

 ORIGINAL

THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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THE STATE,

RESPONDENT **SC Court of Appeals**

V.

DERRICK A. MCILWAIN,

APPELLANT

Appellate Case No. 2013-000373

Appeal from Lancaster County

Brooks P. Goldsmith, Circuit Court Judge

Opinion No. 2014-UP-343

PETITION FOR REHEARING

Pursuant to Rules 221 and 240 of the South Carolina Appellate Court Rules, the undersigned counsel would petition for rehearing in this appeal because this Court may have overlooked the fact that appellant's case was practically identical to State v. Pichardo, 367 S.C. 84, 623 S.E.2d 840 (2005), in that the **purpose** of the traffic stop in appellant's case was complete as the ticket was being written and that there was no reasonable suspicion to support appellant's second (or extended) detention in the case as this was an illegal search and seizure in violation of the Fourth Amendment. In support of this motion the undersigned counsel would submit the following information.

1.) Prior to trial, defense counsel moved to suppress drugs and other items (notebook, money, and digital scales) seized per a vehicle search as tainted evidence because of the illegal search and seizure that occurred during the traffic stop in this case. An in camera hearing followed. During the hearing, Officer Bowers testified that he initiated a traffic stop of a vehicle with no brake/tail lights on October 22, 2012, after 6:00 p.m. on 12th Street in Lancaster County. Officer Bowers stated that Sims was the driver, and that Christina Stevens was a front seat passenger, and that appellant sat in the backseat behind the driver. Then, after Sims produced his license and insurance papers and the tag was found to be valid, Officer Bowers stated that he decided to issue a warning ticket for the non-functioning brake/tail lights. Pretrial Hearing Transcript p. 4, l. 21 – p. 18, l. 11.

2.) Thereafter, Officer Barnes added that he walked to his patrol car and commenced writing the ticket when Officer McLemore arrived on the scene. Pretrial Hearing Transcript p. 18, lines 10-19. Officer Bowers explained that he was told by Officer McLemore, who recognized appellant, that appellant had warrants out against him. Minutes later, Officer Bowers ran a check on appellant and found out that there were warrants outstanding against him. Pretrial Hearing Transcript p. 18, l. 20 – p. 20, l. 9.

3.) Shortly after the warrants were discovered, Officer Bowers and McLemore went to the stopped vehicle and asked appellant to exit the vehicle. Appellant was arrested immediately thereafter. Pretrial Hearing Transcript p. 20, l. 20 – p. 22, l. 1. At this point, Officer Bowers saw a notebook in the back seat containing names and money amounts listed, (presumably drug transactions) and after the driver consented to a search, a zipper bag containing marijuana and cocaine were found, and then more marijuana was found in the console. Also, cash money and digital scales were found inside the vehicle as well. Pretrial Hearing Transcript p. 21-p. 41, l. 4.

4.) Defense counsel argued that the detention of appellant was beyond the scope of the traffic stop and that this prolonged detention that was used to check for warrants resulted in an unreasonable seizure and search because the traffic violation for bad brake/tail lights, which was the purpose or initiation behind the stop, had ended when the traffic ticket was being written by Officer Bowers. This meant that any activity beyond the brake/tail light, which had been resolved, rendered appellant's extended, i.e. second detention, and the search that followed unlawful. Pretrial Hearing Transcript p. 64, l. 2-p. 67, l. 2; Tr. 68, l. 22-p. 69, l. 1; Tr. 69, l. 3-p. 71, l. 23; Tr. 73 lines 2-20.

The trial judge ruled that the intervening warrant information that led to the extended detention of appellant did not render the seizure and search illegal and denied appellant's pretrial motion to suppress the drugs and items seized from the vehicle. Pretrial Hearing Transcript p.73, l. 21-p. 74, l.25.

5.) This Court held in State v. McIlwain, Unpublished Opinion No. 2014-UP-343 (S.C. Ct. App. filed September 24, 2014) that appellant's motion to suppress was properly denied in effect because reasonable suspicion existed to justify the extended duration of the traffic stop and cited to State v. Provet, 405 S.C. 101, 747 S.E.2d 453 (2013), and State v. Morris, 395 S.C. 600, 720 S.E.2d 468 (S.C. Ct. App. 2011) in support of its holding on this issue. However, this Court might have overlooked the fact that in this case, the **purpose** of the traffic had been completed and there was insufficient reasonable suspicion in existence to justify an additional seizure of appellant.

6.) This Court's reliance on Morris and Provet in support of its holding that an extended, i.e., second detention of appellant in this case was justified should be reviewed again in light of the fact that the scenario in appellant's case can be soundly distinguished from the facts in the Morris and Provet cases. For example, in Provet, the defendant was seized via a second detention and asked for his permission to search the car after the first detention and physical personal search of

that defendant yielded nothing, because the officer had observed air fresheners in the car and discovered that the defendant had lied about his alleged travel plans. Therefore, when the canine unit arrived and alerted to drugs (cocaine found in backseat in a fast food bag), the Court held that the second detention and seizure were legal due to justifiable reasonable suspicion that existed in the case. In Morris, the officer saw hallowed “Phillies blunts”¹ and loose tobacco and smelled the odor of marijuana in the car being driven by the defendant after initiating the traffic stop; and even though a search of the defendant yielded no contraband, the conversation the officer had with the defendant regarding his travel plans became suspicious and supported justification for the second detention and search that yielded the presence of ecstasy pills. The Morris Court found that there was reasonable suspicion in existence in that case to uphold the second detention and seizure as legal. In the case at bar, there were no facts amounting to reasonable suspicion to justify appellant’s second or extended detention as in Provet and Morris as there were no discoveries of blunts, and no smell of marijuana and no suspicious conversation or any activity indicating reasonable suspicion on behalf of the appellant or the occupants to justify conducting a second detention in the case (other than Officer McLemore’s arrival and suggestion that there were warrants out on appellant).

7.) To the contrary, however, the facts here support appellant’s claim that no reasonable suspicion of criminal activity was afoot in this case to justify a second seizure and search of the car. In the case at bar, Officer Bowers found no reasonable suspicion of criminal activity after obtaining the proper information from the driver and identifications of the occupants, and had already walked to his patrol car to write a warning ticket for the traffic violation before the second detention occurred. Thus, the initial undertaking regarding the traffic stop (non-operating brake/tail lights) was complete in **purpose** and Officer Bowers had no new suspicion of criminal activity. Hence, the

¹Phillies Blunts are cigars where the tobacco inside may be emptied and replaced with marijuana.

decision to write a warning ticket. At this point, appellant's detention via the traffic stop should have ended since the **purpose** of the traffic stop ended. Officer Bower's testimony at the in camera hearing establishing that the **purpose** of the stop (tail/brake light malfunction) had been fulfilled:

DEFENSE COUNSEL: Now, I think your statement was – and make sure I got this right – you recognized Mr. McIlwain when you had a name to put with the face.

OFFICER BOWERS: Yes.

DEFENSE COUNSEL: When you first saw huh did you go, “Ah, there are pending warrants on him.”

OFFICER BOWERS: No. I didn't know there was a warrant.

DEFENSE COUNSEL: So you weren't looking for him.

OFFICER BOWERS: No. Tr. p. 44, l 2-11.

DEFENSE COUNSEL: Was there anything in the car in plain view that was illegal?

OFFICER BOWERS: No. Tr. p. 44, lines 21-23.

CO-DEFENDANT'S COUNSEL: Well, in this particular case you said that you were headed back to write the ticket after getting the names of everybody in the car, correct?

OFFICER BOWERS: Yes. Tr. p. 46, l. 17 – p. 47, l. 3.

8.) Clearly, no reasonable suspicion existed in this case (save what was subsequently uncovered (warrants) as a result of the “fishing” expedition), to support appellant's extended or second detention and arrest, and ultimately, the search of the vehicle, which yielded the presence of drugs.

9.) The instant case is almost identical to the factual scenario in State v. Pichardo, *supra*, where the Court held that the officer's second (extended) seizure and the search that followed the

See Footnote # 1 in State v. Morris, *supra*.

issuance of the traffic warning ticket violated the Fourth Amendment because there was no reasonable suspicion to support the second and subsequent seizure and search of Pichardo. In Pichardo, the officer found no drugs after the pat down of Pichardo and went on to write a ticket for the lane traffic violation and returned the paperwork to him; but then turned back around to the vehicle to engage in conversation that led ultimately to the second (i.e. extended) detention, which the Court held was illegal because there was no reasonable suspicion to further detain Pichardo as the traffic stop had already been concluded and the purpose of the stop had been fulfilled. The Court in Pichardo cited to Florida v. Royer, 460 U.S. 491 (1983), in holding that an investigation detention must last no longer than to effectuate the purpose of the stop.

10.) The rule is that although the scope of the stop may be enlarged, the scope and duration of the seizure must be strictly tied to and justified by the circumstances which rendered its initial undertaking proper. State v. Morris, 395 S.C. 600, 720 S.E.2d 468 (2011); Sikes v. State, 323 S.C. 28, 448 S.E. 2d 560 (1994). A lawful traffic stop can become unlawful if it is prolonged beyond the time reasonably required to complete its mission. State v. Adams, 397 S.C.481, 725 S.E.2d 523 (2012), citing to State v. Morris, supra, and Illinois v. Caballes, 543 U.S. 405 (2005). Once the purpose of that stop has been fulfilled, the continued detention of the vehicle and occupants would result in a second detention. State v. Morris, supra, citing to State v. Pichardo, 367 S.C. 84, 623 S.E.2d 840 (2005). The encounter can only continue if the police have a reasonable suspicion that other criminal activity would be afoot. State v. Adams, supra; State v. Morris, supra, State v. Pichardo, supra.

11.) In Sikes, which is similar to Pichardo, a vehicle was stopped because the paper tags aroused suspicion of it being stolen, but after receiving the requested identification information from the driver and the passenger; nonetheless, the passenger was taken from the car while police ran a

warrant check on him. The Court reversed in Sikes and held that the officer's further detention of the passenger while going "fishing" for evidence of a crime, i.e., looking for warrants, was unlawful because the scope and duration of the initial seizure must be **tied to and justified by the circumstances which rendered its initiation proper**. In Sikes, the belief that the car was stolen ended upon the receipt of proper identifications. Therefore, there was no reasonable suspicion in existence thereafter to extend the seizure of the passenger by detaining him any further.

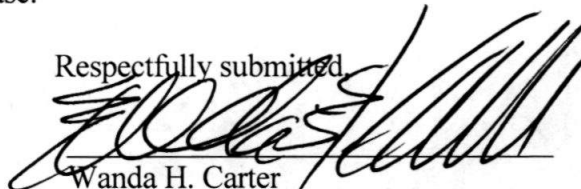
12.) Also, the Sikes Court cited to State v. Johnson, 805 P.2d 761 (Utah 1991), where the Court held that the leap from asking a passenger's name and date of birth to running warrant checks on the passenger was unlawful as such was an attempt to gather information in support of an unparticularized suspicion or hunch. Compare, State v. Williams, 351 S.C. 591, 571 S.E.2d 703 (2003), where the Court held that since the officer had written the traffic ticket and the traffic stop was complete, it was error for the officer to continue to question the defendant until he (officer) believed the answers were inconsistent as a basis to search the vehicle because there was no prior reasonable suspicion that criminal activity had been afoot. Going on a "fishing" expedition to find evidence in support an unparticularized hunch of inchoate criminal activity is unlawful because reasonable suspicion is an objective assessment of the circumstances at trial. See State v. Provet, 405 S.C. 101, 747 S.E. 2d 453 (2013), citing to Whren V. United States, *supra*. Reasonable suspicion is more than an inchoate or unparticularized hunch, but rather it is an objective basis that would lead to a suspicion of criminal activity under the probability of the circumstances. State v. Rogers, 368 S.C. 529, 6219 S.E. 2d 679 (2006) citing to State v. Butler, *supra*. Moreover, once the purpose of the traffic stop has ended, the officer may not extend the duration of the traffic stop without reasonable suspicion that would justify an additional or prolonged seizure. State v. Provet,

405 S.C. 101, 747 S.E. 2nd 453 (2013) citing to Pennsylvania v. Morris, 403 U.S. 106 (1977) and Arizona v. Johnson, 555 U.S. 323 (2009).

13.) This fishing expedition that uncovered the warrants against appellant and led to his illegal second detention violated the Fourth Amendment to the United States Constitution and article 1, §10 of the South Carolina State Constitution because the **purpose** of the initial stop had been completed and there was no reasonable suspicion justifying the second, extended detention which exceeded the **purpose** of the stop, and the drugs obtained from the seizure and search that followed constituted tainted fruit of the poisonous tree. Wong Sun v. United States, 371 U.S. 471 (1963). Thus, the lower court erred in denying appellant's motion to suppress the drugs and other items as evidence in the case.

WHEREFORE, the undersigned counsel would request a petition for rehearing on the issue raised herein, i.e. that the officer's **purpose** in detaining appellant had been complete at the time the ticket was about to have been written and that there was no reasonable suspicion justifying a second detention and subsequent search in the case.

Respectfully submitted,



Wanda H. Carter
Deputy Chief Appellate Defender

This 9th day of October, 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 Jennifer Ellis Roberts, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Mr. Derrick A. McIlwain, at Allendale Correctional Institution, PO Box 1151, Hwy. 47, Fairfax, SC 29827 this 9th day of October, 2014.



Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR APPELLANT

SWORN TO BEFORE ME this 9th day
of October, 2014.

 (L.S.)

Notary Public for South Carolina
My Commission Expires: October 30, 2022.