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STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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SC Court of Appeals

Appeal from Richland County
Robert E. Hood, Circuit Court Judge

THE STATE,

Respondent,

vs.

ERIC TERRELL SPEARS,

Appellant.

Appellate Case No. 2015-000390

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

The trial court properly denied Appellant's motion to suppress the crack cocaine because law enforcement engaged Appellant in a consensual street encounter, not an investigative stop.

STATEMENT OF THE CASE

Appellant Spears was indicted for trafficking between ten and twenty-eight grams of crack cocaine. Spears was convicted as charged by a jury following trial on February 17-18, 2015. Spears did not attend his trial. The presiding judge, the Honorable Robert E. Hood, placed the sentence under seal. On February 19, 2015, Spears was brought before Judge Hood and the sentence was unsealed. Judge Hood sentenced Spears to thirty years imprisonment for third offense trafficking cocaine.

STATEMENT OF FACTS

Spears smuggled crack cocaine to Columbia from New York City as a bus passenger. When Spears acted suspicious during a voluntary street encounter, law enforcement conducted a Terry¹ frisk. In Spears' waistband was a package of crack cocaine.

The trial court conducted a suppression motion just prior to trial. The State's witness for the suppression motion was Special Agent Dennis Tracy who was employed with the Lexington County Sheriff's Office and is a task officer with Immigration and Customs Enforcement (ICE), renamed Homeland Security by the time of trial. On March 29, 2012, Agent Tracy and two other officers were at a drop-off point for what he termed a Chinese bus line. ICE was assisting the Drug Enforcement Agency (DEA) with a tip they received. The

DEA asked for Agent Tracy's assistance because he was certified for interdiction. ROA. pp.

12-15. Agent Tracy explained to the jury about what an interdiction unit does as follows:

Interdiction is a law enforcement effort to stop the flow of narcotics into our neighborhoods by nontraditional means. People using common carrier parcel systems; Fed Ex, UPS, DHL, people coming in airplanes, buses, trains, anything except cars, or just people walking across the border, I assume.

ROA. p. 109, lines 1-7. Agent Tracy has been in law enforcement for nineteen years and worked in narcotics for ten years. ROA. p. 110, lines 1-5.

The Chinese bus line is a low-budget bus line operating out of the Chinatown neighborhood of Manhattan that comes straight to North and South Carolina with few stops. No identification or security is required to travel on the buses, so the bus line is "commonly used by felons, by wanted subjects, by people trafficking narcotics and counterfeit goods. There's a whole slew of people using these buses because of the lack of security." ROA. pp. 15-16 (direct quote, p. 15, line 24 – p. 16, line 3).

Agent Tracy explained to the jury the bus line does not have a real station, but instead drops off its customers at a parking lot or closed business. They were aware of a drop-off point at Dutch Square Mall and another location they went to, the hotel parking lot by Broad River Road near Interstate 20. ROA. p. 113-114.

Agent Tracy and two other officers were positioned at the Broad River Road drop-off point. ROA. p. 16. Agent Tracy testified about what he observed when the bus arrived:

We saw a few people getting off the bus and most of the people we observed didn't arise any suspicions, they were

¹ See Terry v. Ohio, 392 U.S. 1, 26 (1968).

getting off the bus, they were being greeted by relatives or friends, they were making calls, they were getting in cabs. We did see two subjects get off the bus and they retrieved a large number of bags, I think it was four bags total from underneath the bus. And then they engaged in conversations with themselves, continued to look over toward us and then they proceeded to walk up the street toward the post office.

ROA. p. 17, lines 5-14. The two people, a black male and a black female, turned out to be Spears and his girlfriend.

Agent Tracy explained why their attention raised the officers' suspicions: "Most of the other people didn't pay that much attention to us, they would look and go on with their business, but these two subjects continued to – what appeared to us is that they kept looking at us and talking amongst themselves." ROA. p. 18, lines 2-6.

The officers decided to make contact with Spears and his girlfriend. Later on cross-examination, Agent Tracy explained the following:

The reason we contacted them was to first of all identify them, and second of all to ascertain if they were involved in any criminal activity, specifically under our ICE authority it would be trafficking counterfeit goods. They have four large bags coming out of a known source area for counterfeit goods, we thought that might be something we wanted to take a look at.

ROA. p. 39, lines 6-12.

The two subjects walked up the street, towards the post office, and the officers walked behind them. Special Agent Tracy saw the female reach into her bag and pull out an unknown object, then appear to hand the unknown item to the male. The male never brought his hands above his waist so the officers expected the object would be in his hands, his waistband, or his pockets. As the two subjects walked, they continued to look back at the

officers. As the officers were fifteen to twenty feet away from the subjects, the officers asked to speak with them and they stopped walking. The officers identified themselves, made small talk, and asked about their travels. ROA. pp. 18-19.

Special Agent Tracy agreed Spears and his girlfriend would have been free to leave if they chose not to talk to law enforcement. ROA. p. 20, lines 2-7. He explained what happened next:

We then asked them if they had – or we told them the bus lines, that we had had problems in the past with drugs and wanted subjects and counterfeit merchandise, and we asked them for ID. I noted that while I was speaking with the male subject he continued to put his hands underneath his shirt and I guess the motion would be like puff his shirt away from his waistband.

ROA. p. 20, lines 9-15. On cross-examination, Agent Tracy described the shirt as a baggy type of sweatshirt. ROA. p. 39. Agent Tracy noted that in casual conversation, Spears answers “were very forthcoming.” ROA. p. 21, lines 10-12. However, when he asked Spears if he had any weapons on him or his possessions, Spears hesitated before answering “no.” ROA. p. 21, lines 12-14. Agent Tracy became suspicious because his training and experience taught him people hesitate when they are confronted with a question they do not want to answer truthfully. ROA. p. 21, lines 16-20.

Agent Tracy asked Spears to keep his hands where he could see them because Spears started pulling his shirt and moving his hands around his waistband and pocket. However, Spears continued to do the same thing a couple more times and became frustrated when Agent Tracy asked him to stop. Noting, “Drugs and guns are commonly hand in hand, criminals often have designated weapons in their possession,” Agent Tracy decided to pat

down Spears to ensure he did not have any weapons. ROA. p. 20, line 17 - p. 21, line 5 (direct quote, p. 20, lines 23-25).

Before the jury, Agent Tracy explained the following:

I didn't know what he had. I didn't know if he was concealing a weapon in his waistband, I didn't know what he had in his waistband but I didn't want him to [pull at his shirt and waistband] because hands are what can hurt you from a law enforcement perspective. If I . . . can't see your hands that's a concern for me, it's an officer safety concern.

ROA. p. 120, lines 13-19.

When he conducted the pat down, Agent Tracy found a balled-up object in the waistband that felt consistent with crack cocaine. Agent Tracy removed the object, which was wrapped in a napkin. Opening up the napkin, Agent Tracy saw what looked like crack cocaine and also a little marijuana. At that point, the officers detained Spears. ROA. pp. 21-22. On cross-examination, Agent Tracy explained "I've gotten plenty of crack out of a waistband before and that's what it felt like." ROA. p. 44, lines 5-6.

During trial, Agent Tracy explained his actions were not based on the tip, but solely on Spears' actions. ROA. p. 132.

Spears called his quondam girlfriend, Tracy Jenkins, as a witness at the suppression hearing. She testified she did not feel she was free to leave, but was hazy on the specific timing of events. She explained she was told to sit down, but that seemed to occur after Spears was already in handcuffs. ROA. pp. 54-59.

The trial court denied the motion to suppress. ROA. pp. 83-86. Agent Tracy was the State's first witness at trial and testified consistent with his in camera testimony. The second

witness was one of the other two officers with Agent Tracy, Investigator Briton Lorenzen, with Homeland Security. He was the officer who was actually notified about the tip by the DEA. He, Agent Tracy, and Deputy Frank Finch conducted surveillance at the hotel parking lot by Broad River Road. As it turned out, the two targets that were the subject of the tip were not on the bus, but were on another bus that went to the other drop-off point by Dutch Square Mall. ROA. pp. 143-144; p. 149. But while watching the passengers come off the bus and go about their business, he observed two passengers paying close attention to the officers. The officers were all in plain clothes, but Investigator Lorenzen's gun and badge were visible. ROA. pp. 143-145. Investigator Lorenzen explained a lot of weapons can be found in a waistband. ROA. p. 147.

Investigator Brian Gwyn, now with the Lexington County Sheriff's Department, was with the Richland County Sheriff's Department at the time of the arrest. He was also involved with acting on the tip of a black male travelling on the bus from New York carrying narcotics. Investigator Gwyn was monitoring both drop-off points; he initially went to the Broad River location to help set up surveillance and then went to the other drop-off point by Dutch Square Mall when informed that another bus arrived at that location. When he returned, he found the three officers with Spears. He received the seized rocks from Agent Tracy and the rocks field-tested positive for crack cocaine, so they arrested Spears. Investigator Gwyn took over the case as a Richland County case. ROA. pp. 154-155. Investigator Gwyn testified Spears made several statements. Spears claimed to not know what the rocks were, explaining "Just because it's on me doesn't mean I know what it is." ROA. p. 157. Spears complained he felt he was set up because he never saw law

enforcement on the bus line before. Spears admitted he was paid \$2,000 to transport the contraband because it was not worth as much in New York. ROA. pp. 157-158.

Deputy Frank Finch from the Lexington County Sheriff's Department was part of the DEA task force, and as part of his task force duties, was at the Broad River location with Special Agent Tracy and Investigator Lorenzen. He testified consistently with the other two officers involved in the arrest. He explained that as Spears and his girlfriend walked away from the station and the officers followed them, they kept looking back: "As they were walking away they kept looking behind them, kind of looking anxious. Most people were just kind of milling around waiting someone to pick them up, get in their car or on a cell phone to call a ride, whereas these people were literally waking away." ROA. p. 186, lines 21-25. Deputy Finch noted Spears kept pulling at his shirt even after Agent Tracy asked him twice to stop. This drew their attention to Spears' shirt because, Deputy Finch explained, "We are taught the eyes won't kill you but the hands will." ROA. p. 189, lines 6-19. Therefore, Agent Tracy conducted the pat down search. ROA. p. 189.

The forensic chemist testified the substance seized was 11.43 grams of crack cocaine. ROA. p. 176.

ARGUMENT

The trial court properly denied Appellant's motion to suppress the crack cocaine because law enforcement engaged Appellant in a consensual street encounter, not an investigative stop.

Spears argues the law enforcement officers lacked reasonable suspicion to “stop” him and his girlfriend. However, reasonable suspicion was unnecessary because law enforcement engaged in a consensual street encounter in which Spears was free to leave. Spears’ subsequent actions created a reasonable belief Spears may be armed with a deadly weapon, necessitating a Terry frisk. Agent Tracy felt an object during the frisk Agent Tracy immediately recognized was crack cocaine; therefore law enforcement lawfully seized the contraband under the plain feel doctrine. Thus, the trial court properly denied Spears’ motion to suppress because the Fourth Amendment was not violated in this case.

Spears mistakes his interaction with law enforcement as an investigative stop; however, it was merely a consensual street encounter. Under the Fourth Amendment, in order to arrest a person without a warrant, a law enforcement officer must have probable cause that the person committed a crime. Terry v. Ohio, 392 U.S. 1, 26 (1968). In order to stop a person and require a response to questioning, the Fourth Amendment further demands a law enforcement officer have a “reasonable suspicion” the person was engaged in misconduct. Terry, 392 U.S. at 27. When a law enforcement officer “accosts an individual and restrains his freedom to walk away, [the officer] has ‘seized’ that person.” Id. at 16.

However, “not all personal intercourse between policemen and citizens involves ‘seizures’ of persons.” Id. at 19, n.16. “Only when the officer, by means of physical force or

show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred." Id. "[L]aw enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place, by asking him if he is willing to answer some questions, by putting questions to him if the person is willing to listen, or by offering in evidence in a criminal prosecution his voluntary answers to such questions." Florida v. Royer, 460 U.S. 491, 497 (1983). "[E]ven when police officers have no basis for suspecting a particular individual, they may generally ask questions of that individual, ask to see identification, and request to search his or her luggage – as long as the police do not convey a message that compliance with their request is required." Florida v. Bostick, 501 U.S. 429, 434-35 (1991) (citations omitted).

"Moreover, characterizing every street encounter between a citizen and the police as a 'seizure,' while not enhancing any interest secured by the Fourth Amendment, would impose wholly unrealistic restrictions upon a wide variety of legitimate law enforcement practices." United States v. Mendenhall, 446 U.S. 544, 554 (1980). The Mendenhall court noted the need for police questioning for effective enforcement: "Without such investigation, those who were innocent might be falsely accused, those who were guilty might wholly escape prosecution, and many crimes would go unsolved. In short the security of all would be diminished." Id. (citation and quotation marks omitted).

In order to determine whether an incident is a seizure or a consensual street encounter, the trial court must determine whether, under the totality of circumstances, "a reasonable person would have believed that he was free to leave." Id. ("Examples of circumstances that might indicate a seizure, even where the person did not attempt to leave,

would be the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled.”).

Although the officers were at the bus stop originally because of the tip, the officers were legally allowed to be there regardless of whether they received a tip. Moreover, the bus stop is a known area for drug and counterfeit trafficking due to the Chinese bus line. Spears and his girlfriend raised the officers’ suspicions through their actions. But even if Spears did not raise officers’ suspicions, the officers were still allowed to approach Spears and his girlfriend to engage in conversation. The Fourth Amendment does not prohibit the officers from a consensual street encounter.

The facts of Mendenhall are instructive. In Mendenhall, the U.S. Supreme Court found no seizure occurred during a consensual encounter between law enforcement and Mendenhall in the concourse of the airport: the agents were in plain clothes and did not display their weapons, they approached the defendant and identified themselves as federal agents, and they requested to see the defendant’s identification and plane ticket. Id. at 555.

In the instant case, the police followed Spears and his girlfriend on a public street for a brief time before asking him to stop. Further, as in Mendenhall, more than one officer approached Spears and his girlfriend, the officers were dressed in plain clothes, and the officers asked to see identification. Demonstrating that Spears voluntarily spoke with the officers, Agent Tracy observed that Spears was “very forthcoming” during the conversation and in his answers to the officers’ questions. There is no evidence the officers displayed their weapons or used language or tone in a way that would compel Spears to answer their

questions. Until officer safety made the frisk necessary, the officers did not physically touch Spears. The officers never told Spears he could not leave, nor did they put him in handcuffs. If Spears and his girlfriend decided to walk away from the officers prior to the frisk, they would have been free to do so.

Similarly, the U.S. Supreme Court concluded a consensual encounter only became a seizure when the officers kept a defendant's plane ticket and identification, told him they suspected him of transporting narcotics, and asked him to accompany him to a room where they searched his luggage. Royer, 460 U.S. at 494 (1983). However, the Court agreed the Fourth Amendment was not invoked and thus, no seizure occurred when the officers approached and questioned the defendant and asked to see his identification and plane ticket. Id. at 501; see Id. at 523, n.3 (Rehnquist, J., dissenting) ("I also agree with the plurality's intimation that when the detectives first approached and questioned Royer, no seizure occurred and thus the constitutional safeguards of the Fourth Amendment were not invoked.").

In the instant case, no evidence suggests a seizure during the encounter between the officers and Spears until the need for a Terry frisk arose. The officers merely approached Spears and his girlfriend and asked them questions. Like in Mendenhall and Royer, the Court has held this type of encounter to be permissible and not invoke the safeguards of the Fourth Amendment.

Spears contends once the officers realized Spears' name did not match the targets' names, the questioning should have ceased. (See Brief of Appellant, p.14). Spears relies on State v. Tindall, 388 S.C. 518, 698 S.E.2d 203 (2010), as the basis of this argument. (See

Brief of Appellant, p. 14-15). However, Tindall is a case regarding a routine traffic stop, whereas the instant case is a consensual street encounter. Tindall is therefore inapplicable. Mendenhall, 446 U.S. at 556-57 (“Moreover, stopping or diverting an automobile in transit, with the attendant opportunity for a visual inspection of areas of the passenger compartment not otherwise observable, is materially more intrusive than a question put to a passing pedestrian, and the fact that the former amounts to a seizure tells very little about the constitutional status of the latter.”).

Spears challenges the “stop” rather than the frisk. However, for the sake of a thorough analysis, it bears noting Spears persistence in fiddling with his waistband, despite Agent Tracy’s admonitions, led Agent Tracy to justifiably perform a pat down frisk due to valid concerns Spears was armed and dangerous.

The need for police to conduct a frisk or patdown is greater than just the governmental interest in investigating crime. Terry, 392 U.S. at 23. The more important purpose of allowing frisks is to protect the life of police officers. Id. (“[T]here is the more immediate interest of the police officer in taking steps to assure himself that the person with whom he is dealing is not armed with a weapon that could unexpectedly and fatally be used against him.”). Since police officers are all too often killed in the line of duty by armed criminals, “[c]ertainly it would be unreasonable to require that police officers take unnecessary risks in the performance of their duties.” Id.

This Court has explained even when a Terry stop is proper, the police “must have a reasonable belief the defendant is armed and dangerous” before they may frisk a defendant. State v. Fowler, 322 S.C. 263, 267, 471 S.E.2d 706, 708 (Ct.App. 1996), citing Ybarra v.

Illinois, 444 U.S. 85, 100 S.Ct. 338 (1979). “In other words, a reasonable person in the position of the officer must believe the frisk was necessary to preserve the officer’s safety.” Fowler, 322 S.C. at 267, citing Terry, 392 U.S. at 27. Further, “[i]n 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, 249, 525 S.E.2d 535, 540 (Ct. App. 1999) (citing Terry); State v. Smith, 329 S.C. 550, 495 S.E.2d 798 (Ct. App. 1998). “The issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger.” Blassingame.

In the instant case, Agent Tracy had a reasonable belief Spears was armed and dangerous. When Agent Tracy asked Spears if he had any weapons on him, Spears hesitated before answering “no.” This raised suspicion for Agent Tracy because his training and experience taught him that hesitation often infers lying. More importantly, Apellant began pulling his shirt and moving his hands around his waistband and pocket. Agent Tracy asked Spears twice to keep his hands where he could see them because he continued to pull at his shirt and touch his waistband and pocket. After the second time, Agent Tracy decided to pat the Spears down for the safety of himself and the other officers.

Spears’s failure to abide by Agent Tracy’s request to keep his hands where he could see them, combined with the movements by Spears with his shirt, waistband, and pocket, would cause a reasonable person in Agent Tracy’s position to believe the frisk was necessary to preserve the officers’ safety. Fowler. Also, Agent Tracy recounted the specific facts which led Agent Tracy to believe Spears may be armed and dangerous. Id. Thus, the frisk was lawful and did not violate the Fourth Amendment.

Further, Agent Tracy lawfully seized the contraband found in Spears' waistline because upon feeling the item, he immediately recognized, based on his experience and training, the item was crack cocaine.² The crack cocaine was admissible under the plain feel doctrine of Minnesota v. Dickerson, 508 U.S. 366 (1993). In Dickerson, the Court held that a police officer may seize non-threatening contraband detected through the officer's sense of touch during a Terry frisk if the officer is lawfully in a position to detect the presence of contraband, the incriminating nature of the contraband is immediately apparent from its tactile impression, and the officer has a lawful right of access to the object. 508 U.S. at 373-75. The plain feel doctrine is only applicable where the officer conducting the frisk feels an object whose mass or contour makes its criminal character immediately apparent. Id. at 375. In the instant case, Agent Tracy lawfully seized the crack cocaine under the plain-feel doctrine since Agent Tracy was lawfully in the position to detect the presence of contraband, the incriminating nature of the contraband was immediately apparent to Agent Tracy, and he rightfully accessed the object during the Terry frisk.

In the instant case, law enforcement did not take any actions which violated the Fourth Amendment. The record shows the police engaged Spears in a consensual street encounter, conducted a lawful Terry frisk, and recovered the contraband properly through the plain feel doctrine. A trial court's ruling regarding a motion to suppress will be upheld when it is supported by any evidence. State v. Moore, 415 S.C. 245, 781 S.E.2d 897 (2016) (quoting State v. Provet, 405 S.C. 101, 107, 747 S.E.2d 453, 456 (2013)). Thus, this Court

² Note Spears does not challenge the seizure of the contraband on the grounds it exceeded the scope of a permissible Terry frisk.

should affirm the trial court's denial of Spears' motion to suppress because the trial court's findings are abundantly supported by evidence.

CONCLUSION

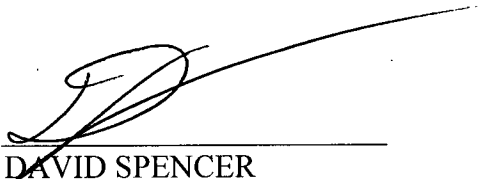
For all of the foregoing reasons, the judgment and conviction of the lower court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR.

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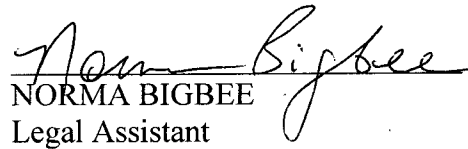
Appellant.

PROOF OF SERVICE

I, Norma Bigbee, certify that I have served the within Final Brief of Respondent on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to: Lanelle C. Durant, Esquire, South Carolina Commission on Indigent Defense, Division of Appellate Defense, P.O. Box 11589, Columbia, SC 29211.

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

This 18TH day of March, 2016.


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