

ORIGINAL

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

THE STATE,

RESPONDENT,

V.

ALFONZO ALEXANDER,

APPELLANT

APPELLATE CASE NO. 2013-002636

Appeal from Abbeville County

Frank R. Addy, Circuit Court Judge

Opinion No. 2015-UP-485

RECEIVED

OCT 27 2015

SC Court of Appeals

PETITION FOR REHEARING

The Court of Appeals affirmed the above named appellant's conviction and sentence on October 14, 2015. In support of this petition for rehearing, which is being submitted on today's date pursuant to Rules 221 and 224 of the South Carolina Appellate Court Rules, Appellant submits the following:

Appellant Alexander raised two issues on appeal: (1) the trial court erred in denying Appellant Alexander's motion to suppress the crack cocaine based on a violation of his Fourth Amendment rights because there was not sufficient reliability of the anonymous call to conduct an

investigative stop; the police did not have reasonable suspicion based on specific and articulable facts that Alexander was armed and dangerous before conducting a Terry¹ frisk; and the police did not have cause to pull any objects from Appellant Alexander's pocket after the officer said nothing felt like a gun during the pat-down: (2) the trial court erred in qualifying Lieutenant John Gray of the Abbeville Police Department as an expert in the field of narcotics investigation which was not specialized knowledge outside the purview of the average juror and which did not meet the requirements of Rule 702, SCRE.

On Issue One, the Court of Appeals cited State v. Taylor, 401 S.C. 104, 108, 736 S.E.2d 663, 665 (2013), for the proposition that a trial court's Fourth Amendment suppression ruling must be affirmed if supported by any evidence. This Court also cited Terry v. Ohio, 392 U.S. 1 (1968), for the holding that when a police officer observes unusual conduct which leads him to reasonably conclude that based on his experience that criminal activity may be afoot, and that persons with whom he is dealing may be armed and dangerous, he is entitled for the protection of himself and others to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons.

On Issue Two, this Court held that the qualification of an expert witness and the admissibility of his testimony were matters within the trial court's sound discretion. A trial court's decision to admit or exclude expert testimony will not be reversed absent a prejudicial abuse of discretion which occurs when the trial court's conclusions are either controlled by an error of law or are based on unsupported factual conclusions.

Respectfully, the Court misapprehended these issues.

¹ Terry v. Ohio, 392 U.S. 1 (1968).

Issue One: The South Carolina Supreme Court wrote in State v. Taylor, *supra*, citing United States v. Perrin, 45 F.3d 869, 871 (4th Cir. 2008) that the required reasonable suspicion can arise from an anonymous tip provided that the totality of the surrounding circumstances justifies acting on the tip.

In State v. Green, 341 S.C. 214, 532 S.E.2d 896 (Ct. App. 2000), the Court of Appeals held that the uncorroborated anonymous tip did not provide officer with reasonable suspicion to stop the defendant's automobile. In Green's case, the police received a dispatch call that a black male by the name of Alonzo Green was leaving Bayside Manor with a large sum of money and narcotics driving a gray four door Maxima. The officer saw a gray Maxima drive by and stopped it based solely on the anonymous tip. The Court of Appeals said that was not enough.

In Terry v. Ohio, *supra*, the U.S. Supreme Court held that when a police officer reasonably concludes that that criminal activity is occurring and the person with whom he is dealing may be armed and dangerous, and there is fear for his own or others' safety, he is entitled for the protection of himself and others to conduct a **carefully limited search** of the outer clothing of such person in an attempt to discover weapons which might be used to assault him. [Emphasis added].

In Minnesota v. Dickerson, 508 U.S. 366 (1993), the police officer stopped Dickerson as he was leaving a known crack house. When he saw the police, Dickerson abruptly started walking in the opposite direction. When the officer did a pat-down search, he found no weapons but found a lump in Dickerson's jacket that he suspected to be crack. The officer reached into Dickerson's pocket and pilled out the small plastic bag that contained crack. The U.S. Supreme Court held that this search was "not authorized by Terry or any other exception to the warrant requirement." The Court held that this further search was constitutionally invalid and therefore, the seizure of the cocaine was unconstitutional.

Alexander's case is similar to Minnesota v. Dickerson, Id., but the police in Dickerson's case actually had more facts supporting reasonable suspicion than in Appellant's case. All the officers in Alexander's case had was the uncorroborated anonymous tip. The officer did not know Alexander and had not heard of Alexander carrying weapons. The officer admitted that Alexander did not act nervous or fidgety; did not make any strange movements; did not look nervous; and there was no mention of names or weapons in the 911 call.

The anonymous tip provided no description of a particular person, and there were numerous people in the apartment. No information was provided as to the source of the anonymous tip to determine its reliability. The officer expressed no concern for safety but only patted Alexander down after seeing the baggies in his pocket. No weapons were found on Alexander.

The officer exceeded the scope of a Terry frisk when he reached into Alexander's pocket and pulled out the baggies although Alexander allegedly consented. His "consent" only came after the unlawful Terry frisk. Although the officer said he saw the baggie before the pat down, he did not include this significant piece of information in his report. He also said he saw the baggie when he looked into Alexander's pocket.

The investigative stop, the Terry frisk, and the search of Alexander's pocket were unconstitutional and the drugs should have been suppressed. The only evidence against Alexander were the baggies because there was other marijuana in the room. There was a bag under the table where the card players were sitting.

Issues Two: In State v. Kromah, 401 S.C. 340, 737 S.E.2d 490 (2013), the Supreme Court wrote in Footnote 5 that they could envision no circumstances where it was appropriate for a forensic interviewer of children to be qualified as an expert because their work was not appropriate for the courtroom. The Court cited State v. Douglas, 380 S.C. 499, 671 S.E.2d 606, 607 (2009)

which held that it was unnecessary for the forensic interviewer to be qualified as an expert because no specialized knowledge was required there.

In State v. White, 382 S.C. 265, 676 S.E.2d 684 (2009), the Supreme Court held that the trial court has a gate keeping function in assuring the reliability of expert testimony as it applies to nonscientific evidence. The same would be true for scientific evidence. The trial court did not clarify whether Lt. Gray was qualified as a scientific expert or non-scientific expert since the qualification was in narcotics investigation and paraphernalia.

This Court cited State v. Chavis, 412 S.C. 101, 106, 771 S.E.2d 336, 338 (2015) which stated two threshold determinations from White, supra, which must be made for non-scientific experts. First, the qualifications of the expert must be sufficient. Second, there must be a determination that the expert's testimony will be reliable.

Defense counsel argued that Lt. Gray's qualifications did not meet the requirements of Rule 702. R. 74, ll. 11 – R. 77, ll. 23. His special training was in the area of meth lab cleanup and Homeland Security and some classes in drug investigation. Defense counsel argued:

Our response would be that 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, to what he found on 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 that this case rises to that level and requires any sort of specialized knowledge as would be required by an expert.

R.73, ll. 17 – R. 74, ll. 1.


It was not harmless error for Lt. Gray to give his expert opinion that Alexander intended to distribute or sell the crack cocaine. The Supreme Court wrote in Kromah that “although an expert's testimony theoretically is to be given no more weight by a jury than any other witness, it is an

inescapable fact that jurors can have a tendency to attach more significance to the testimony of experts.”

The prejudice suffered by Alexander was that Lt. Gray’s opinion related to the inference of distributing crack rather than just possession as there were no witnesses who said he sold or distributed crack. The officer did not witness any drug transaction. This offense carried a much longer prison sentence than just possession.

WHEREFORE, we respectfully request this Court to reconsider its ruling, and remand Alexander’s case for a new trial.

Respectfully submitted,


LaNelle Cantey DuRant
Appellate Defender

This 27th day of October, 2015.

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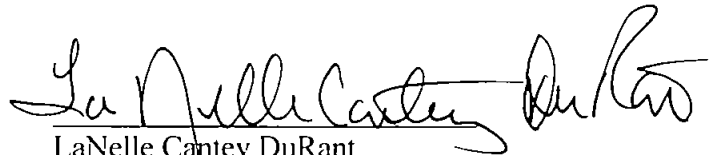
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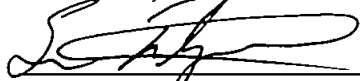
CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Petition for Rehearing in the above-entitled case has been served upon Mary W. Leddon, Esquire, this 27th day of October, 2015.


LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR APPELLANT

SWORN TO BEFORE ME this 27th day
of October, 2015.

 (L.S.)

Notary Public for South Carolina

My Commission Expires: October 30, 2022.