STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Charleston County
Roger M. Young, Circuit Court Judge

Appellate Case No. 2014-000393

THE STATE,

Respondent,

v.

STEVIE CURTIS HIGGINS, JR.,

Appellant.

FINAL BRIEF OF RESPONDENT

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ATTORNEYS FOR RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

The trial court properly admitted into evidence drugs found on Appellant pursuant to a valid search incident to arrest conducted following a valid Terry frisk performed after police saw him standing in the middle of a public roadway, observed him briskly walking away while looking over his shoulder at the sight of law enforcement, and observed a bulge in his right front pocket, which they perceived as a threat.

STATEMENT OF THE CASE

A Charleston County Grand Jury indicted Appellant for unlawful carrying of a handgun, possession of hydrocodone, and possession of diazepam. (R. 82-87.) On January 17, 2014, Appellant proceeded to a bench trial before the Honorable J.C. Nicholson, Jr. Andrew Grimes, Esquire, and Michael Cooper, Esquire, represented Appellant, and Assistant Solicitor James Stack represented the State. The trial judge took the matter under advisement and on February 19, 2014, he found Appellant guilty on all charges. (R. 79.) Judge Nicholson sentenced him to one year's imprisonment on the weapon charge and one year's imprisonment on each drug charge, suspended to ninety days plus one year of probation. (R. 81.)

On February 26, 2014, Appellant filed a Notice of Appeal.

STATEMENT OF FACTS

At approximately 10:30 p.m. on August 17, 2012, Deputy Adam Midgett was patrolling when he observed Appellant standing in the middle of the roadway. (R. 8, lines 21-25.) When Appellant walked quickly away as Deputy Midgett approached, Midgett exited his vehicle and made contact with him. (R. 8, line 25-R. 9, line 4.) After noticing Appellant's right front pants pocket was bulging and seeing Appellant grab that pocket with an open hand, along with his knowledge of the area as a high-crime area, Deputy Midgett conducted a Terry[1] frisk and felt a hard metal object in Appellant's right front pants pocket consistent with a handgun. (R. 9, lines 5-15.) After detaining Appellant, Deputy Midgett discovered a .38 revolver and two pill bottles in Appellant's front pockets. (R. 9, lines 16-21.) Deputy Midgett then arrested him for unlawful carrying of a handgun and possession of controlled substances. (R. 10, lines 11-20.)

Appellant proceeded to a bench trial on January 17, 2014. Deputy Midgett testified regarding the night he observed Appellant standing in the middle of the roadway. (R. 8, lines 21-25.) Deputy Midgett testified that as he approached Appellant in his marked patrol car, Appellant walked briskly into the driveway of a residence, looking furtively back over his shoulder. (R. 8, line 25-R. 9, line 4.) He exited his vehicle and made contact with Appellant, noticing his right front pants pocket was bulging. (R. 9, line 5-7.) He also noticed Appellant grab his right pants pocket with an open hand. (R. 9, lines 7-8.) Based on his knowledge of the area as a high-crime drug area, Deputy Midgett conducted a Terry frisk, feeling a hard metal object in Appellant's right front pants pocket consistent with a handgun. (R. 9, lines 8-15.) Deputy Midgett testified he then detained Appellant and discovered a loaded large frame .38 revolver in his right

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

front pants pocket. (R. 9, lines 16-18; R. 13, lines 11-12; R. 41, lines 23-25.) In Appellant's left pocket, Deputy Midgett testified he discovered two pill bottles, containing what was later identified as hydrocodone and diazepam. (R. 9, lines 18-21; R. 10, lines 5-10.) Defense counsel objected to the admission of the finding of the gun and pills, stating that he would make his legal arguments at the appropriate time. (R. 9, line 22-R. 10, line 1.)

Deputy Midgett continued his testimony, recounting how he read Appellant his Miranda rights and arrested him for unlawful carrying of a handgun and possession of controlled substances. (R. 10, lines 11-20.) Deputy Midgett testified he had made several previous arrests in front of that particular residence involving drugs and a handgun. (R. 11, lines 1-14.) When asked why he wanted to speak to Appellant, Deputy Midgett stated that first, he was causing a hazard by standing in the middle of the roadway and second, he briskly walked away in a suspicious manner, seeming to try to avoid contact with the deputy. (R. 11, lines 15-21.) Deputy Midgett testified that the combination of noticing Appellant's pants pocket bulging and seeing him grab that pocket, the previous arrests at the location, and Appellant's briskly walking away while looking over his shoulder led him to believe Appellant could possibly be armed. (R. 12, lines 7-16.) This belief led Deputy Midgett to conduct a Terry frisk, during which he found a loaded gun. (R. 12, lines 17-21.) Defense counsel renewed his objection when the State moved the gun and bullets into evidence, and the trial judge conditionally admitted them, delaying arguments on whether they were properly seized until later. (R. 13, lines 17-24.) The State also moved into evidence the pill bottles and pills that Deputy Midgett testified he found in Appellant's left front pocket, and defense counsel again renewed his objection. (R. 14, lines 9-20.)

On cross-examination, Deputy Midgett testified that standing in the roadway was an offense for which he could have arrested Appellant. (R. 28, lines 9-21.) He explained that due to his past experiences at that residence and in the general area, coupled with the suspicious manner in which Appellant walked away looking over his shoulder, he believed criminal activity was afoot. (R. 29, lines 2-6.) Deputy Midgett articulated that he perceived a threat from Appellant's action of grabbing at his pocket, which contained a noticeable bulge. (R. 31, lines 20-21.) He described his frisk of Appellant as follows:

> [Appellant] was standing, facing away from me, and I began to pat around his waistband and down his right side to the right-hand pocket. That's immediately when I felt the hard object, metallic object, in his right pocket, and that's when he was detained. I recognized it to be consistent with a handgun.

(R. 35, lines 14-21.)

Officer Jessie King of Charleston County testified regarding his involvement in Appellant's arrest. (R. 44, line 17-R. 45, line 6.) He testified he knew the area where the arrest took place was a high-drug, high-crime area—one where he has been shot at and where he has made several arrests. (R. 45, lines 10-24.) King testified that on the night in question he observed Appellant standing in the public roadway and, when Deputy Midgett's vehicle came up to him, saw him "walk away at a very brisk manner, what I interpreted as he's trying to avoid or flee our presence." (R. 46, lines 17-23; R. 47, lines 6-9.) He also stated Appellant "kept looking over his shoulder as if to see if we were going to pursue him or we were coming towards him." (R. 46, line 23-R. 47, line 1.) When asked why he concluded Appellant was evading them, he answered:

> I believe that he was evading us due to the fact that upon seeing our marked patrol unit, he left the roadway, and then quickly, very brisk walk, began leaving the area. I perceived that as he was attempting to evade law

> enforcement. The general public, they see our vehicles, they may stop, turn to look at us, but they don't automatically leave the area upon seeing us in a very quick manner.

(R. 47, line 22-R. 48, line 4.) King stated he was there when the gun and pill bottles were taken from Appellant. (R. 48, lines 11-20.) On cross-examination, King testified he did not remember exactly how Deputy Midgett made contact with Appellant and did not know whether Deputy Midgett grabbed Appellant. (R. 51, lines 2-8.)

After the State rested, Appellant renewed his motion to suppress the gun and drugs. (R. 58, lines 10-13.) The trial court took the matter under advisement. (R. 58, lines 14-15.)

The defense then called Valley Mae Young and Derrick Brown, who both testified they were at the residence on the night of the arrest. (R. 60, lines 7-11; R. 69, lines 7-15.) Young, who is Appellant's aunt, testified Appellant was walking slow, not fast, after the police pulled up. (R. 61, lines 3-16.) She testified the police walked up fast behind Appellant and grabbed him and put his hands behind his back. (R. 61, lines 20-25.) On cross-examination, Young testified she saw the police pat Appellant down but did not see them take a gun or pills out of his pockets. (R. 63, lines 6-25; R. 65, lines 21-24.) Upon further questioning, she admitted it was dark and there were no lights on the porch where she was. (R. 64, lines 3-6.) Brown, Appellant's cousin, was also present on the porch that night. (R. 69, lines 7-15.) He testified Appellant was walking "normal." (R. 70, lines 3-10.) On cross-examination, Brown testified the police ran up on Appellant and that he saw it clearly. (R. 72, lines 11-16.) However, Brown denied seeing the police take a gun or pill bottles out of Appellant's pockets. (R. 72, line 17-Tr. 73, line 6.)

At the close of Appellant's case, the trial judge asked for memoranda and proposed orders from counsel in lieu of closing arguments. (R. 76, lines 21-23.) On February 19, 2014, the trial judge found Appellant guilty, noting that he found the police officers' testimony that Appellant was in the middle of the road more credible. (R. 79, lines 9-14.) Specifically, he denied the motion to suppress and determined the police had a right to do a Terry search after stopping to investigate why Appellant was in the middle of the road and then observing him acting furtive and trying to run off. (R. 79, lines 15-24.) The trial judge sentenced Appellant to one year's imprisonment on the weapon charge and one year's imprisonment suspended to ninety days' imprisonment plus one year of probation for the drugs charges. (R. 81.)

ARGUMENT

The trial court properly admitted into evidence drugs found on Appellant pursuant to a valid search incident to arrest conducted following a valid Terry frisk performed after police saw him standing in the middle of a public roadway, observed him briskly walking away while looking over his shoulder at the sight of law enforcement, and observed a bulge in his right front pocket, which they perceived as a threat.

Appellant argues the trial judge erred in admitting into evidence drugs found on Appellant pursuant to a search by police at the crime scene. Specifically, he argues the drugs were seized in violation of the Fourth Amendment because the police officer's search exceeded the scope of a Terry frisk by continuing after having seized Appellant's gun. To the contrary, the officer's valid Terry frisk did not exceed its scope. Rather, the Terry frisk ended once the officer felt a gun in Appellant's pocket. At that point, the officer already had probable cause to arrest Appellant based on observing him violating the law by standing in the middle of a roadway. Appellant was properly detained based on the officer's knowledge that the area was one known for drugs and crime—particularly in front of that residence—where arrests for drugs and guns had been made in the past, his observing Appellant walking briskly away from the officer's vehicle while looking back over his shoulder, and his seeing a bulge in Appellant's pocket and feeling it to be a handgun. Only then did the officer remove the gun and drugs from Appellant's pockets and arrest him. Thus, the drugs were removed from Appellant's pocket as the result of a search incident to arrest and the trial court correctly denied the motion to suppress and properly admitted the drugs into evidence.

In criminal cases, the appellate court sits to review errors of law only. State v. Butler, 353 S.C. 383, 388, 577 S.E.2d 498, 500 (Ct. App. 2003). 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. Moore, 404 S.C. 634, 640-41, 746 S.E.2d 352, 355 (Ct. App. 2013). The appellate court will not reverse merely because it would have reached a different conclusion than the trial judge. Id. The reviewing 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, the appellate court *must* affirm the trial court if there is any evidence in the record to support the ruling. State v. Pichardo, 367 S.C. 84, 96, 623 S.E.2d 840, 846 (Ct. App. 2005) (emphasis added).

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. 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, 553-54 (1980) (quoting United States v. Martinez-Fuerte, 428 U.S. 543, 554 (1976)).

The Fourth Amendment's exclusionary rule prohibits unreasonable searches and seizures. U.S. Const. amend. IV; see also S.C. Const. art. I, § 10. Any evidence seized as the result of an unreasonable search and seizure must be excluded from trial. State v. Weaver, 374 S.C. 313, 319, 649 S.E.2d 479, 482 (2007). "Generally, a warrantless search is per se unreasonable and thus violative of the Fourth Amendment's prohibition against unreasonable searches and seizures." State v. Bultron, 318 S.C. 323, 331, 457 S.E.2d 616, 621 (Ct. App. 1995). However, a warrantless search may be constitutional if

it falls within a recognized exception. Id. at 331-32, 457 S.E.2d at 621. South Carolina courts have recognized several exceptions to the warrant requirement, including: (1) search incident to a lawful arrest; (2) "hot pursuit"; (3) stop and frisk; (4) the automobile exception; (5) the "plain view" doctrine; and (6) consent. State v. Bailey, 276 S.C. 32, 36, 274 S.E.2d 913, 915 (1981). A police officer may, without a warrant, arrest a person who commits a crime in his presence. State v. Tyndall, 336 S.C. 8, 16, 518 S.E.2d 278, 282 (Ct. App. 1999) (citing State v. Mims, 263 S.C. 45, 208 S.E.2d 288 (1974) (officer has power and authority to arrest without warrant those who have committed violation of criminal laws of this State within view of such officer)).

Section 56-5-430 of the South Carolina Code defines a street or highway as "[t]he entire width between boundary lines of every way publicly maintained when any part thereof is open to the use of the public for purposes of vehicular travel . . . ." Section 56-5-460 defines roadway as "that portion of a highway improved, designed or ordinarily used for vehicular travel, exclusive of the shoulder or berm." And section 56-5-3160 provides:

> (a) Where a sidewalk is provided and its use is practicable, it shall be unlawful for any pedestrian to walk along and upon an adjacent roadway.
>
> (b) Where a sidewalk is not available any pedestrian walking along and upon a highway shall walk only on a shoulder as far as practicable from the edge of the roadway.
>
> (c) Where neither a sidewalk nor a shoulder is available, any pedestrian walking along and upon a highway shall walk as near as practicable to an outside edge of the roadway and, if on a two-way roadway, shall walk only on the left side of the roadway.

S.C. Code Ann. § 56-5-3160 (1991).

In Terry v. Ohio, the United States Supreme Court held that when a law enforcement officer reasonably believes that "criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous . . . he is entitled . . . to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him." 392 U.S. 1, 30 (1968). Here, Deputy Midgett observed Appellant violating the law by standing in the middle of the roadway, rather than on the shoulder or left side as required by S.C. Code Ann. § 56-5-3160. As an officer, he was aware this was an offense for which he could arrest Appellant. (R. 28, lines 9-21.) As he made contact with Appellant, he noticed Appellant's right front pants pocket bulging and saw Appellant grab at the pocket, which he perceived as a threat. (R. 9, lines 5-8; R. 31, lines 20-21.) Additionally, he believed criminal activity was afoot due to his past experience and knowledge of the area in front of that residence as a high crime and drug area, combined with Appellant's suspicious manner of walking away briskly while looking over his shoulder. (R. 9, lines 8-12; R. 29, lines 2-9.) Because he believed criminal activity was afoot, Deputy Midgett properly conducted a Terry frisk.

Appellant cites State v. Abrams, 322 S.C. 286, 471 S.E.2d 716 (Ct. App. 1996), in which this Court reversed the trial court's decision to deny Abrams' motion to suppress evidence pursuant to the Fourth Amendment. This Court determined the officer exceeded the scope of the Terry search when he felt a tube-like object in Abrams' pocket and suspected it was something used to transport drugs. Id. at 287-88, 471 S.E.2d at 717. While this Court agreed the officer was justified in frisking Abrams for weapons, it found he went beyond the scope of Terry when he continued searching once he discovered Abrams was not armed. Id. at 288-89, 471 S.E.2d at 717-18.

Here, the situation was quite different. Unlike in Abrams, Deputy Midgett immediately saw Appellant grab at a bulge in his pocket as he approached him and perceived this as a threat. Combined with Appellant's walking briskly away from Deputy Midgett while looking over his shoulder and the deputy's knowledge of the area as a high-crime area, this clearly justified the Terry frisk. And, once Deputy Midgett felt a metal object consistent with a gun in Appellant's pocket, the circumstances here can be distinguished from Abrams. First, there actually was a weapon on Appellant's person, whereas in Abrams there was only a tube-like container. This Court in Abrams emphasized "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." Id. at 288, 471 S.E.2d at 717. Here Appellant **was** armed, and this Court implied in its reasoning in Abrams that the officer would have a reason to continue searching.

While conducting the Terry frisk, Deputy Midgett recognized the hard metal feel of the object in Appellant's bulging right front pants pocket to be consistent with a handgun. (R. 9, lines 12-15.) Immediately, Deputy Midgett detained Appellant and proceeded to search his right front pants pocket, recovering a loaded large frame .38 revolver. (R. 9, lines 16-18; R. 13, lines 11-12, R. 41, lines 23-25.) Then Deputy Midgett searched Appellant's left front pants pocket, recovering two bottles of pills. (R. 9, lines 18-21.) The search of the left pocket was not part of the Terry frisk, but rather a search incident to arrest. Thus, Deputy Midgett did not exceed the scope of Terry.

This issue was decided by this Court in State v. Moultrie, 316 S.C. 547, 451 S.E.2d 34 (1994). There, Moultrie claimed the search exceeded the scope of Terry when officers discovered evidence of cash in his wallet. However, this Court found "[t]he fact

that an arresting officer improperly based a search of an individual on a Terry-stop rationale does not prevent the State from otherwise justifying the search by proving probable cause to make a warrantless arrest of the individual existed prior to the search." Id. at 551, 451 S.E.2d at 37. This Court had "to decide whether the challenged search, which occurred before Moultrie's arrest, qualifie[d] as a search incident to that arrest." Id. It determined, "A warrantless search that precedes a formal arrest is nonetheless valid if the arrest quickly follows." Id. This Court decided the search qualified as being incident to arrest because the arrest occurred almost immediately after the search, thus satisfying the requirement that it be closely related in time. Id. at 551-52, 451 S.E.2d at 37.

Next, this Court considered the factors supporting a finding of probable cause for a warrantless arrest, looking at the totality of the circumstances surrounding the officer's knowledge and information that would lead a reasonable person to believe a crime has been committed. Id. at 552, 451 S.E.2d at 37. In Moultrie, the officers received a drug tip and found bags of drugs consistent with information given by the tipster. Here, Deputy Midgett considered: (1) that the area was one known for drugs and crime—particularly in front of that residence—where arrests for drugs and guns had been made in the past; (2) that Appellant violated the law by standing in the middle of the roadway; (3) that Appellant walked briskly away when the officer drove up and looked back over his shoulder as he walked away; and (4) that he saw a bulge in Appellant's pocket and felt it to be a handgun even before detaining him and removing the gun and drugs from his pockets. See Minnesota v. Dickerson, 508 U.S. 366 (1993) (finding officers properly stopped Dickerson and conducted Terry pat-down based on his seemingly evasive action of walking toward the police but then abruptly halting and walking in the opposite

direction and the fact that he had just left a building known for cocaine traffic); United States v. Lender, 985 F.2d 151, 154 (4th Cir. 1993) (finding an area's propensity toward criminal activity is something an officer may consider in determining reasonable suspicion, including personal knowledge that an area has a large amount of drug traffic); State v. Corley, 383 S.C. 232, 242, 679 S.E.2d 187, 192 (Ct. App. 2009) (relying on the defendant being at a "known drug house" where several cases had been made and search warrants executed in finding reasonable suspicion existed). This Court emphasized the fruits of a warrantless search incident to arrest cannot be used to justify the arrest; however, they can still be admitted as evidence. Id. at 551-53, 451 S.E.2d at 37-38.

In Moultrie, this Court carefully looked at the totality of the circumstances to support the arrest while not considering the evidence of cash found in Moultrie's wallet. Because this Court found probable cause existed without considering the cash, it found the cash was then admissible as the fruit of a valid search. Moultrie at 553, 451 S.E.2d at 38. Likewise, because probable cause exists here without consideration of the drug evidence, the drugs were properly admitted as the fruit of the valid search that occurred incident to arrest. See also United States v. Trusheim, 716 F. Supp. 924 (E.D. Va. 1989) (finding a warrantless search of defendant's person that produced drugs, prior to his arrest, was supported by probable cause and was upheld as a search incident to arrest, even though the officers told the defendant, at the time of the search, that he was not under arrest, but only "investigative detention"); United States v. Hernandez, 825 F.2d 846 (5th Cir. 1987) (finding a warrantless pat-down search of defendant's person that produced a counterfeit bill was outside the scope of Terry but was nonetheless lawful where, although the actual arrest occurred after the search, probable cause existed before the search); United States v. Chatman, 573 F.2d 565, 567 (9th Cir. 1977) ("Once

probable cause exists for a warrantless arrest it is immaterial that a warrantless search (without a warrant) precedes the arrest." (citation and internal quotation marks omitted)).

In sum, Deputy Midgett first observed Appellant violating the law by standing in the middle of the roadway. He then observed Appellant's suspicious behavior in walking briskly away from the patrol car while looking over his shoulder. These factors, combined with Deputy Midgett's knowledge of the area as one of crime and drugs, led him to make contact with Appellant. At that point, Deputy Midgett saw a bulge in Appellant's right front pocket and saw him reach for that pocket. These actions supported the deputy's decision to conduct a Terry search for weapons to secure his own safety. After determining the bulge was consistent with the feel of a handgun, Deputy Midgett then detained Appellant and conducted a search incident to arrest, whereupon he recovered the handgun and two bottles of pills. The search was proper as a search incident to arrest and was not simply an overreaching extension of the Terry frisk. See Chatman, 573 F.2d at 567 ("Once probable cause exists for a warrantless arrest it is immaterial that a warrantless search (without a warrant) precedes the arrest." (citation and internal quotation marks omitted)). At no time did Deputy Midgett violate the Fourth Amendment by exceeding the scope of Terry. Therefore, this court should affirm the trial court's decision to deny Appellant's motion to suppress the drug evidence.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

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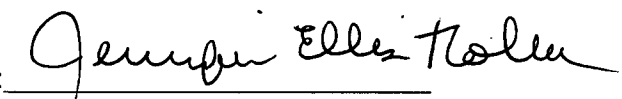
BY: 
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CERTIFICATE OF COUNSEL

The undersigned hereby certify that the Final Brief of Respondent complies with Rule 211(b), SCACR.

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PROOF OF SERVICE

I, Angela Bennett, certify that I have served the within Final Brief of Respondent on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

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I further certify that all parties required by Rule to be served have been served. This 23rd day of October, 2014.

Angela Bennett

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