

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal From Charleston County
Honorable Kristi L. Harrington, Circuit Court Judge

THE STATE,

Respondent,

vs.

JASON THOMAS HUSTED,

Appellant.

INITIAL BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Senior Assistant Deputy Attorney General

HAROLD M. COOMBS, JR.
Senior Assistant Attorney General

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

SCARLETT WILSON
Solicitor, Ninth Judicial Circuit

101 Meeting Street, Suite 400
Charleston, SC 29401
(843) 958-1900

ATTORNEYS FOR RESPONDENT

RECEIVED

MAY 15 2012

SC Court of Appeals

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
STATEMENT OF ISSUES ON APPEAL	1
STATEMENT OF THE CASE	2
ARGUMENT	
I. <u>The trial judge soundly denied the motion for directed verdict for assault on a police officer while resisting arrest.</u>	3
II. <u>The trial judge correctly charged the jury.</u>	8
III. <u>The trial judge correctly charged the jury.</u>	10
CONCLUSION	11

TABLE OF AUTHORITIES

Cases:

<u>Michigan v. Summers</u> , 452 U.S. 692, 101 S.Ct. 2587, 69 L.Ed.2d 340 and n. 12 (1981)	6
<u>State v. Brannon</u> , 388 S.C. 498, 697 S.E.2d 593 (2010)	3
<u>State v. McHoney</u> , 344 S.C. 85, 544 S.E.2d 30 (2001)	7
<u>State v. Simmons</u> , 269 S.C. 649, 239 S.E.2d 656 (1977)	9
<u>State v. Smith</u> , 315 S.C. 547, 446 S.E.2d 411 (1994)	10
<u>State v. Stone</u> , 285 S.C. 386, 330 S.E.2d 286 (1985)	8
<u>Terry v. Ohio</u> , 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed. 2d 889 (1968)	6

Other Authorities:

Rule 208(b)(1)(B)SCACR	3
3 W. LaFave, Search and Seizure § 9.2, pp. 36-37 (1978)	6

STATEMENT OF ISSUES ON APPEAL

1. The defendant asks whether the trial court made an error of law in failing to grant his motion for directed verdict but states no ground or basis for the trial court's purported error. (Appellant's Statement of Issues on Appeal 1).

2. The defendant asks whether the court made an error of law in failing to define "lawful arrest" for the jury when that lawful arrest was a necessary element of an [unidentified] offense. (Appellant's Statement of Issues on Appeal 2).

3. The defendant asks whether the court made an error of law in failing to charge his proposed jury instructions 1-4 and 6 but states no ground or basis for the trial court's purported error. (Appellant's Statement of Issues on Appeal 3).

STATEMENT OF THE CASE

The Charleston County Grand Jury charged the defendant with assault on a police officer while resisting arrest (2010-GS-10-2968). The defendant and his counsel came to trial December 8-9, 2010, before the Honorable Kristi L. Harrington, Judge, and a jury. The jury found the defendant guilty of resisting arrest, and the court imposed a sentence of one year imprisonment suspended upon service of sixty days, probation for one year, and certain terms and conditions. The defendant served opposing counsel with a timely notice of appeal.

ARGUMENT

I.

The trial judge soundly denied the motion for directed verdict for assault on a police officer while resisting arrest.

The defendant asks whether the trial court made an error of law in failing to grant his motion for directed verdict but states no ground or basis for the trial court's purported error. (Appellant's Statement of Issues on Appeal 1). The statement of an issue on appeal must present a purported error the appellate court's review, Rule 208(b)(1)(B)SCACR, and the want of a complete assignment of error presents nothing for review.

The substance of the defendant's argument on appeal is that the "officers merely wanted to talk to him to find out what was happening[,] . . . [and he] had the right not to talk to the officers." The officers lacked probable cause for an arrest, and he, then, could not have resisted a lawful arrest. (IBOA pp. 3-6). This is similar to his position at trial: After the state rested, the defendant made a motion for directed verdict on the ground that there had been no probable cause for an arrest, and he could then resist. The defendant also offered that one is free to walk away from a Terry stop and cited State v. Brannon.¹ There is no legal requirement to talk to the police, and the police had detained him merely because he did not talk to the police. (Tr. p. 135 - p. 137, line 12; p. 140, lines 2-16). The court denied the

¹ State v. Brannon, 388 S.C. 498, 697 S.E.2d 593 (2010)(police responded to 911 report of unauthorized person in a vehicle, arrived at scene and saw defendant; police approached and shouted "stop, police!"; defendant fled, and police caught him and charged resisting arrest; the Court found there was no evidence an arrest was being made when the defendant fled from police; also noting that under Terry v. Ohio an individual can be seized under the Fourth Amendment without being arrested under state law, and an individual is seized under the Fourth Amendment when a reasonable person, in view of all the circumstances of a particular case, would not believe he was free to leave).

motion. (Tr. p. 140, line 17 - p. 141). At the close of the evidence the defendant renewed his motion for a directed verdict. There was no probable cause for the arrest, no lawful arrest, and one has the right to resist an unlawful arrest. Resisting detention is not the same as resisting arrest. The court again denied the motion. (Tr. p. 214; p. 215, line 21 - p. 216). An examination of the evidence and applicable law shows that the police attempted to investigate an incident, stopped the defendant on the basis of reasonable suspicion, and the defendant responded by assaulting the officers and resisting arrest. The motion for directed verdict for assault on a police officer while resisting arrest was soundly denied.

Summary of Pertinent Testimony

Officer Riccio responded to a parking lot fight in progress that involved many individuals. Coincidentally, he was close to the Back Nine Pub and was on the scene some five seconds after receiving the call at about 2:20 AM on June 13, 2009. The Pub is in a strip-mall building, and a storage facility was in the back of the building. (Tr. pp. 59-61). He arrived in an unmarked vehicle and turned on his blue lights. When he saw an unrelated co-defendant carry a handgun to a truck, Riccio drew his weapon and handcuffed him. Riccio advised of having a person with a gun and requested back-up support. Officers Devasto and Ferguson reached the scene while Riccio's attention was on the man with the gun - and while people were still screaming - and immediately pursued a person who was fleeing into a wooded area. Riccio followed and saw the officers escorting the defendant - "kind of holding onto him" - out of the woods where he had been hiding with another person - both were covered in blood. The defendant was intoxicated and asking not to be tazed. When the defendant reached the parking lot, he broke loose and began running toward the rear of the Back Nine Bar. Devasto and Ferguson attempted to stop him. (Tr. pp. 62-66; p.

When the defendant reached the parking lot, he broke loose and began running toward the rear of the Back Nine Bar. Devasto and Ferguson attempted to stop him. (Tr. pp. 62-66; p. 74, lines 2-5; p. 89, lines 2-11). The defendant was very belligerent, very intoxicated, and not cooperative while the officers attempted to tell him that they needed to investigate. Officer Ferguson got a handcuff only on the defendant's left hand, and the defendant began swinging the attached cuff - a potential weapon. The encounter turned from an investigative stop to an assault on the police. When the defendant [successfully] physically resisted two officers, Riccio was concerned for their safety and twice applied pepper spray. The defendant said that his military training had prepared him to get out of the situation, and he required an uncommon number - at least three - pepper sprays to get him on the ground and to stop fighting. (Tr. pp. 67-69; p. 77, lines 20-25). Riccio testified, in sum, the police were trying to make an investigative stop since, in part, the blood on the defendant indicated his probable involvement in the reported fight. The agitated, intoxicated defendant escalated the investigative stop by fighting the police and apparently wanting to harm someone; he committed a crime in the presence of the officers. (Tr. p. 74, lines 14-22; pp. 77 - 78, line 2).

Similarly, Officers Ferguson and Devasto responded to the call about an assault, person with firearm, and physical activity in progress. On arrival, persons at the scene advised that two people involved in the physical activity had fled to the rear of the business. When they went behind the building and into a wooded area, the officers announced that they were police and said, "Don't move." The defendant asked the officers not to taze him, and the officers saw two people "actually covered in blood." (Tr. pp. 97-99, line 1; p. 113). The officers wanted to assess the situation and directed the blood covered people out of the

woods to a parking area for an investigative stop. The defendant was not cooperative and ignored Ferguson's asking - commanding - him to stop and attempted to leave the scene. The defendant knew that he was being detained. Ferguson smelled alcohol about the defendant, and the defendant began using foul language and became very belligerent and disorderly. The people at the front of the business could have heard the defendant. Ferguson, other involved persons, and everybody in the area knew that the defendant was being arrested. After Ferguson put the handcuff on his left arm, the defendant began swinging the other "really sharp" open part of the handcuff so aggressively that Ferguson feared for her life. (Tr. p. 99-100; p. 110, lines 2-10; p. 111, line 10 -p. 112; p. 116; p. 122, line 13 - p. 123, line 2).

The defendant testified. He was trying to get Robert Morris out of harm's way by taking him around back and away from Jason Ayers. Walking out of the woods, he made a smart remark but used no foul language. He put out his arms and explained to officers that he was not doing anything. He indicated who they were looking for, announced that he was going to the front of the building, and took some three or four steps. The defendant anticipated getting to the front of the bar, and police would question everyone. Instead, a female officer grabbed him. Officers put a handcuff on one wrist, and Riccio pepper sprayed him. (Tr. pp. 193-197; p. 204; pp. 210-211). He absolutely did not flail a handcuff at the officers. (Tr. p. 201). He did not threaten any police officer and did not try to hurt anybody. (Tr. p. 204). People told the police that he was the wrong person. (Tr. p. 202).

Discussion

The right of the police to detain an individual based upon reasonable suspicion of criminal activity cannot be seriously challenged. Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868,

20 L.Ed. 2d 889 (1968); Michigan v. Summers, 452 U.S. 692, 101 S.Ct. 2587, 69 L.Ed.2d 340 and n. 12 (1981)(circumstances determine reasonable length of investigatory detention) citing 3 W. LaFave, Search and Seizure § 9.2, pp. 36-37 (1978)(interrogation is the most common investigative technique utilized in a Terry type stop and may include both a request for identification and inquiry addressing suspicious conduct of person detained; officer may communicate with others to verify an explanation or to confirm identification); State v. Brannon, 388 S.C. 498, 697 S.E.2d 593 (2010)(observing that under Terry v. Ohio an individual can be seized under the Fourth Amendment without being arrested under state law, and an individual is seized under the Fourth Amendment when a reasonable person, in view of all the circumstances of a particular case, would not believe he was free to leave).

A defendant is entitled to a directed verdict when the State fails to produce evidence of the offense charged. In reviewing a motion for directed verdict, the trial judge is concerned with the existence of the evidence, not with its weight. On appeal from the denial of a directed verdict, an appellate court must view the evidence in the light most favorable to the State. If there is any direct evidence or substantial circumstantial evidence reasonably tending to prove the guilt of the accused, we must find the case was properly submitted to the jury.

State v. McHoney, 344 S.C. 85, 544 S.E.2d 30 (2001)(internal citation omitted). According to the state's evidence, the defendant quickly escalated the investigative stop by refusing to be detained, fighting the police, and placing at least one officer in fear. During the affray, the defendant committed a number of offenses in the officers' presence, including public disorderly conduct and assault, which supported his arrest, and the defendant resisted the officers' lawful arrest.

II.

The trial judge correctly charged the jury.

On appeal the defendant asks whether the court made an error of law in failing to define “lawful arrest” for the jury when lawful arrest was a necessary element of an [unidentified] offense. (Appellant’s Statement of Issues on Appeal 2). After the jury charge the defendant thought that “lawful arrest” needed to be explained. The court found that the instructions were sufficient. (Vol. II Tr. p. 51).

The jury charge included the state’s burden of proving the defendant’s criminal intent and knowingly and willfully resisting a lawful arrest by a person the defendant knew or should have known was a law enforcement officer, merely fleeing an officer’s demand to stop was not resisting arrest, and the defendant was not required to submit to an illegal arrest and could use as much force as reasonably necessary to resist an unlawful arrest. (Vol. II Tr. p. 45, line 15 - p. 48, line 3). A trial judge is constitutionally required to “explain so much of the criminal law as is applicable to the issues made by the evidence adduced at trial.” State v. Stone, 285 S.C. 386, 330 S.E.2d 286 (1985). The evidence adduced at trial established: In the state’s view, the police had reasonable suspicion to temporarily detain the defendant for investigation into his possible involvement in the bar fight, and the defendant suddenly escalated the officers’ attempted temporary seizure by assaulting the officers. In the defendant’s view, he was helping someone when the police arrived and during the course of cooperating with their investigation, the police handcuffed and pepper sprayed him. (Please see facts in Argument I). The record demonstrates the sufficiency of the court’s jury instruction, and further instruction could only reasonably have confused the jury. Even if the defendant had proposed an instruction, the trial judge has no obligation to grant a requested

charge which may confuse or mislead the jury. State v. Simmons, 269 S.C. 649, 239 S.E.2d 656 (1977).

III.

The trial judge correctly charged the jury.

The defendant asks whether the court made an error of law in failing to charge his proposed jury instructions 1-4 and 6 but states no ground or basis for the trial court's purported error. (Appellant's Statement of Issues on Appeal 3). The substance of the defendant's argument on appeal is that there is a "stricter application of disorderly conduct when dealing with police officers, as opposed to the general public." (IBOA p. 7). In light of the defendant's account of the incident - his attempting to help a man, and his denying both assaulting the police and using foul language (Tr. pp. 193-197; p. 201; p. 204; pp. 210-211) - his assignment of error is difficult to understand.

The defendant offered proposed jury charges including 1-4 and 6. The court noted that it was charging that a person may not be punished for voicing an objection to a police officer where no fighting words are used and, further, the court was charging the substance of most of the defendant's requests. (Vol. II Tr. pp. 5-10). In fact, the court's jury charge defining "fighting words" and that a person may not be punished for only voicing an objection to the police, and flight from an officer's demand to stop is not resisting arrest were charged and the substance of the defendant's requests 1, 2, 3, 4, and 6. (Vol. II Tr. p. 47, line 22 - p. 48, line 3). A trial judge is constitutionally required to "explain so much of the criminal law as is applicable to the issues made by the evidence adduced at trial." State v. Stone, 285 S.C. 386, 330 S.E.2d 286 (1985). Accord, State v. Smith, 315 S.C. 547, 446 S.E.2d 411 (1994)(substance of law is what must be instructed to jury). There was no conceivable error.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Senior Assistant Deputy Attorney General

HAROLD M. COOMBS, JR.
Senior Assistant Attorney General

SCARLETT WILSON
Solicitor, Ninth Judicial Circuit

BY: Harold M. Coombs, Jr.
Harold M. Coombs, Jr.

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

ATTORNEYS FOR RESPONDENT

May 15, 2012

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal From Charleston County
Honorable Kristi L. Harrington, Circuit Court Judge

THE STATE,

Respondent,

vs.

JASON THOMAS HUSTED,

Appellant.

PROOF OF SERVICE

I, Harold M. Coombs, Jr., certify that I have served the within Initial Brief of Respondent and Designation of Matter on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to his attorney of record, J. Joseph Condon, Jr., Esquire, 3842-C Leeds Avenue, N. Charleston, South Carolina 29405.

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

This 15th day of May, 2012.


HAROLD M. COOMBS, JR.

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

ATTORNEY FOR RESPONDENT

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal From Charleston County
Honorable Kristi L. Harrington, Circuit Court Judge

THE STATE,

Respondent,

vs.

JASON THOMAS HUSTED,

Appellant.

**DESIGNATION OF MATTER
TO BE INCLUDED IN THE RECORD ON APPEAL**

In addition to the matter designated by the Appellant, Respondent proposes the following to be included in the Record on Appeal:

Vol. I pp. 1-6; 58-141; 193-216

Vol. II pp. 5-10; 40-51

To facilitate the preparation of the Final Brief, Respondent requests that counsel for Appellant retain the page numbers of the trial transcript in the Record on Appeal, in addition to the new page numbers. Additionally, Respondent notes personal data identifiers and other sensitive information should be redacted from the transcript or other documents pursuant to the South Carolina Supreme Court Order dated August 13, 2007.

The undersigned hereby certifies this Designation contains no matter which is irrelevant to this appeal.

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Senior Assistant Deputy Attorney General

HAROLD M. COOMBS, JR.
Senior Assistant Attorney General

SCARLETT WILSON
Solicitor, Ninth Judicial Circuit

By: Harold M. Coombs, Jr.
Harold M. Coombs, Jr.

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

ATTORNEYS FOR RESPONDENT

May 15, 2012