STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Abbeville County
The Honorable Frank R. Addy, Circuit Court Judge

Appellate Case No. 2013-002636

THE STATE,

Respondent,

v.

ALFONZO ALEXANDER,

Appellant.

FINAL BRIEF OF RESPONDENT

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II.

The trial court did not abuse its discretion in qualifying Lt. John Gray as an expert in narcotics investigation. He was qualified by knowledge, skill, and experience to speak on the subject. His opinion was relevant to the issue of intent. Moreover, it is clear that narcotics investigation is information not commonly known to the average juror.

STATEMENT OF THE CASE

Alfonzo Alexander ("Appellant") was indicted for Possession with Intent to Distribute ("PWID") Crack Cocaine, Third Offense. (R. 194-95) Appellant was tried in his absence by a jury on May 28-30, 2013. The Honorable Frank R. Addy presided. Following the guilty verdict, Appellant's sentence was sealed. On September 18, 2013, the sentence of twenty-nine years was read. (Supp. R. p. 2) Appellant then filed a Motion to Reconsider Sentence dated September 26, 2013. (R. pp. 189-91) The Motion was denied by Judge Addy in an order dated November 26, 2013.)

STATEMENT OF FACTS

On August 12, 2012, an anonymous caller phoned 911 to report "people gambling, using drugs, and selling drugs" at apartment 401 in in an Abbeville apartment complex. (R. pp. 12-13, pp. 80-81) Lt. John Gray responded to the area and encountered the apartment tenant, Ella Brown, outside the door to the apartment. (R. p. 13; p. 81; p. 121) Lt. Gray advised Brown of the complaint and asked if he could look inside the apartment. (R. p. 13, p. 18, pp. 81-82) Brown opened the apartment door. (R. p. 14, p. 82; p. 121) Lt. Gray observed approximately ten people inside the apartment, some engaged in a card game. (R p. 14, pp. 82-83) He also detected a strong odor of marijuana. (R. p. 14, p. 82) Upon stepping into the apartment, Lt. Gray noticed a bag of marijuana on the floor at Appellant's feet. (R. p. 14, p. 83) Appellant was seated on000 00a couch holding a large sum of money. (R. pp. 14-15, p. 83) Lt. Gray could also see baggies coming out of Appellant's pocket. (R. p. 15, p. 21; p. 83)

Lt. Gray frisked Appellant for weapons. During the frisk he felt "in [Appellant's] pocket that there was additional bulge under the baggie that you could see through his pocket that felt to be more baggies. And in his other pocket, you could just feel a – a hard square. Wasn't sure what it was at the time." (R. pp. 15-16, p. 84) Lt. Gray asked if he could retrieve the items from the pocket, and Appellant stated that he could. (R. p. 16, p. 84) Inside Appellant's pocket were 16-18 baggies, an "off-white, rocklike substance...believed to be crack cocaine," and digital scales. (R. p. 16, pp. 84-86) The substance was later determined to be 6.8 grams of crack cocaine. (R. p. 122) Appellant also had a total of $839.00, mostly in twenty-dollar bills. (R. p. 17; p. 92)

ARGUMENT

I.

The trial court properly denied Appellant's request to suppress crack cocaine found in his pocket. Officers entered Brown's apartment based on her consent, not based on the anonymous tip received. Upon entering the apartment, officers (1) smelled marijuana, (2) observed a card game and money on the table, consistent with gambling, (3) observed a bag of marijuana in plain view on the floor near Appellant's feet, and (4) saw Appellant on the couch holding a large sum of money with baggies protruding from his pocket. Therefore, officers had reason to investigate the obvious criminal activity. Due to the nexus between drugs and guns and the number of individuals in the room, a Terry frisk for weapons was reasonable. However, crack cocaine in Appellant's pocket was discovered when the investigating officer asked for and received permission to remove the baggies from Appellant's pocket. As such, evidence supported the trial court's finding.

"South Carolina appellate courts review Fourth Amendment determinations under a clear error standard." State v. Provet, 405 S.C. 101, 747 S.E.2d 453 (2013). The appellate court will affirm if there is any evidence to support the trial court's ruling.; State v. Taylor, 401 S.C. 104, 736 S.E.2d 663 (2013). The trial court's denial of Appellant's motion to suppress is supported by evidence in the record.

In the present case, the trial court correctly discerned that officers did not rely on the anonymous tip as a basis for their entry into Brown's apartment. (R. Supp. p. 1) Lt. Gray approached Brown outside her apartment in a public area, inquired about the tip, and asked for her consent to look inside the apartment. The anonymous tip was not necessary for officers to approach Brown in a public area and ask her questions. "[A] seizure does not occur simply because a police officer approaches an individual and asks a few questions." Florida v. Bostick, 501 U.S. 429, 434 (1991). No seizure had occurred at this point.

Brown then opened the door for the officers. "As a guest, [Appellant] assumed the risk that the home resident would allow others into the area." State v. Bailey, 276 S.C. 32,

37, 274 S.E.2d 913, 916 (1981). Because Brown consented to allowing officers into her apartment, officers were lawfully present.

The trial court also correctly found that the Terry frisk was appropriate. (R. p. 28; pp. 34-35) Once the door was opened, Lt. Gray reported (1) smelling marijuana, (2) a card game and money on the table, consistent with gambling reported in the tip, (3) a bag of marijuana in plain view on the floor near Appellant's feet, (4) approximately 10 individuals as opposed to 3 officers, and (5) Appellant on the couch holding a large sum of money with baggies protruding from his pocket. Lt. Gray also cited the well-known connection between guns and drugs. (R. pp. 26-27) It is well settled that "[a]n investigative detention is constitutional if supported 'by a reasonable and articulable suspicion that the person seized is engaged in criminal activity.'" State v. Taylor, 401 S.C. 104, 108, 736 S.E.2d 663, 665 (2013) (quoting Reid v. Georgia, 448 U.S. 438, 440 (1980).) "In assessing whether a suspect is armed and dangerous, the officer need not be absolutely certain the individual is armed." State v. Blassingame, 338 S.C. 240, 249, 525 S.E.2d 535, 540 (1999). Our courts recognize:

> ...that because of the "indisputable nexus between drugs and guns," where an officer has reasonable suspicion that drugs are present in a vehicle lawfully stopped, there is an appropriate level of suspicion of criminal activity and apprehension of danger to justify a frisk of both the driver and the passenger in the absence of other factors alleviating the officer's safety concerns.

State v. Banda, 371 S.C. 245, 253, 639 S.E.2d 36, 40 - 41 (2006). While the present case does not involve an automobile stop, it clearly involves the reasonable suspicion of drug activity based upon Lt. Gray's observations upon entering Brown's apartment.

Based on the factors listed by Lt. Gray, officers frisked all individuals inside the apartment, including Appellant. (R. p. 26, p. 88) Lt. Gray's observations when Brown

opened the door provide reasonable suspicion that criminal activity was afoot. In addition to the narcotics readily seen and smelled, Lt. Gray's observations of the baggies in Appellant's pockets and money in his hand provide additional indication that Appellant in particular may be involved in distribution of narcotics. The factors listed by Lt. Gray clearly provide a basis for reasonable suspicion of narcotics distribution and therefore justified his concerns for safety, particularly in light of the number of individuals and close quarters.

Appellant's case is readily distinguishable from that of State v. Fowler, 322 S.C. 263, 471 S.E.2d 706 (Ct. App. 1996), cited by Appellant. Fowler encountered officers on the street. Officers knew he had a prior drug conviction, believed he was walking in a "suspicious manner," "acted 'kind of scared,'" did not take the normal sidewalk route, "was known to carry weapons," kept "company with suspected drug dealers and persons known to carry weapons," and did not greet officers as he usually did. Id. at 265. Officers admitted that Fowler "did not do anything to make the police believe he was armed or involved in drug activity." In Fowler's case, officers did not even have an articulable suspicion to justify a Terry stop. The court further noted that even if the Terry stop were proper, the officers articulated no facts on which to base a belief Fowler was armed and dangerous. In contrast to Fowler, Appellant was stopped with narcotics at his feet, baggies bulging from his pockets, and a large amount of cash in his hand in a room that smelled of marijuana. It appeared there was gambling. There were around 10 individuals inside the small apartment and only 3 officers whereas Fowler was alone and approached by law enforcement on a public street. Unlike Fowler, who was merely walking in his own neighborhood and did nothing to arouse suspicion of drugs or arms, Appellant appeared to be in the act of distributing narcotics at the moment the officers entered.

Officers further articulated a concern based on experience about the well-known nexus between drugs and guns. In contrast to Fowler, in Appellant's case officers articulated reasons for stopping Appellant and reasons to justify a frisk of his outer clothing for weapons.

However, as the trial court also discerned, the drugs were not discovered as a result of plain feel during the frisk. The drug evidence Appellant seeks to suppress was found as a result of a consensual search of his pocket. There is no requirement that officers know what is in a suspect's pocket before asking for consent to remove the item; there is no requirement that the officer believe that a weapon will be found before asking for consent to remove items from a pocket.

For all these reasons, evidence supports the trial court's denial of Appellant's motion to suppress.

II.

The trial court did not abuse its discretion in qualifying Lt. John Gray as an expert in narcotics investigation. He was qualified by knowledge, skill, and experience to speak on the subject. His opinion was relevant to the issue of intent. Moreover, it is clear that narcotics investigation is information not commonly known to the average juror.

Appellant first questioned the adequacy of Lt. Gray's training and experience. "The qualification of an expert witness and the admissibility of the expert's testimony are matters within the trial court's sound discretion." State v. White, 372 S.C. 364, 373, 642 S.E.2d 607, 611 (Ct. App. 2007). "To warrant reversal based on the admission or exclusion of evidence the complaining party must prove both the error of the ruling and the resulting prejudice. To show prejudice, there must be a reasonable probability that the jury's verdict was influenced by the challenged evidence or the lack thereof." Id. at 373-374. (Internal citations omitted.)

"A person is competent as an expert when he or she has acquired knowledge, skill, or experience so that he or she is better able than the jury to form an opinion on the subject matter." State v. Robinson, 396 S.C. 577, 586, 722 S.E.2d 820, 825 (Ct. App. 2012) (citing Rule 702, SCRE). The burden of showing the requisite qualifications rests with the party offering the expert. Id. "However, defects in the amount or quality of education and experience go to the weight of the expert's testimony and not its admissibility." Id.

The trial court properly concluded that Lt. Gray was qualified by knowledge, skill, or experience to offer expert testimony in narcotics investigations. (R. pp. 76-77) Lt. Gray has had experience with narcotics investigations since he began his law enforcement career in 1995. (R. pp. 67-68) He began as a reserve officer, and at the time of trial in 2013 had been a full-time officer for approximately 16 year. (R. p. 76) He was

specifically assigned to narcotics for five years while working for Abbeville County. When he moved to the Abbeville city police department, he was also expressly assigned to narcotics several months before Appellant's trial. (R. p. 68) Lt. Gray is a certified drug instructor through the Federal Law Enforcement Training Center (FLETC). He has attended numerous courses. (R. pp. 68-69) He has been called upon by other officers to assist in identifying drugs and paraphernalia. (R. p. 70) Lt. Gray investigated and assisted in numerous cases, estimating investigations involving nearly 100 people over the course of his career. (R. p. 75) His experience ranged from cases involving simple possession of a single pill to one case involving 50 pounds of marijuana and 500 ecstasy pills. (R. p. 76) While Lt. Gray's training and experience is not as extensive as that of the expert in Robinson, it still sets him far apart from the average juror. Any shortcoming in his experience goes to the weight of his testimony, not its admissibility. Therefore, the trial court did not abuse its discretion.

In the State's case, Lt. Gray's expert opinion was limited to a short statement that he believed that the amount of crack cocaine, the baggies, and the scales together indicated that Appellant intended to were consistent with the distribution of crack cocaine. (R. pp. 94-95) Appellant further argues the testimony should have been excluded on two grounds: (1) the statute provides for an inference of intent to distribute when the amount possessed exceeds one gram, thereby removing the need to present additional evidence and (2) no specialized knowledge was needed here because the information was within the knowledge of average jurors.

As to Appellant's first argument, the amount of crack cocaine seized, 6.8 grams, indeed leads to an inference that Appellant intended to distribute. As a preliminary matter, this particular argument was never presented to the court. Appellant merely stated

that the objection was in part based on "relevancy, that this is outside what the jury would need...." (R. p. 77) "To preserve an issue for review there must be a contemporaneous objection that is ruled upon by the trial court. The objection should be addressed to the trial court in a sufficiently specific manner that brings attention to the exact error." State v. Johnson, 363 S.C. 53, 58-59, 609 S.E.2d 520, 523 (2005). (Internal citation omitted) Nonetheless, the argument fails on the merits. The inference arising from the amount in possession is not mandatory, and the State bears the burden of proof. State v. Andrews, 324 S.C. 516, 479 S.E.2d 808 (Ct. App. 1996). The amount of narcotics is, as the trial court instructed, "simply an evidentiary fact to be taken into consideration by [the jury], along with other evidence in [the] case, and to be given the weight [the jury decides] it should have." (R. p. 169) Lt. Gray's testimony is highly relevant to ensure that the jury is aware of the significance of the baggies, digital scales, and large amounts of cash as consistent generally with distribution of crack cocaine as opposed to personal use.

Appellant further argues that the significance of such evidence does not require specialized knowledge:

> ...that's not something that the jury needs any sort of specialized testimony – specialized scientific – or other testimony about. I think he can testify, obviously, what he found on our – our client. But the purpose of expert witnesses is to explain something that's outside the purview of the – average juror. And I – I just don't think this rises to that level and requires any sort of specialized knowledge as would be required from an expert.

(R. p. 73, line 18 – p. 74, line 1) In effect, Appellant argued that the average juror would be aware that multiple baggies, scales, and cash on the person were tools of the crack cocaine trade as opposed to personal use. In other words, Appellant's objection posited that the inference of Appellant's intent to distribute under these facts was plain to the

average person in the community, so plain that an expert was not even required. The trial court found that based on his experience and education, Lt. Gray possessed knowledge in the field of narcotics investigation, an area which an average juror would be unfamiliar with. (R. pp. 76-77) This Court has recognized "how crack cocaine was sold and packaged" as a topic outside the purview of the average juror. Robinson at 588, 722 S.E.2d 825-826. Appellant's argument is therefore without merit. Moreover, if the public were so well versed in the drug trade that this would be within their purview, it stands to reason that any error in Lt. Gray offering testimony to that effect would be harmless – he merely said what they already knew.

Finally, overall, any error in admitting Lt. Gray's testimony would be harmless. The trial court was careful to instruct that expert witness opinions could be accepted or rejected. (R. p. 79; p. 167) Robinson at 587-588, 722 S.E.2d 825 (citing State v. Douglas, 380 S.C. 499, 503, 671 S.E.2d 606, 609 (2009) (finding a defendant was not prejudiced by the witness's expert qualification because the fact that the witness was qualified as an expert did not require the jury to accord her testimony any greater weight than that given to any other witness); State v. White, 382 S.C. 265, 271, 676 S.E.2d 684, 687 (2009) (finding the circuit court properly instructed the jury to give the expert witness's testimony "such weight and credibility as you deem appropriate as you will with any and all witnesses that will testify at this trial"); State v. Commander, 384 S.C. 66, 75, 681 S.E.2d 31, 35 (Ct.App. 2009) ("As with any witness, the jury is free to accept or reject the testimony of an expert witness.").

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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March 16, 2015

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CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent 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."

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PROOF OF SERVICE

I, Anne Mueller, certify that I have served the within Final Brief of Respondent and Designation of Matter 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 16th day of March, 2015.

Anne Mueller

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