Katzin, 732 F.3d (C.A.3, 2013), the third circuit gave over a two-page discussion on why the exclusionary rule applies in warrantless GPS cases. 732 F.3d at 205-208. And, the facts in Katzin arose before Jones was decided.

The instant opinion does not recognize the precedent set forth in Wong Sun and Brown and can not show any evidence of the substance that dissipates or attenuates the taint of the State’s continued illegal search of petitioner.

The Court of Appeals asserts that petitioner created a new and distinct criminal act by positing two minor traffic violations. These minor violations were in fact strong circumstantial evidence petitioner was going to be stopped and searched no matter what. The police were exploiting the illegality of the GPS device.

The Court of Appeals further misapplies the new and distinct criminal violation doctrine. Furthermore, it is even uncertain if the United States Supreme Court even subscribes to this doctrine

as it is enunciated by the Court of Appeals. The Court cites State v. Nelson, 336 S.C. 186, 519 S.E. 2d 786 (1990) and In re Jeremiah, 361 S.C. 620, 606 S.E.2d 766 (2004) for its precedent for this proposition. But those cases, and the cases they cite, stand for the proposition that a new and distinct criminal violation is one that is in response to the illegal conduct of the police. There has been no evidence presented in this case that petitioner's "illegal" lane change was in response to the prior illegal conduct of the police. Examples of which the Court cites from In re Jeremiah are:

Accord United States v. Waupekenay, 973 F.2d 1533 (10th Cir 1992) (although police entered suspect's home illegally, suspect commenced new illegal activity when he aimed semi-automatic rifle at police); State v. Windus, 207 Ariz. 328, 86 P.3d 384 (App. 2004) (although officers unlawfully entered defendant's yard, officers did not exploit their unlawful entry to provoke defendant's new distinct criminal conduct consisting of an aggravated assault and resisting arrest); Clark v. United States, 755 A.2d 1026 (D.C. 2000) (even if defendant was under unlawful arrest when he threatened police officer with bodily harm, evidence of that crime would not be suppressed as "fruit of the poisonous tree," as the commission of the threat was an intervening act that purged any taint associated with the unlawful arrest); State v. Miskimins, 435 N.W.2d 217 (S.D. 1989) (where defendant's response to unlawful action by police itself a new, distinct criminal act, there are sound policy reasons for not suppressing this evidence). See also U.S. v. Sprinkle, 106 F.3d 613 (4th Cir. 1997) (defendant fired gun at police after illegal stop); U. S. v. Nooks, 446 F.2d 1283 (5th Cir. 1971) (defendant fled at over 100 MPH and fired several shots at police).

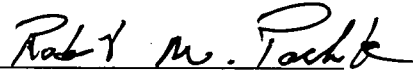
The evidence in this case was seized because of the exploitation of the illegal search. There were no sufficient intervening circumstances to attenuate the taint of the illegal search. The police conduct was a flagrant abuse of power. Under the Court of Appeals' interpretation of the Fourth Amendment and the exclusionary rule, the police could put an illegal GPA device on any vehicle and not be sanctioned if they wait for a lane change where a turn signal is not used. The exclusionary rule is not to be thwarted in such a way. The exclusionary rule would have no

meaning. Miranda warnings did not purge the taint of an illegal arrest in Brown. A failure to signal lane change should not purge the taint of the illegal search and continued monitoring of petitioner.

CONCLUSION

Petitioner's conviction should be reversed.

Respectfully submitted,



Robert M. Pachak
Appellate Defender

ATTORNEY FOR PETITIONER.

This 5th day of December, 2013

STATE OF SOUTH CAROLINA
*
IN THE SUPREME COURT

Certiorari to Charleston County

J. C. Buddy Nicholson, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

V.

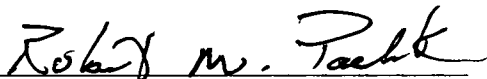
ALFRED ADAMS,

APPELLANT

APPELLATE CASE NO. 2012-212779

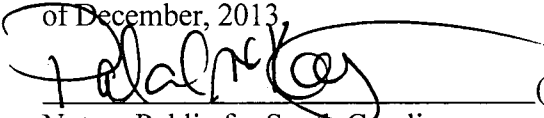
CERTIFICATE OF SERVICE

I certify that a true copy of the brief of petitioner, in this case has been served on Deborah R.J. Shupe, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and the South Carolina Court of Appeals, this 5th day of December, 2013.


Robert M. Pachak
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 5th day
of December, 2013.


Notary Public for South Carolina

My Commission Expires: July 24, 2022

(L.S.)