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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Marion County
William H. Seals, Jr., Circuit Court Judge

Opinion No. 2014-UP-366 (S.C. Court of Appeals filed October 29, 2014)

THE STATE,

RESPONDENT,

V.

DARRELL LEE BIRCH,

APPELLANT.

APPELLATE CASE NO. 2012-213215

PETITION FOR REHEARING

The Appellant, Darrell Lee Birch, respectfully petitions the Court for a rehearing of its Opinion No. 2014-UP-366 pursuant to Rule 221(a), SCACR based upon the following points overlooked or misapprehended by the Court:

On October 29, 2014, this Court filed its unpublished opinion affirming Appellant's convictions for possession with intent to distribute cocaine base and possession of ecstasy. In his appeal, Appellant argued that the officer's search of Appellant's person violated the Fourth Amendment and the evidence seized as a result of the unlawful search should be suppressed where:

1. Appellant's mere presence at a private residence being searched pursuant to the consent of the homeowner did not provide probable cause for the officer to search Appellant;

2. the officer lacked reasonable suspicion that Appellant was engaged in criminal activity to justify an investigatory detention and frisk where Appellant was merely standing in the home being searched with his hand in his pocket and made no movements toward the officer; and

3. the officer exceeded the scope of a pat-down search of the outer clothing of Appellant where the officer forcibly removed Appellant's hand from his pocket.

In affirming the Trial Court's denial of Birch's motion to suppress the drug evidence, this Court cited to Michigan v. Summers, 452 U.S. 692 (1981) for its holding that officers executing search warrants are permitted to detain occupants until the search is completed and Muehler v. Mena, 544 U.S. 93 (2005) for its holding that use of reasonable force to effectuate detention of occupants during the execution of a search warrant is permissible.

Summers, however, does not authorize searches of individuals on premises being searched pursuant to a search warrant. Summers only authorizes requiring occupants to remain on the premises. Footnote 4 of the Summers opinion makes it clear that the United States Supreme Court was only addressing the detention and not the search of occupants. In Summers, the police did not search the defendant until after they had probable cause to arrest the defendant and had actually arrested him. 452 U.S. at 695 n.4. The Court reaffirmed its holding in Ybarra v. Illinois, 444 U.S. 85 (1979) that a search warrant authorizing the search of a certain location does not give rise to probable cause to search that person.

It is also significant that in the Summers and Muehler cases, officers had obtained a search warrant for the search of the premises before entering and detaining the occupants. The Court in Summers observed that "[o]f prime importance" in accessing the detention was "the fact that the police had obtained a warrant to search respondent's house for contraband.

A neutral and detached magistrate had found probable cause to believe that the law was being violated in that house and had authorized a substantial invasion of the privacy of the persons who resided there." 452 U.S. at 701. A search warrant therefore provides objection justification for the detention because a judicial officer has already determined there is probable cause to believe that someone in the home has committed a crime and there is minimal intrusion to require a person to remain in his home while the search warrant is being executed.

In Appellant's case, there was no search warrant issued by a neutral and detached magistrate. The search of the home was being conducted only on the consent of the homeowner. Furthermore, the officers in Appellant's case did not just try to simply detain him and require him to remain on the premises. There is no evidence in the record that Officer Grice asked Appellant to identify himself or informed Appellant that a search of the premises was being conducted. Instead, Officer Grice immediately proceeded with a search of Appellant. This was not just a detention. Officer Grice yanked Appellant's hand out of his pocket which led to the medicine bottle containing contraband to fall out of Appellant's pocket and then pulled off Appellant's ball cap which then led Officer Grice to recognize Appellant. There is no exception to the Fourth Amendment permitting this warrantless search. Appellant's presence at the premises, even if he were an occupant, was not sufficient to establish probable cause to search Appellant's person.

Officer Grice also lacked reasonable suspicion to search Appellant's person. A police officer may elevate a police-citizen encounter into an investigatory detention only if the officer has a reasonable suspicion supported by articulable facts that criminal activity may be afoot even if the officer lacks probable cause." United States v. Burton,

228 F.3d 524, 527-28 (4th Cir. 2000) (internal citations omitted). "Reasonable suspicion is something more than an inchoate and unparticularized suspicion or hunch, and it is the government's burden to articulate facts sufficient to support reasonable suspicion." Id. (internal citations omitted).

"Once an officer had a basis to make a lawful investigatory stop, he may protect himself during that stop by conducting a search for weapons if he has reason to believe that the suspect is armed and dangerous. . . . But an officer may not conduct this protective search for purposes of safety until he has a reasonable suspicion that supports the investigatory stop." Id. at 528 (internal citations omitted). Therefore, before an officer an conduct a protective search, the officer "must first have reasonable suspicion supported by articulable facts that criminal activity may be afoot.' Id.

When officers entered Horne's home to search Horne's residence, they did not have any reason to suspect that Appellant was engaged in criminal activity merely because he was present in Horne's residence. See State v. Broadnax, 654 P.2d 96, 101 (Wash. 1982) ("Merely associating with a person suspected of criminal activity does not strip away the protections of the Fourth Amendment to the United States Constitution."). Appellant was simply just "standing in the front room" of Horne's residence with his hand in his pocket. R. 29, ll. 5-7. Such conduct does not justify an officer's reasonable suspicion that criminal activity must be afoot.

Appellant's refusal to remove his hand from his pocket also did not establish that reasonable suspicion that criminal activity was afoot to justify a protective search of Appellant. "An individual's refusal to cooperate, without more, does not furnish the minimal level of objective justification needed for detention or seizure." Burton, 228

F.3d at 529 (quoting Florida v. Bostick, 501 U.S. 429, 437 (1991)); see also United States v. Flowers, 912 F.2d 707, 712 (4th Cir. 1990) (noting that a defendant has "the right to refuse to speak with . . . officers, who in turn possess no right to detain citizens who decline to talk or otherwise identify themselves).

In Burton, the United States Court of Appeals for the Fourth Circuit held that the refusal of the defendant to remove his hand from his pocket at the insistence of the police officer was not sufficient to establish reasonable suspicion that criminal activity was afoot. The court further held that in the absence of reasonable suspicion, the officer in Burton could not frisk the defendant "merely because he felt uneasy about his safety." The court concluded that the officer's reaching inside the defendant's coat was an unlawful search and the handgun discovered as a result of the unlawful search should have been suppressed at trial. Burton, 228 F.2d at 528-59.

Similarly, Appellant's refusal to remove his hand from his pocket was also not sufficient to establish reasonable suspicion that criminal activity was afoot. The record is devoid of any evidence that Appellant made any furtive movements as Officer Grice approached. As in Burton, Officer Grice only forcibly removed Appellant's hand from his pocket because Officer Grice felt uneasy about his safety. But just as the court in Burton concluded that this was an insufficient basis to frisk the defendant in that case, Appellant's refusal to remove his hand from his pocket was insufficient to justify Officer Grice forcibly removing Appellant's hand from his pocket. Any evidence seized as a result of Officer Grice unlawfully searching Appellant and then subsequently arresting Appellant after Officer Grice removed Appellant's ball cap and discovered Appellant's

identity should have been suppressed and trial and accordingly, Appellant's convictions reversed.

Even assuming *arguendo* that the search of Appellant was justified, the scope of the search was impermissible. In conducting a constitutionally acceptable pat-down search, a law enforcement officer is confined to "patting the outer clothing of the suspect for concealed objects which might be used as instruments of assault." Sibron v. New York, 392 U.S. 40, 65 (1968). In Sibron, the United States Supreme Court found that a search was not reasonably limited in scope where the officer "with no attempt at an initial limited exploration for arms, . . . thrust his hand into Sibron's pocket and took from him envelopes of heroin." , the United States Supreme Court found that a search was not reasonably limited in scope where the officer "with no attempt at an initial limited exploration for arms, . . . thrust his hand into Sibron's pocket and took from him envelopes of heroin." Id. Officer Grice's forcible removable of Appellant's hand from his pocket and the pulling off of Appellant's ball cap to reveal Appellant's identity likewise exceeded the scope of a lawful pat-down.

On this issue, this Court cited to State v. Freiburger, 366 S.C. 125, 620 S.E.2d 737 (2005) for its holding that a full warrantless search of a person is permitted if he has been lawfully arrested and the search is conducted in the immediate vicinity of, and substantially contemporaneously, to the arrest. In Freiburger, the search of the defendant's person preceded the lawful arrest. Id. at 130, 620 S.E.2d at 739. The Supreme Court observed that a search may precede a formal arrest if the officer has probable cause to arrest at the time of the search. Id. at 132, 620 S.E.2d at 740. In Freiburger, the officer who searched the defendant testified that although the defendant

had not been arrested at the time of the pat down search, he was going to be arrested for hitchhiking. Id. at 133, 620 S.E.2d at 741.

Freiburger is inapplicable to Appellant's case. When Officer Grice forcibly removed Appellant's hand from his pocket and pulled his ball cap off his head, Officer Grice did not at that time have probable cause to arrest Appellant. Officer Grice only discovered Appellant's identity and that there was an outstanding warrant for his arrest after the illegal search and seizure. Officer Grice testified that when he entered Horne's residence, there was an individual in the front room wearing a ball cap, coat, and jeans. At this point, Officer Grice did not know the identity of this individual and had no probable cause to arrest this individual. Officer Grice claimed that the individual had his left hand in his pants pocket and that Officer Grice told the individual several times to remove his hand. Officer Grice said that when the individual refused to remove his hand from his pocket, Officer Grice "forcibly removed his hand and when [he] did an object fell out on the floor." R. 86, l. 11 – 87, l. 8.

After this container, which later was discovered to contain crack cocaine, fell on the floor, Officer Grice then removed the individual's ball cap and said he recognized the individual as Appellant and knew that the Marion County Combined Drug Unit for looking for Appellant. R. 88, ll. 1-8.

But for this illegal search and seizure, Officer Grice would not have known that the person standing in Horne's house and minding his own business had outstanding warrants on him. But for this illegal search and seizure, Officer Grice would not have known that this individual was the person for whom the Drug Unit was looking. But for this illegal search and seizure, Officer Grice would not have had an independent and lawful reason for

searching Appellant's person. The only reason Officer Grice learned that the person in Horne's house was Appellant was because Officer Grice illegally yanked Appellant's left hand out of his pocket and then illegally pulled Appellant's ball cap off his head to reveal his identity after a container fell to the floor from Appellant's pocket.

When the search of Appellant occurred, Officer Grice did not yet have probable cause to arrest Appellant. Therefore, Officer Grice was not entitled to conduct a full warrantless search of Appellant. Officer Grice's forcible removable of Appellant's hand from his pocket and the pulling off of Appellant's ball cap to reveal Appellant's identity accordingly exceeded the scope of a permissible pat-down of Appellant's outer clothing.

CONCLUSION

For the reasons set forth herein, Appellant Darrell Lee Birch respectfully requests that the Opinion of the Court of Appeals be withdrawn, the evidence seized in violation of the Fourth Amendment be suppressed, and his convictions reversed

Respectfully submitted,

Carmen V. Ganjehsani
Appellate Defender

This 13th day of November, 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 William M. Blitch, Jr., Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 13th day of November, 2014.

Carmen V. Ganjehsani
Appellate Defender
ATTORNEY FOR APPELLANT

SWORN TO BEFORE ME this 13th day
of November, 2014.

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