THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Union County
John C. Hayes, III, Circuit Court Judge

Opinion No. 2014-UP-324 (S.C. Court of Appeals filed August 20, 2014)

THE STATE,

RESPONDENT,

V.

RANDY JARROD CROSBY,

APPELLANT.

APPELLATE CASE NO. 2011-205-207

PETITION FOR REHEARING

The Appellant, Randy Jarrod Crosby, respectfully petitions the Court for a rehearing of its Opinion No. 2014-UP-324 pursuant to Rule 221(a), SCACR based upon the following points overlooked or misapprehended by the Court:

On August 20, 2014, this Court affirmed the conviction and sentence of Appellant for possession with intent to distribute crack cocaine. Appellant argued on appeal that the Trial Court erred in: (1) refusing to suppress the evidence seized during the search of the vehicle when law enforcement did not have reasonable suspicion to justify the traffic stop; (2) refusing to suppress the evidence seized during the search of the vehicle because law enforcement did not have probable cause to believe the vehicle contained evidence of criminal activity and no exigent circumstances existed to justify the warrantless search; and

(3) finding a sufficient chain of custody existed to admit the evidence seized during the search of the vehicle and the drug evidence found in the police car.

ISSUE ONE: In Appellant's case, law enforcement did not have reasonable suspicion to justify the traffic stop because: (1) the information provided by Harris, the drug dealer, is inherently unreliable because Harris was not known by law enforcement; (2) this was not a high crime area; (3) the car was traveling legally and no citations were issued; (4) there was no evidence of attempted flight; (5) there was no evidence of evasive behavior; (6) the hour was not late as it was 6:00 PM on June 24th; (7) the Trial Court relied on incorrect information that Captain McNeil saw the Ford Expedition at the Lighthouse, when he was actually a mile down the interstate; and (8) law enforcement failed to verify any information regarding the black Ford Expedition prior to the stop. *See State v. Woodruff*, 344 S.C. 537, 544 S.E.2d 290 (Ct. App. 2001). Therefore, the Trial Court erred in refusing to suppress the evidence seized by law enforcement. R. 157, l. 10 – 9, l. 1; *See Wong Sun v. United States*, 371 U.S. 471, 484 (1963); *see also State v. Nelson*, 336 S.C. 186, 519 S.E.2d 786 (1999).

This Court relied on *State v. Driggers*, 322 S.C. 506, 511, 473 S.E.2d 57, 60 (Ct. App. 1996) in affirming the Trial Court's decision that Harris was not a confidential informant (CI). In *Driggers*, the court held that a non-confidential informant should be given a higher level of credibility because he exposes himself to public view and to possible criminal and civil liability should the information he supplied prove to be false. This reliance was in error because Harris acted as a CI because he had already incurred criminal charges and was trying to reduce those charges by supplying additional information to law enforcement.

This Court also relied on *Lopez v. State*, 664 S.E.2d 866, 869 (Ga. Ct. App. 2008) for the rule that in providing probable cause for an arrest, the informant's admissions against penal interest are valuable facts indicating the informant is reliable and telling the truth. This reliance by the Court is also in error because Harris was caught selling crack cocaine to a CI. He was not making an admission against penal interest; he was trying to get out of jail. R. 14, l. 9-15, l. 5.

State v. Peters, 271 S.C. 498, 248 S.E.2d 475 (1978), relied on by this Court, is also distinguishable because in that case the officer was well acquainted with the informant, the informant having previously given him information on four or five occasions. The officers in Appellant's case knew nothing about Harris; *see also Miller v. State*, 780 So.2d 151 (Fla. Ct. App. 2000) (holding information given by confidential informant who had never been used by the investigating officers before and who was only arrested a day earlier, was not sufficiently reliable so as to provide the officers with the reasonable suspicion needed to stop the defendant's vehicle).

This Court also affirmed the corroboration of Harris's information by Captain McNeil's validation that he saw Pope at the Lighthouse when Harris said Pope would be there. This reliance was in error because the testimony revealed that Captain McNeil did not actually see the Ford Expedition at the Lighthouse, but rather was a mile down the same highway before the Lighthouse. *See id.* (observing that the defendant did not stop at the meeting place that the CI described to the officers and finding no reasonable suspicion for stop). When defense counsel renewed his motion to suppress, R. 311, l. 7 – 312, l. 2, the Trial Court admitted:

> I'm very concerned about that because my corroboration was based, for lack of a better way to put it, kind of a three-legged

> stool . . . they were expecting a black Ford Expedition; that there was more than one person in the car, which was confirmed by Officer Sherfield when he followed the car and saw somebody in the back; and that the car was coordinated to be at the Lighthouse when Mr. Pope said it was by an officer. . . . It's a crucial fact in the decision I reached.

R. 312, l. 14 – 313, l. 5. The Trial Court stated, "I am going to still not grant the motion to suppress. I am, as you can probably tell, disturbed about the way this has fallen into place." R. 318, ll. 16-18. The Trial Court subsequently ruled, "I still find it is sufficient . . . nexus in time and place to establish the settlement corroboration or Harris's testimony . . . [the] motions to suppress are again denied on behalf of all three defendants." R. 319, ll. 15-21.

Traffic stops are reviewed under the standard set forth in *Terry v. Ohio*, 392 U.S. 1 (1968) because a traffic stop is more analogous to an investigative detention than a custodial arrest. *See United States v. Rusher,* 966 F.2d 868, 875 (4th Cir. 1992). In *Terry*, the United States Supreme Court outlined a two-prong test for analyzing the constitutionality of a traffic stop: (1) whether the police officer's action was justified at the inception of the traffic stop; and (2) whether the police officer's subsequent actions were reasonably related in scope and duration to the circumstances that justified the stop. *Rusher,* 966 F.2d at 875. Notably, temporary detention of individuals during a traffic stop by police, even if only for a brief period and for a limited purpose, constitutes a seizure of the persons within the meaning of the Fourth Amendment. *See Whren v. United States,* 517 U.S. 806, 809–10 (1996); *see also United States v. Arvizu,* 534 U.S. 266, 273 (2002) (noting the Fourth Amendment's protection against "unreasonable searches and seizures" extends to "brief investigatory stops of persons or vehicles").

In *Brendlin v. California,* 551 U.S. 249, 127 S.Ct. 2400 (2007) the United States Supreme Court ruled that passengers of vehicles may challenge the constitutionality of a

stop. The court noted that "the stopping of a vehicle and the detention of its occupants constitute a "seizure" within the meaning of the Fourth Amendment." 551 U. S. at 256, 127 S.Ct. at 2406 quoting *Colorado v. Bannister*, 449 U.S. 1, 4, n. 3, 101 S.Ct. 42 (1980). In *Brendlin* the court ruled that the passenger was seized from the moment the driver's car came to a halt on the side of the road. In our case, Appellant was seized when their car was detained. "Inarticulate hunches" do not support detentions. *Delaware v. Prouse*, 440 U.S. 648, 99 S.Ct. 99 S.Ct. 1391 (1979); *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868 (1968).

"To justify a brief stop [or] detention, the police officer must have a reasonable suspicion that the person has been involved in criminal activity." *State v. Robinson*, 306 S.C. 399, 402, 412 S.E.2d 411, 413 (1991). The term "reasonable suspicion" requires a particularized and objective basis that would lead one to suspect another of criminal activity. *See United States v. Cortez*, 449 U.S. 411 (1981); *see State v. Woodruff*, 344 S.C. 537, 544 S.E.2d 290 (Ct. App. 2001). In determining whether reasonable suspicion exists, the whole picture must be considered. *See United States v. Sokolow*, 490 U.S. 1 (1989). The burden is on the State to articulate facts sufficient to support reasonable suspicion. *See State v. Butler*, 343 S.C. 198, 539 S.E.2d 414 (Ct. App. 2000); *see also State v. Pichardo*, 367 S.C. 84, 104, 623 S.E.2d 840, 851 (Ct. App. 2005).

The United States Supreme Court created the exclusionary rule to safeguard Fourth Amendment rights. *United States v. Calandra*, 414 U.S. 338 (1974). The exclusionary rule prohibits the use of evidence obtained directly or indirectly through an unlawful search or seizure under the fruits of the poisonous tree doctrine. *See Wong Sun v. United States*, 371 U.S. 471, 484 (1963); *see also State v. Nelson*, 336 S.C. 186, 519 S.E.2d 786 (1999) (finding evidence is not admissible under the "fruit of the poisonous

tree" doctrine when the police exploit an unlawful search to seize evidence that would not have otherwise come to light). The Fourteenth Amendment incorporates the rule of excluding evidence obtained through an illegal search or seizure and makes it applicable to the states. *Mapp v. Ohio*, 367 U.S. 643, 655 (1961).

"The purpose of the Fourth Amendment is not to eliminate all contact between the police and the citizenry, but 'to prevent arbitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals.'" *United States v. Mendenhall*, 446 U.S. 544, 553–54 (1980) (quoting *United States v. Martinez–Fuerte*, 428 U.S. 543, 554 (1976). The United States Supreme Court and the Supreme Court of this State have recognized and applied the principle that police officers are not granted under *Terry*, "a general warrant to rummage and seize at will" and that any evidence seized from an unlawful detention must be excluded as "fruit of the poisonous tree." *State v. Woodruff*, 344 S.C. 537, 549, 544 S.E.2d 290, 296-97, n. 1 (citing *Texas v. Brown*, 460 U.S. 730, 748 (1983) (Stevens, J., concurring) (The United States Supreme Court "*has been sensitive to the danger . . . that officers will enlarge a specific authorization, furnished by a warrant or an exigency, into the equivalent of a general warrant to rummage and seize at will*") (emphasis added).

The Court of Appeals misapprehended this issue. The Court relied on incorrect information that Captain McNeil had a visual sighting of Pope's car at the lighthouse Fish Camp when Captain McNeil actually was a mile before the Lighthouse. This Court also relied on the finding that Harris was not a CI when the record was clear that Harris expected a benefit and did receive one.

ISSUE TWO: Law enforcement did not have probable cause to believe that the vehicle in which Appellant was a passenger contained evidence of criminal activity. *See Carroll*, 267 U.S. at 153. This is because law enforcement failed to conduct an investigation to gain probable cause; instead, the officers handcuffed the occupants and immediately searched the car without consent. The incident does not meet the automobile exception because the car was not mobile once the men were removed. The men did not have drugs nor weapons on them.

Notably, this instant case is distinct from our Supreme Court's decision in *Weaver*, where the murder suspect's Jeep smelled of bleach and had a wet interior after the murder. *Weaver*, 374 S.C. 313, 649 S.E.2d 479(2007). The officers had only the unreliable information provided by the recently arrested drug dealer who was facing serious jail time. Accordingly, the Trial Court erred in refusing to suppress the evidence seized by law enforcement. R. 159 l. 2 – 160, l. 3; *See Wong Sun*, 371 U.S. at 484; *see also Woodruff*, 344 S.C. 537, 549, 544 S.E.2d 290, 296-97, n. 1 (citing *Brown*, 460 U.S. 730, 748 (1983 (Stevens, J., concurring).

This Court of Appeals relied again on the misconception that Captain McNeil saw Pope's car at the lighthouse for probable cause. The Trial Court had found that law enforcement had probable cause to stop the vehicle:

> Not a lot of information, that's true, but enough, I think, to establish probable cause to make the stop, and that corroboration is that a black Ford Expedition would be coming from Spartanburg to Union on 176 out of Spartanburg. That alone would not be enough . . . [Harris] gave information that he had been contacted by whoever was on the other end of that phone, whether it was Pope or not, that the car in question was passing the Lighthouse fish camp, and that was confirmed by Mr. McNeil, Officer McNeil. So I think that's enough to create probable cause for

the stop.

R. 158, l. 10 – 9, l. 1.

This Court found there was probable cause based on the automobile exception. The automobile exception to the search warrant requirement is based on: (1) the ready mobility of automobiles and the potential that evidence may be lost or destroyed before a warrant is obtained and (2) the lessened expectation of privacy in motor vehicles which are subject to government regulation. *State v. Cox*, 290 S.C. 489, 351 S.E.2d 570 (1986). The automobile exception does not contain a separate exigency requirement. *See Dyson*, 527 U.S. 465 (1999).

"[U]nder the automobile exception, probable cause *alone* is sufficient to justify a warrantless search." *State v. Cox*, 290 S.C. 489, 351 S.E.2d 570 (1985). "The standard for probable cause to conduct a warrantless search is the same as that for a search with a warrant." *State v. Bultron*, 318 S.C. 323, 332, 457 S.E.2d 616, 621 (Ct. App. 1995).

This Court again relied, in error, we respectfully submit, on the information provided by the CI, Harris to provide probable cause. When a confidential informant is involved, it is necessary to examine the reliability and credibility of the informant for determining the existence of probable cause. *Illinois v. Gates*, 462 U.S. 213, 230-235 (1983). This Court, for probable cause, further relied on the fact that the officer saw the co-defendant Appellant look at the officer and bend down in the car. This was in error because no drugs were found in the car nor on the three defendants. The only item found near Appellant was the scale with residue of cocaine.

ISSUE THREE: The Court of Appeals affirmed the Trial Court's finding that the scales seized from Pope's car were a non-fungible item and a chain of custody was not required. This Court misapprehended the issue.

"[Our Supreme] Court has long held that a party offering into evidence fungible items such as drugs or blood samples must establish a complete chain of custody as far as practicable." *State v. Sweet*, 374 S.C. 1, 6, 647 S.E.2d 202, 205 (2007). In Appellant's case, the "unique factual circumstances" of the case establish that a sufficient chain of custody did not exist. Our Supreme Court has noted, "[T]he mere fact that evidence is sealed upon presentation for testing does not, in itself, establish a sufficient chain of custody." *State v. Hatcher*, 392 S.C. 86, 94-95, 708 S.E.2d 750, 754-55 (2011).

The scales had not been in a secured evidence bag and one of its batteries was missing when it was retrieved—not when it was placed in the drawer. The scales were kept in a drawer with a hundred other scales in a vault, and the original bag in which the scales were contained was broken. R. 36, ll. 1 – R. 38, ll. 11. There was also no chain of custody for the scales – Lieutenant Sherfield just collected the scales and kept it and admitted there was no chain. R. 54, ll. 3-5.

As to the crack cocaine, the officers provided false information on the accompanying affidavit of the evidence bag. Therefore, the Trial Court erred in finding a sufficient chain of custody existed. R. 160, ll. 9-25; R. 390, l. 24 – 391, l. 19; *See Carter*, 344 S.C. at 424, 544 S.E.2d at 837 ("Proof of chain of custody need not negate all possibility of tampering so long as the chain of possession is complete.").

State v. Glenn, 328 S.C. 300, 492 S.E.2d 393, 395 (1997), succinctly summarizes the chain-of-custody law:

> Because fungible items such as drugs or blood samples are not readily identifiable and may be easily tampered with, the party offering such items into evidence must establish a chain-of-custody as far as practicable. [Citations omitted.] Where the analyzed substance is passed through several hands, the evidence must not leave it to conjecture as to had it and what was done with it between the taking an analysis. However, the proof of chain-of-custody need not negate all possibility of tampering, but instead must only establish a complete chain of evidence as far as practicable. [Citations omitted.]
>
> While the chain of custody requirement is strict where fungible evidence is involved, where the issue is the admissibility of non-fungible evidence – that is evidence that is unique and identifiable – the establishment of a strict chain of custody is not required ... [i]f the offered item possesses characteristics which are fairly unique and readily identifiable, and if the substance of which the item is composed is relatively impervious to change, the trial court is viewed as having broad discretion to admit nearly on the basis of testimony that the item is the one in question and is in a substantially unchanged condition. On the other hand, if the offered evidence is of such a nature as not to be readily identifiable, or to be susceptible to alteration by tampering of contamination, the sound exercise of the trial court's discretion may require a substantially more elaborate foundation. A foundation of the latter sort will commonly entail testimony tracing the "chain-of-custody" of the item with sufficient completeness to render it reasonably probable that the original item has neither been exchanged with another nor been contaminated or tampered with. [Citations and quotation marks omitted.]

See also, State v. Freiburger, 366 S.C. 125, 620 S.E.2d 737 (2006).

The scales, in this case, do not fit the description of non-fungible items as stated in *State v. Glenn, id.* because they were not unique and identifiable. They were thrown in a drawer with other scales. The original bag was broken. A chain of custody was necessary to determine if these were the scales found in the car. If the State could not prove that, the

scales should have been suppressed. The issue is not whether it can be tampered with; it is can it be uniquely identified.

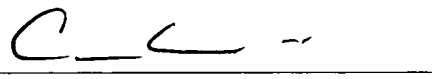
In addition, the crack cocaine was allegedly found in Vinson's patrol car. Lieutenant Sherfield testified that he took the crack cocaine from the three individuals in the traffic stop which was false. Vinson says he took the crack cocaine from his patrol car and gave it to Lieutenant Sherfield, but there is no report stating that the drugs were given to Sherfield. Appellant has been charged with possession of these drugs and yet the officers cannot even keep their stories straight of where they found this evidence.

While weak links in the chain of custody are typically a question of credibility for the jury, what happened to the evidence, how it was taken and collected and by whom and where it was taken from, cannot be left to conjecture. The manner of handling must still be demonstrated. "Evidence is still required as to how the item was obtained and how it was handled to ensure that it is, in fact, what it is purported to be." *Hatcher*, 392 S.C. at 95, 708 S.E.2d at 755. There is no proper evidence as to this issue on either the scales or the drugs, and therefore, the scales and drug evidence should be suppressed.

CONCLUSION

For the reasons set forth herein, Appellant Randy Jarrod Crosby respectfully requests that the Opinion of the Court of Appeals be withdrawn, his conviction be reversed, and the case remanded to the Trial Court for a new trial with instructions to suppress the evidence seized by law enforcement.

Respectfully submitted,



Carmen V. Ganjehsani
Appellate Defender

This 4th day of September, 2014.

RECEIVED
SEP 04 2014
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Union County
John C. Hayes, III, Circuit Court Judge

Opinion No. 2014-UP-324 (S.C. Court of Appeals filed August 20, 2014)

THE STATE,

RESPONDENT,

V.

RANDY JARROD CROSBY,

APPELLANT.

APPELLATE CASE NO. 2011-205-207

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 Mark R. Farthing, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Mr. Randy Jarrod Crosby, #348909,Walden Correctional Institution, 4340 Broad River Road, Columbia, SC 29210, this 4th day of September, 2014.

Carmen V. Ganjehsani
Appellate Defender

ATTORNEY FOR APPELLANT

SWORN TO BEFORE ME this 4th day
of September, 2014.

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