ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Beaufort County

Thomas W. Cooper, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ANDRE DECOSTA,

APPELLANT

FINAL REPLY BRIEF OF APPELLANT

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I. The attenuation doctrine does not apply where the alleged intervening act of discovering suspended tags was never indicated to the occupants of the vehicle, the temporal proximity was almost immediate, and the police misconduct was flagrant because the officer's purpose was a fishing expedition for evidence of involvement in the robbery.

II. The inevitable discovery doctrine does not apply where the officer would not have been in a position to discover that the vehicle had suspended tags absent the illegal stop and a future stop of the vehicle for suspended tags is purely speculative.

ARGUMENT IN REPLY

I. The attenuation doctrine does not apply where the alleged intervening act of discovering suspended tags was never indicated to the occupants of the vehicle, the temporal proximity was almost immediate, and the police misconduct was flagrant because the officer's purpose was a fishing expedition for evidence of involvement in the robbery.

The Trial Court erred in refusing to suppress the evidence obtained as a result of law enforcement's unlawful stop of the vehicle in which Appellant was a passenger where law enforcement did not have probable cause or reasonable suspicion of criminal activity to justify stopping the vehicle. Officer Gonzales relied on a hunch that the vehicle he stopped had been involved in the burglary, but "inarticulate hunches" do not support detentions. Delaware v. Prouse, 440 U.S. 648, 661 (1979); Terry v. Ohio, 392 U.S. 1, 22 (1968). The African-American driver of the vehicle had not violated any traffic laws. The officer's subsequent averment that he initiated the stop because (1) the vehicle, which was not the only moving vehicle in the area at that time, was spotted 0.7 miles away from a burglary that had been committed minutes earlier during the early morning hours of November 29, 2010, and (2) the vehicle was slowly approaching a stop sign on a side street to turn right onto a major thoroughfare, is a nothing more than a post hoc attempt to articulate a reasonable basis where none existed. The search was not constitutional simply because the fruits justified the arrests. Smith v. Ohio, 494 U.S. 541 (1990).

In its Respondent's Brief, the State argues that even if the investigatory stop was not supported by reasonable articulable suspicion, the exclusionary rule should not apply because the evidence was attenuated enough from the violation to dissipate the taint because the officer learned of the vehicle's suspended tags after he initiated the stop but before he discovered the evidence in the vehicle. The attenuation doctrine provides that "not all evidence conceivably derived from an illegal search need be suppressed if it is somehow attenuated enough from the violation to dissipate the taint." State v. Adams, 409 S.C. 641, 648, 763 S.E.2d 341, 345 (2014) (quoting United States v. Najjar, 300 F.3d 466, 477 (4th Cir.2002)). In determining whether derivative evidence has been purged of the taint, the Court considers several factors, including: "(1) the amount of time between the illegal action and the acquisition of the evidence; (2) the presence of intervening circumstances; and (3) the purpose and flagrancy of the official misconduct." Id. (quoting United States v. Gaines, 668 F.3d 170, 173 (4th Cir.2012)). All of these factors weigh in favor of exclusion in the present case. Furthermore, the application of the attenuation doctrine here would subvert the intention of the exclusionary rule to deter police misconduct and prevent the prosecution from being "put in a better position than it would have been if no illegality had transpired." Elkins v. United States, 364 U.S. 206, 217 (1960) (providing that the purpose of the exclusionary rule is deterrence of police misconduct, removing the incentive to disregard citizen's constitutional rights in the only effective way available); Nix v. Williams, 467 U.S. 431, 443 (1984).

Generally, "all evidence obtained by searches and seizures in violation of the Constitution is ... inadmissible in state court." Mapp v. Ohio, 367 U.S. 643, 655 (1961). The exclusionary rule applies beyond the direct product of a constitutional illegality to require exclusion of the "fruit of the poisonous tree," that is, "other incriminating evidence derived from the primary evidence." Nix, 467 U.S. at 441 (citing Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920)). However, the exclusionary rule is not absolute. As the United States Supreme Court explained in Nix:

> We need not hold that all evidence is 'fruit of the poisonous tree' simply because it would not have come to light but for the illegal actions of the police. Rather, the more apt question is such a case is 'whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.'

467 U.S. at 442 (1984) (quoting Wong Sun v. United States, 371 U.S. 471, 487–88 (1963)). Once it is determined that the evidence was illegally seized, the burden shifts to the State to prove that an exception to the exclusionary rule applies. Id. at 444. If the State fails to meet its evidentiary burden then the evidence must be suppressed.

The cases cited by the State in support of attenuation are factually dissimilar from the present case because they involved officers observing an unlawful act such as running a stop sign, speeding, shooting at officers, or attempting to flee. The violation alleged here of suspended tags was not readily apparent from the officer's observation of the vehicle.[1] The officer had to call in the tags and await confirmation from dispatch to learn that the tags were suspended. Notably, the officer had already initiated the traffic stop before he received any confirmation regarding the tags. The State's argument that the subsequent revelation of suspended tags should overcome the lack of reasonable articulable suspicion is similar to the argument that the subsequent revelation of an

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[1] It is unclear from the testimony what infraction resulted in suspension of the license plate. The suspension may have related to lack of insurance, a bounced check for fees, or some other problem. See S.C. Code Ann. §§ 56-10-540, 56-3-870, 56-3-1330. Regardless, there was no violation apparent from viewing the license plate itself. The officer had to call in the tag number and wait for a response from dispatch to learn that the tags were suspended.

outstanding warrant provides sufficient attenuation to justify an otherwise unconstitutional stop. This argument has been rejecting in many jurisdictions, which apply the exclusionary rule even when an arrest warrant is discovered during an otherwise unlawful stop. See State v. Grayson, 336 S.W.3d 138, 150–51 (Mo. 2011) (concluding officer's discovery of arrest warrant did not attenuate taint of unlawful stop, and neither independent source doctrine nor inevitable discovery applied); United States v. Williams, 615 F.3d 657, 670 (6th Cir. 2010) ("Although we have observed that the Seventh Circuit treats the discovery of a warrant as an intervening circumstance sufficient to render incriminating evidence admissible, we have never adopted its approach as the law of this circuit. Other circuits, meanwhile, have applied the exclusionary rule despite the emergence of a valid arrest warrant during the course of an illegal encounter." See, e.g., United States v. Lopez, 443 F.3d 1280, 1286 (10th Cir. 2006); United States v. Luckett, 484 F.2d 89, 90–91 (9th Cir. 1973)).

In Williams, the Sixth Circuit noted the policy concerns surrounding application of the attenuation doctrine, stating: "Moreover, allowing information obtained from a suspect about an outstanding warrant to purge the taint of an unconstitutional search or seizure would have deleterious effects. It would encourage officers to seize individuals without reasonable suspicion—not merely engage them in consensual encounters—and ask them about outstanding warrants." 615 F.3d at 670 n.6. Likewise, application of the attenuation doctrine in the present case would encourage officers to initiate traffic stops without reasonable suspicion "in the hopes that something might come up," i.e. a suspended tag, suspended license, or outstanding warrant. Id. at 670 (citing Brown v.

Illinois, 422 U.S. 590, 605 (1975) and United States v. Shaw, 464 F.3d 615, 630-31 (6th Cir. 2006).

In the present case, the officer purportedly initiated the traffic stop because the vehicle was moving slowly in the "vicinity" of a jewelry store that had been burglarized. R. pp. 12, l. 13 – 13, l. 1; R. p. 14, ll. 1-13. However, as more fully discussed in Appellant's Brief, the vehicle was approaching a stop sign prior to entering onto a highway and was approximately .7 miles from the jewelry store when the officer saw it After following the vehicle onto the highway, the officer called in the vehicle's tag number and activated his blue lights. The officer testified that after the vehicle pulled into the Walgreens parking lot, dispatch confirmed that the tags were suspended. R. pp. 14, l. 14 – 15, l. 2. The officer then approached the vehicle and saw Appellant lying in the back seat and observed that both occupants were dressed in black. R. p. 15, ll. 8-22. The driver, Anthony Hamilton, consented to a search of his vehicle. Underneath a coat, Officer Gonzales found jewelry and watches that appeared to have come from the jewelry store just burglarized. Officer Gonzales also saw an ax on the floor. R. pp. 16, l. 9 – 17, l. 8. A later search of the vehicle revealed additional incriminating evidence. R. pp. 112 – 121.

Applying the three attenuation factors to these facts, they each weigh against admission of the evidence. Beginning with consideration of the second factor, the State argues that the suspended tags were discovered by the officer prior to the discovery of the evidence such that the tag suspension serves as the intervening circumstance. The timing of events is essential because under United States v. Gaines, 668 F.3d 170 (4th Cir. 2012), if the dispatcher's response came after the search then the suspension cannot be an intervening circumstance.[2] In holding that an intervening circumstance must occur prior to the discovery of the challenged evidence, the Gaines court distinguished United States v. Sprinkle, 106F.3d 613 (4th Cir. 1997), in which it previously expressed the "strong policy reason for holding that a new and distinct crime, even if triggered by an illegal stop, is a sufficient intervening event to provide independent grounds for arrest." Gaines, 668 F.3d at 174. The Gaines court found that "the illegal act in Sprinkle broke the causal chain between the unlawful stop and the discovery of the firearm. By contrast, in [Gaine's] case, the causal chain remains intact." Id Thus, the timing is an essential factor in determining whether an event is an intervening circumstance at all. Here, the officer purportedly learned of the tag suspension after initiating the stop but before he approached the vehicle. However, it is noteworthy that no ticket was issued for the suspended tag and that the officer indicated to the occupants only that they were under suspicion of burglary. R. pp. 16, l. 9 – 17, l. 8. Additionally, even if the suspension does serve as an intervening circumstance, the other factors of temporal proximity of the illegality

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[2] In Gaines, officers testified that there was crack in the lower corner of the windshield 668 F.3d at 171. Gaines, a passenger in the vehicle, assaulted one of the officers after he conducted a patdown and discovered a gun in Gaines' waistband Id. The trial court did not believe the officer's testimony regarding the crack in the windshield, determining that they could not have seen it from their vantage point such that they lacked reasonable articulable suspicion. Id. at 172. In granting the motion to suppress, "[t]he court found dispositive the fact that the firearm was discovered by Officer Shetterly as a direct result of the illegal stop, and not as a result of Gaines' subsequent illegal behavior assaulting the officers." Id. On appeal, the government contended that the attenuation doctrine should apply to allow admission of the gun. Id. at 171-72. The Fourth Circuit rejected this argument because the gun was found pursuant to the unlawful patdown prior to the assault on the officer such that the assault did not constitute an intervening event. Id at 175. The court held "that where, as here, the discovery of the challenged evidence follows an unlawful search, but precedes an independent criminal act on the part of the defendant, that criminal act is not an intervening event for the purpose of determining whether the 'taint' of the unlawful police action is purged." Id. at 175.

and the flagrancy of the misconduct reflect that this circumstance is insufficient to attenuate the taint.

Regarding the first factor, temporal proximity between the illegal action and acquisition of the evidence, it was almost immediate. The officer pulled the vehicle over on less than reasonable suspicion, discovered the suspended tags, immediately removed the driver of the vehicle for "investigative detention" notably mentioning only the burglary and not the suspended tags, conducted a preliminary search of the vehicle revealing the stolen jewelry and ax, and arrested the occupants. The subsequent search of the vehicle at the scene yielded additional items from the jewelry store, two black masks, two bandanas, two pairs of gloves, two lighters, and Appellant's wallet. R. pp. 112 – 121. The immediacy of the unlawful stop and the discovery of the evidence points in favor of exclusion.

Lastly, in evaluating the third factor of the purpose and flagrancy of the misconduct, the officer engaged in the very type of misconduct that the exclusionary rule was designed to prevent. As discussed in Appellant's Brief, the officer's stop of the vehicle was not supported by articulable facts sufficient to constitute reasonable suspicion. The officer admitted that the reason he initiated the stop was wholly related to his hunch that the vehicle was related to the burglary – he did not yet know of the tag suspension. It is undisputed that he did not know of the suspended tags when he initiated the stop. Thus, his only possible intent was to engage in a fishing expedition that is "precisely the sort of overreaching that the exclusionary rule is intended to deter." Grayson, 336 S.W.3d at 148 (citing United States v. Jefferson, 906 F.2d 346, 348-49 (8th Cir.1990) (applying exclusionary rule when officer unreasonably detained defendant at highway rest stop so the officer could engage in what he himself called "a fishing expedition") and State v.

Murphy, 693 S.W.2d 255, 266 (Mo.App.1985) ("It is axiomatic that the Fourth Amendment was never intended to license prosecuting authorities to engage in unbridled 'fishing expeditions'"). Thus, the third factor also weighs in favor of exclusion.

In the present case, the officer obtained the evidence of the robbery and arson by taking advantage of the direct chain of events arising from the initial illegality perpetrated on Appellant. The attenuation factors weigh heavily in favor of exclusion. Had the officer not pursued the vehicle, he would never have been in a position to call in tag number of the vehicle, request consent to search the vehicle, or to discover the evidence in the backseat of the vehicle. To apply the attenuation doctrine here to save the unlawful search would put the prosecution "in a better position than it would have been if no illegality had transpired." Nix, 467 U.S. at 443. Therefore, the discovery of evidence in the back seat of the vehicle was not attenuated enough to dissipate the taint of the unlawful stop. The exclusionary rule should apply.

II. The inevitable discovery doctrine does not apply where the officer would not have been in a position to discover that the vehicle had suspended tags absent the illegal stop and a future stop of the vehicle for suspended tags is purely speculative.

Alternatively, in its Respondent's Brief, the State argues that even if the investigatory stop was not supported by reasonable articulable suspicion, the exclusionary rule should not apply because the evidence would have been inevitably discovered because the vehicle's suspended tags would have eventually lead to its lawful stop.

The inevitable discovery doctrine "states that if the prosecution can establish by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means, the information is admissible despite the fact it was illegally obtained." State v. Spears, 393 S.C. 466, 713 S.E.2d 324 (Ct. App. 2011) (citing Nix, 467 U.S. at 444). The State argues that in the present case "the discovery of the incriminating evidence was inevitable in light of the fact the vehicle in which Appellant was riding would have inevitably been stopped for a suspended tag violation if Sergeant Gonzales had not stopped the vehicle based on his suspicions of criminal activity." Resp't Br. p. 20. The State also contends that Sergeant Gonzales himself would have inevitably stopped the vehicle because he had called in the tag number. Resp't Br. pp. 22-23. In support of its position, the State cites United States v. Halls, 40 F.3d 275, 276 (8th Cir. 1994), where an officer who stopped Hall in Missouri lacked reasonable articulable suspicion to justify an investigative stop, ordinarily making the subsequent search of the vehicle "fruit of the poisonous tree." Id. However, the inevitable discovery doctrine applied to save the drugs and gun from exclusion because agents were awaiting Halls' arrival in Iowa pursuant to an entirely independent drug investigation, had a complete vehicle description, and were stationed along Halls' known travel route ready to follow him into Iowa to execute their valid search warrant for the vehicle. Id. at 277. Thus, the Eighth Circuit held that the evidence seized pursuant to the "insupportable Missouri stop would necessarily have been found as a result of the Iowa warrant because Halls would have been legitimately detained at the border." Id. The State also cites Nix v. Williams, 467 U.S. 431, 448-50 (1984), in which the Court applied the inevitable discovery doctrine to admit the victim's remains because they would have been found just two and a half miles further along the search route of the 200-member volunteer search party even without the defendant's uncounseled statements. However, here the inevitably of the discovery is far more speculative than it was in Halls or Nix.

The facts and analysis in United States v. Owens, 782 F.2d 146 (10th Cir. 1986), are far more analogous to the present case. After arresting Owens in the parking lot for receiving stolen property, Officers completed a warrantless search of his motel room and discovered evidence including two pounds of cocaine found in a closed draw string bag inside a dresser drawer.[3] 782 F.2d at 148-49. In addition to other exceptions to the exclusionary rule ultimately rejected by the Tenth Circuit, the government contended that

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[3] Motel staff became suspicious when Owen's received an unusually high volume of calls. Owens, 782 F.2d at 148. Charles Epperly, a police officer who worked part-time as a motel security guard, observed the room overnight and saw several people visit the room for five or ten minutes each. Id. Epperly returned to the motel shortly before 7:30 a.m. with his partner from the Oklahoma City police force and ran a license plate check that indicated Owens' car was stolen. Id. Rather than arrest Owen's immediately they decided to wait for Owens to return to his car and watched Owens' motel room from a room across the parking lot. Id. Shortly after noon, Epperly had a plain-clothes officer pose as a motel employee to lure Owens to his car, at which time Owens was arrested. Id. Over Owens' objection, officers entered his motel room and found drugs and paraphernalia in plain view and found two ounces of cocaine in a bag inside of a closed dresser drawer. Id. at 149. Owens moved to suppress the cocaine evidence. Id.

the inevitable discovery exception permitted the cocaine's admission because the motel maid's routine cleaning of the room would have revealed the contraband. Id. at 152. The Court noted that "[a]ll the cases that have endorsed the inevitable discovery exception have relied upon independent, untainted investigations that would have inevitably uncovered the same evidence." Id. It also noted "the danger of admitting unlawfully obtained evidence 'on the strength of some judge's speculation that it would have been discovered legally anyway.'" Id. at 152-53 (quoting United States v. Romero, 692 F.2d 699, 704 (1982)). The Court found that motel staff cleaning a room would not necessarily have opened luggage and closed containers, the police would not necessarily have been made aware of any discovery that was made, the staff would not necessarily have recognized the powder as cocaine, and Owens could have made arrangements to remove the bag with the cocaine from the room with the help of a friend or on his own if he made bail such that it may not remain in the drawer indefinitely. Id. at 152-53. Based on this analysis, the Court concluded that the inevitable discovery exception did not overcome exclusion "because of the highly speculative assumption of 'inevitability' that would be required to apply it here." Id. at 153.

The State's contention that Sergeant Gonzales would have inevitably discovered the evidence because he would have ticketed and towed the vehicle for the suspended tag ignores the fact that Sergeant Gonzales called in the tag number only because he was conducting an unlawful stop of the vehicle based on his hunch. Had he not followed the vehicle and called in the tag number, he would never have learned that the tags were suspended. The tag check was not a separate, independent investigation being conducted by the officer untainted by his prior misconduct. Thus, the unlawful stop and tag check were intrinsically linked and the latter cannot be deemed inevitable absent the former.

The State's further contention that another officer would have eventually stopped the vehicle for suspended tags is far more speculative than it is inevitable. A vehicle may go weeks, months, or even years with suspended tags and never be pulled over. This is especially true since a license plate's suspension is not readily apparent from observing the vehicle. Rather, the tag number must be called in by the officer in order for him or her to become aware of a tag suspension. Additionally, even if stopped for the suspended tags, a search of the vehicle was not inevitable. While it was Sergeant Gonzales' testimony that his common practice is to ticket the driver and tow the vehicle, such is not necessarily the practice of all officers. If stopped for the tags in the future, the officer may instead give a warning and opportunity to clear up the suspension or issue a ticket but not require a tow. Thus, there is no evidence that a tow of the vehicle and incidental search was inevitable. Further, there is no guarantee that the stolen items and other evidence would have remained in the vehicle and been present during any future stop or tow. In all likelihood the occupants would have removed the stolen goods and other evidence from the vehicle after they reached their destination. Thus, much like Owens, the inevitability of discovery by some other officer in the future is far too speculative to allow application of the inevitable discovery doctrine.

Therefore, neither the stop of the vehicle for suspended tags nor the discovery of the evidence in the backseat was inevitable. The exclusionary rule should apply.

CONCLUSION

For the reasons set forth herein and in Appellant's Brief, Appellant Andre DeCosta respectfully requests that the evidence seized in violation of the Fourth Amendment be suppressed and his convictions reversed.

Respectfully submitted,

Laura R. Baer

Laura R. Baer
Appellate Defender

ATTORNEY FOR APPELLANT.

This 9th day of April, 2015.

CERTIFICATE OF COUNSEL FOR APPELLANT

The undersigned certifies that to the best of my ability the Final Reply 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."

April 9, 2015

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Initial Reply Brief of Appellant in the above referenced case has been served upon Mark R. Farthing, Esquire, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 this 9th day of April, 2015.

Laura R Baer

Laura R. Baer
Appellate Defender

ATTORNEY FOR APPELLANT.

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

Bailey Reed (L.S.)
Notary Public for South Carolina
My Commission Expires: October 24, 2021 .