

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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Appeal from Richland County

SC Court of Appeals

Robert E. Hood, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ERIC TERRELL SPEARS,

APPELLANT

APPELLATE CASE NO. 2015-000390

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Did the trial court err in denying Appellant Spears' motion to suppress the drugs based on a Fourth Amendment violation because there was not sufficient probable cause to conduct an investigative stop of Appellant?

STATEMENT OF THE CASE

On July 18, 201, the Richland County Grand Jury indicted Eric T. Spears on the charge of trafficking crack cocaine more than ten grams and less than twenty-eight grams. On February 17-18, 2015, a trial was held before the Honorable Robert Hood and a jury in Spears' absence. R. 3, ll. 1 – R. 7, ll. 16. Spears was represented by Lucas Hawks and Adam Ruffin. R. 1; R. 10, ll. 1 – 7. The state was represented by Luck Campbell and Meghan Walker. R. 1; R. 9, ll 15 – 21. The jury returned a verdict of guilty as indicted. R. 227, ll. 2 – 10. Judge Hood issued the sentence and sealed it pursuant to the rules of trial in absence. R. 231, ll. 18 – 21.

On February 19, 2015, Spears appeared before Judge Hood for sentencing. Judge Hood opened the sealed sentence and sentenced Spears to thirty years for a trafficking crack cocaine third offense. R. 232, ll. 1 – R. 233, ll. 12. Spears' attorney filed a notice of appeal. This appeal follows.

STATEMENT OF FACTS

On March 29, 2012, Agent Dennis Tracy, who was with the Lexington County Sheriff's Office and also with the Immigration Customs Enforcement Task Force later known as Homeland Security, went to the designated drop off point of one of the buses of the Chinese Bus Line. This Chinese Bus Line operated out of New York and was frequented by criminals because there was no security, no ID checks, and was inexpensive. R. 108, ll. 14 – R. 113, ll. 19.

Two other agents went with him: Briton Lorenzen of Homeland Security and Frank Finch, who was a narcotics agent with the Lexington Sheriff but was assigned to the Drug Enforcement Administration (DEA) Task Force. Their job was to deter the flow of drugs from other areas into South Carolina. R. 142, ll. 15 – R. 143, ll. 21; R. 183, ll. 9 – Tr. 185, ll. 20; R. 109, ll. 1 – 11. The men went to the point where the bus would stop. It was not a real bus station but a drop off in a parking lot of an old Comfort Inn on Broad River in Columbia just north of I-20. R. 113, ll. 12 – R. 114, ll. 16.

The law enforcement agents went to the bus acting on a tip that a DEA agent had received and conveyed to the agents. Agent Tracy did not know the source of the tip as to whether it was an informant or some other source. R. 111, ll. 17 – R. 112, ll. 8. Agent Dennis said the tip was that one black male was traveling from New York to South Carolina with narcotics. R. 112, ll. 4 – 12; R. 132, ll. 1 – 12.

Agent Lorenzen testified that he was contacted by his counterpart at DEA to conduct a bus interdiction¹ related to the DEA case they were investigating. He did not receive the tip himself. Two targets involved in their DEA case were supposed to be aboard the Chinese

¹ Interdiction was defined by agent Dennis as a law enforcement effort to stop the flow of narcotics into Columbia neighborhoods by nontraditional means. R. 109, ll. 1 – 7.

bus. The names of the targets were Tyrone Richardson and Eric Bradley who were both black males. Agent Lorenzen had never heard the name of Eric Spears. R. 143, ll. 9 – R. 144, ll. 25; R. 149, ll. 1 -24.

On March 29, 2012, the three agents went to the drop off point on Broad River Road where the bus had parked. People were disembarking from the bus. Most of the passengers were getting into a cab or calling on their cell phones or had someone there picking them up. Two people were not on a cell phone and did not have someone getting them. These two people were paying an “excessive” amount of attention to the agents as law enforcement. However, the agents were in plain clothes and Agent Dennis believed that people “don’t pay attention to people in plain clothes unless they are engaged in illegal activity. Agent Dennis had his gun and badge concealed, but the two people continued to look at them. R. 114, ll. 1 – Tr. 116, ll. 15. However, in contrast, Agent Briton Lorenzen and Agent Frank Finch both testified at trial that both their guns and badges were visible during this encounter. R. 144, ll. 20 – R. 145, ll. 13; R. 187, ll. 1 – 12.

The two people, a man and woman, retrieved their baggage from the bus and proceeded to walk up the street to the road. The agents decided to make contact with the two people. They had no plan to arrest them or detain them. The agents’ purpose was to “engage them in a consensual encounter and see if there was anything suspicious about their stories or their actions.” R. 116, ll. 16 – R. 117, ll. 14.

Before the encounter as the agents were following the man and woman, they observed the woman remove an unknown object from her purse and hand it to the man. They could not tell what the object was. The agents did not see the man lower his hands below his waist. R. 117, ll.15 – R. 118, ll. 11.

When the agents were about eight to ten feet behind the couple, the agents asked them if they could talk to the couple for a minute. The agents identified themselves as law enforcement. They asked the couple casual questions such as where they were coming from. When the agents asked for identification, the man handed them a New York identification. Agent Dennis described the man as very forthcoming in his conversation and answers. The man started rearranging his clothing as though to pull it away from his body. Agent Dennis asked him not to do that for safety reasons as the man's hands were out of view when he did. When Agent Dennis asked the man if he had any illegal items on him or his property, the man hesitated and then said no. Agent Dennis believed that when people hesitate, they are not telling the truth. R. 118, ll. 12 – R. 119, ll. 18.

The man continued to pull at his shirt so it was not possible to see anything that might have been in his waistband. Agent Dennis became concerned for his own safety as he thought the man might have a weapon in his waistband. After the man did not stop pulling at his shirt, Agent Dennis told the man that he was going to perform a pat down of his waistband to ensure that the man did not have a weapon. When Agent Dennis did the pat down of the man's waist, Agent Dennis felt a small hard object about the size of a golf ball with jagged edges. That feel was consistent with crack cocaine that Agent Dennis, in his experience, had felt before. Spears was detained at that point and turned over to Investigator Brian Gwyn with the Richland County Sheriff's Office. Investigator Gwyn was on the scene at that point. R. 120, ll. 1- R. 123, ll. 10.

When Investigator Gwyn arrived at the scene, he saw Agents Tracy, Lorenzen and Finch with Spears and a woman. The agents already had the crack cocaine and Investigator Gwyn took possession of Spears and the crack. Investigator Gwyn performed a field test on

the drugs and determined it was cocaine base or crack. He arrested Spears then for trafficking crack cocaine. R. 150, ll. 11 – 24; R. 154, ll. 1 – R. 155, ll. 25.

Investigator Gwyn read the Miranda rights to Spears as soon as he arrested him. Spears told the investigator that he understood his rights. Investigator Gwyn then asked Spears questions but he seemed “standoffish” at first. Spears said he felt he had been set up. When asked why he did this, Spears responded: “Stupidity.” Then Spears related that he was paid \$2200 by an individual to bring the crack cocaine into South Carolina because crack was cheaper in New York. R. 156, ll. 1 – R. 158, ll. 23.

Investigator Gwyn then admitted that after Spears was advised of his right to remain silent, Spears said he did not want to talk. He never asked for an attorney. However, while Investigator Gwyn was doing paperwork, Spears initiated conversation. Investigator Gwyn then identified Spears from a photograph the state produced that was part of the identification Spears had on his person. R.159, ll. 1 – R. 160, ll. 17.

In a pretrial motion, defense counsel moved to suppress the drugs on three grounds. He argued that Spears was targeted on the initial contact without reasonable suspicion. Spears was frisked without reasonable suspicion of a weapon, and the plain view doctrine did not satisfy pulling the drugs from Spears’ waistband. R. 11, ll. 17 – R. 12, ll. 22. The state called Agent Dennis Tracy to testify in the pretrial suppression hearing. R. 13, ll. 1 – Tr. 45, ll. 15.

Agent Dennis told of the tip which he did not put in his report because he did not receive the tip directly. The information he had was simply a black male with no other description. The agents were there at the scene due to the tip, but he admitted that the tip was not specific enough for him to identify the subject as their target. He could not identify

the subject as the target based on the tip alone. The agents made contact with the individuals “solely based on their activity” and not based on the tip per se. R. 31, ll. 12 – R. 32, ll. 13. Agent Dennis also admitted that he did not mention in his report that the individuals paying excessive attention to the agents appeared to be nervous. However, he admitted that he thought it was important that the individuals were nervous. R. 34, ll. 20 – R. 36, ll. 6. Agent Dennis also did not mention in his report that the woman gave an object from her purse to the man. R. 37, ll. 1 – 8.

The defense called Traci Jenkins to testify at the pretrial hearing. She was the woman with Spears at the bus stop, and was married to Spears. R. 54, ll. 1 – 25; R. 59, ll. 17 – 25. She remembered the incident. She did not feel free to leave during the twenty minute encounter. She thought they had to talk to the agents. They stopped because they were told to stop. R. 55, ll.1 – R. 60, ll. 1.

In his argument following the testimony at the pretrial hearing, defense counsel argued that the agents did not have reasonable suspicion to stop Spears and the woman on the initial contact. All they had was the two people looking at them at the bus stop and nervousness. No reasonable person would have felt free to leave in these circumstances when the agents were following them and then started asking them questions about criminal activity. R. 61, ll. 6 – R. 65, ll. 5.

The judge denied the motion to suppress. His basis for the initial stop as being valid was that the defendant was seen getting off a bus that was known by law enforcement to be used by criminals. The defendant paid close attention to the agents or officers even though they were in plain clothes and their guns were out of sight. [See above where two officers/agents had guns and badges visible.] The agents began to follow the defendant and

his wife who were nervous. Agent Dennis saw the woman hand an object to the defendant. The defendant and his wife willingly stopped and talked to the agents. The law enforcement agents never told the defendant that he was not free to leave. R. 83, ll. 15 – R. 86, ll. 8.

At the Jackson v. Denno² hearing, defense counsel objected to the admission of the statements by Spears that he was bringing the crack into the state for someone else and that he was paid \$2200 to do so. Counsel's objections were based on the grounds that these statements were not relevant and not needed because the statute on trafficking was based on the amount. R. 77, ll. 8 – R. 81, ll. 22. The judge overruled the objections, and deemed the statements relevant. He ruled that the statements went to an element of the crime. R. 81, ll. – R. 82, ll. 1. Counsel did not object when the statements were admitted into evidence. R. 156, ll. 1 – R. 159, ll. 22.

Tara Kinney, who worked in the Richland County Sheriff's Office in the forensic laboratory, tested the drugs found in Spears' case. She determined that it was crack cocaine with a net weight of 11.43 grams. R. 172, ll. 1 – 17; R. 176, ll. 4 – 22.

When the drugs were admitted into evidence as State's Exhibit One, defense counsel objected based on all of his prior suppression motions. The judge admitted the drugs. R. 196, ll. 5 – 12.

² Jackson v. Denno, 378 U.S. 368 (1964).

ARGUMENT

The trial court erred in denying Appellant Spears' motion to suppress the drugs based on a Fourth Amendment violation because there was not sufficient probable cause to conduct an investigative stop of Appellant.

The Fourth Amendment protects the right of the people to be secure in their persons, house, papers, and effects, against unreasonable searches and seizures. U.S. Const. amend. IV. This guarantee protects against unreasonable searches and seizures, including seizures that only involve a brief detention. Robinson v. State, 407 S.C. 169, 754 S.E.2d 862 (2014) citing State v. Pichardo, 367 S.C. 84, 97, 623 S.E.2d 840, 847 (Ct. App. 2005) (citing United States v. Mendenhall, 446 U.S. 544 (1980)). Reasonable suspicion is something more than an inchoate and unparticularized suspicion or hunch. Terry v. Ohio, 392 U.S. 1, 27 (1968). The police officer may make reasonable inferences regarding the criminality of a situation in light of his experience, but he must be able to point to articulable facts that, in conjunction with his inferences, "reasonably warrant" the intrusion. Id. at 21, 27. Robinson v. State, 407 S.C. 169, 754 S.E.2d 862(2014).

The South Carolina Supreme Court wrote in State v. Taylor, 401 S.C. 104, 736 S.E.2d 663 (2013), 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. The Fourth Circuit held in United States v. Branch, 537 F.3d 328, 337 (4th Cir. 2008) that courts must look at the cumulative information available to the officer...and not find a stop unjustified based merely on a piecemeal refutation of each individual fact and inference.

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.

"To justify a brief stop [or] detention, the police officer must have a reasonable suspicion that the person has been involved in criminal activity." State v. Robinson, 306 S.C. 399, 402, 412 S.E.2d 411, 413 (1991). The term "reasonable suspicion" requires a particularized and objective basis that would lead one to suspect another of criminal activity. See United States v. Cortez, 449 U.S. 411 (1981); see State v. Woodruff, 344 S.C. 537, 544 S.E.2d 290 (Ct. App. 2001). In determining whether reasonable suspicion exists, the whole picture must be considered. See United States v. Sokolow, 490 U.S. 1 (1989). The burden is on the State to articulate facts sufficient to support reasonable suspicion. See State v. Butler, 343 S.C. 198, 539 S.E.2d 414 (Ct. App. 2000); see also State v. Pichardo, 367 S.C. 84, 104, 623 S.E.2d 840, 851 (Ct. App. 2005).

The United States Supreme Court created the exclusionary rule to safeguard Fourth Amendment rights. United States v. Calandra, 414 U.S. 338 (1974). The exclusionary rule prohibits the use of evidence obtained directly or indirectly through an unlawful search or seizure under the fruits of the poisonous tree doctrine. See Wong Sun v. United States, 371 U.S. 471, 484 (1963); see also State v. Nelson, 336 S.C. 186, 519 S.E.2d 786 (1999) (finding evidence is not admissible under the "fruit of the

poisonous tree" doctrine when the police exploit an unlawful search to seize evidence that would not have otherwise come to light).

“The purpose of the Fourth Amendment is not to eliminate all contact between the police and the citizenry, but ‘to prevent arbitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals.’” United States v. Mendenhall, 446 U.S. 544, 553–54 (1980) (quoting United States v. Martinez–Fuerte, 428 U.S. 543, 554 (1976).)

The law enforcement agents lacked probable cause and reasonable suspicion to stop and detain Spears. The trial judge erred in denying Spears’ motion to suppress the drugs based on the lack of reasonable suspicion for the stop. Spears’ mere presence on the Chinese bus did not mean that he was a criminal. State v. Kelsey, 331 S.C. 50, 502 S.E.2d 63 (1998).

The agents who stopped Spears did not know the source of the tip but only that it came from their DEA counterpart. Therefore, they had no knowledge if the tip was reliable, and had no information about the reliability of the source. Agent Dennis knew only that the tip contained only the description of a black male. The tip did not say there would be a man and woman. Agent Lorenzen knew the targets of the tip were two black males and had their names of Tyrone Richardson and Eric Bradley. R. 149, ll. 3 – 17. Therefore, the totality of the circumstances did not support the reasonable suspicion of the anonymous tip.

Because the agents had the names of the targets from the tip, once they learned Spears’ name from his identification and saw that it did not match the targets’ names, the investigative stop should have ceased. Spears should have been released at that point. This situation is similar to the case of State v. Tindal, 388 S.C. 518, 698 S.E.2d 203 (2010).

In Tindal, id., the Supreme Court held 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 is beyond the scope of the stop and therefore illegal unless the officer has reasonable suspicion of a serious crime.


In Spears' case, the law enforcement agents exceeded the scope of the investigative stop once they checked Spears' identification and learned he was not the man they were looking for.

The trial judge relied on the nervousness of Spears as cause for suspicion. However, Agents Lorenzen and Finch said their guns and badge were not hidden. This would cause a reasonable person to observe and act nervous. Any reasonable person would act nervous if he were being followed by three men with guns.

CONCLUSION

Based on the above, Appellant's conviction and sentence should be reversed and the case remanded for a new trial.

Respectfully submitted,


LaNelle Cantey DuRant
Appellate Defender

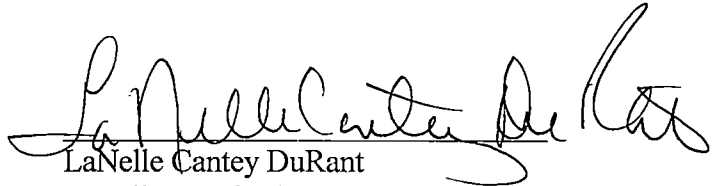
ATTORNEY FOR APPELLANT

This 10th day of March, 2016.

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."

March 10, 2016


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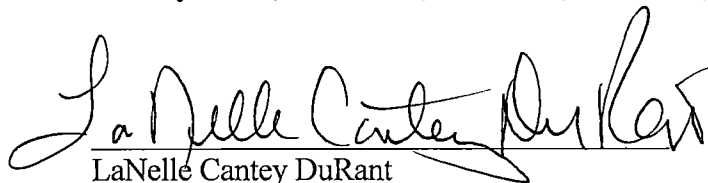
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APPELLANT

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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 Benjamin Aplin, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 10th day of March, 2016.



LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 10th day of March, 2016.

 (L.S.)

Notary Public for South Carolina
My Commission Expires: July 3, 2023.