THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Greenville County
G. Edward Welmaker, Circuit Court Judge

Opinion No. 2014-UP-282 (S.C. Court of Appeals filed July 9, 2014)

THE STATE,

RESPONDENT,

V.

DONALD MARQUICE ANDERSON,

APPELLANT.

APPELLATE CASE NO. 2012-212499

PETITION FOR REHEARING

The Appellant, Donald Marquice Anderson, respectfully petitions the Court for a rehearing of its Opinion No. 2014-UP-282 pursuant to Rule 221(a), SCACR based upon the following points overlooked or misapprehended by the Court:

On July 9, 2014, this Court filed its unpublished opinion affirming Appellant's conviction for possession with intent to distribute cocaine base. In his appeal, Appellant argued that the Trial Court erred in ruling that the police officers had reasonable suspicion of criminal activity to justify stopping Appellant and reasonable suspicion to conduct a pat-down search of Appellant for weapons.

The police officers in this case had no justification for stopping and detaining Appellant under the stop and frisk exception to the Fourth Amendment set forth in Terry v.

Ohio, 392 U.S. 1 (1968). The State stated at the suppression hearing that four primary facts, taken together, provided the officers the basis for a reasonable suspicion of criminal activity: (1) the high crime neighborhood; (2) the execution of a search warrant of a suspected crack distribution house that was unconnected to Appellant; (3) the fact that Appellant was seen in the cut area between the home being searched and Sullivan Street, an area which was not covered by the search warrant; and (4) that Appellant changed direction and walked away upon seeing police officers. R. 42, l. 11 – 44, l. 18.

In making the determination that the officers had a particularized and objective basis for suspecting the particular person stopped of criminal activity, the courts must consider the totality of the circumstances as they existed at the time of the stop. United States. v. Beauchamp, 659 F.3d 560, 569-70 (6th Cir. 2011). This does not, however, prevent a court from discussing each factor one by one as each are put into the mix. United States v. Sprinkle, 106 F.3d 613, 617 (4th Cir. 1997).

First, the fact that the officers spotted Appellant in a high crime neighborhood at dusk before it was dark does not provide independent or freestanding grounds for reasonable suspicion. See id. "Were we to treat the dangerousness of the neighborhood as an independent corroborating factor, we would be, in effect, holding a suspect accountable for factors wholly outside his control." United States v. Perrin, 45 F.3d 869, 873 (4th Cir. 1995); see also Brown v. Texas, 443 U.S. 47, 52 (1979) ("The fact that appellant was in a neighborhood frequented by drug users, standing alone, is not a basis for concluding that appellant himself was engaged in criminal conduct. In short, the appellant's activity was no different from the activity of other pedestrians in that neighborhood.").

Although being seen in a high crime neighborhood carries no weight standing alone, "'an area's disposition toward criminal activity is an articulable fact' . . . that may be considered along with more particularized factors to support a reasonable suspicion." Sprinkle, 106 F.3d at 617 (internal citations omitted). In this case, there are no other particularized factors to support a reasonable suspicion as discussed further below.

The second and third factors the State pointed to as justifying the officers' stop of Appellant was the execution of a search warrant at a suspected crack distribution house nearby and Appellant's location in a cut area between the home searched and Sullivan Street, an area that was not covered by the search warrant. The United States Supreme Court, however, has recently held that the seizure of a person stopped and detained beyond the immediate vicinity from the premises to be searched is invalid where the only justification for the detention was to ensure the safety and efficacy of the search. Bailey v. United States, 133 S. Ct. 1031 (2013).

That is what the officers did in this case. A perimeter was set up beyond the immediate vicinity of the house to be searched, and officers were to detain individuals in this area even though it was outside of the scope of the search warrant. R. 11, ll. 8-15; 16, ll. 13-15. When the officers saw Appellant in the cut area, they knew nothing in particular about Appellant except that he was present in the cut area between Dobbs Street and Sullivan Street. Appellant made no gestures indicative of criminal conduct or movements that might have suggested an attempt to conceal contraband.

There was no reason for these officers to have believed that Appellant was committing or about to commit a crime. That Appellant was located in an area that the officers had deemed relevant to the execution of the search warrant is a factor that should

be dismissed in determining whether the officers had reasonable suspicion to detain Appellant. See Ybarra v. Illinois, 444 U.S. 85 (1979) (holding that although search warrant gave police officers authority to search premises of public tavern and to search bartender for narcotics, pat-down search and seizure from tavern patron was not constitutionally permissible where there was no reasonable belief that patron was involved in any criminal activity or that patron was armed and dangerous).

The last factor the State points to as suspicious is that Appellant changed direction and walked away upon seeing the officers. Even assuming that Appellant walked away at a quick pace as Detective Hyatt testified, this alone, without more, is not an indication of criminal activity.

Walking away, even hurriedly, from an officer does not create reasonable suspicion. See Beauchamp, 659 F.3d at 570; see also United States v. Camacho, 661 F.3d 718, 726-27 (1st Cir. 2011) (holding that facts fell short of an objectively reasonable, particularized basis for suspecting defendant of criminal activity where "the most that can be said is that the two men were observed in a high crime area walking away from the vicinity of a street fight that one caller reported as involving Latin Kings"); United States v. Patterson, 340 F.3d 368, 372 (6th Cir. 2003) (stating that walking away from police "constitutes a factor to be outrightly dismissed"); United States v. Davis, 94 F.3d 1465, 1468 (10th Cir. 1996) (finding defendant's actions "in exiting the car, making and then breaking eye contact with the officers, and then walking away from the officers" does not furnish the valid basis for a Terry stop); State v. Pugh, 826 N.W.2d 418, 423-24 (Wis. Ct. App. 2012) (finding crooked manner in which defendant walked away from officer did not give rise to reasonable suspicion of criminal activity necessary for a stop).

"Evasive conduct can, of course, assist an officer in forming reasonable suspicion," but here there was no evasive conduct by Appellant. Sprinkle, 106 F.3d at 618. In cases in which courts have found that walking away from police does contribute to reasonable suspicion, specific facts have shown that the defendant's behavior was otherwise suspicious See United States v. Bumpers, 705 F.3d 168, 175-76 (4th Cir. 2013) (holding officer possessed reasonable suspicion to detain defendant where upon being caught by officer in the act of trespassing, defendant attempted to evade police by leaving premises at a quick pace); United States v. Pearce, 531 F.3d 374, 382-83 (6th Cir. 2008) (finding where officer observed defendant "exit a vehicle, glance towards him, hunch over, place his right hand in the small of his back, and start backing away," officer had a reasonable basis for believing defendant had a weapon and was getting ready to fire); United States v. Caruthers, 458 F.3d 459, 466-67 (6th Cir. 2006) (finding reasonable suspicion when the defendant hurried away from an officer and "hunched down" by a wall as if to conceal contraband or reach for a weapon); State v. Taylor, 401 S.C. 104, 107, 111-13, 736 S.E.2d 663, 664, 667 (2013) (finding reasonable suspicion where officers observed defendant "huddled up" with another male in what looked like a drug transaction before the two men immediately split up upon seeing the officers).

There is absolutely no evidence in this case that Appellant's behavior was otherwise suspicious. He was merely standing in the cut area with a female friend and turned and walked away upon seeing the police officers. This factor cannot form the basis of a reasonable suspicion on behalf of the officers to stop Appellant.

In its Opinion, this Court relied upon State v. Corley, 383 S.C. 232, 679 S.E.2d 187 (Ct. App. 2009), *aff'd as modified*, 392 S.C. 125, 708 S.E.2d 217 (2011) for the proposition

that Appellant's location in a cut area sometimes used by drug runners supported the Trial Court's finding that the officers had reasonable suspicion to stop Appellant. In Corley, the officer was conducting surveillance of a known drug residence and observed the defendant approach the residence in his vehicle at 2:50 a.m. The defendant exited his vehicle, walked to the rear of the residence, remained there for less than two minutes, and then returned to his vehicle and left. The officer initiated a traffic stop when the defendant failed to use a turn signal. Id. at 236, 679 S.E.2d at 189. This Court held that the officer's observation of defendant walking to the rear of the known drug residence, remaining there for a short period of time, and then promptly returning to his automobile, all which occurred in the early morning hours, supported a finding that the officer had reasonable suspicion to stop and investigate the defendant based on the officer's suspicion of drug activity. Id. at 242-43, 679 S.E.2d at 192-93.

In Corley, the officer actually saw the defendant approach the known drug residence during the early morning hours and remain there for a short period of time – activity apparently consistent with engaging in a drug transaction. In Appellant's case, the officers never saw Appellant approaching or leaving the house where the search warrant was being executed. The officers merely saw Appellant in the dead center of the cut area, which while also allegedly used by drug runners, was also just a shortcut pathway from Dobbs Street to Sullivan Street that anyone in the neighborhood could use. Simply put, this cut area was located in a high crime area, which as explained above, without anything more, is not sufficient to support reasonable suspicion of criminal activity to justify stopping Appellant.

Therefore, the factors provided by the State gain little, if any, strength when put together. Together, they did not give the officers in this case the necessary reasonable,

articulable suspicion of criminal activity. The stop of Appellant was not justified, and the motion to suppress the evidence of the crack cocaine should have been granted.

In addition, the officers did not have reasonable suspicion to conduct a pat-down search of Appellant for weapons where the officers did not articulate any specific facts which led them to believe that Appellant may have been armed or dangerous other than a generalized concern for their own safety.

Under Terry, "a law enforcement officer, for his own protection and safety, may conduct a pat-down to find weapons that he reasonably believes or suspects are then in the possession of the person he has accosted." Ybarra v. Illinois, 444 U.S. 85, 93 (1980). "Nothing in Terry can be understood to allow a generalized cursory search for weapons . . . . The "narrow scope" of the Terry exception does not permit a frisk for weapons on less than reasonable belief or suspicion directed at the person to be frisked . . . ." Id. at 93-94.

Detectives Hyatt and Rhinehart offered no articulable reasons why Anderson needed to be frisked for weapons other than generalized concerns for the safety of themselves. To justify a pat-down search for weapons, an officer needs to articulate specific facts that led him or her to believe that the detained person was armed and dangerous. Terry, 392 U.S. at 21, 27; State v. Fowler, 322 S.C. 263, 267, 471 S.E.2d 706, 708 (Ct. App. 1996). A mere general concern for officer safety is not sufficient. Westmoreland v. State, 965 N.E.2d 163, 167 (Ind. Ct. App. 2012) (finding where defendant did not make any furtive movements and was not hostile or belligerent, officers were not justified based on a general concern for their own safety in patting down defendant); Commonwealth v. Preacher, 827 A.2d 1235, 1239-40 (Pa. Super. Ct. 2003).

The testimony of the officers indicated that Appellant made no movements or gestures indicating he was in possession of a weapon or about to commit an assault or otherwise acted threatening in any way. Instead, Appellant immediately complied with the officer's demands to get on the ground and was thereafter almost instantaneously handcuffed by Detective Rhinehart. Appellant was not wearing bulky clothing which could have concealed a weapon. Rather, he was wearing a shirt and shorts. Detective Hyatt further testified that he did not see anything that looked like a weapon on Appellant. Detective Hyatt only conducted the pat-down out of a general concern for officer safety. R. 17, ll. 19-21; 18, ll. 8-18; 23, ll. 6-10; 26, ll. 13-18 See Ybarra, 444 U.S. at 93 (holding that although search warrant gave officers the authority to search premises of tavern, pat-down of tavern patron was invalid where patron gave no indication or made any gestures suggesting he had a weapon).

This Court relies upon State v. Banda, 371 S.C. 245, 639 S.E.2d 36 (2006) for the proposition that when an officer has reasonable suspicion that drugs are present, there is an appropriate level of suspicion of criminal activity to justify a pat-down of an individual. In Banda, the South Carolina Supreme Court found that the police clearly had reasonable suspicion to suspect that drugs were present in the vehicle of which the defendant was a passenger. The police had observed the vehicle leave the residence of a known drug dealer. Additionally, the vehicle displayed stolen Georgia license tags and the police knew from a confidential informant that the target's drug shipments came from Georgia. Even though the police realized that the defendant was not their target, the Supreme Court found that the fact that the activity observed at the target's house corroborated the informant's statements was enough to give the officers a reasonable

suspicion that the defendant was in some way involved with the target's drug activity and that drugs might therefore be in the vehicle. Given the frequent association between drugs and guns, the Supreme Court held that the officer's frisk for weapons was appropriate under Terry. Id. at 253-54, 639 S.E.2d at 40-41.

In Banda, the officers had sufficient information that drugs would likely be found in the vehicle in which the defendant was a passenger and therefore with this information plus the nexus between drugs and guns, the officers had reasonable suspicion that the defendant might have been armed and dangerous. In Appellant's case, he was merely seen by officers in the middle of a cut through path in the neighborhood. The officers never saw him approaching or leaving the house being searched. The officers had no reason to believe that Appellant would have had drugs on his person. Therefore, without any reasonable belief that he had drugs on him, there was no reason for the officers to believe that Appellant was armed and dangerous.

Accordingly, the pat-down search of Appellant was invalid where the officers lacked a reasonable suspicion that Appellant was armed and dangerous. The Trial Court's denial of Appellant's motion to suppress the cocaine evidence should be reversed.

CONCLUSION

For the reasons set forth herein, Appellant Donald Marquice Anderson respectfully requests that the Opinion of the Court of Appeals be withdrawn and his conviction be reversed.

Respectfully submitted,

Carmen V. Ganjehsani
Appellate Defender

This 24th day of July, 2014.

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Petition for Rehearing in the above-entitled case has been served upon Mary Shannon Williams, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 24th day of July, 2014.

Carmen V. Ganjehsani
Appellate Defender
ATTORNEY FOR APPELLANT

SWORN TO BEFORE ME this 24th day
of July, 2014.

Bailey Reed (L.S.)
Notary Public for South Carolina
My Commission Expires: October 24, 2021.