STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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SC Court of Appeals

Appeal from Abbeville County

Frank R. Addy, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ALFONZO ALEXANDER,

APPELLANT

APPELLATE CASE NO. 2013-002636

INITIAL BRIEF OF APPELLANT

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2. Did the trial court err in qualifying Lieutenant John Gray of the Abbeville Police Department as an expert in the filed of narcotics investigation which was not specialized knowledge outside the purview of the average juror and which did not meet the requirements of Rule 702, SCRE?

[1] Terry v. Ohio, 392 U.S. 1 (1968).

STATEMENT OF THE CASE

On January 7, 2013, the Abbeville County Grand Jury indicted Alfonzo Alexander on the charge of possession with intent to distribute crack cocaine (PWID) and PWID crack within the proximity of a school or park. On May 28-30, 2013, a trial was held before the Honorable Frank R. Addy and a jury in the absence of Appellant Alexander. Alexander was represented by Janna Nelson and Patricia A. Bolen. The state was represented by C. Yates Brown and Christopher Andrew Morrow. Tr. 1. Judge Addy did grant the defense motion for a directed verdict on the proximity charge. Tr.247, ll. 5 – 8. The jury returned a verdict of guilty on the PWID crack. At the close of the trial, Judge Addy sealed the sentence. Tr. 300, ll. 7 – Tr. 301, ll. 16.

On September 18, 2013, Alexander appeared before Judge Frank R. Addy for the purposes of sentencing. Alexander was again represented by Patricia Bolen, and the state was represented by Yates Brown. Judge Addy unsealed the sentence and sentenced Alexander to twenty-nine years in prison. September 18, 2013 Tr. 5, ll. 16 – Tr. 6, ll. 9.

Alexander's attorney filed a motion to reconsider the sentence which Judge Addy denied on November 26, 2013. Alexander's attorney filed a notice of appeal. This appeal follows.

STATEMENT OF FACTS

During pretrial motions, Lieutenant John Gray with the Abbeville Police Department testified that on August 12, 2012, he received a call through dispatch that an anonymous tipster had called complaining there were people in a neighboring apartment using drugs, gambling, and selling drugs. Lt. Gray and his shift went to the apartment and met the renter of the apartment, Ella Brown, sitting outside. Lt Gray told her of the complaint and asked if he could look inside the apartment. Ms. Brown consented. Tr. 84, ll. 1 – Tr. 85, ll. 4.

When he entered the apartment, Lt. Gray saw a crowd of people-about ten- inside the apartment. There was a strong smell of marijuana. Four or five people were sitting in the kitchen area playing cards. Tr. 86, ll. 5 – 14. There was a bag of marijuana under the table where the card players were located which contained about four and one/half grams of marijuana. Any of them could reach that marijuana. Tr. 174, ll. 5 – Tr. 175, ll. 19; Tr. 152, ll. 1 – Tr. 155, ll. 2.

Lt. Gray saw Alexander sitting on a couch in the living room just to the left when he entered the front door. There was a small bag of marijuana on the floor beside Alexander, and he had a large sum of money in his hand. The officer saw plastic baggies coming out of Alexander's left pocket. Lt. Gray then patted Alexander down for officer safety because guns and drugs go together. However, no weapon was found on Alexander. Tr. 86, ll. 17 – Tr. 87, ll. 19; Tr. 155, ll. 1 – 25.

When Lt. Gray patted Alexander down, he could feel an additional bulge under the baggie that he could see through his pocket that felt to be more baggies. In his other pocket, he could feel a hard square. Alexander gave consent for Lt Gray to remove the baggies and other things from his pocket. When he removed the baggies, Lt. Gray found a quantity of an

off-white, rocklike substance that he believed to be crack and a set of small scales. The cash that Alexander was about $839. Alexander was arrested and charged with PWID crack and PWID crack in the proximity of a school or playground. The only other person arrested was one man for trespassing. Tr. 87, ll. 20 – Tr. 90, ll. 3; Tr. Tr. 156, ll. 1 – Tr. 161, ll. 3.

On cross examination, Lt. Gray admitted that Alexander did not stand up but continued sitting on the sofa. In his report, Lt. Gray did not report anything about Alexander being fidgety. Alexander did not threaten him in any way. Nor did he reach for his pocket. He did not make any sharp movements, and did not look nervous. There was no mention of guns in the 911 call. In his report, Lt. Gray did not write that he saw baggies protruding from Alexander's pocket, but saw the baggies when he patted Alexander down. He had no prior know ledge of Alexander; he did not know him. Lt. Gray admitted that the baggies he felt did not feel like a gun. The scales did not feel like a gun either. Tr. 90, ll. 12 – Tr. 95, ll. 22.

At the beginning of the trial, defense counsel made a pretrial motion to suppress the drugs; the judge held the suppression hearing and Lt. Gray's pretrial testimony. Defense counsel argued that the drugs should be suppressed on the basis of a Fourth Amendment violation because the drugs were unlawfully seized and should be suppressed under the exclusionary rule. Tr. 69, ll. 25 – Tr. 70, ll. 6.

Counsel cited from the 911 report and the police officers' incident report Tr. 70, ll. 16 – tr. 72, ll. 7. Counsel argued that the basis of her motion was twofold. The first basis was that the police acted on an anonymous tip without any corroboration by the officers which was not sufficient reliability for an investigatory stop. She argued that anonymous calls were held to a higher standard for reliability. She cited State v. Taylor, 401 S.C. 104, 736 S.E.2d 663 (2013) for this constitutional issue because there were no other suspicious

circumstances. The anonymous caller in Alexander's case did not know who the apartment belonged to, and did not see any drugs or money exchanged. Although the investigative stop was of Ms. Brown, the drugs should be suppressed as part of the "fruit of the poisonous tree" doctrine because it resulted from the unlawful stop. Tr. 72, ll. 8 – Tr. 73, ll. 18.

The second basis for the suppression of the drugs was the unlawful Terry frisk. The police needed reasonable suspicion based on specific and articulable facts that the person to be frisked is armed and dangerous. Tr.73, ll. 17 – 25. Counsel cited the case of Minnesota v. Dickerson, 508 U.S. 366 (1993) which held that officers needed to be able to investigate without fear of violence.

There was nothing in the officers' incident report to indicate they had any reasonable fear for their safety. The state did not meet the constitutional burden to conduct a Terry frisk. Tr. 73, ll. 17 – Tr. 76, ll. 17.

At the close of the suppression hearing, defense counsel argued the same issues and position. Tr. 100, ll. 3 – Tr. 103, ll. 16. The state argued that under the totality of the circumstances the frisk was constitutional, and that Alexander consented. Defense counsel responded in argument that the police officer had no right to pull anything from Alexander's pocket because the officer testified that nothing during the pat-down felt like a gun. Therefore, the Terry frisk was unconstitutional. The judge denied the suppression motion, and allowed the drugs to come into evidence. Tr. 103, ll. 1 – Tr. 107, ll. 2.

Willie Smith, the forensic chemist from SLED, testified that the drugs found on Alexander weighed 6.8 grams. Tr. 221, ll. 1 – 15; Tr.224, ll. 1 – Tr. 225, ll. 1.

Defense counsel objected when the baggies and scales were admitted into evidence and when the drugs were admitted into evidence. Tr. 159, ll. 1 – Tr. 160, ll. 10; Tr. 224, ll. 1

– Tr. 226, ll. 2. Defense counsel renewed all objections at the close of the trial. Tr. 293, ll. 18 – 25.

During the testimony of Lt. Gray before the jury, the solicitor moved to have Lt. Gray qualified as an expert in the field of narcotics and paraphernalia investigations. After a few questions, defense counsel had a matter of law, and the jury was excused. Tr. 142, ll. 19 – Tr. 144, ll. 8.

The state provided a proffer of Lt. Gray's testimony which was that the state would have lt. Gray give his opinion as an expert that based on the number of baggies and weight of the drugs that created an inference that Alexander possessed the drugs with an intent to distribute. Tr. 145, ll. 1 – 14. Defense counsel argued:

> Our response would be that that's not something that the jury needs any sort of specialized testimony ---specialized scientific or other testimony about. I think he can testify, obviously, to what he found on our client. But the purpose of expert witnesses is to explain something that's outside the purview of the average juror. And I—I just don't think that this case rises to that level and requires any sort of specialized knowledge as would be required by an expert.

Tr.145, ll. 17 – Tr. 146, ll. 1.

Following argument by the state, defense counsel said she wanted to make an objection for the record both on relevancy and that this was outside what a jury would need; as well as the qualifications that did not meet the requirements of Rule 702, SCRE. Tr. 146, ll. 11 – Tr. 149, ll. 23.

The judge qualified Lt. Gray as an expert in the field of narcotics investigation and paraphernalia. Tr. 149, ll. 24 Tr. 150, ll. 12. When Lt. Gray testified that in his expert opinion, based on the grams and baggies found on Alexander, the drugs were for sale and

distribution, defense counsel renewed her prior objection on that matter. Tr. 166, ll.18 – Tr. 167, ll. 9.

ARGUMENT

The trial court erred in denying Appellant Alexander's motion to suppress the crack cocaine based on a violation of his Fourth Amendment rights because there was not sufficient reliability of the anonymous call to conduct an investigative stop; the police did not have reasonable suspicion based on specific and articulable facts that Alexander was armed and dangerous before conducting a Terry frisk; and the police did not have cause to pull any objects from Appellant Alexander's pocket after the officer said nothing felt like a gun during the pat-down?

The Fourth Amendment protects the right of the people to be secure in their persons, house, papers, and effects, against unreasonable searches and seizures. U.S. Const. amend. IV. This guarantee protects against unreasonable searches and seizures, including seizures that only involve a brief detention. Robinson v. State, 407 S.C. 169, 754 S.E.2d 862 (2014) citing State v. Pichardo, 367 S.C. 84, 97, 623 S.E.2d 840, 847 (Ct. App. 2005) (citing United States v. Mendenhall, 446 U.S. 544 (1980). Reasonable suspicion is something more than an inchoate and unparticularized suspicion or hunch. Terry v. Ohio, 392 U.S. 1, 27 (1968). The police officer may make reasonable inferences regarding the criminality of a situation in light of his experience, but he must be able to point to articulable facts that , in conjunction with his inferences, "reasonably warrant" the intrusion. Id. at 21, 27. Robinson v. State, 407 S.C. 169, 754 S.E.2d 862(2014).

The South Carolina Supreme Court wrote in State v. Taylor, *supra,* citing United States v. Perrin, 45 F.3d 869. 871 (4th Cir. 2008) that the required reasonable suspicion can arise from am anonymous ti,p provided that the totality of the surrounding circumstances justifies acting on the tip. The Fourth Circuit held in United States v. Branch, 537 F.3d 328, 337 (4th Cir. 2008) that courts

must look at the cumulative information available to the officer...and not find a stop unjustified based merely on a piecemeal refutation of each individual fact and inference.

In State v. Green, 341 S.C. 214, 532 S.E.2d 896 (Ct. App. 2000), the Court of Appeals held that the uncorroborated anonymous tip did not provide officer with reasonable suspicion to stop the defendant's automobile. In Green's case, the police received a dispatch call that a black male by the name of Alonzo Green was leaving Bayside Manor with a large sum of money and narcotics driving a gray four door Maxima. The officer saw a gray Maxima drive by and stopped it based solely on the anonymous tip. The Court of Appeals said that was not enough.

In Terry v. Ohio, *supra*, the U.S. Supreme Court held that when a police officer reasonably concludes that that criminal activity is occurring and the person with whom he is dealing may be armed and dangerous, and there is fear for his own or others' safety, he is entitled for the protection of himself and others to conduct a **carefully limited search** of the outer clothing of such person in an attempt to discover weapons which might be used to assault him. [Emphasis added].

In State v. Fowler, 322 S.C. 263, 471 S.E.2d 706 (1996), Fowler was seen coming from the front yard of a suspected drug house in a high drug area. The officers stopped him thinking he might have a weapon. The officers found a large lockblade knife and $504.87 on Fowler's person. The officer said Fowler walked in a suspicious manner and acted "kind of scared." The officers also knew Fowler had a prior conviction for drugs and was known to carry weapons and the officer had known him for two and one-half years. The Court of Appeals ruled that the officer did not have reasonable suspicion to frisk Fowler as Fowler had no prior weapons charges; police did not find weapons on defendant during previous searches; and another officer testified that Fowler did not do anything to make the officers think he was armed.

In Minnesota v. Dickerson, 508 U.S. 366 (1993), the police officer stopped Dickerson as he was leaving a known crack house. When he saw the police, Dickerson abruptly started walking in the opposite direction. When the office did a pat-down search, he found no weapons but found a lump in Dickerson's jacket that he suspected to be crack. The officer reached into Dickerson's pocket and pilled out the small plastic bag that contained crack. The U.S. Supreme Court held that this search was "not authorized by Terry or any other exception to the warrant requirement." The Court held that this further search was constitutionally invalid and therefore, the seizure of the cocaine was unconstitutional.

Alexander's case is similar to Minnesota v. Dickerson, Id., but the police in Dickerson's case had more facts of suspicion than in Appellant's case. All the officers in Alexander's case had was the uncorroborated anonymous tip. The officer did not know Alexander and had not heard of Alexander carrying weapons. The officer admitted that Alexander did not act nervous or fidgety; did not make any strange movements; did not look nervous; and there was no mention of names or weapons in the 911 call.

The officer exceeded the scope of a Terry frisk when he reached into Alexander's pocket and pulled out the baggies although Alexander allegedly consented. His consent came after the unlawful Terry frisk. Although the officer said he saw the baggie before the pat down, he did not include this significant piece of information in his report. He also said he saws the baggie when he looked into Alexander's pocket.

The investigative stop, the Terry frisk, and the search of Alexander's pocket were unconstitutional and the drugs should have been suppressed.

ARGUMENT II

The trial court erred in qualifying Lieutenant John Gray of the Abbeville Police Department as an expert in the filed of narcotics investigation which was not specialized knowledge outside the purview of the average juror and which did not meet the requirements of Rule 702, SCRE.

Rule 702, SCRE, provides ``that if scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise.

In State v. Robinson, 396 S.C. 577, 722 S.E.2d 820 (Ct. App. 2012), the Court of Appeals held that Commander Marvin Brown of the Drug Enforcement Unit was qualified as an expert in "how crack is packaged, sold, the going price, the typical intoxicating dose, and the different habits between the typical addict, and the typical drug dealer." Commander Brown had thirty years of experience in narcotics enforcement, and had published an article in a national magazine for the United States Attorney's Office. He taught classes as he was the narcotics supervisor.

Alexander's case is distinguished from Robinson in that Lieutenant Gray was an officer with the Abbeville Police Department in narcotics investigations. He had been in law enforcement since 1995 and had participated in only twenty or more narcotics investigations with the city but maybe one hundred in his career. He had taken classes several years before and was a certified drug instructor. Tr.139, ll. 6 – Tr. 149, ll. 6.

In State v. Kromah, 401 S.C. 340, 737 S.E.2d 490 (2013), the Supreme Court wrote in Footnote 5 that they could envision no circumstances where it was appropriate for a forensic interviewer of children to be qualified as an expert because their work was not appropriate for the courtroom. The Court cited State v. Douglas, 380 S.C. 499, 671 S.E.2d 606, 607 (2009) which held

that it was unnecessary for the forensic interviewer to be qualified as an expert because no specialized knowledge was required there.

It was not necessary for Lt. Gray to be qualified as an expert to give his opinion that Alexander's possession of 6.8 grams of crack was an inference that he intended to sell or distribute it. This was clear from the statute so all he had to do was cite the statute. South Carolina Code Section 44-53-375 (B) provided that "possession of one or more grams of methamphetamine or cocaine base is prima facie evidence of a violation of this subsection." Subsection (B) provided that a person who manufactures or distributes or possesses with intent to distribute is guilty of a felony and must be sentenced to prison.

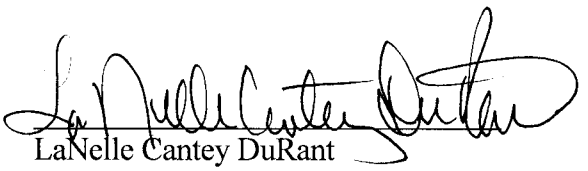
It was not harmless error for Lt. Gray to give his expert opinion that Alexander intended to distribute or sell the crack cocaine. The Supreme Court wrote in Kromah that "although an expert's testimony theoretically is to be given mo more weight by a jury then any other witness, it is an inescapable fact that jurors can have a tendency to attach more significance to the testimony of experts."

The prejudice suffered by Alexander was that Lt. Gray's opinion related to the inference of distributing crack rather than just possession as there were no witnesses who said he sold or distributed crack. The officer did not witness any drug transaction. This offense carried a much longer prison sentence than just possession.

CONCLUSION

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

Respectfully submitted,



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This 4th day of November, 2014.