

 ORIGINAL

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Charleston County

Kristi Lea Harrington, Circuit Court Judge

RECEIVED

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SC Court of Appeals

THE STATE,

RESPONDENT,

V.

DOMINIQUE LAVAR WILLIAMS,

APPELLANT

APPELLATE CASE NO. 2014-001617

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1.

Whether the plain view exception excused the warrantless search of appellant's vehicle when the crime suspected was unlawful carrying of a handgun and the vehicle was unoccupied?

2.

Whether appellant was entitled to a directed verdict on the charge of unlawful carrying of a handgun because the State presented no evidence that he carried the handgun about his person as required by S.C. Code Ann. § 16-23-20?

3.

Whether the trial judge erred in manufacturing a definition of carrying a handgun about the person that is not contained in the statute and was contrary to the defendant's request to charge the plain and ordinary meaning of the terms of the statute, and in charging the jury on an exception to unlawful carrying of a handgun when such exception is an affirmative defense that was not raised by the defense and illegally expanded the proscribed conduct?

STATEMENT OF THE CASE

On November 13, 2012, a Charleston County grand jury indicted appellant for unlawful carrying of a handgun. R. 223. On June 18, 2014, appellant was tried before the Honorable Kristi L. Harrington and a jury. R. 1. Chris Lietzow and Jenna Newman represented the State. R. 2. Michael Cooper and Annie Andrews represented appellant. R. 2. The jury convicted appellant. R. 186, l. 23 – 187, l. 2. The trial judge deferred post-trial motions and sentencing. R. 191, l. 12 – 192, l. 20. On July 22, 2014, Judge Harrington heard post-trial motions and sentenced appellant to two days' imprisonment, with credit for two days' time served. July 22, 2014, R. 194; 213, ll. 11 – 20. This appeal follows.

ARGUMENT

1.

The plain view exception did not excuse the warrantless search of appellant's vehicle when the crime suspected was unlawful carrying of a handgun and the vehicle was unoccupied.

Relevant Facts

The Suppression Hearing

Before trial, Judge Harrington heard testimony and argument relating to the warrantless search of a car and an alleged statement made by the defendant.¹ Around midnight on July 24, 2012, Officer James Greenawalt ("Greenawalt") of the North Charleston Police Department K-9 division was peeping into cars with his flashlight in the parking lot of a bar. R. 12, l. 6 – 13, l. 8. R. 26, ll. 11 – 16. As he looked into an older model Crown Victoria, he saw a pistol between the driver and passenger seats. R. 14, ll. 8 – 20. Officer Greenawalt and another officer backed away from the car and watched it for an hour. R. 15, ll. 5 – 25.

Appellant Dominique Williams ("Williams") and his friend Antonio Simmons ("Simmons") left the bar and were walking to the car. R. 49, ll. 6 – 25. Simmons testified they were "chatting, joking around about what was going on in the club, about females, and then the next thing you know I looked up and had a gun pointed at me." R. 50, ll. 1 – 9. The gun was in his face at "point-blank range." R. 50, ll. 16 – 17. Officer Greenawalt admitted the police advanced on Williams and Simmons with their guns drawn. R. 22, ll. 5

¹ Judge Harrington suppressed the alleged statement made by Williams, R. 79, ll. 12 – 25. That ruling is not on appeal.

– 9. Williams and Simmons were handcuffed and held behind the car. R. 22, l. 19 – 23, l. 4.

Simmons testified that the police searched them, took the keys out of Williams' pocket, and went inside the car. R. 51, ll. 5 – 18. An officer took the gun out of the car and asked them “what is this.” R. 51, ll. 7 – 13. Williams and Simmons never made it to the car before the police seized them. R. 51, ll. 19 – 23.

Officer Greenawalt's recollection differed from Simmons. He claimed Williams opened the passenger's door and then opened the driver's door. R. 16, l. 13 – 17, l. 7. In Officer Greenawalt's version, only when the driver's door was “ajarred to the point [Williams] could make entry to the vehicle” did they make their “presence known” with guns drawn. R. 17, ll. 1 – 7. R. 22, ll. 5 – 9. The officer admitted that Williams never got inside the car. R. 22, ll. 1 – 4.

On direct-examination, Officer Greenawalt claimed that another officer reached into the car and took the pistol once Williams and Simmons were in handcuffs behind the car. R. 18, ll. 15 – 20. Officer Greenawalt said that Williams, without being asked any questions, “decided to make an utterance to me in saying that the weapon was his, it fell out of his pocket.” R. 18, ll. 15 – 20. When asked again on cross-examination, Officer Greenawalt reiterated that the other officer “retrieved the firearm from the vehicle.” R. 24, ll. 1 – 5. Defense counsel impeached him with his report that said as *Greenawalt* retrieved the pistol, “the subject made the statement.” R. 24, l. 11 – 25, l. 21. After defense counsel argued that

Officer Greenawalt's testimony was not credible, Judge Harrington suppressed the statement.² R. 76, l. 9 – 79, l. 25.

Officer Greenawalt admitted that he could not tell if the gun was real without inspecting it. R. 27, ll. 12 – 18. Nor could he tell whether the gun was stolen just by looking at it. R. 27, ll. 19 – 21. The gun was checked against police records and it was not stolen. R. 28, ll. 20 – 21. Officer Greenawalt admitted that he believed the pistol was legally registered to Williams. R. 28, ll. 7 – 17. Defense counsel asked, "So the only thing illegal about the gun, in your opinion, was where it was placed in the vehicle?" R. 28, ll. 7 – 8. Officer Greenawalt answered, "Correct." R. 28, l. 9.

Judge Harrington heard extensive argument on whether the search of Williams' car complied with the Fourth Amendment. R. 28, l. 24 – 40, l. 12. R. 59, l. 15 – 80, l. 1. The State argued that the plain view exception to the warrant requirement saved the search. R. 63, l. 24 – 65, l. 4. Williams argued that the location of the pistol in the car was not illegal because the car was unoccupied. R. 59, l. 17 – 63, l. 20. Williams argued, based on State v. Clarke, 302 S.C. 423, 396 S.E.2d 827 (1990) that the exceptions to the unlawful carrying statute "are not descriptive of the offense." R. 61, ll. 7 – 62, l. 21. The trial court ultimately ruled that the plain view exception applied and refused to suppress the pistol. R. 78, l. 21 – 79, l. 11. Williams renewed his objection when the State offered the pistol in the evidence. R. 96, ll. 9 – 13.

² The State argued that even though Williams had been placed in handcuffs at the point of a gun, he was not in custody under Miranda because Officer Greenawalt testified that Williams was not under arrest. R. 73, l. 20 – 76, l. 7. Judge Harrington's ruling suppressing Williams' statement is not on appeal.

Discussion

The plain view exception to the warrant requirement did not apply because the illegality of the pistol was not immediately apparent. “Where a search is undertaken by law enforcement officials to discover evidence of criminal wrongdoing, ... reasonableness generally requires the obtaining of a judicial warrant.” Riley v. California, 134 S.Ct. 2473, 2482 (2014). U.S. Const. amends. IV, XIV. The only exception to the warrant requirement advanced by the State was that the pistol was in plain view.

For the plain view exception to excuse a warrantless search, the police must have probable cause. Arizona v. Hicks, 480 U.S. 321, 326 (1987). In Hicks, police officers entered a residence because of shots fired. Id. at 323-24. While they were in the apartment, the police moved a stereo to examine the serial numbers. Id. The stereo turned out to be stolen. Id. The Court ruled moving the stereo equipment was a search and the plain view exception did not apply because it was not immediately apparent that the stereo equipment was contraband or stolen. Id. at 325-27. See also State v. Wright, 391 S.C. 436, 443, 706 S.E.2d 324, 327 (2011) (stating requirement that “incriminating nature of the evidence was immediately apparent to the seizing authorities”).

Pistols are not illegal. U.S. Const. amend. II. The police acted under the belief that the pistol as it lay on the floorboard was illegal under S.C. Code Ann. § 16-23-20. This code section is titled, “Unlawful carrying of handgun; exceptions.” S.C. Code Ann. § 16-23-20. It is not titled, “Unlawful placement or storage of handguns.” The conduct proscribed is: “It is unlawful for anyone to **carry about the person** any handgun, whether concealed or not, except as follows, unless otherwise specifically prohibited by law.” Id. (emphasis added). It was not disputed that Williams never entered the vehicle.

According to Simmons, Williams never even opened the doors of the vehicle before he was seized by police officers with their guns drawn. The pistol was only laying on the floorboard of an unoccupied car. Since Williams was not carrying the handgun “about his person,” section 16-23-20 did not apply and did not render the pistol immediately apparent as illegal. “A policeman does not have the right to seize any object in his view in order to examine it and determine if it is or would be evidence in a criminal prosecution.” State v. Meichel, 290 So.2d 878, 880 (La. 1974).

The court relied on one of the exceptions to this statute to find that the illegality of the pistol was immediately apparent. S.C. Code Ann. § 16-23-20(9). This exception states:

(9) a person in a vehicle if the handgun is:

(a) secured in a closed glove compartment, closed console, closed trunk, or in a closed container secured by an integral fastener and transported in the luggage compartment of the vehicle; however, this item is not violated if the glove compartment, console, or trunk is opened in the presence of a law enforcement officer for the sole purpose of retrieving a driver’s license, registration, or proof of insurance. If the person has been issued a concealed weapon permit . . . then the person also may secure his weapon under a seat in a vehicle, or in any open or closed storage compartment within the vehicle’s passenger compartment.

S.C. Code Ann. § 16-23-20(9)(a) (emphasis added).

Reliance on this exception was error. The exceptions to section 16-23-20 do not broaden the proscribed conduct. State v. Clarke, 302 S.C. 423, 396 S.E.2d 827 (1990). In Clarke, the Supreme Court held that, “The statute clearly states that it is unlawful to carry a pistol and the exceptions are not descriptive of the offense.” Id. at 425, 396 S.E.2d at 828. The defendant in Clarke argued that the State must negate the exceptions in section 16-23-20 in an indictment. Id. The Court rejected this contention and ruled

that “an exception to a criminal offense shall be negated in the indictment only if the language of the exception must be regarded as descriptive of the offense.” Id. Holding that the exceptions were not descriptive of the offense, the Court held that the defendant bears the burden of proof on the exceptions. Id.

Clarke means that the court could not use the exception contained in section 16-23-20(9) to broaden the offense. Under the State’s theory, because the pistol was not in the glove compartment, it was illegal even though no one was in the car. Clarke forbids this reasoning. Clarke requires that the State must prove illegality under the proscription of the first sentence of section 16-23-20: that Williams carried a handgun about his person. Since it was admitted the vehicle was unoccupied when the police first saw the pistol, there was nothing illegal about it under the statute. It was also admitted that Williams never entered the. Williams was seized before he even had a chance to enter the car or put the pistol in the glove compartment. Even if the exception could be used to broaden the proscribed conduct, it would not apply because by its plain terms it requires “a person in a vehicle.” S.C. Code Ann. § 16-23-20(9). Since the plain view exception does not apply, the warrantless search and seizure was illegal and the pistol should have been suppressed.

2.

Appellant was entitled to a directed verdict on the charge of unlawful carrying of a handgun because he did not carry the handgun about his person as required by S.C. Code Ann. § 16-23-20.

The facts presented at trial were largely unchanged from the suppression hearing with the exception that Simmons did not testify. Officer Greenawalt again testified that

he saw the pistol, waited for an hour until Williams approached the car and opened the door, and then seized Williams at the point of a gun. R. 90, l. 7 – 92, l. 20. R.. 97, ll. 6 – 18. R. 98, l. 1 – 101, l. 7. Officer Jason Monroe testified that appellant admitted he owned the pistol and that the weapon came “back completely legal.” R. 129, ll. 9 – 21. R. 134, ll. 6 – 7.

Williams argued he was entitled to a directed verdict because there was no evidence that he carried the pistol about his person. R. 140, l. 11 – 142, l. 20. The trial judge questioned both lawyers regarding the meaning of “about their person.” R. 144, l. 5 – 145, l. 8. Both attorneys admitted it had not been defined. R. 144, l. 5 – 145, l. 8. The State argued the statute meant that it meant anywhere the person could access. R. 145, l. 13 – 146, l. 14. The State also argued that the moment Williams opened the door, he was guilty of unlawful carrying. R. 146, l. 15 – 147, l. 5. In response, Williams argued that under the State’s interpretation, Williams would not be “allowed to pick up the weapon momentarily and place it in the glove box” and therefore could not have legally entered his car. R. 147, l. 8 -148, l. 22. Williams argued that since the State offered no evidence that Williams put the gun on the floor of the car, the State’s theory of illegality led to an absurd reading of the statute and that Williams was entitled to a directed verdict. R. 147, l. 8 -148, l. 22. The trial judge denied appellant’s motion. R. 148, l. 23 – 151, l. 9.

Williams was entitled to a directed verdict because the State produced no direct evidence nor substantial circumstantial evidence of his guilt. State v. Odems, 395 S.C. 582, 720 S.E.2d 48 (2011); State v. Bostick, 392 S.C. 134, 139, 708 S.E.2d 774, 777 (2011). It was undisputed that Williams never entered the car. As argued above in Issue

1, the State needed to prove that Williams carried the pistol about his person and could not use the exception to broaden the proscribed conduct. S.C. Code Ann. §16-23-20; State v. Clarke, 302 S.C. 423, 396 S.E.2d 827 (1990). Since Williams never entered the car, he did not carry the pistol and the pistol was not about his person. Williams was not required to disprove section 16-23-20(9). The State was required to prove that he carried the pistol about his person. Since the evidence is undisputed that Williams never entered the car (nor even had an opportunity to place the pistol in the glove box), he was entitled to a directed verdict.

3.

The trial judge erred in manufacturing a definition of carrying a handgun about the person that is not contained in the statute and was contrary to the defendant's request to charge the plain and ordinary meaning of the terms of the statute, and in charging the jury on an exception to unlawful carrying of a handgun when such exception is an affirmative defense that was not raised by the defense and illegally expanded the proscribed conduct.

During the charge conference, Williams asked that the trial court charge the jury that the words of a statute should be given their plain and ordinary meaning. R. 158, ll. 11 – 20. The trial judge declined this request. R. 160, ll. 1 – 12. The trial judge then charged the jury that a weapon is:

about the defendant's person if it is readily accessible and convenient for immediate use. The pistol need not be actually touching the person of the defendant. There are exceptions to this general law against carrying a pistol which allows certain people to carry pistols. The exception in this case is a person in a vehicle where the pistol is secured in a closed glove compartment, closed console or closed trunk.

R. 182, ll. 1 – 11. The trial judge deferred sentencing and post-trial motions and heard further argument about the propriety of this jury charge. July 22, 2014, R. 196, l. 1 – 199, l.

21. R. 216 Defendant’s Motion for a New Trial. The trial judge ruled:

Based—reviewing, again, that—your argument that the jury instructions were given, and you did properly, I believe, preserve that argument for appellate purposes, that when I gave the instructions that they were confusing and misleading, I disagree. I had charged what I believed to be the appropriate law in the state of South Carolina based upon the facts that were given. The instructions reflected the testimony and the evidence that was presented at trial and I crafted them in such a way as to make the statute and the definitions that were brought up during the trial clear to the jury and the exception under Subsection 9 was mentioned several times throughout the trial, and I find that the instruction was not prejudicial to the Defendant. I find that they were adequately and thoroughly given to the jury, they thoroughly explained the law on the evidence that was presented throughout the trial. The issues, again, were clear. I do believe that the plain reading of the statute was satisfied and your motion for a new trial is denied.

July 22, 2014, R. 201, l. 15 – 202, l. 10.

The trial judge erred in expanding the statutory terminology. The trial judge should only have charged the jury that appellant could be found guilty if he carried the handgun about his person. “Penal statutes are construed strictly against the State and in favor of the defendant.” Williams v. State, 306 S.C. 89, 91, 410 S.E.2d 563, 564 (1991). “This Court is without authority to depart from the plain meaning of the words of the statute.” Id. Statutory terms must be given their literal meaning when they are plain and unambiguous. State v. Benjamin, 341 S.C. 160, 163, 533 S.E.2d 606, 607 (Ct. App. 1991). “In such circumstances, this Court simply lacks the authority to look for or impose another meaning and may not resort to subtle or forced construction in an attempt to limit or expand a statute’s scope.” Id.

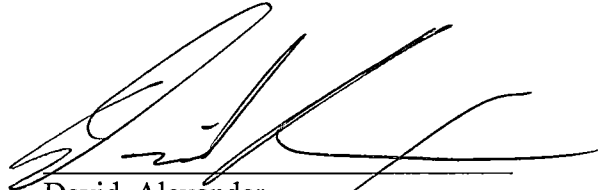
Inclusion of the phrase “if it is readily accessible and convenient for immediate use” and that the pistol did not have to touch the defendant impermissibly expanded the scope of the statute. This definition failed to strictly construe the statute against the State and was error. Under the court’s charge, it was impossible for the jury to render a verdict of not guilty.

The trial court also erred in charging the vehicle exception to section 16-23-20. As argued above, under Clarke, the exceptions are not descriptive of the offense and the defendant bears the burden of producing evidence. Clarke at 425, 396 S.E.2d at 828. The defendant presented no evidence and did not assert the exception as a defense. Therefore, it was error to charge the exception. Doing so in this case again impermissibly expanded the proscribed conduct and allowed the jury to convict appellant based on the exception, not the statute itself. As the charge was erroneous and prejudicial, appellant’s conviction should be reversed and he should be granted a new trial.

CONCLUSION

For the foregoing reasons, appellant's conviction should be reversed. In the alternative, appellant should be granted a new trial.

Respectfully submitted,



David Alexander
Appellate Defender

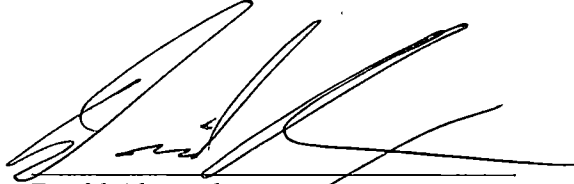
ATTORNEY FOR APPELLANT

This 13th day of August, 2015.

CERTIFICATE OF COUNSEL FOR APPELLANT

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

August 13, 2015



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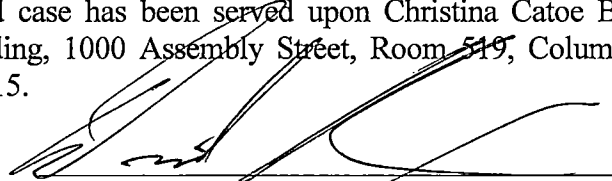
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CERTIFICATE OF SERVICE


The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Christina Catoe Bigelow, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 13th day of August, 2015.



David Alexander
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 13th day of August, 2015.



(L.S.)
Notary Public for South Carolina
My Commission Expires: July 3, 2023.