STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Laurens County
Eugene C. Griffith, Jr., Circuit Court Judge

DAVORIS SMILEY,

RESPONDENT,

-v-

THE STATE OF SOUTH CAROLINA,

APPELLANT

BRIEF OF THE RESPONDENT

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Index

Table of Authorities

CASES

STATUTES

Statement of the Case

The Respondent agrees with the Appellant's Statement of the Case.

Argument

I. Judge Griffith Correctly Recognized that the "Investigative Detention" in Question was an Illegal Arrest and that Trial Counsel was Ineffective for Failing to Object to Introduction of the Evidence Seized Pursuant to that Unlawful Seizure

The Appellant relies heavily on Fourth Amendment precedent to contend that Respondent's arrest was legal.[1] The Appellant, however, overlooks the fact that the State of South Carolina is free to provide its citizens with a greater degree of protection than that guaranteed by the Federal Constitution. See California v. Ramos, 463 U.S. 992, 1013-14, 103 S. Ct. 3446, 3460 (1983)("It is elementary that States are free to provide greater protections in their criminal justice system than the Federal Constitution requires."). In this way, the Appellant fails to consider and even dismisses out-of-hand the clear language of South Carolina's law governing warrantless arrests.

This State's law is explicitly clear on the authority of a police officer to make a warrantless arrest. First, § 17-13-30 states that "[t]he sheriffs and deputy sheriffs of this State may arrest without warrant any and all persons who, within their view, violate any of the criminal laws of this State if such arrest be made at the time of such violation of law or immediately thereafter." Id. Section 17-13-30 is further buttressed by the requirements of § 23-13-60, which clearly holds that

> [t]he deputy sheriffs may for any suspected freshly committed crime, whether upon view or upon prompt information or complaint, arrest without warrant and, in pursuit of the criminal or suspected criminal, enter houses or break and enter them, whether in their own county or in an adjoining county.

S.C. CODE ANN. § 23-13-60. See also State v. Martin, 275 S.C. 141, 268 S.E.2d (1980)(holding that § 17-13-30 must be construed in light of § 23-13-60). Both of these

[1] The Appellant concedes the point that when the Respondent was placed into "investigative detention," he was placed under arrest.

statutes employ terms such as "freshly committed," "immediately thereafter," and "upon prompt information or complaint," indicating that the Legislature stressed the immediacy of events necessary for a warrantless arrest. It did not authorize law enforcement to conduct warrantless arrests long after the commission of a crime, as is the case here. To this end, where a crime can no longer be considered "freshly committed," law enforcement must obtain a warrant in order for the arrest to be valid.

Since its decision in Martin, this Court recognized the sense of urgency inherent in both of these statutes. Even though Martin dealt with a warrantless misdemeanor arrest, this Court stated unequivocally that

> while generally an officer cannot arrest, without a warrant, for a misdemeanor not committed in his presence, an officer can arrest for a misdemeanor when the facts and circumstances observed by the officer give him probable cause to believe that a crime has been freshly committed.

Id. at 145-46. The question now becomes whether, at the time of Respondent's arrest, the robbery constituted a "freshly committed" crime or whether the extended period of time between the robbery and the arrest rendered the crime "stale."

Here, the Guatemex was robbed by three individuals around nine o'clock P.M. on the evening of April 24, 2011. (App. p. XX 88:15–90–17; 337:20–24). The police were contacted and arrived Fifteen minutes later. (App. p. 94:13–16; 137:11–14). Not long after arriving at the Guatemex, the Respondent's co-defendants had been apprehended. They were, however, taken to the police department where they waited for Leann Riggott to return from the crime scene to speak with them. (App. p. 366:6–12). Riggott testified that it was not until after midnight that she interviewed Lakasion Robinson, the co-defendant who testified at the Respondent's trial. (App. p. 366:13–17). Based on her

conversation with Robinson and an "anonymous tip" as to the Respondent's location at Laurens Terrace Apartments, the Respondent was arrested just after 1 A.M. on the morning of April 25, 2011—more than four hours after the robbery and miles away from the Guatamex.[2]

In Martin, this Court upheld the trooper's warrantless arrest, finding that

> [w]hen the officer arrived at the scene, he found two cars, each damaged on the front and rear and showing paint flecks corresponding to the color of the other. Appellant was highly intoxicated and admitted that he was the driver of one of the vehicles. A group of fifteen to twenty people had gathered at the scene. *These facts were observed by the officer and the only reasonable conclusion to be drawn was that a collision between the two vehicles had just occurred and that the crime had been freshly committed.*

Id. (emphasis supplied). Cases flowing from Martin and § 23-16-60 have likewise emphasized the importance of the closeness of facts involved in the warrantless arrests.

In Lapp v. S.C. Dep't of Motor Vehicles, 387 S.C. 500, 692 S.E.2d 565 (Ct. App. 2010), the Court of Appeals found lawful a warrantless arrest for driving under the influence where the officer arrived on scene and observed the defendant still behind the wheel of the automobile. Id. at 505. The defendant smelled strongly of alcohol and admitted that she had struck two vehicles. Id. "Because Lapp was still sitting in her vehicle at the scene of the accident," the Court of Appeals held, "it was reasonable for Officer Simmons to conclude that the accident had recently occurred and that Lapp had freshly committed the crime of DUI." Id. In Fradella v. Town of Mount Pleasant, 325 S.C. 469, 482 S.E.2d 53 (Ct. App. 1997), the Court of Appeals affirmed another warrantless arrest for DUI where officers arrived on scene shortly after being summoned, found defendant's car had been involved in an accident, were informed by a witness that

[2] The Appellant argues in its brief that, at the time the co-defendants were arrested, law enforcement learned of the Respondent's alleged involvement in the Guatemex robbery. App. Brief at 15.

the defendant smelled of alcohol, and located defendant, who had admitted to dispatch that he was involved in a car accident, within twenty minutes of arriving on scene.

Unfortunately, there can be no bright line definition of what constitutes a "freshly committed" crime. The statute and case law, however, all indicate the necessity of proximity between the suspected crime and the arrest. Section 23-13-60 mandates either view of the crime or "prompt information or complaint" of the crime. Id. The statute also permits pursuit of the suspect, further indicating a rapid chain of events. Moreover, all of the crimes discussed in the foregoing cases addressed incidents which had just occurred moments before police involvement. Each involved time periods spanning minutes and in no case involved a time frame of more than an hour.

The Appellant relies on this Court's holdings in State v. Baccus, 367 S.C. 41, 625 S.E.2d 216 (2006), to shore up its position that the "test is simply, at the time of arrest, did the arresting officer have reliable information such that a reasonable person would believe that the arrestee had committed a crime." The Baccus Court never addressed §§ 23-13-60 or 17-13-30 and it is unclear if the issue before the Court presently was even raised in Baccus. Instead, what the Appellant essentially argues is that the Baccus decision nullifies § 23-13-60. No reasonable interpretation of the Baccus decision can be construed as this Court so brazenly encroaching upon and supplanting the Legislature's legitimate policy-making authority with the Court's own judgment.

Trial counsel admitted at the PCR hearing that he thought nothing wrong with the Respondent's warrantless arrest and never thought to object to any evidence seized as a result. (App. p. 42:10–43:6). Nevertheless, the record in this case demonstrates that the Respondent was arrested without a warrant in contradiction of South Carolina law. The

clothing seized by law enforcement when the Respondent was booked into the detention center was a direct product of this unlawful arrest. This evidence was "the most damaging evidence" presented by the prosecution during the Respondent's trial. (App. p. 43:15–44:3). By failing to object to the introduction of this evidence, the PCR court correctly found trial counsel to be ineffective.

II. Judge Griffith Properly Ruled that the Pictures Seized from the Respondent's Cell Phone were the Result of an Unreasonable Search and that Trial Counsel was Ineffective for Failing to Object to the Pictures' Introduction

Nothing in the record shows that law enforcement had probable cause to search the Respondent's cell phone for the pictures that were eventually used to convict him. "The Fourth Amendment provides that 'no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.' " Stanford v. Texas, 379 U.S. 476, 481 (1965)(citing U.S. Const. Amen. IV)(emphasis in original). As held by the United States Supreme Court's decisions in Wolf v. Colorado, 338 U.S. 25, 69 S.Ct. 1359 (1949), Mapp v. Ohio, 367 U.S. 643, 81 S.Ct. 1684 (1961), and Ker v. California, 374 U.S. 23, 83 S.Ct. 1623 (1963), these "fundamental protections" are applicable to the States through the Fourteenth Amendment. Stanford, 379 U.S. at 481.

The affidavit in support of the search warrant in question states that the Respondent and co-defendants

> conspired and did rob at gunpoint the Guatemex Store located at 1105 N. Harper St in the city limits of Laurens, SC. The subjects touched items in the store and all three suspects had cell phones on their person at the time of arrest and it is believed that the three may have had conversations on their cell phones before and or after the robbery between themselves and or others.

(App. p. 676). Nothing in this affidavit indicates any information whatsoever supporting a probable cause to seize pictures from the Respondent's cell phone. There is nothing in the affidavit that demonstrates that the affirming officer, Leann Riggott, even knew of the pictures in question much less that they were evidence of the crime in question. Instead, it merely states that conversations were made by the suspects. Riggott further testified that the only knowledge she had of the cell phones being used in connection with the robbery was limited to Respondent and a co-defendant texting one another. (App. p. 414). Law enforcement was arguably wholly unaware that these incriminating pictures even existed until the Respondent's phone was searched. The complete lack of probable cause supporting seizure of these pictures is so bare on the face of the search warrant and application that even a reasonably trained officer could not reasonably rely on the affidavit. Cf. U.S. v. Leon, 468 U.S. 897, 923, 104 S.Ct. 3405, 3421 (1984)(quoting Brown v. Illinois, 422 U.S. 590, 610-11, 95 S.Ct. 2254, 2265-66 (1975)(Powell, J., concurring in part)).

Instead, the pictures in question were seized from the Respondent's phone were used to connect him to the robbery. This gun, of course, was never recovered,[3] despite law enforcement finding numerous other items located at Laurens Terrace allegedly taken from the Guatemex. Had trial counsel objected to the introduction of the pictures, there is a substantial likelihood that the result of the trial would have been different.

III. The Respondent Was Prejudiced by Trial Counsel's Failure to Produce the Co-Defendant's Plea Transcript and the PCR Court Properly Recognized Such

[3] Patrick Durkin was proffered as an expert witness by the State for the purposes of testifying that the gun in the pictures taken from the Respondent's phone was the same gun depicted in the Guatemex surveillance footage. See Testimony of Patrick Durkin, App. p. 254–360).

By the time of the trial, the Respondent's co-defendant Robinson had already plead guilty. Trial counsel testified that he was aware that he had offered to turn state's witness in return for a lenient sentence. (App. p. 664:2–24). Evidence was proffered at the Respondent's trial, both by Robinson's attorney and a Eighth Circuit solicitor, regarding Robinson's plea and any potential deals involved. (App. p. 191–194, 203–206). In the midst of the resulting confusion, Robinson's attorney repeatedly testified that any agreement to cooperate was placed on the record at Robinson's plea and that the transcript was the best place to look. (App. p. 193:23–194:2). Instead of requesting a copy of Robinson's plea transcript, he stated before the court that he "was under the assumption that a Brady motion asked for the prosecution to give [the defense] what they know, and [the plea transcript] would be one of the things they would give us." (App. p. 199:19–21).

Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992), is inapposite to this case. There, none of the witnesses who would have allegedly provided the applicant with an alibi defense testified at the PCR hearing. Id. at 561–62. Here, trial counsel admitted that he was aware that Robinson had received a deal in return for his cooperation. The "speculation" of Robinson's cooperation was corroborated by Robinson's attorney during the trial. Furthermore, Robinson was shown at trial to have given conflicting accounts of his participation in the robbery. See e.g. App. 239:1–23;

IV. The PCR Court Correctly Recognized That It Was Ineffective Assistance of Counsel to Call Diana Melendez to the Stand without Previously Investigating Her Testimony

Judge Griffith properly recognized that it was both error and prejudice for trial counsel to have called Diana Melendez to testify in the Respondent's case-in-chief. To be

clear, Melendez was an eye-witness to the robbery and personally observed both robbers. Never having even spoken to Melendez prior to calling her as a witness, (App. p. 58:1–3), trial counsel called Melendez to the stand for the express purpose of testifying that co-defendant Pulley was the gunman. (App. p. 58:7–11). Melendez testified as trial counsel expected but did not leave the stand without also incriminating the Respondent:

Q. Did the guy on the right-hand side say anything?

A. I, I don't know.

Q. Don't know. Okay. That's fair. When they were getting ready to leave the store, did they say anything?

A. Only I head the part of let's go, let's go, D I think.

Q. Say it again please.

A. Let's go, D.

Q. Let's go, D. And did the one that was on my right [the gunman] or on my left [Pulley] say that?

A. On the left.

Q. The left?

A. Yes.

Nevertheless, the Appellant argues that this Court should turn a blind eye to this testimony because it was part of a valid trial strategy. This Court has recognized that "when counsel articulates a **valid** reason for employing a certain strategy, such conduct generally will not be deemed ineffective assistance of counsel." Lounds v. State, 380 S.C. 454, 462, 670 S.E.2d 646, 650 (2008)(citing Ingle v. State, 348 S.C. 467, 560 S.E.2d 401 (2002); Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992)(emphasis in original)). The

validity of this strategy, however, is reviewed under an "objective standard of reasonableness." Lounds, 380 S.C. at 462; Ingles, 348 S.C. at 470.

Trial counsel called an eye-witness to the stand to identify a co-defendant. It is not beyond reason, however, to anticipate that when one places an eye-witness on the stand—again, for the purpose of pointing the finger at a co-defendant—that the witness may also point the finger at one's own client. It is, no doubt, a risky proposition. One reduces the inherent risks by investigating and interviewing the witness prior to calling her to the stand. The Appellants argument that trial counsel's failings were part of a valid trial strategy would hold some water if there had been some investigation into Melendez in the first place. See Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 597 (2007)(citing Thompson v. Wainwright, 787 F.2d 1447, 1450 (11th Cir.1986); Strickland v. Washington, 466 U.S. 668, 691, 104 S.Ct. 2052 (1984))("Without a doubt, '[a] criminal defense attorney has a duty to investigate, but this duty is limited to reasonable investigation.'"). "Moreover, while the scope of a reasonable investigation depends upon a number of issues, 'at a minimum, counsel has the duty to interview potential witnesses and to make an **independent** investigation of the facts and circumstances of the case.'" Ard, 372 S.C. at 331-32(quoting Troedel v. Wainwright, 667 F.Supp. 1456, 1461 (S.D.Fla.1986), *aff'd,* 828 F.2d 670 (11th Cir.1987) (emphasis in original)). As trial counsel testified, there was no investigation into the witness Diana Melendez—he never even spoke to her before putting her on the stand. This was not trial strategy; it was a gamble and the Respondent lost.

V. The "Overwhelming Evidence of Guilt" In this Case Was Derived from Illegally Obtained Evidence

The Appellant claims the Respondent was not prejudiced by trial counsel's deficient performance because there was "overwhelming evidence of guilt." The problem with this, however, is that a large bulk of evidence in question, as argued above, was illegally seized and improperly admitted.

This is not a case like Ford v. State, 314 S.C. 245, 442 S.E.2d 604 (1994), where the deficiency of counsel's failure to request an alibi charge was counterbalanced by DNA and other evidence. Id. at 248. Nor is this a case like Humbert v. State, 345 S.C. 332, 548 S.E.2d 862 (2001), where counsel's only deficient conduct was allowing the defendant to appear in prison garb. Id. 337–38. There, the defendant was identified by the robbery victim, was seen driving a truck matching the description of the vehicle observed at the scene of the crime, and food and postage stamps were found in the back of the patrol car where the defendant had been seated. Id. at 338. This case is further distinguishable from Geter v. State, 305 S.C. 365, 409 S.E.2d 344 (1991), where the explicit and corroborated description of sexual assault by four victims, along with medical evidence supporting the victim's testimony, greatly outweighed trial counsel's failure to object or otherwise request curative instructions when the victims testified as to the defendant's prior bad acts. Id. at 367. In this way, the Appellant's reliance on these cases is misplaced.

Instead, a critical bulk of the evidence presented against the Respondent regarded the clothing worn by the suspects in the Guatemex surveillance video and the clothing unlawfully seized from the Respondent at the detention center. Furthermore, as the state argues, the Respondent was shown wearing the same clothing as in the surveillance footage that he was wearing in the pictures illegally seized from his cell phone. App.

Brief at 15. As argued earlier, both the clothes and the cell phone pictures should have been excluded. Had the evidence been excluded, the case against the Respondent would have been greatly reduced.

The Appellant also bases its overwhelming-evidence argument on the testimony of Respondent's co-defendant Robinson, which only circles back to the detrimental nature of the clothing illegally seized and improperly introduced in this case. By the time of his testimony, Robinson had already pled to the lesser crime of misprision of a felon. The evidence in this case, however, amply demonstrates that of the three individuals casing the Guatemex, only two suspects entered the store and committed the robbery. Co-Defendant Jakeivan Pulley was shown to have entered the Guatemex prior to the robbery and then shown to have been one of the suspects who, moments later, committed the robbery. Also, as the Appellant points out, there is a height difference between the Respondent and Pulley. As between the two remaining suspects, only Respondent or Robinson could have been the second robber. The robber was shown in the Guatemex surveillance video to have held the gun in his left hand while Pulley emptied the cash register. Both Respondent and Robinson are left-handed. (App. p. 243:25–244:3). Moreover, Robinson was shown to have given several conflicting accounts of his participation in the robbery. See e.g. App. p. 245:16–248:16.

Without the clothing evidence and without the pictures from the Respondent's cell phone, a large shadow could have been cast on Robinson's testimony and his role in the robbery. Additionally, with a fuller understanding of what Robinson said on the record at the time of his plea, Robinson's already suspect and self-serving testimony

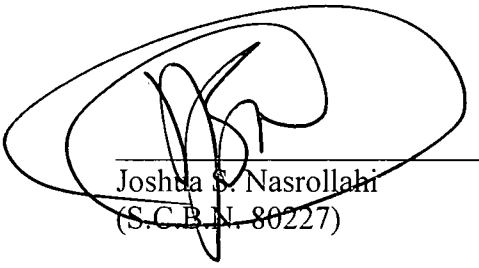
could have been wholly discredited by the Respondent. Instead, Robinson came off as a corroborating witness rather than the self-interested snitch that he was.

The final nail in the Respondent's coffin was the testimony of Diana Melendez. The only witness for the defense testified against the Respondent, implicating him in the robbery. With all of the illegally seized evidence, the self-serving testimony of co-defendant Robinson, and, to top it all off, the testimony of Diana Melendez, there was indeed overwhelming evidence of guilt. Had trial counsel properly objected to this evidence and investigated the testimony of Robinson and Melendez, however, the case against the Respondent would have been considerably thinner.

Conclusion

For the reasons stated above, this Court should affirm the Order of the PCR Court and deny the Appellant's petition.

February 4, 2015



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PROOF OF SERVICE

The undersigned hereby certifies that a true copy of the Brief of the Respondent in the above-referenced case has been served upon Rutledge Johnson Esquire, Assistant Attorney General, Office of the Attorney General, Rembert Dennis Building, 1000 Assembly Street, Rm. 519, Columbia, SC 29201, this 4th day of February 2015.

Emily Burdette
Legal Secretary

SUBSCRIBED AND SWORN TO before me
This 4th day of February 2015.

_____(L.S.)
Notary Public for South Carolina
My Commission Expires: 4/9/22

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July 01, 2014

VIA U.S. MAIL

The Hon. Daniel E. Shearouse
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RE: *Davoris Smiley v. State of South Carolina, 2013-002269*
Our File No. SC-12-1098.02

Dear Mr. Shearouse:

Please find enclosed for filing one (1) original and fifteen (15) copies of the Brief of the Respondent in the above-captioned case. Please file the original and the fourteen (14) copies and please return one (1) clocked copy in the enclosed return envelope. If you have any questions or concerns, please do not hesitate to contact me at your earliest convenience. With kind regards, I am

Very Sincerely Yours,

Emily Burdette
Paralegal

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