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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Horry County

Benjamin H. Culbertson, Circuit Court Judge

THE STATE

RESPONDENT

v.

VERNTIRELL DUKES

APPELLANT

APPELLATE CASE NO. 2012-213138

ANDERS BRIEF OF APPELLANT

LANELLE CANTEY DURANT
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

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STATEMENT OF ISSUE ON APPEAL

Did the trial court err in denying appellant's motion to suppress the gun because it was seized from the vehicle in an illegal search which was a violation of appellant's Fourth Amendment rights?

STATEMENT OF THE CASE

On June 21, 2012, the Horry County Grand Jury indicted Verntirell Jerwon Dukes on the charge of unlawful possession of a pistol. On October 4-5, 2012, Dukes proceeded to trial before the Honorable Benjamin H. Culbertson and a jury. Dukes was represented by Melinda Knowles, and the state was represented by Martin Spratlin. The jury returned a verdict of guilty as indicted. Judge Culbertson sentenced Dukes to five years. R. 244, ll. 6 – 20. A notice of appeal was filed. This appeal follows.

ARGUMENT

The trial court erred in denying appellant's motion to suppress the gun because it was seized from the vehicle in an illegal search which was a violation of appellant's Fourth Amendment rights.

On April 14, 2012, about two o'clock in the early morning, Nicole MacDowell and her fiancé, Clevon Dantzler, picked up Verntirell Dukes and his girlfriend, LaTashia, and went to the Sun-Up Bar in Socastee which they frequented often. R. 144, ll. 11 – R. 147, ll. 15; R.153, ll. 1 – 22; R. 161, ll. 3 – 17. An argument pursued between her fiancé, Dantzler, and another customer. It reached the point that her fiancé was surrounded by several men so Dukes went to help him. Nicole and LaTashia were able to get the men to leave before a physical fight started. R. 158, ll. 7 – R. 165, ll. 25.

When they get in the car, Dantzler was in the drivers' seat; Nicole in the front passenger; Dukes behind Nicole; and LaTashia behind the driver. They started to pull out and were stopped by two policemen who made them all get out of the car one by one. R. 166, ll. 1 – R. 169, ll. 24.

Her car was a two door GMC Jimmy. In order to get Dukes out of the back seat, the front seat had to be pushed all the way up to the dashboard. R. 145, ll. 3 – 10; R. 150, ll. 7 – 10. Nicole was shocked when a gun was found in the floorboard of her car as she had no idea a weapon was in her car. R. 169, ll. 1 – 24; R. 173, ll. 1 – 15; R. 175, ll. 4 – 21.

Nicole's testimony was that none of them were in the car when the gun was found in the vehicle. She, LaTashia and Dantzler were handcuffed, and Dukes was already in the patrol car. The officers said they found the gun under the front passenger seat but in the back

area where Dukes feet were. The front seat had to be pushed up so the gun was visible. However, the gun was not found until later. R. 176, ll. 1 – R. 177, ll. 25.

Sammy Owens was a taxi cab driver who was responding to a call from a restaurant in the same building with the Sun-Up Bar on April 14, 2012. As he was waiting, he saw the crowd on the sidewalk and the commotion. Then he allegedly saw Dukes and another man leave the crowd and go to a dark brownish SUV vehicle and grab firearms. He saw Dukes tuck the gun under his belt in the back. They then went back to the bar. Owens then called 911 from his cell phone and was told they had already received one call. R. 78, ll. 15 – R. 86, ll. 20.

Officer William Odom testified that he was working the night shift on April 14, 2012 until six o'clock a.m. He received a dispatch call to go to the Sun-Up Bar due to a fight in progress and possibly a black male carrying a firearm. None of the witnesses wanted to talk to him until finally one man named Leonard Lewis told him that a man described as Dukes had a gun and pointed out the tan SUV that Dukes had entered. Officer Odom and his back-up, Officer Steve Rhew, stopped the car which was trying to leave. As Officer Rhew was getting Dukes out of the car from the back seat, Officer Odom saw a revolver pistol under the back rear seat where Dukes was sitting. R. 91, ll. 12 – R.103, ll. 23.

As a rebuttal witness for the state, Officer Odom testified that he first saw the gun when Officer Rhew removed Dukes from the car. However, for officer safety reasons, they got everyone out of the car first, and then retrieved the gun from the car. The purpose in getting everyone out first was to prevent anyone from reaching over and grabbing the gun. R. 200, ll. 8 – R. 204, ll. 22.

Pretrial, the state told the court that Dukes had a prior conviction of a violent felony which was burglary second degree violent which was the basis for the unlawful possession of a firearm. R. 14, ll. 21 – R. 15, ll. 8.

In a pretrial motion, defense counsel made a motion for the suppression of the gun on the basis that there was no probable cause to enter the vehicle. Therefore, the search was unlawful and a violation of Dukes' Fourth Amendment right. R. 21, ll. 10 – R. 22, ll. 16. A suppression hearing was held when the two police officers testified. The judge denied the motion to suppress the firearm. R. 22, ll. 17 – R. 46, ll. 6.

The Fourth Amendment to the United States Constitution provides that the people have a right to be secure in their persons and homes against unreasonable searches and seizures, and no warrants shall issue, but with probable cause, supported by oath and affirmation, describing the place to be searched and the things to be seized.

In State v. Blassingame, 338 S.C. 240, 525 S.E.2d 535 (Ct. App. 1999), the Court of Appeals held that a police officer may stop and briefly detain and question a person for investigative purposes, without treading upon his Fourth Amendment rights, when the officer has a reasonable suspicion supported by articulable facts, short of probable cause for arrest, that the person is involved in criminal activity; reasonable suspicion" requires a particularized and objective basis that would lead one to suspect another of criminal activity.

The United States Supreme Court held in Arizona v. Gant, 556 U.S. 332 (2009), that among the exceptions to the warrant requirement is a search incident to lawful arrest. The Court held that the police may search the passenger compartment of a vehicle incident to occupant's recent arrest only if it is reasonable to believe that the arrestee might access the vehicle at the time of the search or that the vehicle contains evidence of the offense of arrest.

The Court also wrote that the limitation to a search incident to arrest, that it may only include the arrestee's person and the area within his immediate control, that is the area from within which he might gain possession of a weapon or destructible evidence, defines the boundaries of this exception to the warrant requirement and ensures that the scope of a search incident to arrest is commensurate with its purposes of protecting the arresting officers and safeguarding any evidence of the offense of arrest that an arrestee might conceal or destroy. Id.

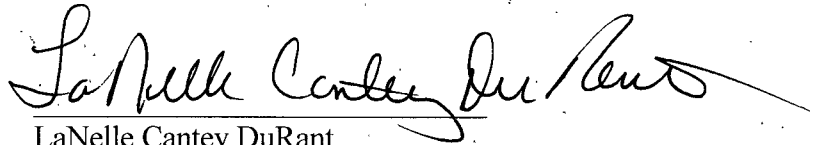
The trial court should have suppressed the firearm evidence found as a result of the search. This was an illegal search and violated Dukes' Fourth Amendment rights because the police did not provide any specific facts as to why there was articulable suspicion to search the vehicle.

The firearm should have been suppressed in Dukes' case because the police did not have probable cause to search the vehicle. The witness, Nicole, testified that the search was done after they were all out of the car. Until the police found the gun, Dukes was not under arrest. This was not a search incident to arrest. There were not articulable facts to support probable cause. The police were responding to a call, as Officer Odom testified, where there was the "possibility of a black man with a firearm."

CONCLUSION

Based on the above, the conviction and sentence should be reversed and the case remanded for a new trial.

Respectfully submitted,

A handwritten signature in cursive script, reading "LaNelle Cantey DuRant". The signature is written in black ink and is positioned above the printed name and title.

LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR APPELLANT

This 6th day of September, 2013.

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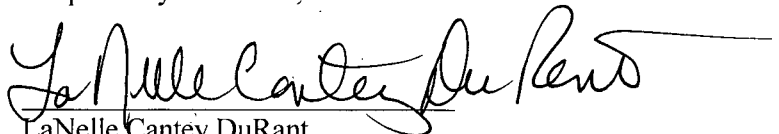
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Verntirell Dukes states:

1. She is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent appellant.
2. She has reviewed the record of appellant's trial before Judge Benjamin H. Culbertson, which was held on October 5, 2012, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. She has, pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967), briefed an arguable legal issue which arose during the course of the trial.

WHEREFORE, she asks the Court to relieve her as counsel for Verntirell Dukes.

Respectfully submitted,



LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR APPELLANT

This 6th day of September, 2013.

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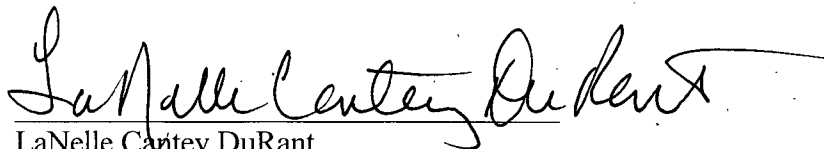
**DESIGNATION OF MATTER TO BE
INCLUDED IN RECORD ON APPEAL**

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

- (1) True-billed indictment(s);
- (2) Entire Trial Transcript October 4-5, 2012.

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

September 6th, 2013



LaNelle Caritey DuRant
Appellate Defender

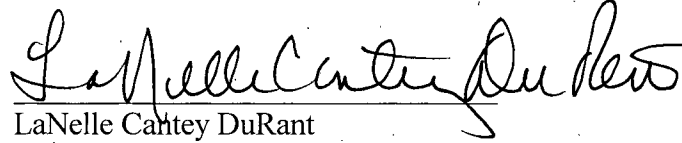
South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

Attorney for Appellant

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Anders 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."

September 6th, 2103



LaNelle Cartey DuRant
Appellate Defender

S.C. Commission on Indigent Defense
Division of Appellate Defense
1330 Lady Street, Suite 401
Post Office Box 11589
Columbia, South Carolina 29211-158

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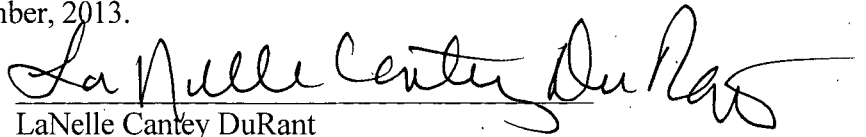
V.

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RESPONDENT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Anders Brief of Appellant and Designation of Matter and Record on Appeal in the above referenced case has been served upon Salley W. Elliott, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Anders Brief of Appellant and Designation of Matter and Record on Appeal have been served on Verntirell Dukes, #318790 at Evans Correctional Institution, 610 Hwy. 9 West, Bennettsville, SC 29512, this 6th day of September, 2013.



LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 6th day of September, 2013.

Leaie Kendall (L.S.)

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