STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Spartanburg County

J. Derham Cole, Circuit Court Judge

THE STATE, RESPONDENT,

V.

COREY WILLIAM BROWN, APPELLANT

APPELLATE CASE NO. 2015-000094

INITIAL BRIEF OF APPELLANT

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TABLE OF CONTENTS

[1] Terry V. Ohio, 392 U.S. 1 (1968).

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

STATEMENT OF ISSUE ON APPEAL

Did the trial court err in denying Appellant's motion to suppress the drugs found on his person following a Terry[2] frisk when the officers lacked articulable suspicion that Appellant was armed and dangerous as officers presented no evidence that they feared for their safety but only performed a pat-down as an evidentiary search which was a violation of Brown's Fourth Amendment rights?

[2] Terry V. Ohio, 392 U.S. 1 (1968).

STATEMENT OF THE CASE

On November 24, 2010, the Spartanburg County Grand Jury indicted Corey W. Brown on the charge of trafficking in cocaine more than ten grams. On January 21, 2013, Brown proceeded to trial before the Honorable J. Derham Cole. At Brown's request, a bench trial was held. Tr. 92, ll. 15 – 23. Brown was represented by Richard H. Whelchel, and the state was represented by James Edward Hunter and Kinli Bare. Tr. 1. Pretrial, a suppression hearing was held on Appellant Brown's motion to suppress the drugs. Without ruling on the motion, Judge Cole, with the agreement of all parties, proceeded with the bench trial. Tr. 109, ll. 1 – 24.

On January 9, 2015, Brown again appeared before Judge Cole for his ruling on the motion. Judge Cole denied the motion to suppress and found Brown guilty of trafficking in cocaine. Tr. 127, ll. 1 – 9. At that point, Brown had been incarcerated for 808 days on this charge. Tr. 128, ll. 21 – 24. Judge Cole sentenced Brown to the minimum sentence of five years. Tr. 130, ll. 1 – 5. Brown's attorney filed a notice of appeal. This appeal follows.

STATEMENT OF FACTS

On the night of August 28, 2010, Officer Jonathan Lawson and Sergeant Mark Hillers were on patrol on the north side of Spartanburg which was known to be a high crime area. Around ten o'clock they observed a Chrysler vehicle pull over on the side of Farley Street and park. Immediately an Infiniti pulled up and Brown entered the driver's side. The officers followed the Infiniti and observed the vehicle make two turns without using a turn signal either time. Officer Lawson requested tag information on the car. Once he received that, the officers initiated a traffic stop on these turn signal traffic violations. Tr. 25, ll. 18 – Tr. 28, ll. 6.

Officer Lawson approached the driver's side. He described Brown as being very nervous, fidgety and with sweat on his head. Brown kept patting his right leg. Two other people were in the car: a male passenger in the back seat and a woman in the front passenger seat. Officer Lawson obtained Brown's driver's license, car registration and insurance information. He returned to the patrol car to check these items. Sergeant Hillers remained at Brown's car. Tr. 28, ll. 7 – Tr. 29, ll. 3.

Sergeant Hillers, while at Brown's car, saw Brown begin talking to people who gathered at the apartment complex nearby. Then Brown began just moving his lips to the people. Ronnie Lyles was the back seat passenger. He began talking to Sergeant Hillers and showing him the inside of bags and telling Sergeant Hillers that they did not have anything. Sergeant Hillers saw Brown put his hand out of the window. When Sergeant Hillers went to check the area, Brown allegedly said to him that he did not throw any drugs out of the window. Once Lieutenant Munoz arrived to stand at the car, Sergeant Hillers went to the patrol car to speak with Officer Lawson. Tr. 50, ll. 18 – 25; Tr. 55, ll. 7 – Tr. 59, ll. 17.

Sergeant Hillers told Officer Lawson that he believed that Brown threw something out of the window. They then rewound the patrol car video to see if Brown discarded something out of the window. Initially, Sergeant Hillers testified at the suppression hearing that they could not "confirm or deny" from the footage if Brown did or not. Tr. 59, ll. 17 – Tr. 60, ll. 12. However, on cross examination, defense counsel s read from Sergeant Hillers' report of the incident:

> **Q:** We viewed the footage and determined that nothing had been thrown from the window.
>
> **A:** That's correct.

Tr. 68, ll. 20 – Tr. 69, ll. 10.

Officer Lawson then said that based on Brown's "reactions, his nervousness and the actions that Sergeant Hillers believed he had seen," Officer Lawson returned to the car and asked Brown to exit the vehicle. The information on Brown's license had not come through at that point. Brown asked why because his license was good and he did not have any warrants on him. Officer Lawson had Brown exit the vehicle and go to the back of the vehicle. He had to ask Brown twice. Brown looked to the right and left when he got out of the car. Tr. 29, ll. 12 – Tr. 30, ll. 25.

Officer Lawson asked Brown if he had any weapons and Brown said no. The officer asked if he could do a pat-down to make sure Brown did not have any weapons, and Brown asked why because he did not have any weapons. Officer Lawson then performed a pat-down or as the officer said, a Terry frisk. Officer Lawson felt a large bulge in Brown's right pocket which the officer said he believed to be a package of narcotics based on his experience and training. He asked Brown what was in his pocket and Brown said a package.

Officer Lawson then asked him how much "weed" did he have on him. Brown responded "jus a little bit." Since Brown admitted he had marijuana, Officer Lawson placed him under arrest and removed the package. The officer detained Brown and then found a plastic baggy in his front pocket that contained powder cocaine. Tr. 31, ll. 1 – Tr. 33, ll. 5.

On cross-examination, Officer Lawson admitted that the information on Brown's driver's license and vehicle information came back with no problems. Tr. 37, ll. 11 – 22. Officer Lawson did not return Brown's license to him until Brown was transported to the detention center. The officer wrote the ticket for the traffic violation after the entire incident as was his practice. Officer Lawson also admitted that there were three officers present during the search and arrest. Tr. 44, ll. 1 – Tr. 47, ll. 25.

Appellant Corey Brown testified at the suppression hearing that the alternator on his car went out and that was the reason he parked on the side of the road on Farley Street. He called his friend Ronnie, who was the back seat passenger when they were stopped, to come help jump start his car. But it did not work so Brown could not drive his car. Brown then got in the car with Ronnie and a woman and headed to the Freemont School Apartments. He was sure he used his turn signal because the officers were across the street when they were trying to jump start the car. The blue lights came on and Brown stopped at the Freemont Apartments. Tr. 70, ll. 1 – Tr. 72, ll. 25.

He gave his license and car information to Officer Lawson who went to the patrol car. Officer Hiller then joined him in the patrol car. After about thirty to forty minutes, Officer Lawson returned to Brown's vehicle and asked him to exit the car. Brown knew the time because he had his phone. Brown did not try to throw anything from the vehicle and admitted in his trial testimony that he had the cocaine in his pocket. Brown said no when the

officer asked to search him, but Officer Lawson did the pat-down anyway. Tr. 73, ll. 1 – Tr. 78, ll. 20.

Mike West was the training coordinator for Spartanburg 911. He maintained the records of the traffic calls for the police. Tr. 83, ll. 1 – 25. The initial call that Officer Lawson made on Brown was at 2237 hours. At 2249.03 Officer Lawson, who was number 90 to the 911 caller, called for shackles. At 2254, the officers made a traffic stop at Freemont School Apartments. At 2306 and 55 seconds a case number was generated for the officers. Tr. 84, ll. 1 – Tr. 91, ll. 25.

After jury selection, defense counsel made a pretrial motion to suppress the drugs based on the unconstitutionality of the search. Counsel argued that the search violated the federal and state prohibition against unreasonable searches and seizures. Counsel explained that it was a Terry frisk and there was not sufficient reason for the officer to conduct a Terry frisk. Then the suppression hearing was held. Tr. 24, ll. 15 – Tr. 25, ll. 19.

Following the suppression hearing, defense counsel argued that in order to conduct a pat-down, the officer had to have an articulable suspicion that he and the other officers may be in danger. There had to be articulable facts of reasonable suspicion that Brown was armed and dangerous. Brown and the others were left in the car while Officers Lawson and Hillers reviewed the video tape. Only **after** the officers saw that Brown did not throw anything from the car, the officers decided to remove him from the vehicle and search him. There was no testimony before the trial court that the officers believed Brown was armed and dangerous. Even though it was a high crime area, counsel noted that the precedent established this was insufficient. Tr. 95, ll. 23 – Tr. 97, ll. 13.

Counsel argued that the traffic call was at 2237 and the officers called for a case number at 2306. During this time, Brown was unreasonably detained and searched. The officers prolonged the stop and used this as a fishing expedition. When the license and vehicle information came back fine, the officer should have stopped there. Therefore, the drugs should be suppressed. Tr. 97, ll. 14 – Tr. 105, ll. 11.

The state argued that Brown and his passenger brought up the drugs first which gave the officer reasonable suspicion that there were drugs in the vehicle. Also, Brown patting his right leg created suspicion. Tr. 108, ll. 1 – 25.

The judge ruled that he would review the case law before he decided the motion. Tr. 109, ll. 9 – 10.

At the conclusion of the evidence for the suppression hearing and prior to the arguments, defense counsel told the court that Brown wanted to go forward with a bench trial without a jury. All parties agreed to the bench trial. Tr. 92, ll. 1 – Tr. 94, ll. 25. Following the suppression hearing and arguments, the trial judge decided to go forward with the testimony for the bench trial in case the motion to suppress was denied. If all were in agreement, the testimony already heard in the suppression hearing would be used for the bench trial. All agreed. Tr. 109, ll. 9 – 24.

Officer Lawson testified as to the participants in the chain of custody without objection. Tr. 110, ll. 1 – 115, ll. 25. Ashley Harris, the lieutenant in charge of the forensic laboratory in the Spartanburg County Sheriff's Office, testified that she tested the substance retrieved by Officer Lawson. It was 27.34 grams of powder cocaine. Tr. 116, ll. 1 – 24; Tr. 120, ll. 9 – Tr. 122, ll. 12.

Defense counsel told the court that Brown wanted his testimony at the suppression hearing to be considered only for the suppression hearing. The court agreed to this. Tr. 123, ll. 19 – Tr. 124, ll. 15.

On January 9, 2015, Judge Cole, ruled on the suppression motion and bench trial. He denied the motion to suppress and found Brown guilty of trafficking cocaine. He sentenced Brown to the minimum of five years. Tr. 127, ll. 1 - Tr. 130, ll. 5.

ARGUMENT

The trial court erred in denying Appellant's motion to suppress the drugs found on his person following a Terry[3] frisk when the officers lacked articulable suspicion that Appellant was armed and dangerous as officers presented no evidence that they feared for their safety but only performed a pat-down as an evidentiary search which was a violation of Brown's Fourth Amendment rights.

In Terry v. Ohio, 392 U.S. 1 (1968), the United States Supreme Court held that a police officer must have reasonable articulable suspicion that a person is armed and dangerous before the officer can conduct a pat down. In State v. Lesley, 326 S.C. 641, 486 S.E.2d 276 (1997), the South Carolina Supreme Court wrote:

> Police may stop a motor vehicle and briefly detain and question an occupant if they have a reasonable suspicion that the occupant is involved in criminal activity. Michigan v. Long, 463 U.S. 1032, 103 S.Ct. 3469, 77 L.Ed.2d 1201 (1983); State v. Robinson, 306 S.C. 399, 412 S.E.2d 411 (1991). This suspicion must be based on "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." Terry v. Ohio, 392 U.S. 1, 21, 88 S.Ct. 1868, 18780, 20 L.Ed.2d 889, 906 (1968).

The Court in Terry, id. also wrote that inarticulate hunches do not support detention. The United States Supreme Court in Terry provided a two-prong test for determining the constitutionality of a traffic stop: (1) whether the police officer's action was justified at the initial traffic stop; (2) whether the officer's subsequent actions were reasonably related in scope and duration to the circumstances that justified the stop.

In State v. Woodruff, 344 S.C. 537, 544 S.E.2d 290 (Ct. App. 2001), the Court of Appeals, citing Terry, *supra,* held that in assessing whether a suspect is armed and

[3] Terry V. Ohio, 392 U.S. 1 (1968).

dangerous, and thus, a pat -down search for weapons is required, he officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent person in the circumstances would be warranted in the belief that his safety or that of others was in danger.

In State v. Taylor, 401 S.C. 104, 736 S.E.2d 663 (2013), the South Carolina Supreme Court ruled that the lateness of the hour and a high crime area were not enough for reasonable suspicion but were factors to be considered.

In State v. Burgess, 394 S.C. 407, 714 S.E.2d 917 (Ct. App. 2011), the Court of Appeals cited U.S. v. Foster, 634 F.3d 243, 248 (4th Cir. 2011). The Federal Appeals Court was mindful of concerns regarding the state "using whatever facts are present, no matter how innocent, as indicia of suspicious activity" and that the state "must do more than simply label a behavior as 'suspicious' to make it so." The Court continued to say that the state "must be able to either articulate why a particular behavior is suspicious or logically demonstrate, given the surrounding circumstances, that the behavior is likely to be indicative of some more sinister activity than may appear at first glance." Id.

In State v. Tindall, 388 S.C. 518, 698 S.E.2d 203 (2010), the South Carolina Supreme Court wrote that in carrying out a routine traffic stop, a law enforcement officer may request a driver's license and vehicle registration, run a computer check, and issue a citation; any further detention for questioning was beyond the scope of the stop and therefore illegal unless the officer has reasonable suspicion of a serious crime.

In State v. Tindall, Id., the officer questioned Tindall for fifteen to twenty minutes into the stop before the officer asked Tindall if he could search the car. Then, he questioned Tindall for an additional six to seven minutes after he said he was writing a warning ticket

before the officer started asking questions such as where he was going, and the purpose of the trip.

The Supreme Court held that this continued detention violated the Fourth Amendment. The Supreme Court cited four factors which together did not constitute reasonable suspicion. These were: Tindall was driving to Durham to meet his brother; he was driving a rental car; Tindall did "felony stretch" on exiting the car (raising his arms in a stress relief movement); and Tindall seemed nervous.

The drugs should be suppressed because the officers did not have articulable reasonable suspicion to conduct a frisk pursuant to Terry v. Ohio, *supra.* The only articulable facts the officers had were that Brown patted his leg and had beads of sweat on his head. The officer described him as being "nervous" which is a totally subjective opinion. He did not throw anything out of the car window as the officers determined from watching the video. Officer Hillers said Brown was talking to the residents of the apartment complex who came out on the steps and then 'mouthed' some words to them. This is not an indication that he had drugs or a weapon since he did not throw anything from the window. Brown telling the officer that he did not throw drugs from the window was correct. Any reasonable person stopped by the police in a high crime area at night for a minor traffic violation as not giving a turn signal would believe the officers were looking for some indication of a crime.

The officers exceeded the scope of the stop. Detaining Brown while they watched the video **before** the officers received the information that his driver's license and car information were good was unreasonable and a violation of his Fourth Amendment rights. To conduct a Terry frisk when there was no indication that the officers feared for their safety

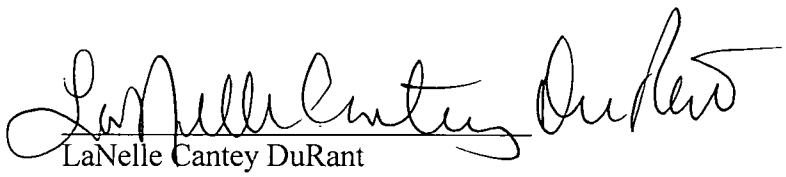
was a violation of Brown's constitutional rights. There was no testimony that the officers thought they were in danger form Brown. Officer Lawson believed the bulge in Brown's pocket was narcotics—not a weapon. Tr. 31, ll. 5-Tr. 32, ll. 6. Brown did not throw anything from the window so the officers went on a fishing expedition by frisking him. The time frames also show that Officer Lawson asked for shackles before the traffic stop was shown on the CAD report as occurring at 2254. He asked for the shackles at 2249. He had already determined there would be an arrest although the solicitor assumed an arrest had already been made at 2249. Tr. 88, ll. 1 – Tr. 91, ll. 24.

The Fourth Amendment to the United States Constitution provides that the right of the people to be secure in their persons, homes, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath of affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

CONCLUSION

Based on the above, the convictions and sentences should be reversed and the case remanded for a new trial.

Respectfully submitted,



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This 26th day of August, 2015.