ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Charleston County

Roger M. Young, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

STEVIE CURTIS HIGGINS, JR.,

APPELLANT

APPELLATE CASE NO. 2014-000393

FINAL BRIEF OF APPELLANT

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[1] Terry V. Ohio, 392 U.S. 1 (1998).

[2] Minnesota v. Dickerson, 508 U.S. 366 at 373 (1993).

STATEMENT OF THE CASE

Appellant Stevie Curtis Higgins was convicted of carrying a handgun unlawfully and possession of hydrocodone and possession of diazepam via a bench trial held at the January 2014 term of the Charleston County General Sessions Court before Judge Roger M. Young. Appellant was found guilty as charged and sentenced to imprisonment for a period of one year on the gun charge and ninety days (suspended) on the two drug charges. Michael Cooper represented appellant at trial and Assistant Solicitor James Stack appeared on behalf of the state in the case.

Appellant appealed his convictions and sentences. This brief follows.

ARGUMENT

The trial judge erred in admitting into evidence drugs found on appellant pursuant to a search by police at the crime scene where the drugs were seized in violation of the Fourth Amendment because the police officer's search exceeded the scope of the pat-down search for guns and continued into his clothing, which yielded narcotics, despite the fact that appellant's gun had already been seized and there were no longer any safety concerns in order to justify the protracted search, particularly since the sole purpose of a Terry[3] frisk is not to discover evidence, but to pursue an investigation without fear of danger or violence.[4]

The case at bar began when appellant was approached by police around 10:30 pm on August 17, 2012, after he was seen allegedly walking in the middle of the street on Doctor Taylor Road in Charleston, South Carolina. Thereafter, appellant was stopped and detained by police. The search and seizure of appellant that followed yielded a large (not small) pistol, and diazepam and hydrocodone pills. R. 4, l. 18 – R. 5, l. 8.

The state's case consisted of the testimony of only two witnesses: police officers Adam Midgett and Jessie King. Officer Midgett testified that after he saw a male standing in the middle of Doctor Taylor Road, he pulled up beside the male and stopped him, and then noticed that his right front pants pocket was bulging. Officer Midgett explained that he conducted a "Terry frisk" of appellant and felt a "hard metal object" in that right front pants pocket, which turned out to be a pistol (.38 revolver). Note that the gun was a "large frame revolver." R. 41, l. 20 – 25. After the pistol was recovered, Officer Midgett continued to search and seized pill bottles in the male's **left** pocket. R. 8, l. 2 – R. 9, l. 21.

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[3] 392 U.S. 1 (1998)

[4] See Minnesota v. Dickerson, 508 U.S. 366 at 373 (1993)

After having received Miranda warnings, the male, who was later identified as appellant, stated that he had no prescription for the pills and that the handgun belonged to someone else. R. 10, lines 5 – 20. Appellant was arrested at the scene immediately thereafter. Officer Jessie King testified that he assisted Officer Midgett in the detention and search of appellant, and that the initial search yielded the presence of a weapon and that the continued search yielded the presence of prescription pills. R. 44, l. 17 – R. 48, l. 20.

Prior to trial, defense counsel objected to the admission of the narcotics (pills) seized pursuant to a search of appellant because the search and seizure violated the Fourth Amendment. R. 5, l. 19 – R. 6, l. 23; R. 14, lines 9 – 22. The trial judge responded that he was taking the matter "under advisement." R. 13, lines 21-24; R. 58, lines 10-13. Counsel renewed the objection to the admission of the narcotics at the close of the state's case. R. 58, lines 4 – 15.

As a rule, an officer may conduct a "Terry" investigative pat-down frisk during the detention of a suspect to discover weapons where there is fear that the suspect is armed, but the search is carefully limited for this purpose only. Terry v. Ohio, 392 U.S. 1 (1968); State v. Taylor, 401 S.C. 104, 736 S.E.2d 663 (2013); State v. Odom, 376 S.C. 330, 656 S.E. 2d 748 (2008); State v. Adams, 397 S.C. 481, 725 S.E.2d 523 (2013). However, the pat-down search cannot be unreasonable. State v. Taylor, supra. For example, in State v. Abrams, 322 S.C. 286, 471 S.E.2d 716 (1996), the Court reversed where police officers exceeded the scope of a permissible Terry search by continuing the search of the defendant after it was clear that the defendant was unarmed. The officer's pat-down search of the defendant in Abrams yielded a tube-like instrument, which did not indicate the existence of a weapon, so

at that point, the limited Terry search was satisfied and there was no need to continue the search. Nonetheless, the officers continued searching and opened the tube and found crack inside. In Abrams, the Court's rationale follows:

> However, once the officers determined Abrams was not armed, they could not carry the intrusiveness of their search further unless the incriminating character of the object discovered during the search was immediately apparent to the officer performing the pat-down...[as]...the sole purpose of the Terry search is not to discover evidence, but to enable a police officer to pursue his or her investigation without fear of violence. Minnesota v. Dickerson, 508 U.S. 373.

The same Abrams rationale applied in the instant case. Here, the officers determined that appellant was armed and removed the weapon from his right front pocket, which then removed any future fear for their safety. This meant that the continued search of appellant's **left** front pocket, where the narcotics were found, was an intrusion beyond the Terry limit. In other words, after this large weapon was confiscated from appellant's right front pocket, there was no further basis for the officers to believe that they faced any danger during appellant's detention. Furthermore, the record is devoid of any testimony by the officers to the effect that there was anything immediately recognizable in appellant's **left** front pocket that would justify the continuation of the search of appellant. In Minnesota v. Dickerson supra, the Supreme Court held that if no weapons are found via a Terry pat-down search, then a continued search is unconstitutional unless the officer feels an object whose contour makes its identity immediately apparent or recognizable as criminal in nature (plain feel doctrine).

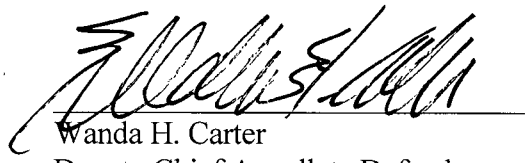
In the case at bar, the record in devoid of clear and/or credible evidentiary suspicion establishing that the officers saw anything in appellant's **left** pocket that was similar to the

"hard metal object"[5] (the weapon confiscated) that was viewed in appellant's right front pocket. The only threat the officers recognized was the large bulge in appellant's right front pocket only where indeed a weapon existed. R. 31, lines 19 – 21; R. 34, l. 1 – R. 36, l. 7. Hence, the scope of the pat-down search of appellant's **left** front pocket exceeded the boundaries of Terry, and thus violated the Fourth and Fourteenth Amendments to the United States Constitution and article 1, § 10 of the South Carolina State Constitution. As a result, the narcotics found on appellant should have been suppressed as tainted fruit of the poisonous tree. See Wong Sun. United States, 371 U.S. 471 (1963).

CONCLUSION

Based on the foregoing argument, appellant requests that his narcotics convictions be reversed and remanded for a new proceeding.

Respectfully submitted,



Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR APPELLANT

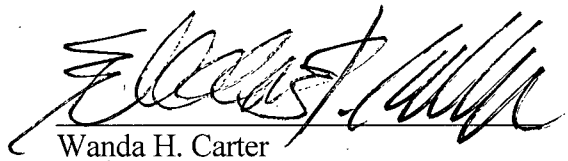
This 3rd day of November, 2014.

[5] Tr. 9, lines 12 - 15

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR.

November 3, 2014



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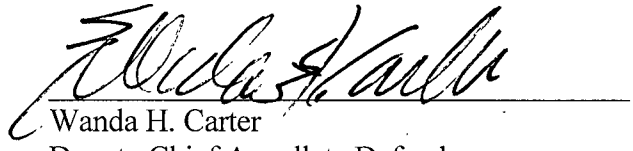
CERTIFICATE OF SERVICE

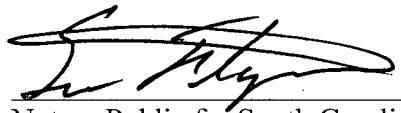
The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Ashleigh Wilson, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 3rd day of November, 2014.



Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 3rd day of November, 2014.



(L.S.)
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