RECEIVED

JAN - 6 2016

SC SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal From Abbeville County
The Honorable Frank R. Addy, Circuit Court Judge
Appellate Case No. 2015-002570
(Unpublished Opinion No. 2015-UP-485, S.C. Ct. App., filed October 14, 2015)

THE STATE,

Respondent,

v.

ALFONZO ALEXANDER,

Petitioner.

RETURN TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

ALAN WILSON
Attorney General

DEBORAH R.J. SHUPE
Senior Assistant Deputy Attorney General
SC Bar No. 5098

Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

DAVID M. STUMBO
Solicitor, Eighth Judicial Circuit

Post Office Box 516
Greenwood, SC 29648
(864) 942-8800

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

STATEMENT OF QUESTIONS ON APPEAL

I. Did the Court of Appeals properly affirm the circuit court's denial of Petitioner's motion to suppress the items found on Petitioner's person because the weapons frisk was reasonable, and Petitioner consented to removal of the items from his pockets?

II. Did the Court of Appeals properly affirm the circuit court's qualification of the lead investigator as an expert in narcotics investigations based on the investigator's knowledge, experience and training?

STATEMENT OF THE CASE

On August 12, 2012, an anonymous 911 caller reported "people gambling, using drugs, and selling drugs" at a particular apartment in the city limits of Abbeville. Lt. John Gray and two other officers of the Abbeville Police Department responded to the area, and encountered the apartment tenant, Ella Brown, sitting outside the apartment. Lt. Gray told her about the 911 report, and asked if he could look inside the apartment. Brown consented and opened the apartment door for the officers to go inside. (Record on Appeal [R.], pp. 12-14, 80-82, 85, 121).

As he entered the apartment, Lt. Gray immediately detected the strong odor of marijuana, and saw approximately ten people inside, some engaged in a card game at a table. Petitioner Alphonso Alexander was seated on a couch to the left of the front door, with a large wad of money in his hand, a plastic baggie sticking out of his pocket, and a bag of marijuana on the floor at his feet. (R., pp. 14-15, 82-83).

Based on the number of people in the apartment and the evidence of drug activity, for officer safety purposes, the officers frisked everyone inside the apartment for weapons. When Lt. Gray frisked Petitioner, he felt a bulge under the baggie sticking out of Petitioner's pocket, which he thought could be more baggies. He also felt a hard square in Petitioner's other pocket, but could not identify it. Lt. Gray did not immediately reach into the pockets to remove the items, but asked Petitioner for consent to reach in the pockets for them. Petitioner consented, and Lt. Gray found more plastic baggies in one pocket, including one containing a substance subsequently determined to be 6.8 grams of crack cocaine, and a digital scale in the other pocket. Petitioner also had $839 in cash, most in $20 bills. (R., pp. 15-17, 26, 84-86, 92, 122).

On January 7, 2013, the Abbeville County Grand Jury indicted Petitioner on one count of possession with intent to distribute crack cocaine.[1] The case was called for a jury trial on May 28, 2013, before the Honorable Frank R. Addy, Jr., Circuit Court Judge. Petitioner did not appear at trial, which proceeded *in absentia*.

Petitioner moved to suppress the drugs and digital scale seized from his pockets on the grounds the anonymous tip did not provide a sufficient basis for the investigation, and the seized evidence was the result of an unconstitutional frisk because there were no legitimate officer safety concerns to justify it. At the suppress hearing, Lt. Gray testified about the circumstances leading up to the seizure, including the anonymous 911 tip, Brown's consent for the officers to enter the apartment, his observations inside the apartment, the frisk, and Petitioner's consent to remove the items from his pockets. After hearing the testimony and arguments, the circuit court denied the motion to suppress, finding the totality of the circumstances justified the frisk, and Petitioner consented to the removal of items from his pockets. (R., pp. 5-35).

Lt. Gray testified before the jury he began his law enforcement career in 1995 as a reserve officer with the Abbeville Police Department, worked narcotics cases throughout his career, including five years in the narcotics division of the Abbeville County Sheriff's Department, and was put in a full-time position in the Abbeville Police Department narcotics division a few months prior to the trial of this case. He attended multiple training courses in narcotics, including a forty hour course in methamphetamine clean-up through the U.S. Drug Enforcement Agency, was a certified drug instructor through the Federal Law Enforcement Training Center (FLETC), and consulted with other law

[1]The Grand Jury also indicted Petitioner on a proximity charge. The circuit court directed a verdict on that charge at trial, and it is not an issue in this appeal.

enforcement officers on identifying narcotics paraphernalia. The State then moved to qualify him as an expert in narcotics investigations. (R., pp. 67-70).

Petitioner objected to Lt. Gray's qualification as an expert, contending his experience and training in narcotics was limited to methamphetamine cases, and his testimony regarding the significance of the weight, baggies and scales to the distribution charge was not outside the purview of the average juror. The circuit court overruled Petitioner's objection, finding Lt. Gray had obtained knowledge, through experience and education, regarding the nature of how drugs are packaged for distribution, an average person would not have general knowledge about that issue, and Lt. Gray's testimony was clearly relevant "to the very heart of the state's [distribution] case." (R., pp. 71-78).

Lt. Gray then testified about the circumstances leading to discovery of crack cocaine, baggies and the digital scale in Petitioner's pockets. He further testified, over objection, that the amount of crack cocaine seized, combined with the baggies and digital scale, indicated the crack cocaine was for distribution. (R., pp. 80-95).

The jury convicted Petitioner of possession with intent to distribute crack cocaine. After the State presented Petitioner's criminal history, which included two prior drug distribution convictions, the court entered a sealed sentence pending Petitioner's apprehension and appearance. (R., pp. 173-181). After Petitioner was apprehended in Florida, he appeared for sentencing on September 19, 2013, and the court sentenced him to twenty-nine years incarceration. (R., pp. 182-187). Petitioner moved for reconsideration of the sentence, which the court denied by Order filed December 16, 2013. (R., pp. 189-193). This appeal followed.

By unpublished opinion filed October 14, 2015, the South Carolina Court of Appeals affirmed Petitioner's conviction and sentence, finding there was evidence to support the circuit court's denial of Petitioner's motion to suppress the evidence seized by Lt. Gray, and the circuit court did not abuse its discretion in qualifying Lt. Gray as an expert. (Appendix, pp. 1-2). The Court denied Petitioner's Petition for Rehearing by Order filed November 19, 2015. (Appendix, pp. 3-10). Petitioner filed a Petition for Writ of Certiorari to the Court of Appeals on December 15, 2015, seeking review of the Court of Appeals opinion.

ARGUMENT

I. The Court of Appeals properly affirmed the denial of Petitioner's motion to suppress the items found on Petitioner's person after a weapons frisk, because the frisk was reasonable, and Petitioner consented to removal of the items from his pockets.

Petitioner asserts the circuit court erred in denying his suppression motion, and the Court of Appeals misapprehended the issue. On the contrary, the circuit court and the Court of Appeals properly considered the totality of the circumstances leading to Lt. Gray's frisk of Petitioner, and Petitioner's subsequent consent to removal of the items from his pockets.

On appeal, Fourth Amendment determinations are reviewed under a clear error standard, and the appellate courts will affirm the trial court's ruling if there is any evidence to support it. State v. Provet, 405 S.C. 101, 747 S.E.2d 453 (2013); State v. Taylor, 401 S.C. 104, 736 S.E.2d 663 (2013). There was ample evidence in the record to support the circuit court's denial of Petitioner's motion to suppress the evidence seized by Lt. Gray.

Initially, the circuit court correctly found the officers did not rely on the anonymous tip as a basis for their entry into Brown's apartment. (Supplemental Record on Appeal [SR.], p. 1). Lt. Gray approached Brown outside her apartment in a public area, told her about the tip, and asked for consent to look inside the apartment. While the anonymous tip was not sufficient to establish probable cause for a warrant, it certainly provided a sufficient basis for investigation, allowing officers to approach individuals, including Brown, in a public area to ask questions. At that point, there was no seizure or Fourth Amendment issue. "[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).

Knowing the purpose of their investigation, Brown voluntarily gave the officers consent to look inside the apartment, and even opened the apartment door for them. Thus, the officers lawfully entered the apartment. Petitioner was a guest in Brown's apartment, and as such, he assumed the risk she would allow others into it. *See* State v. Bailey, 276 S.C. 32, 274 S.E.2d 913, 916 (1981) (guest assumes the risk the property owner will allow others into the area).

The evidence also supports the circuit court's determination the frisk for weapons was appropriate. (R., pp. 28, 34-35). It is well settled "[a]n investigative detention is constitutional if supported 'by a reasonable and articulable suspicion that the person seized is engaged in criminal activity.'" Taylor, 736 S.E.2d at 665 (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, 525 S.E.2d 535, 540 (1999).

Lt. Gray testified that when he entered the apartment, he: (1) immediately smelled marijuana; (2) observed a card game and money on the table, consistent with gambling reported in the tip; (3) saw a bag of marijuana in plain view on the floor near Petitioner's feet; (4) saw Petitioner seated on a couch holding a large wad of money, with baggies protruding from his pockets; and (5) saw there were approximately ten individuals in the small apartment with only three officers. He also noted the well-known connection between guns and drugs. (R., pp. 28-27). *See* Taylor, 736 S.E.2d at 671 (recognizing the "indisputable nexus between drugs and guns," which may justify a frisk when officer has

reasonable suspicion drugs are present); State v. Banda, 371 S.C. 245, 639 S.E.2d 36, 40-41 (2006) (same). Lt. Gray's observations when he entered the apartment, including drugs in plain view, other indicia of drug activity (baggies and large amount of money) and gambling, amply supported a reasonable suspicion drug distribution and other illegal activity was occurring there, and justified frisking everyone in the apartment for weapons, particularly in light of the number of individuals inside and the close quarters.

Petitioner's reliance on State v. Fowler, 322 S.C. 263, 471 S.E.2d 706 (Ct. App. 1996), is misplaced because it is readily distinguishable from this case. In Fowler, the officers admitted the defendant "did not do anything to make the police believe he was armed or involved in drug activity" when they encountered him on the street, and detained and frisked him. They detained him because they 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 707. The Court of Appeals reversed the convictions for possession of a concealed weapon and possession of crack cocaine, finding officers did not have an articulable suspicion to justify even a brief detention, but even if the detention was proper, the officers articulated no facts on which to base a belief the defendant was armed and dangerous. *Id.* at 708.

In this case, however, Lt. Gray saw a bag of marijuana in plain view at Petitioner's feet, a large wad of money in Petitioner's hand, and baggies sticking out of Petitioner's pocket. In addition, it appeared there was gambling, and the apartment was small, with approximately ten people inside and only three police officers. Unlike the

officers in Fowler, Lt. Gray articulated many factors leading to a reasonable suspicion Petitioner was involved in the distribution of drugs, and a basis for officer safety concerns, which justified frisking everyone in the apartment, including Petitioner, for weapons.

Finally, the circuit court's determination Petitioner consented to removal of the drugs and digital scale from his pocket is also supported by the evidence. Petitioner does not dispute he gave consent for Lt. Gray to remove the items from his pockets, or contend he was coerced into giving consent, but argues the Court of Appeals "misapprehended the issue," because his consent came after "the unlawful Terry stop." As discussed above, however, Petitioner's brief detention and frisk were lawful, and both the circuit court and the Court of Appeals properly resolved that issue. Further, Petitioner was not under arrest at the time he was frisked, and when Lt. Gray could not identify the items he felt in Petitioner's pocket as potential weapons, he properly sought and obtained Petitioner's consent before he actually went inside the pockets and removed the items.[2]

Based on the foregoing, both the circuit court and the Court of Appeals properly determined the frisk of Petitioner was justified, and the evidence was seized pursuant to Petitioner's consent rather than an unlawful expansion of the frisk. Therefore, the Petitioner for Writ of Certiorari to the Court of Appeals should be denied on this issue.

---

[2]As a practical matter, there was probable cause to arrest Petitioner for possession of the marijuana at his feet, and a search incident to that arrest would inevitably lead to discovery of the evidence in his pockets. Recognizing it might be difficult to prove constructive possession beyond a reasonable doubt, however, Lt. Gray did not immediately arrest Petitioner, and sought consent before going into Petitioner's pockets Ultimately, no one was charged in relation to the marijuana because of the constructive possession problem. (R., pp. 105-107).

II. The Court of Appeals properly affirmed the circuit court's qualification of the lead investigator as an expert in narcotics investigations based on the investigator's knowledge, experience and training.

Petitioner asserts the Court of Appeals erred in affirming the circuit court's qualification of Lt. Gray as an expert in narcotics investigations, because he did not have sufficient knowledge, training or experience, and the subject of his testimony regarding the significance of the drug weight, digital scale and baggies on the issue of distribution was not outside the purview of the average juror. As with Issue I, Petitioner contends the Court of Appeals "misapprehended these issues."

A. Qualification

Qualification of an expert witness and admissibility of the expert's testimony are matters within the trial court's sound discretion, and the appellate courts will not reverse the trial court's determination absent a prejudicial abuse of discretion. State v. Chavis, 412 S.C. 101, 771 S.E.2d 336, 338 (2015); State v. White, 382 S.C. 265, 676 S.E.2d 684, 687 (2009). The party seeking reversal must prove both the error and the resulting prejudice, which requires a reasonable probability the jury's verdict was influenced by the admission or absence of the challenged evidence. State v. White, 372 S.C. 364, 642 S.E.2d 607, 611 (Ct. App. 2007).

"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, 722 S.E.2d 820, 825 (Ct. App. 2012) (citing Rule 702, SCRE). Expert qualification is not limited to any group of people acting professionally, and the offering party bears the burden to show the witness'

requisite qualifications, "[h]owever, defects in the amount or quality of education and experience go to the weight of the expert's testimony and not its admissibility." *Id.*

Lt. Gray began his law enforcement career in 1995, worked on narcotics investigations throughout his career, including five years assigned to the Abbeville County Sheriff's Department narcotics unit, and as of 2013, he had been a full-time officer for approximately sixteen years. After joining the Abbeville City Police Department, he continued to assist with narcotics investigations until he was specifically assigned to the Department's narcotics section several months before the trial in this case. (R., pp. 67-68).

During his career, Lt. Gray personally investigated and/or assisted in numerous narcotics cases, ranging from simple possession of a single pill to a case involving fifty pounds of marijuana and 500 ecstasy pills, and he estimated the cases involved approximately 100 people. In addition to his work experience, Lt. Gray attended numerous courses related to narcotics investigations, became a certified drug instructor through FLETC, and consulted with other officers in identifying drugs and drug paraphernalia. (R., pp. 68-76).

The circuit court properly concluded Lt. Gray was qualified by knowledge, training and experience to offer expert testimony on narcotics investigations.[3] (R., pp. 76-78). Lt. Gray's training and experience in narcotics investigations clearly sets him far

[3]Petitioner compares Lt. Gray's qualifications to the expert qualified in Robinson, who had thirty years law enforcement experience. Such comparison is of little value because expert qualifications are necessarily diverse, and years of experience is only one factor the court can consider.

apart from the average juror, and the circuit court properly ruled any purported shortcoming in his experience went to the weight of his testimony, not its admissibility.[4]

B. Necessity of Expert Testimony

The only opinion offered during Lt. Gray's testimony was limited to the significance of the amount of crack cocaine found in Petitioner's pocket, the baggies, and the digital scale, which he testified indicated an intent to distribute the crack cocaine when considered together. (R., pp. 94-95). Petitioner contends the testimony was unnecessary, and 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 regarding intent; and (2) no specialized knowledge was needed because the information was within the knowledge of average jurors.

As a threshold matter, Petitioner's contention the testimony was unnecessary because the amount of crack cocaine seized, 6.8 grams, already leads to an inference of intent to distribute it, is not preserved for appellate review. An issue must be raised to and ruled on by the trial court, and it must be presented in "a sufficiently specific manner that brings attention to the exact error." State v. Johnson, 363 S.C. 53, 609 S.E.2d 520, 523 (2005). In the circuit court, Petitioner only asserted the subject of Lt. Gray's expert testimony was not outside the knowledge of the average juror, and never referenced the

[4]Petitioner cites a footnote in State v. Kromah, 401 S.C. 340, 737 S.E.2d 490 (2013), as support for his contention Lt. Gray's qualifications were insufficient for expert designation. Kromah is readily distinguishable. The issue in Kromah was the expert qualification of forensic interviewers because of the danger their "expert" testimony would improperly bolster a child victim's testimony, not a law enforcement officer with significant experience and knowledge regarding aspects of a particular type of investigation.

statutory inference. (R., pp. 72-78). Therefore, the impact of the statutory inference on the necessity for Lt. Gray's testimony is not properly before this Court.

Even if preserved, however, the argument is meritless. The statutory inference of intent based on the amount of drugs possessed is not mandatory, and the State still bears the burden to prove intent beyond a reasonable doubt. State v. Andrews, 324 S.C. 516, 479 S.E.2d 808 (Ct. App. 1996). The amount of narcotics is simply an evidentiary fact for the jury's consideration, along with other evidence in the case, and it is to be given the weight the jury determines it should have, which is exactly what the circuit court charged the jury in this case. (R., p. 169). As the circuit court found, Lt. Gray's testimony regarding the packaging of drugs for distribution was highly relevant to the issue of Petitioner's intent. (R., pp. 76-77).

Petitioner's contention the significance of such evidence does not require specialized knowledge is also meritless. The essence of his contention is the average juror would have sufficient knowledge regarding the packaging and distribution of narcotics to infer intent from the facts of this case. In other words, expert testimony was unnecessary because Petitioner's intent was so plain from the evidence.

Contrary to Petitioner's contention, "how crack cocaine was sold and packaged" is a topic outside the purview of the average juror. Robinson, 722 S.E.2d at 825-826. Thus, the circuit court properly found Lt. Gray possessed knowledge in the field of narcotics investigation, an average juror would not be familiar with the specifics of distributing narcotics, and Lt. Gray's expert testimony would assist the jury. (R., pp. 76-77).

Finally, even if it was error to admit Lt. Gray's opinion, any possible error was harmless beyond a reasonable doubt. First, if the Court accepts Petitioner's view of the public's knowledge regarding specifics of the narcotics trade, Lt. Gray's testimony regarding the significance of the evidence on the issue of intent was harmless because he merely said what the jurors already knew.

Further, the circuit court properly instructed the jury it determined what weight to give expert testimony, and could accept or reject it entirely. (R., pp. 79, 167). Therefore, Petitioner was not prejudiced by the admission of Lt. Gray's expert testimony. *See* Robinson, 722 S.E.2d at 825 (defendant was not prejudiced by the witness's expert qualification because the jury was not required to accord her testimony any greater weight than given to any other testimony) (*citing* State v. Douglas, 380 S.C. 499, 671 S.E.2d 606, 609 [2009]); *see also* White, 676 S.E.2d at 687 (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, 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.").

The circuit court did not abuse its discretion in qualifying Lt. Gray as an expert in narcotics investigations, and allowing him to testify about the significance of the evidence on the issue of intent, and the Court of Appeals properly affirmed the circuit court's rulings. Therefore, the Petition for Writ of Certiorari to the Court of Appeals should be denied on this issue.

CONCLUSION

Based on the foregoing and the arguments set forth in the Final Brief of Respondent, the State submits the Petition for Writ of Certiorari to the Court of Appeals should be denied in its entirety.

Respectfully submitted,

ALAN WILSON
Attorney General

DEBORAH R.J. SHUPE
Senior Assistant Deputy Attorney General
SC Bar No. 5098

DAVID M. STUMBO
Solicitor, Eighth Judicial Circuit

PO Box 516
Greenwood, SC 29648
(864) 942-8800

By: Deborah R.J. Shupe
DEBORAH R.J. SHUPE

Office of Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

January 6, 2016

RECEIVED
JAN - 6 2016
SC SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal From Abbeville County
The Honorable Frank R. Addy, Circuit Court Judge
Appellate Case No. 2015-002570
(Unpublished Opinion No. 2015-UP-485, S.C. Ct. App., filed October 14, 2015)

THE STATE, Respondent,

v.

ALFONZO ALEXANDER, Petitioner.

PROOF OF SERVICE

I, Sally Ellison, certify I served the Return to Petition for Writ of Certiorari to the Court of Appeals on Petitioner by depositing copies in the United States mail, postage prepaid, addressed to:

LaNelle Cantey DuRant
Assistant Appellate Defender
South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589

I further certify all parties required by Rule to be served have been served.

This 6th day of January, 2016.

Sally Ellison

SALLY ELLISON
Legal Assistant

Office of Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727