

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Sumter County

William Jeffrey Young, Circuit Court Judge

RECEIVED

MAR 28 2012

S.C. Supreme Court

Opinion No. 2011-UP-475 (S.C. Ct. App. filed 10/26/2011)

09-GS-43-0371.

THE STATE,

RESPONDENT,

V.

JAMES P. AUSTIN,

APPELLANT

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS

ELIZABETH A. FRANKLIN-BEST
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, S. C. 29211-1589
(803) 734-1343

ATTORNEY FOR PETITIONER.

INDEX

INDEX 1

CERTIFICATE OF COUNSEL..... 2

QUESTION PRESENTED 3

STATEMENT OF THE CASE..... 4

ARGUMENT

 The South Carolina Court of Appeals erred when it affirmed
 petitioner’s sentence and conviction for possession of cocaine
 because the trial court judge should have suppressed the drugs when
 petitioner was illegally seized, and because the trial court judge
 should have granted petitioner’s motion for a continuance due to the
 unavailability of a material witness. 5

CONCLUSION 13

CERTIFICATE OF COUNSEL

Counsel for petitioner certifies that the petition for rehearing was made and finally ruled on by the Court of Appeals on 1/30/2012.

QUESTION PRESENTED

Did the South Carolina Court of Appeals err when it affirmed petitioner's sentence and conviction for possession of cocaine because the trial court judge should have suppressed the drugs when petitioner was illegally seized, and because the trial court judge should have granted petitioner's motion for a continuance due to the unavailability of a material witness?

STATEMENT OF THE CASE

James P. Austin was indicted by the Sumter County grand jury of possession of crack cocaine. On September 24-25th, he stood trial before the Honorable W. Jeffrey Young and a jury. He was represented by John D. Clark, Esquire. He was convicted, and sentenced to 5 years, suspended on the service of 1 year.

Austin appealed his sentence and conviction, and the South Carolina Court of Appeals affirmed in an unpublished, *per curiam* opinion, State v. Austin, No. 2011-UP-475 (filed October 26, 2011). App. 1.

Petitioner then filed a petition for rehearing which was denied January 30, 2012. App. 11.

This petition for writ of certiorari timely follows.

ARGUMENT

The South Carolina Court of Appeals erred when it affirmed petitioner's sentence and conviction for possession of cocaine because the trial court judge should have suppressed the drugs when petitioner was illegally seized, and because the trial court judge should have granted petitioner's motion for a continuance due to the unavailability of a material witness.

The South Carolina Court of Appeals erred when it affirmed petitioner's sentence and conviction in an unpublished *per curiam* decision that failed to offer any legal reasoning for its decision, but rather relied on string citations to deny petitioner's claims. Respectfully, petitioner asks this Court to grant his petition for writ of certiorari and ultimately reverse his convictions.

RELEVANT FACTS:

Prior to the start of trial, defense counsel made a motion to suppress the drugs seized in this case because, he argued, they were taken in violation of the 4th amendment. Earlier, defense counsel made a motion to continue the case because a material state's witness, Detective Wilson, was not available to testify. The judge refused that motion. See *infra*, Argument 2, and the state proceeded to offer its evidence supporting introduction of the drugs into evidence at trial.

The State first called Detective Kim Coker to the stand. Coker had eleven years of law enforcement experience. ROA 26, ll. 17 -- 24. At the time of these events, she was a part of the drug unit. ROA 27. She testified that she, and the other officers, had received an anonymous tip that a male subject was outside a convenience store:

“We had received an anonymous tip that a male subject was outside the store, and was -- had a telephone call to another subject and was bringing him a quantity of cocaine. We had a description given to us of the male subject that made the phone call. When we arrived at the store that particular subject was standing there talking to another gentleman. We just got out to investigate the situation. When we drew up, Detective Quiroz was in the driver's seat. I was in the rear passenger seat behind the driver's seat.

And Detective Wilson was in the passenger front seat. When we pulled up, I was on the side that was closest the defendant. When we exited the vehicle, I saw the defendant thrown (sic) down an object to the ground. And when I walked up, there was a dollar bill. When I opened up the dollar bill, there was a quantity of cocaine inside that dollar bill.”

ROA 28, ll. 2 -- 20.

According to Coker she retrieved the item containing cocaine prior to placing petitioner under arrest. ROA 31, ll. 19 -- 21. Coker testified that Detective Wilson actually received the anonymous phone call. ROA 35, ll. 11 -- 19. After this testimony, defense counsel made an additional motion for a continuance in this case. ROA 35, l. 20 -- 36, l. 13. Coker testified that she did not speak with anyone on the telephone. ROA 36, ll. 14 -- 16. Coker did not know who called -- she did not know that person's name, nor would she recognize the caller if the caller were in the courtroom. ROA 37, ll. 1 -- 23. Coker did not remember whether they were in the car, or at the police offices, when they received this call. Coker testified that these events occurred at night time, at approximately 9:30 pm. ROA 40, l. 21 -- 41, l. 14. She also testified that the car they were driving had dark tinted windows. ROA 40, ll. 13 -- 19.

Coker testified that she and the other officers abruptly pulled in to the convenience store. They wanted to surprise petitioner and the person standing with him. Coker testified that it was her intention to approach him about the cocaine. ROA 42, l. 13 -- 43, l. 20. Coker also testified that she did not observe petitioner throw down the dollar bill containing the cocaine until after she exited the car. ROA 51, ll. 19 -- 24. Coker also testified that she observed exactly where petitioner threw the drugs and that she “kept her eye on it.” ROA 52, l. 24 -- 53, l. 3. Coker testified, before the jury, that the only reason the officers went to a convenience store was to investigate the anonymous tip. ROA 75, l. 23 -- 76, l. 2. Coker also testified that the petitioner was not the person described by the

anonymous tip. ROA 76, ll. 13 -- 25. Coker admitted that, of the three officers present at the scene, she was the only one who observed the petitioner growing the dollar bill to the ground. ROA 77, ll. 1-3; ROA 78, ll.2-13.

The State also called Detective Quiroz to the stand. Quiroz has been with the Sumter Police Department for little over 5 years. ROA 55, ll. 19 -- 21. Quiroz testified that he believed that Coker received a telephone call (a claim she disputed). He testified that he believed that the telephone call stated there was an individual at the store trying to sell drugs either to the clerk or somebody else. ROA 56, ll. 15 -- 19. Quiroz also testified he believed that they may have actually received a second call. ROA 56, ll. 20 -- 24. Quiroz testified that once they pulled up to where petitioner and his friend were, they started talking to them. ROA 58, ll. 7 -- 14. Quiroz testified that Coker stated that she had seen petitioner throw something into the trash can. ROA 58, ll. 23 -- 24. Significantly, Quiroz did not observe petitioner throw anything into the trash can. ROA 58, l. 25 -- 59, l. 2. Quiroz also testified that Coker was digging through the trash can to retrieve what she saw the petitioner throw away. ROA 59, ll. 15 -- 24.; ROA 60, 8 -- 13. Quiroz did not observe Coker pick anything up from the ground. ROA 60, ll. 14 -- 16. Quiroz did not recall who actually searched petitioner. ROA 61, ll. 2 -- 9. Quiroz testified that had petitioner or his friend attempted to leave they would have been stopped. ROA 63, ll. 14 -- 16. He testified:

Q. Right. So they weren't free to leave once you drove up in that parking lot, were they?

A. They were until I spoke to them. I mean once they started to speak to them, at that time they were free to leave. I had not engaged them at that time.

Q. But you were going to engage them, right?

A. Right. Those were my intentions.

Q. And you were not going to let him leave until you engage them, right?

A. I would have spoken to them. I mean, what came after that is --

Q. Right. But you would've said, "Hey," if they would have run you would've chased them, right?

A. Yes, sir.

Q. If they tried to leave you would've stop them from leaving, right?

A: Right. Based on the information we were given as far as . . .

Q: Okay. Thank you, sir. That's all I have.

ROA 66, l. 16 -- 67, l. 9.

At trial, Quiroz was asked the following question:

Q: So your basis for detaining the defendant was?

A: Strictly off information that we received.

Q: And from what Detective Coker said?

A: Right. Right.

ROA 89, ll. 5-9.

At trial, Quiroz also testified that he did not hear Coker claim that she observed petitioner drop the drugs until after he exited the vehicle. ROA 90, ll. 11 -- 18.

Defense counsel moved to suppress the drugs on the basis that the search and seizure violated the 4th amendment. Counsel argued that the seizure was not supported by probable cause. Counsel argued that both officers testified that they saw these two individuals standing in the parking lot and that was the extent of their observations. They did not testify they saw them handing anything out of the window, or conducting a drug transaction. Quiroz, in fact, testified that he would have stopped them if they had attempted to avoid police questioning. The evidence presented at the pre-trial hearing established that petitioner was not free to leave. Counsel argued

that petitioner was improperly seized. In support of this argument counsel relied on State v. Woodruff, 344 S.C. 537, 544 S.E.2d 290 (Ct. App. 2001); Terry v. Ohio, 392 U.S. 1 (1968); State v. Davis, 354 S.C. 348, 580 S.E.2d 778 (2003); and Florida v. J.L., 529 U.S. 266 (2000). Counsel argued that there was no corroboration of the anonymous tip in this case. ROA 67, l. 20 – 74, l. 1.

The judge denied the motion:

THE COURT: Thank you. The motion for as (sic) to the suppression of the evidence, I am not going to suppress the evidence. The police received an anonymous tip which was subsequently corroborated by the defendant's actions when they drove up. Had he not thrown anything down, you would be dead on, Mr. Clark. They would not have been able to search your client. But the testimony is that your client threw something down. They checked it. It had cocaine in it. At that point in time, they had reason to stop. And therefore, anything they found out after that. (sic). And including what they saw there.

There is absolutely no expectation of privacy out in the front of a store. This is not in a hotel room or anything like. (sic). Therefore, the weight that the jury wants to put on it, whether they want to believe Detective Coker or not would be up to you to put reasonable doubt in their minds to that. But the facts of the stop and the evidence that which was obtained from your client will be coming into evidence.

ROA 74, ll. 2 -- 24.

The trial court judge erred in denying petitioner's motion to suppress because the anonymous tip, which was uncorroborated by any personal observations, was insufficient to justify the seizure of petitioner. The drugs which were found as a result of the police action are fruit of the poisonous tree and should be suppressed. Wong Sun v. United States, 371 U.S. 471 (1963). As the officers testified, the only reason they approached the convenience store was to investigate the anonymous tip that they received. The officers did not identify any additional factor in their decision to approach petitioner. The state never even called the one witness who the other officers claimed received the anonymous tip, Detective Wilson. It is clear from the testimony of the officers that petitioner was not free to leave at the time the officers approached him. He was therefore seized

within the meaning of the 4th Amendment. California v. Hodari, 499 U.S. 621 (1991). The State did not provide any evidence that would justify the seizure of petitioner in this case because there stop was not predicated on reasonable suspicion, and because there was no evidence presented regarding the reliability of the anonymous tip. State v. Taylor, 388 S.C.101, 694 S.E. 2nd 62 (2010).

Petitioner's Motion for a Continuance

Trial counsel moved for a continuance when the state called petitioner's case to trial. Officer Wilson, who was present with Detective Coker and Quiroz when these events occurred was not available to testify. On the day that trial was scheduled to start, defense counsel first found out that Wilson was under a medical disability and would not be appearing in court. Defense counsel was informed by the solicitor that putting Wilson under subpoena would be of no benefit because he is disabled. On the day of trial, Wilson was having surgery. ROA 4-13.

The state argued that Wilson's testimony would merely be cumulative to the testimony of Coker and Quiroz. ROA 6, l. 24 -- 7, l. 4.

Defense counsel made a motion pursuant to Rule 7 of the South Carolina Rules of Criminal Procedure. Counsel argued that it was necessary for petitioner's defense for Wilson to appear and testify. The judge asked the state how they would be prejudiced by a continuance. The state responded:

I beg the Court's indulgence for one second. Your Honor, the answer to that question is, I mean, there no (sic) prejudice to us. And were (sic) ready to proceed though. This case is one of I actually am (sic) – I don't have an older case due to the fact that I was recently hired. It is one of my older cases. I am ready to go to trial.

ROA 12, ll. 6 – 13 (emphasis added).

The judge did not grant the continuance motion. ROA 13, ll. 20 -- 22.

During its closing argument, the state took advantage of Wilson's absence:

And, Ladies and Gentlemen, Mr. Clark was you to draw some kind of negative inference for the state's case based on the fact that you didn't hear from Mr. Wilson, Detective Wilson. But I submit to you, Ladies and Gentlemen, there is no evidence that Detective Wilson's testimony would have been any different.

ROA 228, ll. 10-16.

The state also argued that it "cannot be required to bring in every single witness in a case."

ROA 99, ll. 10-12.

The state also made the following argument:

But I submit to you there is no reason for Detective Coker fabricated anything in regards to this case. And there is no motive on her part to lie. No motive on her part to mislead you. There's been nothing shown to call into question the credibility of Detective Coker.

ROA 101, ll. 7-14.

The State's entire closing argument was an exercise in explaining away the inconsistencies of the testimony of the two officers they called to testify. ROA 91 - 115.

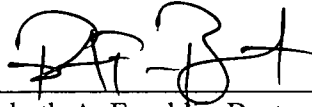
The trial court judge abused his discretion by not granting defense counsel's motion for continuance. Counsel made the appropriate motion under Rule 7, and the state conceded that it would not have been prejudiced by the continuance. Counsel had the right to have Wilson testify and be subject to cross-examination. The credibility of Coker was the essential issue in this case. Counsel was unable to mount a vigorous defense without the presence of this material witness. Additionally, the state took unfair advantage of their failure to produce this witness. It is also important to note that the state only called professional witnesses and that it would not have caused them any burden to reschedule the trial when Wilson was available. State v. Smith, 387 S.C. 619, 693 S.E.2d 415 (2009). See also Melendez -- Diaz v. Massachusetts, 129 S.Ct. 2527, 2540 (2009). ("More fundamentally, the Confrontation Clause imposes a burden on the prosecution to present its witnesses, not on the defendant to bring those adverse witnesses into court. Its value to the

defendant is not replaced by a system in which the prosecution presents its evidence via *ex parte* affidavits and waits for the defendant to subpoena the affiant if he chooses.”) Respectfully, petitioner asks this Court to grant his petition for writ of certiorari and ultimately reverse his convictions and sentence.

CONCLUSION

For the preceding reason, petitioner respectfully asks this Court to grant his petition for writ of certiorari and ultimately reverse his convictions and sentence.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'E. Franklin-Best', written over a horizontal line.

Elizabeth A. Franklin-Best
Appellate Defender

ATTORNEY FOR PETITIONER.

This 28th day of March, 2012

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Sumter County
William Jeffrey Young, Circuit Court Judge

Opinion No. 2011-UP-475 (S.C. Ct. App. filed 10/26/2011)
09-GS-43-0371.

THE STATE,

RESPONDENT,

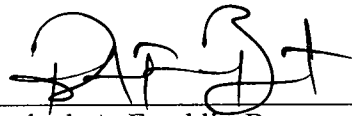
V.

JAMES P. AUSTIN,

APPELLANT

CERTIFICATE OF SERVICE

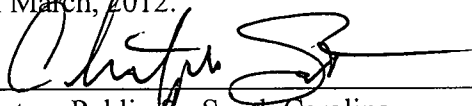
I certify that a true copy of the petition for writ of certiorari and a copy of the appendix, in this case has been served on Mary S. Williams, Esquire, and the S.C. Court of Appeals this 28th day of March, 2012.



Elizabeth A. Franklin-Best
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 28th day
of March, 2012.

 (L.S.)
Notary Public for South Carolina
My Commission Expires: May 16, 2021