

 ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Greenville County

Edward W. Miller, Circuit Court Judge

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S.C. Supreme Court

STATE OF SOUTH CAROLINA,

RESPONDENT,

V.

KENNETH HENRY SHERMAN,

APPELLANT.

APPELLATE CASE NO. 2014-001364

ANDERS BRIEF OF APPELLANT
PURSUANT TO WHITE v. STATE

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STATEMENT OF ISSUE ON APPEAL

Did the trial judge err in ruling Appellant was not seized for purposes of the Fourth Amendment where he was a passenger in a car during a traffic stop and where the police officer asked for his identification?

STATEMENT OF THE CASE

On January 10, 2012, the Greenville County Grand Jury indicted Appellant Kenneth Henry Sherman for possession of cocaine base with intent to distribute and trafficking heroin. App. 96-100. On February 13, 2012, Appellant proceeded to trial before The Honorable Edward W. Miller and a jury. Jake Erwin represented Appellant and Joyce Monts represented the State. App. 1.

Prior to trial Appellant moved to suppress drug evidence seized from Appellant as a result of a traffic stop. App. 7, 7-11. The judge denied the motion. App. 24, line 5—App. 26, line 18. Appellant then sought to enter a plea. After a routine colloquy, the judge accepted his pleas of guilty as charged. App. 28, line 1—App. 31, line 18. The judge issued concurrent sentences of sixteen years' incarceration. App. 35, lines 19-24.

ARGUMENT

THE TRIAL JUDGE ERRED IN RULING APPELLANT WAS NOT SEIZED AS A PASSENGER IN THE CAR BECAUSE EVEN THOUGH THE DETENTION WAS BRIEF AND FELL SHORT OF ARREST, OFFICER GODFREY RESTRAINED HIS FREEDOM.

STATEMENT OF FACTS

In a hearing on the motion to exclude the drug evidence, the State called law enforcement officer James Godfrey to testify that on March 23, 2011, he pulled over a Dodge Stratus on Anderson Road near Greenville for speeding. Godfrey asked for the driver's information and identifying information from the other two occupants of the vehicle, including Appellant, who was sitting behind the driver's seat. Godfrey stated Appellant had no identification card but gave his name and birthdate. Godfrey returned to his patrol vehicle and checked the occupants for outstanding warrants. Finding records showed Appellant had one, he returned to the Stratus and advised Appellant he was attempting to secure the warrant. He again returned to the patrol car to wait for a copy, and he claimed Appellant then opened the door of the Stratus and fled on foot. Godfrey and another officer at the stop chased, tazed, and handcuffed Appellant. In his pockets they found baggies of heroin, scales, and pieces of crack cocaine. App. 7, line 21—App. 17, line 15.

Counsel for Appellant cross-examined Godfrey. He reviewed Godfrey's account for confirmation of the order of events and some additional details. App. 18, line 9—App. 21, line 1. Counsel then argued to the trial judge that under *Sikes v. State*, 323 S.C. 28, 448 S.E.2d 560 (1994), Godfrey impermissibly seized Appellant while he ran the warrant check. App. 21, line 11—App. 23, line 20. The State responded that the warrant search did not measurably extend the initial, valid traffic stop. App. 23, line 21—App. 24, line 4. The judge then responded that no evidence of the length of the stop was presented. Moreover, the real issue appeared to be whether Appellant was

seized for purposes of the Fourth Amendment. Because Appellant did not refuse Godfrey's request for information, the evidence did not show the interaction constituted a seizure rather than consensual encounter. App. 24, line 5—App. 26, line 18.

DISCUSSION

The trial judge erred in ruling Appellant was not seized as a passenger in the car because even though the detention was brief and fell short of arrest, Godfrey restrained his freedom. “The purpose of the Fourth Amendment is . . . ‘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 guarantees “[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. “[T]he underlying command of the Fourth Amendment is always that searches and seizures be reasonable.” *Wilson v. Arkansas*, 514 U.S. 927, 931 (1995).

An individual is seized under the Fourth Amendment when an officer restrains his freedom, even if the detention is brief and falls short of an arrest. *Sikes v. State*, 323 S.C. at 30, 448 S.E.2d at 562. For example, traffic stops are reviewed under the standard set forth in *Terry v. Ohio*, 392 U.S. 1 (1968), because a traffic stop is more analogous to an investigative detention than a custodial arrest. See *United States v. Rusher*, 966 F.2d 868, 875 (4th Cir. 1992). Consequently, *Terry* outlines a two-prong test for analyzing the constitutionality of a traffic stop: (1) whether the police officer's action was justified at the inception of the traffic stop; and (2) whether the police officer's subsequent actions were reasonably related in scope and duration to the circumstances that justified the stop. *Rusher*, 966 F.2d at 875. An officer may also stop a car

and briefly detain the occupants if he has a reasonable suspicion that the occupants are involved in criminal activity. *Sikes v. State*, 323 S.C. at 30-31, 448 S.E.2d at 562.

“As a general matter, the decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred.” *State v. Butler*, 343 S.C. 198, 201, 539 S.E.2d 414, 416 (Ct. App. 2000) (citations omitted). “An investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop and the scope of the detention must be carefully tailored to its underlying justification.” *State v. Pichardo*, 367 S.C. 84, 99, 623 S.E.2d 840, 847-48 (Ct. App. 2005) (citing *Florida v. Royer*, 460 U.S. 491 (1983)).

Once the initial purpose of a stop has been fulfilled, further detention is beyond the scope of the stop and therefore illegal unless the officer has reasonable suspicion that a serious crime is afoot. *State v. Tindall*, 388 S.C. 518, 521, 698 S.E.2d 203, 205 (citing *U.S. v. Sullivan*, 138 F.3d 131 (4th Cir. 1998)). “‘Reasonable suspicion’ requires a ‘particularized and objective basis that would lead one to suspect another of criminal activity.’” *State v. Khingratsaiphon*, 352 S.C. 62, 69, 572 S.E.2d 456, 459 (2002) (quoting *United States v. Cortez*, 449 U.S. 411, 418 (1981)). In determining whether reasonable suspicion exists, the court must consider the totality of the circumstances. *State v. Rogers*, 368 S.C. 529, 534, 629 S.E.2d 679, 682 (Ct. App. 2006).

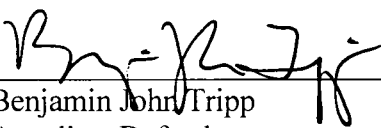
In this case, even though the detention was brief and fell short of arrest, Godfrey restrained Appellant’s freedom as a passenger in the car. Godfrey pulled over for speeding the car in which Appellant was riding. He testified he not only asked for the driver’s information, but he also asked for identifying information from Appellant and the other passenger. Godfrey also admitted Appellant did not have an identification card. Thus, Godfrey’s request for Appellant’s name and birthdate constituted an additional seizure beyond the scope of the initial stop for a traffic

violation. Even though he only briefly accosted and instructed Appellant to provide identifying information, the encounter was nonetheless a seizure under the Fourth Amendment. The fact that Godfrey had seized Appellant at that point is bolstered by Godfrey's own testimony that as soon as Appellant tried to leave the area, officers chased him down and tazed him. Thus, the trial judge erred by failing to conclude as a matter of law that Appellant was seized when Godfrey accosted him.

CONCLUSION

For the foregoing reasons, Appellant requests that the Court reverse the decision of the trial court and dismiss the charges against Appellant.

Respectfully submitted,



Benjamin John Tripp
Appellate Defender

ATTORNEY FOR APPELLANT

This 6th day of March, 2015.

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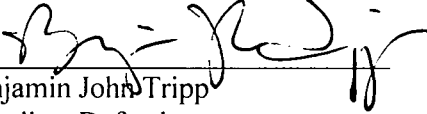
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Kenneth Henry Sherman 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 Edward W. Miller, which was held on February 13, 2012, 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 Kenneth Henry Sherman.

Respectfully submitted,


Benjamin John Tripp
Appellate Defender

ATTORNEY FOR APPELLANT

This 6th day of March, 2015.

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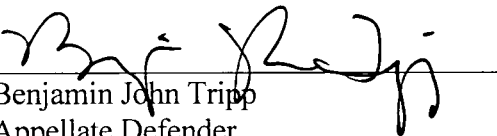
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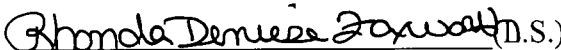
CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Anders Brief of Appellant Pursuant to White v. State in the above referenced case has been served upon Karen Ratigan, Esquire, Office of the Attorney General, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Anders Brief of Appellant Pursuant to White v. State have been served on Kenneth Henry Sherman, #183789 at McCormick Correctional Institution, 386 Redemption Way McCormick, SC 29899, this 6th day of March, 2015.


Benjamin John Tripp
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 6th day of March, 2015.

 (D.S.)
Notary Public for South Carolina
My Commission Expires: October 17, 2021.