STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Greenville County
Honorable G. Edward Welmaker, Circuit Court Judge
Appellate Case No. 2014-001968

THE STATE,

Respondent,

v.

DONALD MARQUICE ANDERSON,

Petitioner.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Other Authorities:

STATEMENT OF ISSUES

I.

The trial court correctly found that police officers had reasonable suspicion to stop Petitioner where Petitioner was present in a high drug area, was using a shortcut known from experience to be used by drug traders in connection with 106 Dobbs Street, a warrant was being executed at 106 Dobbs Street, the occupants of 106 Dobbs Street were known to be armed and dangerous, and Petitioner immediately veered in the other direction after seeing police officers wearing clearly marked police vests.

II.

Because the officers had reasonable suspicion to conduct a Terry stop of Petitioner, the frisk for weapons was appropriate and no additional basis to search for weapons was required. During the lawful pat-down, Detective Hyatt recognized the feel of the baggie containing rocks of crack cocaine from his experience. Therefore, the seizure was constitutionally valid.

STATEMENT OF THE CASE

Petitioner was indicted during the May 2012 term of the Greenville County Grand Jury for Possession of Cocaine Base with Intent to Distribute (2011-GS-23-9939). On July 10, 2012, a jury was selected for trial. Testimony was taken pre-trial for purposes of Petitioner's motion to suppress and admissibility of a statement pursuant to Jackson v. Denno.[1] Following this testimony and argument, the Honorable G. Edward Welmaker denied Petitioner's motion to suppress drug evidence and found Petitioner's statement admissible. (Tr. p. 63, line 9 – p. 65, line 22.) Following pre-trial motions, Petitioner waived his right to a jury trial, opting to have the case heard by the bench. (Tr. p. 65, line 24 – p.74, line 20.) Judge Welmaker found Petitioner guilty. (Tr. p. 108.) Petitioner was sentenced to five (5) years, provided that upon the service of 90 days, the balance is suspended with probation for forty (40) months.[2] Conditions on probation included gainful employment or public service, substance abuse counseling, random drug and alcohol testing, and intensive probation for the first six (6) months. (Tr. p. 122, lines7-24.)

The Court of Appeals affirmed Petitioner's conviction and sentence. State v. Anderson, 2014-UP-282 (S.C. Ct. App. filed July 9, 2014). (Appx. pp. 1-4.) His Petition for Rehearing was denied on August 25, 2014, and the Petition for Writ of Certiorari followed. (Appx. pp. 5-16.)

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[1] 378 U.S. 368 (1964).

[2] Petitioner was also on probation for a prior drug conviction. (Tr. p. 104, line 20 – p. 105, line 6.) Judge Welmaker found a willful violation of probation and extended the probationary sentence for two (2) additional years.

STATEMENT OF THE FACTS

On August 4, 2011, at approximately 7:45 pm, the Greenville Police SWAT team executed a search warrant at 106 Dobbs Street. (Tr. p. 24.) The warrant was based on observations over time of drug transactions involving the home and the surrounding area, particularly nearby Sullivan Street. (Tr. p. 23, line 23 – p. 27, line 2.) A footpath, or "cut," led from 106 Dobbs to Sullivan Street, passing by another home at 113 Sullivan Street. Several experienced officers had observed that the cut was used by "runners," individuals who would purchase narcotics at 106 Dobbs Street and deliver them to buyers along Sullivan Street. (Tr. p. 24, line 17 – p. 25, line 6; p. 33, line 16 – p. 34, line 1; 48, lines 9-15.) Police officers felt that the raid of 106 Dobbs was particularly dangerous; individuals associated with the residence had prior convictions for murder, resisting arrest, and other violent acts. (Tr. p. 26, line 21 – p. 27, line 2.) Because of this enhanced concern for safety, officers secured a no-knock warrant and employed a distraction device at the moment of breach. During the raid, as planned, a team entered the home. Meanwhile, officers were placed in various points around the perimeter. (Tr. p. 28, lines 4-15.) Due to their observations of the cut between 106 Dobbs Street and Sullivan Street, police officers were placed there for security. (Tr. p. 28, line 18 – p. 29, line 7.)

Detective Kevin Hyatt, an officer with nine (9) years' experience, three and a half (3 ½) of them in narcotics, positioned himself in the bend of Dobbs Street "right next to the cut." (Tr. p. 33, lines 3-15; p. 34, lines 10-13.) Other officers fell into position on Sullivan Street at the end of the cut. (Tr. p. 34, lines 24-25.) Hyatt was personally familiar with the use of the cut path in the local drug trade. (Tr. p. 33, line 18 – p. 34, line 1.) While the search warrant was being executed, Detective Hyatt observed Petitioner

"half-way up to the cut between Dobbs and Sullivan." (Tr. p. 34, lines 15-16.) Petitioner appeared to see the officers at Sullivan Street then looked back toward the officers on Dobbs Street. (Tr. p. 34, line 23 – p. 35, line 6.) Petitioner then "veered to the right in a quick manner to go towards 113 Sullivan" as if to avoid contact with police. (Tr. p. 35, lines 3-6; p. 38, lines 22-24; p. 39, lines 1-20.)

Due to the safety concerns surrounding the raid, Hyatt ran toward Petitioner with weapon drawn. Petitioner and a female companion complied with Hyatt's instructions to lie on the ground. (Tr. p. 35, lines 8-12.) Hyatt was then joined by Sergeant Gary Rhinehart, an officer with ten (10) years' experience, four (4) of them in narcotics. (Tr. p. 41, lines14-15.) Rhinehart was also personally familiar with the community and particularly with the cut, having received and responded to many complaints of drug trade along the cut between Dobbs and Sullivan Streets. (Tr. p. 41, lines 21-25; p. 42, lines 10-18.) Officers placed Petitioner in handcuffs and then had him return to his feet. Hyatt then conducted a pat-down search for weapons. (Tr. p. 35, lines 16-24.) As Hyatt passed his hand over Petitioner's right pocket, Hyatt felt "plastic crumbling, felt multiple hard objects, rock-like objects in the bag." (Tr. p. 36, lines 2-4.) Based on his experience, Hyatt surmised that this was crack cocaine. (Tr. p. 36, lines 4-15.) Hyatt told Rhinehart that he believed Petitioner had drugs in his pocket, and Petitioner immediately said, "man, these are not my shorts." (Tr. p. 36, lines 21-22; p. 43, lines 17-25.) The bag of beige rocks recovered from Petitioner's pocket field tested positive for crack cocaine. (Tr. p. 44, lines 2-5.)

Petitioner moved to suppress the crack cocaine found in his pocket for two reasons:

(1) The drugs were not found as part of a Terry[3] stop but pursuant to the warrant executed at 106 Dobbs Street and its curtilage, and Petitioner was outside the bounds of the warrant;

(2) Even if it was a Terry stop, it was improper because:

a. Lack of reasonable suspicion to stop Petitioner.

b. Lack of reasonable suspicion that Petitioner was armed.

(Tr. p. 52, line 10 – p. 53, line 6.) Judge Welmaker found this to be a legitimate stop and frisk under Terry, and denied Petitioner's motion to suppress.

Later in the trial, Petitioner and neighbor Brunyesha Anderson asserted that Apellant had only been hanging out at Petitioner's relative's property at 113 Sullivan Street. (Tr. p. 97, line 16 – p. 99, line 17; p. 100, line 20 – p. 102, line 20.) Petitioner conceded that there was crack cocaine in his pocket but stated that he only had three (3), not eight (8), rocks. (Tr. p. 105, line 7-p. 106, line 18.) Petitioner denied any connection to the occupants of 106 Dobbs Street. (Tr. p. 102, line 18 – p. 103, line 11.) Petitioner maintained that he saw police arrive and was initially relieved but became worried that if shots were fired a gasoline tank in the back yard of 113 Sullivan Street could ignite. (Tr. p. 102, lines 1-20.) Petitioner assumed the noise was a gunshot, a sound he was not surprised to hear from the vicinity of 106 Dobbs, thinking "it was one of his people going crazy again." (Tr. p. 101, lines 9-25.)

[3] Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868 (1968)

STANDARD OF REVIEW

In Fourth Amendment search and seizure cases, the appellate court is limited to determining if there is *any* evidence to support the trial court's findings and can only reverse due to clear error. State v. Flowers, 360 S.C. 1, 5, 598 S.E.2d 725, 727 (Ct. App. 2004). "[A]n appellate court may conduct its own review of the record to determine whether the trial judge's ruling is supported by the evidence." State v. Khingratsaiphon, 352 S.C. 62, 70, 572 S.E.2d 456, 460 (2002). However, an appellate court will not reverse merely because it would have reached a different conclusion than the trial judge. State v. Rivera, 384 S.C. 356, 361, 682 S.E.2d 307, 310 (Ct. App. 2009).

ARGUMENT

I.

The trial court correctly found that police officers had reasonable suspicion to stop Petitioner where Petitioner was present in a high drug area, was using a shortcut known from experience to be used by drug traders in connection with 106 Dobbs Street, a warrant was being executed at 106 Dobbs Street, the occupants of 106 Dobbs Street were known to be armed and dangerous, and Petitioner immediately veered in the other direction after seeing police officers wearing clearly marked police vests.

Petitioner contends that the trial court should have suppressed the evidence found on him as a result of his stop and frisk because the officers did not have reasonable suspicion to justify stopping him. However, looking at the totality of circumstances, the investigatory stop was justified because the officers had reasonable suspicion that criminal activity was afoot. Thus, Petitioner's conviction and sentence should be affirmed.

The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. This guarantee protects against unreasonable searches and seizures, including those involving only a brief detention. State v. Pichardo, 367 S.C. 84, 97, 623 S.E.2d 840, 847 (Ct. App. 2005). However, "[t]he 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, 553-554 (1980) (quoting United States v. Martinez-Fuerte, 428 U.S. 543, 554 (1976)).

In United States v. Weaver the Fourth Circuit advised the following:

> The Supreme Court has recognized three distinct types of police-citizen interactions: (1) arrest, which must be supported by probable cause; (2) brief investigatory stops, which must be supported by reasonable articulable

> suspicion; and (3) brief encounters between police and citizens, which require no objective justification.

282 F.3d 302, 309 (4th Cir. 2002). Thus, a police officer may stop and briefly detain a person if the officer has "reasonable suspicion supported by articulable facts, short of probable cause for arrest, that the person is involved in criminal activity." State v. Blassingame, 338 S.C. 240, 248, 525 S.E.2d 535, 539 (Ct. App. 1999) (citing Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868 (1968)). Reasonable suspicion is something more than an "inchoate and unparticularized suspicion" or "hunch." Terry, 392 U.S. at 27. Instead, reasonable suspicion is founded upon "the specific reasonable inferences" the law enforcement officer "is entitled to draw from the facts in light of his experience." Id; State v. Burton, 349 S.C. 430, 562 S.E.2d 668, 672 (Ct. App. 2002) , rev 'd on other grounds, 356 S.C. 259, 589 S.E.2d 6 (2003).

When deciding whether reasonable suspicion exists, courts look at the totality of the circumstances. State v. Corley, 383 S.C. 232, 240, 679 S.E.2d 187, 191 (Ct. App. 2009); United States v. Sokolow, 490 U.S. 1, 8, 109 S. Ct. 1581 (1989) (courts must look at the "whole picture" when determining whether or not reasonable suspicion exists). Furthermore, "[f]actors which alone may be 'susceptible of innocent explanation' can 'form a particularized and objective basis' for a stop when taken together." United States v. Glover, 662 F.3d 694, 698 (4th Cir. 2011) (quoting United States v. Arvizu, 534 U.S. 266, 277–78 (2002)).

Once an officer has detained an individual based on a reasonable articulable suspicion, the officer is permitted to use whatever steps are reasonably necessary to effectuate the detention, ensure officer safety, and maintain the status quo throughout the course of the detention. See United States v. Hensley, 469 U.S. 221, 235 (1985) ("When

the Covington officers stopped Hensley, they were authorized to take such steps as were reasonably necessary to protect their personal safety and to maintain the status quo during the course of the stop."); see also Adams v. Williams, 407 U.S. 143, 145-146 (1972) ("The Fourth Amendment does not require a policeman who lacks the precise level of information necessary for probable cause to arrest to simply shrug his shoulders and allow a crime to occur or a criminal to escape. On the contrary, [Terry] recognizes that it may be the essence of good police work to adopt an intermediate response. A brief stop of a suspicious individual, in order to determine his identity or to maintain the status quo momentarily while obtaining more information, may be most reasonable in light of the facts known to the officer at the time.") (citations omitted).

In this case, officers only needed reasonable suspicion that criminal activity was afoot to detain Petitioner. Factors which may be considered in determining whether there is a reasonable suspicion of criminal activity include: presence in a high crime area, the lateness of the hour, nervous or evasive behavior, flight, the existence of a tip and the quality thereof, and the officer's experience and intuition. State v. Taylor, 388 S.C. 101, 694 S.E.2d 60 (Ct. App. 2009), rev'd based on finding that reasonable suspicion existed, 401 S.C. 104, 736 S.E.2d 663, (2013). The combination of various factors, which alone would be insufficient, may amount to reasonable suspicion. Id.

In the present case, as the trial judge noted, officers articulated several facts which, taken together, provide a reasonable suspicion:

(1) Petitioner was present in a community well-known to the officers to be rife with drug traffic;

(2) The particular footpath being traversed had, in the officers' own personal experience, been frequently used by "runners" traveling between 106 Dobbs Street and Sullivan Street in drug transactions;

(3) Execution of a search warrant at nearby 106 Dobbs Street had just begun, a location known to officers after thorough investigation to be used in the sale of drugs;

(4) Based on the criminal records of the occupants of 106 Dobbs Street, it was feared that the occupants were armed and dangerous and may attempt to evade police;

(5) After noticing officers clad in gear with "Police" clearly visible, Petitioner veered to avoid contact with police.

While each factor standing alone may not provide reasonable suspicion, when these factors are taken together, the trial court correctly concluded that reasonable suspicion for a Terry stop existed. (See Tr. p. 63, line 15 – p. 64, line 12; p. 108, lines 1-15.)

II.

Because the officers had reasonable suspicion to conduct a Terry stop of Petitioner, the frisk for weapons was appropriate and no additional basis to search for weapons was required. During the lawful pat-down, Detective Hyatt recognized the feel of the baggie containing rocks of crack cocaine from his experience. Therefore, the seizure was constitutionally valid.

Petitioner also argues that the trial court should have suppressed the evidence found on him because the officers did not have reasonable suspicion to justify conducting a pat-down for weapons. However, since reasonable suspicion existed to justify Hyatt's investigatory stop, the subsequent Terry frisk of Petitioner was justified. See United States v. Boone, 2012 WL 874832 at *6 ("Once reasonable suspicion exists to justify an

investigative stop, an officer may conduct a limited pat-down for officer safety.") During a pat-down search for weapons, an officer may seize an item where the incriminating character of the item is immediately apparent. Minnesota v. Dickerson, 508 U.S. 366, 113 S.Ct. 2130 (1993) (contraband excluded from evidence because the officer had manipulated the object after determining that no weapons were present); see also State v. Smith, 329 S.C. 550, 495 S.E.2d 798 (Ct. App. 1998) (evidence admitted that was found during a pat-down of individual because it was apparent to officer from touch and feel of bag and from experience that it contained narcotics). Here, Hyatt felt crumpling plastic and what felt like rocks. In Hyatt's experience, this was likely crack cocaine. Hyatt's suspicions were only buttressed by Petitioner's exclamation that the pants he was wearing were not his own. Because Hyatt immediately recognized the criminal character of the plastic bag during his pat-down search, seizure of the bag and drugs in Petitioner's pocket was not unconstitutional.

CONCLUSION

For the reasons discussed above, the State requests that this Court deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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Sept. 25, 2014

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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

Opinion No. 2014-UP-282 (S.C. Ct. App. filed July 9, 2014)
Appellate Case No. 2014-001968

THE STATE,

Respondent,

v.

DONALD MARQUICE ANDERSON,

Petitioner.

PROOF OF SERVICE

I, Ellen R. DuBois, certify that I have served the within Return to Petition for Writ of Certiorari by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Carmen V. Ganjehsani, Esquire
S.C. Commission on Indigent Defense
Division of Appellate Defense
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I further certify that all parties required by Rule to be served have been served.
This 27th day of September, 2014.

Ellen R. DuBois
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