STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from York County

John C. Hayes, III, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ELDER PRESCOTT LEACH

APPELLANT

APPELLATE CASE NO. 2014-001158

ANDERS BRIEF OF APPELLANT

JOHN H. STROM
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STATEMENT OF ISSUE ON APPEAL

Did the trial court commit a reversible error in upholding the warrantless seizure and search of Appellant's vehicle under the "plain view" doctrine because the searching officer did not discover the packaging materials or the scale until she either: (1) sat in the vehicle, which was an unlawful vantage point, or, (2) opened the driver's side door, which constituted an improper warrantless search?

STATEMENT OF THE CASE

On March 20, 2014, the York County Grand Jury indicted Appellant Elder Leach for two counts of trafficking in crack cocaine. R. 326 – R. 325. On February 27, 2014, the State filed notice of intent to seek a sentence of life imprisonment without the possibility of parole.

On May 12, 2014, Appellant proceeded to trial before the Honorable John C. Hayes, III, and a jury. R. 1. Michael L. Brown and Sean Cronin represented Appellant. Assistant Solicitors Mathew Shelton and Leslie Robinson represented the State.

The jury found Appellant guilty as charged. R. 311, ll. 1-14. The trial court sentenced Appellant to two concurrent terms of life imprisonment without the possibility of parole. R. 316, ll. 21-25.

This appeal follows.

ARGUMENT

The trial court committed a reversible error in upholding the warrantless seizure and search of Appellant's vehicle under the "plain view" doctrine because the searching officer did not discover the packaging materials or the scale until she either: (1) sat in the vehicle, which was an unlawful vantage point, or, (2) opened the driver's side door, which constituted a an improper warrantless search.

Relevant Facts

On June 19, 2013, at the direction of law enforcement, Tezo Ervin contacted Appellant to allegedly purchase three ounces of crack cocaine. R. 106, ll. 16 – R. 110, ll. 8. Ervin, a drug dealer and user with an extensive criminal record, offered to work with law enforcement for cooperation credit on a trafficking charge for which he was facing up to thirty years in prison. R. 122, ll. 10 – R. 128, ll. 10.

Ervin was given three thousand three hundred dollars in marked bills to purchase the drugs. R. 223, ll. 5-17. While driving to meet Appellant, law enforcement lost visual contact with Ervin. R. 117, ll. 16 – R. 118, ll. 15. During this time Ervin stopped on the side of road and opened the hood of his vehicle, a part of the car that had not been searched by law enforcement during his briefing. R. 91, ll. 8 – R. 93, ll. 20; R. 117, ll. 18-20. Ervin met Appellant in a residential lot where Appellant walked over to Ervin's car and an exchange took place. R. 110, ll. 7-14. Immediately thereafter, law enforcement moved in and arrested Appellant before he reached his vehicle. R. 142, ll. 6-11.

Once Appellant was arrested, Ervin turned over, what laboratory results revealed to be thirty-eight grams of crack cocaine as well as three hundred dollars of the marked buy-money which Ervin testified Appellant returned to him. R. 131, ll. 1-24. Law enforcement recovered the remaining three thousand dollars at the location of Appellant's arrest. R. 167, ll. 23-24.

Search of Appellant's Vehicle

After Appellant was arrested and handcuffed; law enforcement conducted a warrantless search of his vehicle. R. 140, ll. 20-22. Appellant's vehicle was on private property. R. 227, ll. 18-23. During the search, Officer Robin Gander opened the driver's side door and sat down. She then noticed a small black scale in the center console and what appeared to be packaging materials. R. 143, ll. 9-20. Gander inspected the packaging materials and discovered what she believed to be a quantity of crack cocaine. *Id.*

Unusually, Appellant's vehicle was not impounded. Instead, Gander drove the vehicle to the police station where it was processed. R. 143, ll. 2-25. Subsequent tests confirmed that the packaging materials contained 12.55 grams of crack cocaine. R. 206, ll. 1-8.

Trial and Suppression Hearing

During trial, Appellant moved to suppress the evidence of the crack cocaine found in the vehicle on the grounds that the warrantless search was not conducted incident to arrest and that no other exception to the warrant requirement applied. R. 144, ll. 20 – R. 145, ll. 24. The State countered that the drugs were in plain view with Gander claiming:

> ***As soon as you sit down you look in the driver's side door to get in***, you could clearly see a digital scale in the center console of the vehicle as well as on the passenger seat you can clearly see a bag of crack – I cannot say how much it was - as well as package materials."

R. 140, ll. 5 – R. 144, ll. 18 (*emphasis added*). The court denied Appellant's motion; concluding that the plain view exception to the warrant requirement justified the search. R. 146, ll. 4-15. The court also believed "consent and abandonment" of the vehicle by Appellant further supported the propriety of the warrantless search. *Id.*

When the jury reentered, Gander remained on the stand and claimed, over a renewed objection by defense counsel, that she saw the digital scale and packaging material inside the

vehicle. R. 150, ll. 5-7. Gander then confirmed that the photographs of the evidence found in the car, taken by another officer at the station reflected how they appeared when Gander entered Appellant's car.[1] R. 151, 16-24. No other officer testified that they observed the scale and packaging materials on the passenger seat at the time of Appellant's arrest. Gander conceded that she drove the vehicle alone to the police station and that no photographs were taken at the scene of Appellant's arrest. R. 151, ll. 3-24.

The State then called Jamie Faulkenberry, the officer who took the photographs of the scales and packaging once the vehicle arrived at the police station. R. 163, ll. 10-16. Faulkenberry recalled that she examined Appellant's vehicle once Gander delivered it to the police station. R. 171, ll. 2-21. Faulkenberry alleged that the evidence found in the car was sitting on the passenger seat when the vehicle reached the station. *Id.* Faulkenberry then authenticated the photographs of the items found and they were entered into evidence. R. 171, ll. 15 – R. 172, ll. 23. Faulkenberry testified that she had not seen the packaging materials and scale following Appellant's arrest or during the investigation at the controlled buy location. R. 182, ll. 1-19.

Appellant did not testify. R. 247, ll. 13-25. After the jury returned a guilty verdict on both charges, the trial court sentenced Appellant to two concurrent sentences of life imprisonment without the possibility of parole. R. 316, ll. 21-25.

[1] These photographs were entered into the record as State's Exhibits Nos. 6 – 9. It appears that Exhibits 6, 7, and 8 had the items recovered during the search manipulated before being photographed as the scale appears on the seat instead of in the center console and the alleged crack cocaine has been moved so as to appear in a single photograph. These photographs are on file with the Court.

Discussion

The trial court committed a reversible error in upholding the warrantless seizure and search of Appellant's vehicle under the "plain view" doctrine because the searching officer did not discover the packaging materials and scale until she either: (1) sat in the vehicle, which was an unlawful vantage point as law enforcement had no legitimate reason to seize the vehicle under the circumstances; or, (2) opened the driver's side door, which constituted a warrantless search allowing her to observe portions of the car's interior not otherwise readily visible from outside the vehicle.

The Fourth Amendment to the United States Constitution prohibits unreasonable searches and seizures: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and 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." U.S. Const. amend. IV. Consequently, the United States Supreme Court created the exclusionary rule to safeguard Fourth Amendment rights against police misconduct. *United States v. Calandra*, 414 U.S. 338 (1974).

The Fourteenth Amendment incorporates the rule of excluding evidence obtained through an illegal search or seizure and makes it applicable to the states. *Mapp v. Ohio*, 367 U.S. 643, 655 (1961). The exclusionary rule provides that evidence seized in violation of the Fourth Amendment must be excluded from trial. *Id.*; *See State v. Sachs,* 264 S.C. 541, 560, 216 S.E.2d 501, 511 (1975); *see also State v. Brown*, 389 S.C. 473, 483, 698 S.E.2d 811, 816 (Ct. App. 2010).

Additionally, the exclusionary rule also prohibits the use of evidence obtained directly or indirectly through an unlawful search or seizure under the fruits of the poisonous tree doctrine.

See Wong Sun v. United States, 371 U.S. 471, 484 (1963); *see also State v. Nelson*, 336 S.C. 186, 519 S.E.2d 786 (1999) (finding if law enforcement exploit an unlawful search to seize evidence that would not have otherwise come to light, that evidence is the "fruit of the poisonous tree" and is not admissible).

Furthermore, the United States Supreme Court has held that "searches [and seizures] conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment-subject only to a few specifically established and well-delineated exceptions." *Katz v. United States*, 389 U.S. 347, 357 (1967) (footnote omitted); *See Coolidge v. New Hampshire*, 403 U.S. 443, 91 (1971); *see also State v. Weaver,* 361 S.C. 73, 80–81, 602 S.E.2d 786, 790 (Ct. App. 2004).

These exceptions are "jealously and carefully drawn," and there must be "a showing by those who seek exemption...that the exigencies of the situation make the course imperative." *Coolidge*, 403 U.S. at 91. More specifically, the burden is on the State to justify a warrantless search or seizure. *Id.* Recognized exceptions have include: (1) search incident to a lawful arrest; (2) "hot pursuit;" (3) "stop and frisk;" (4) "automobile exception;" (5) the "plain view" doctrine; and (6) consent.[2] *Id.*

Yet, despite these exceptions, the United States Supreme Court has emphasized its concern with warrantless searches and seizures:

> "The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. ***Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate***

[2] When reviewing a Fourth Amendment search and seizure case, an appellate court must affirm the trial judge's ruling if there is any evidence to support the ruling. *State v. Missouri,* 361 S.C. 107, 603 S.E.2d 594 (2004). Additionally, an appellate court will reverse only when there is clear error. *Id.*

> ***instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.***

Johnson v. United States, 333 U.S. 10, 14-15 (1948) (*emphasis added*).

The Supreme Court of the United States has also addressed the warrant requirement's effect on the seizing officer: "In cases where the securing of a warrant is reasonably practicable, it must be used and when properly supported by affidavit and issued after judicial approval protects the seizing officer against a suit for damages. ***In cases where seizure is impossible except without warrant, the seizing officer acts unlawfully and at his peril unless he can show the court probable cause.***" *Carroll v. United States*, 267 U.S. 132, 156 (1925) (*emphasis added*).

As an exception to the warrant requirement, the plain view doctrine permits law enforcement to remove objects which can be identified and seen without a search. *State v. Thomas,* 248 S.C. 573, 151 S.E.2d 855 (1966) (overruled on other grounds by *State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991) (a seizure of what is in plain view, without a search, is not prohibited by the search and seizure provisions of the South Carolina or United States Constitutions).

To fall under the protections of the plain view doctrine the State must satisfy two requirements: (1) the initial intrusion which afforded the authorities the plain view was lawful and (2) the incriminating nature of the evidence was immediately apparent to the seizing authorities. *State v. Wright*, 391 S.C. 436, 443, 706 S.E.2d 324, 327 (2011) (*citing Horton v. California*, 496 U.S. 128, 110 (1990). The State carries the burden of proving that evidence seized was, in fact, in plain view, or risk its admissibility. *State v. Brown*, 289 S.C. 581, 347 S.E.2d 882 (1986) (suppression is required when the state puts forth no competent evidence that items seized were in plain view).

In the present case, the trial court erred in concluding that the plain view doctrine permitted the search and seizure of Appellant's car as law enforcement did not observe the packaging, the scales, or the crack cocaine until Gander entered the vehicle. Gander testified that she noticed the items on the passenger seat and in the center console: "***As soon as you sit down you look in the driver's side door to get in***". R. 143, ll. 9-15 (*emphasis added*).

Alternatively, even if her testimony is understood to mean that **she observed the packaging material and scales once she opened the door**; the plain view doctrine is still inapplicable as opening a car door is a search within the meaning of the Fourth Amendment. *McHam v. State*, 404 S.C. 465, 478, 746. S.E.2d 41, 49 (2013) (plain view doctrine requires the officer to be able to observe what is in open or plain view when he is located where he has a lawful right to be, ***where an officer has opened the car door to view portions of the interior of the car that he could not otherwise see a search has taken place***) (*emphasis added*). There was no testimony that the items were visible from outside the vehicle.

The driver's seat was not a lawful vantage point as the police did not have any legitimate reason to enter the vehicle or seize it. It is uncontested that the vehicle was located on private property and was not an obstruction to traffic that would justify removal. R. 227, ll. 18-23. There were no exigent circumstances, such as the risk of Appellant escaping in the vehicle, justifying prompt action by law enforcement. *State v. Peters*, 271 S.C. 498, 248 S.E.2d 475 (1978).

Nor was the search incident to arrest or a safety sweep as Appellant was outside of the car when arrested and was already handcuffed in custody when the search was conducted. *State v. Brown*, 401 S.C. 82, 90-91, 736 S.E.2d 263, 267 (2012) (*citing Arizona v. Gant,* 556 U.S. 332

(2009)(search of vehicle incident to arrest is only permissible if arrestee within in reaching distance of passenger compartment).

There was no evidence law enforcement sought Appellant's consent, the consent of the car's titled owner, or that the car had been voluntarily abandoned. *State v. Lemacks*, 275 S.C. 181, 184, 268 S.E.2d 286 (1980) (running car in roadway was abandoned and constituted a traffic hazard justifying search). Likewise, there was no testimony on any standardized procedure or policies law enforcement employed when searching or seizing vehicles after a drug bust that would justify a seizure and inventory search. *State v. Boyd*, 288 S.C. 206, 208, 341 S.E.2d 144, 145-46 (Ct. App. 1986) (*citing South Dakota v. Opperman,* 428 U.S. 364 (1976). Finally, as defense counsel correctly stated: "there is no reason to believe that there will be evidence of the arrest in [the vehicle] because the alleged drug transaction has already taken place [outside of the vehicle]." R. 145, ll. 18-24.

Accordingly, the trial court erred in holding that the warrantless seizure of Appellant's vehicle on private property was proper under the Fourth Amendment because the officers failed to secure a search warrant or establish that probable existed under the plain view doctrine, to seize the vehicle.[3] R. 145, ll. 25 – R. 146, ll. 16; *See Coolidge v. New Hampshire*, 403 U.S. at 91.

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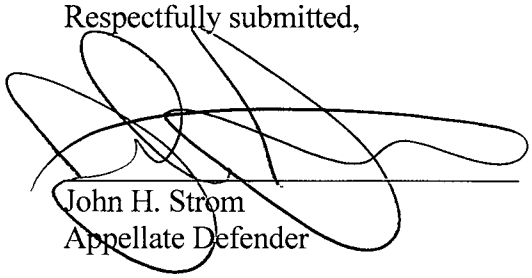
[3] While unpreserved, the two indictments for trafficking stem from a single act; Appellant's alleged possession of up to 50.58 grams of crack cocaine. *Matthews v. State,* 300 S.C. 238, 387 S.E.2d 258 (1990) (vacating conviction and sentence for possession of marijuana with intent to distribute where defendant was convicted of possession with intent to distribute and trafficking based on the same act); *State v. Brown,* 319 S.C. 400, 407, 461 S.E.2d 828, 833 (1995).

Appellant should have only been indicted for a single count of trafficking because the indictments represent a single offense as the elements charged in each are identical and trafficking is a crime defined by possession of a certain amount of narcotic. Appellant has been prescribed greater punishment than the legislature intended. *Blockburger v. United States,* 284 U.S. 299, 304, (1932); *State v. Gosnell,* 341 S.C. 627, 535 S.E.2d 453 (2000) (defendant indicted for trafficking by conspiracy "handled" a maximum of 252 grams and could not be found guilty on indictment alleging trafficking by conspiracy in excess of 400 grams).

CONCLUSION

For the foregoing reasons, Appellant's convictions should be reversed and this case remanded to the York County Court of General Sessions for a new trial.

Respectfully submitted,



John H. Strom
Appellate Defender

ATTORNEY FOR APPELLANT

This 9th day of February, 2015.

STATE OF SOUTH CAROLINA

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APPELLANT

APPELLATE CASE NO. 2014-001158

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Elder Prescott Leach states:

1. He is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent appellant.

2. He has reviewed the record of appellant's trial before Judge John C. Hayes, III, which was held on , and, in his opinion, the appeal is without legal merit sufficient to warrant a new trial.

3. He has, pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967), briefed an arguable legal issue which arose during the course of the trial.

WHEREFORE, he asks the Court to relieve him as counsel for Elder Prescott Leach.

Respectfully submitted,

John H. Strom
Appellate Defender

ATTORNEY FOR APPELLANT

This 9th day of February, 2015.

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DESIGNATION OF MATTER TO BE INCLUDED IN RECORD ON APPEAL

Appellant proposes the following be included in the Record on Appeal:

(1) True–billed indictment(s);
(2) Entire Trial Transcript (May 12-14, 2014);
(3) State's Exhibit 6 (Photo – baggies);
(4) State's Exhibit 7 (Photo – Digital scales & white substance);
(5) State's Exhibit 8 (Photo – plastic baggies w.white substance); and
(6) State's Exhibit 9 (Photo – digital scales on console).

I certify that this designation contains no matter which is irrelevant to this appeal.

February 9th, 2015

John H. Strom
Appellate Defender

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PO Box 11589
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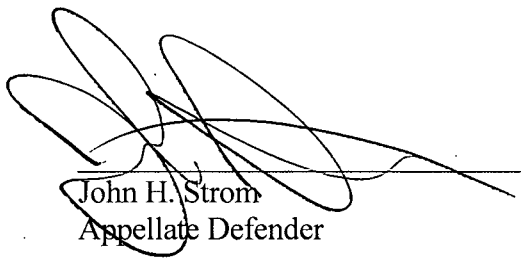
(803) 734-1343

Attorney for Appellant

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Anders Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

February 9, 2015



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APPELLATE CASE NO. 2014-001158

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Anders Brief of Appellant and Designation of Matter in the above referenced case has been served upon Salley W. Elliott, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Anders Brief of Appellant and Designation of Matter and Record on Appeal have been served on Elder Prescott Leach, #197673 at Lieber Correctional Institution, P.O. Box 205, Ridgeville, SC 29472, this 9th day of February, 2015.

John H. Strom
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 9th day of February, 2015.

Rhonda Denise Foxworth (L.S.)
Notary Public for South Carolina
My Commission Expires: October 17, 2021.