STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Charleston County

Kristi Lea Harrington, Circuit Court Judge

CLARENCE ROBINSON,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

PETITION FOR WRIT OF CERTIORARI

LANELLE CANTEY DURANT
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

ATTORNEY FOR PETITIONER

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ISSUE PRESENTED

Did the PCR court correctly grant review pursuant to White v. State , 263 S.C. 110, 208 S.E.2d 35 (1974) because the applicant did not knowingly and voluntarily waive his appellate rights?

STATEMENT

In May 2008, the Charleston County Grand Jury indicted Clarence Montez Robinson on the charges of armed robbery and possession of a firearm during the commission of a violent crime. On June 22 – 25, 2009, Robinson proceeded to trial before the Honorable Deadra L. Jefferson and a jury. He was tried in a joint trial with two of his co-defendants, David Lee Brown[1] and Colin Boston. Robinson was represented by Stephen Harris, and the state was represented by Dale Savage and Michael Sahn, assistant solicitors. The jury retuned verdicts of guilty on all three defendants as indicted. Judge Jefferson sentenced Robinson to twelve years on the armed robbery, and to a concurrent sentence of five years on the gun charge. App. 862 – 863. Robinson's attorney filed a notice of appeal which was dismissed by the Court of Appeals because counsel failed to serve the notice on opposing counsel. App. 857.

On February 9, 2010, Robinson filed an application for post-conviction relief (PCR). The state filed a return on July 14, 2010. An evidentiary hearing was held on November 18, 2010 before the Honorable Kristi L. Harrington. Robinson was represented by Tiarna Harman, and the state was represented by Matthew J. Friedman, assistant attorney general. On December 15, 2010, Judge Harrington issued an order granting Robinson a review of direct appeal issues pursuant to White v. State, 263 S.C. 110, 108 S.E.2d 35 (1974). Judge Harrington denied and dismissed with prejudice all other allegations for PCR review. App. 856. Robinson's attorney filed a notice of appeal. This petition follows.

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[1] Court of Appeals affirmed Co-Defendant David Brown's conviction in State v. Brown, 2011-UP-182 (Ct. App. filed April 25,2011). A Petition for Writ of Certiorari to this Court filed June 13, 2011(pending).

ARGUMENT

The PCR court correctly granted review pursuant to White v. State , 263 S.C. 110, 208 S.E.2d 35 (1974) because the applicant did not knowingly and voluntarily waive his appellate rights.

On February 26, 2009, four black males with pistols and their faces covered with bandanas, entered Benders Bar & Grill in West Ashley and robbed the patrons and management. Everybody was told to get on the floor. As a result none of the patrons could identify the suspects' faces. Colleen Denham, one of the patrons, saw black Timberlands on one man and black high-top Nikes (Willie D's) on another man. App. 83, ll. 12 – 25; App. 93, ll. 1 – 25; App. 95, ll. 1 – 25; App. 96, ll. 1 – 25; App. 97, ll. 1 – 25.

Officer Bonanni testified that on 10:06 PM while on patrol he saw a car parked at 12 Sawgrass Road. The four-door vehicle was parked in the darkened fenced in area of James Island Christian Church. The vehicle was burgundy or maroon in color and he saw four black males inside. The officer said he had heard a dispatch about an armed robbery but a description of the vehicle was not given. App. 178, ll. 8 – 25; App. 179, ll. 1 – 24.

Sgt. Ray testified that he responded to 12 Sawgrass Road at 10:09 PM. When he arrived Officer Bonanni was talking to the driver of the car. Sgt. Ray asked the driver, Clarence Robinson, to get out of the vehicle and he patted him down. He was asked if he asked anyone else to get out of the car and he said yes. All four defendants were removed from the car. App. 231, ll. 5 – 25; App. 232, ll. 1 – 25; App. 233, ll. 1 – 25; App. 234, ll. 1 – 25; App. 235, ll. 1 – 25; app. 236, ll. 1 – 25; App. 237, ll. 1 – 25; App. 238, l. 1 – 25; App. 239, ll. 1 – 16.

An in-camera examination was held. Sgt Ray said when Brown was removed from the vehicle he saw a silver-black handgun on the floorboard of the car. The handgun was a .22 caliber

with no serial number. All of the defendants were placed under arrest and were read their Miranda rights. Sgt. Ray continued to search the car. App. 239, ll. 17 – 25; App. 240, ll. 1 – 25. Three more handguns were found in the trunk along with clothing, gloves, a knit hat, handkerchiefs and a pair of red and black Nike shoes. App. 243, ll. 2 – 25.

Defense counsel argued that there was no traffic violation for this stop, and no suspicion of them doing anything wrong. App. 259, ll. 18 – 25; App. 260, ll. 1 – 25; App. 261, ll. 1 – 25; App. 262, ll. 1 – 26. The trial court ruled that the stop was legal and all the evidence was admissible. App. 265, ll. 15 – App. 273, ll. 14.

At his PCR hearing, Robinson testified that he told his attorney that he wanted to appeal his conviction. App. 842, ll. 9 – 25; App. 844, ll. 3 – 16. He wanted to appeal because his Fourth Amendment rights were violated because the officers did not have a search warrant to search the trunk of the car. App. 843, ll. 1 – 3. His trial counsel was ineffective because he did not raise the issue of the firearm not being in his possession. App. 843, ll. 21 – 25.

The PCR judge ruled that Robinson did not meet his burden of proof on his claims of ineffective assistance of trial counsel. App. 853. The judge ruled that trial counsel was thoroughly competent in his representation of Robinson. App. 854. However, the PCR judge did find that Robinson did not knowingly and voluntarily waive his right to a direct appeal and granted him the right to a belated appeal according to White v. State, 263 S.C. 110, 108, S.E.2d 35 (1974). App. 854.

On review, a PCR judge's findings will be upheld if there is any evidence of probative value to support them. Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989). Trial counsel

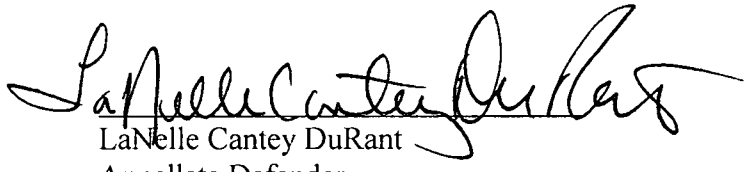
must ensure that a criminal defendant is made fully aware of his appeal rights. White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974).

The order of the PCR court granting the belated appeal should be affirmed.

CONCLUSION

The order of the PCR court granting a belated appeal pursuant to White v. State should be affirmed.

Respectfully submitted,



LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR PETITIONER

This 3rd day of January, 2012.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Charleston County
Kristi Lea Harrington, Circuit Court Judge

CLARENCE ROBINSON,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

I certify that a true copy of the petition for writ of certiorari and a copy of the appendix in this case have been served on Matthew J. Friedman, Esquire and Clarence Robinson, this 3rd day of January, 2012.

LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 3rd day
of January, 2012.

(L.S.)
Notary Public for South Carolina

My Commission Expires: December 4, 2017.

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

RECEIVED

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S.C. Supreme Court

Appeal from Charleston County

Deadra L. Jefferson, Circuit Court Judge

CLARENCE ROBINSON,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

BRIEF OF APPELLANT PURSUANT TO WHITE v. STATE

LANELLE CANTEY DURANT
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ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Did the trial court err in failing to suppress the four guns and all other evidence seized following the detention of the motor vehicle occupied by Robinson and three co-defendants when there was no reasonable suspicion of criminal activity to justify detaining the men?

STATEMENT OF THE CASE

In May 2008, the Charleston County Grand Jury indicted Clarence Montez Robinson on the charges of armed robbery and possession of a firearm during the commission of a violent crime. On June 22 – 25, 2009, Robinson proceeded to trial before the Honorable Deadra L. Jefferson and a jury. He was tried in a joint trial with two of his co-defendants, David Lee Brown[1] and Colin Boston.[2] Robinson was represented by Stephen Harris, and the state was represented by Dale Savage and Michael Sahn, assistant solicitors. The jury retuned verdicts of guilty on all three defendants as indicted. Judge Jefferson sentenced Robinson to twelve years on the armed robbery, and to a concurrent sentence of five years on the gun charge. App. 862 – 863. Robinson's attorney filed a notice of appeal which was dismissed by the Court of Appeals because counsel failed to serve the notice on opposing counsel. App. 857.

On February 9, 2010, Robinson filed an application for post-conviction relief (PCR). The state filed a return on July 14, 2010. An evidentiary hearing was held on November 18, 2010 before the Honorable Kristi L. Harrington. Robinson was represented by Tiarna Harman, and the state was represented by Matthew J. Friedman, assistant attorney general. On December 15, 2010, Judge Harrington issued an order granting Robinson a review of direct appeal issues pursuant to White v. State, 263 S.C. 110, 108 S.E.2d 35 (1974). Judge Harrington denied and dismissed with prejudice all other allegations for PCR review. App.

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[1] Court of Appeals affirmed Co-Defendant David Brown's conviction in State v. Brown, 2011-UP-182 (Ct. App. filed April 25,2011). A Petition for Writ of Certiorari to this Court filed June 13, 2011(pending).

[2] A fourth co-defendant, Darnel Brown, was not a party to this trial as his case had been resolved. He did not testify. App. 13, ll. 24 – 25; App. 14, ll. 1 – 3.

856. Robinson's attorney filed a notice of appeal. This brief of petitioner is being filed simultaneously with a petition for a writ of certiorari.

ARGUMENT

The trial court erred in failing to suppress the four guns and all other evidence seized following the detention of the motor vehicle occupied by Robinson and three co-defendants when there was no reasonable suspicion of criminal activity to justify detaining the men.

On February 26, 2009, four black males with pistols and their faces covered with bandanas, entered Benders Bar & Grill in West Ashley and robbed the patrons and management. Everybody was told to get on the floor. As a result none of the patrons could identify the suspects' faces. Colleen Denham, one of the patrons, saw black Timberlands on one man and black high-top Nikes (Willie D's) on another man. App. 83, ll. 12 – 25; App. 93, ll. 1 – 25; App. 95, ll. 1 – 25; App. 96, ll. 1 – 25; App. 97, ll. 1 – 25.

Andre Thompson, the general manager of the bar, testified that he noticed one of the robbers had tennis shoes like his – they were red and black Air Jordan shoes, but they had white laces. App. 190, ll. 9 – 25; App. 191, ll. 22 – 25; App. 192, ll. 19 – 25; App. 193, ll. 1 – 7.

Adina Walden testified that she did not see their faces as all wore bandanas. App.115, ll. 11 – 25. David Allsbrooks said the faces were covered, and he could not identify anyone, as did Mary Nance. App. 123, ll. 1 – 25; App. 147, ll. 1 -4.

Officer John Bonanni testified that on February 26, 2008 at 10:06 PM while on patrol he saw a car parked at 12 Sawgrass Road. The four-door vehicle was parked in the darkened fenced in area of James Island Christian Church facing a fence. He parked behind the car at an angle so the car could not leave. App. 181, ll. 1 – 25; App. 183, ll. 7 – 25. When he first approached the vehicle, he thought that it might be a couple parked there, or a church member had left the car. App. 189, ll. 2 – 13.

The vehicle was burgundy or maroon in color and he saw four black males inside. The officer said he had heard a dispatch about an armed robbery but a description of the vehicle was not given. App. 178, ll. 8 – 25; App. 179, ll. 1 – 24.

Officer Bonanni ran a check on the driver's license of the driver, and it was clear with no problems. He kept the license. App. 185, ll. 16 – 25; App. 186, ll. 1 – 25. Officer Bonanni admitted that the four men were not committing any crime and were already parked there. App. 187, ll. 11 – 25. He said the parking lot was approximately twelve miles from Benders Bar. App. 188, ll. 21 – 25; App. 189, ll. 1- 4.

Andre Thompson, the general manager of the bar, who had testified that one of the robbers had tennis shoes like his – red and black Air Jordan shoes but with white laces- was taken to the location where the four black males were detained. He could not recognize anyone by face, but he did recognize the red and black Air Jordans. App. 190, ll. 9 – 25; App. 191, ll. 22 – 25; App. 192, ll. 19 – 25; App. 193, ll. 1 – 7; App. 217, ll 10 – 25; App. 218, ll. 1 – 25; App. 219, ll. 1 – 25; App. 220, ll. 1 – 25; App. 221, ll. 1 – 11.

Sgt. Scott Ray testified that he responded to 12 Sawgrass Road at 10:09 PM. When he arrived Officer Bonanni was talking to the driver of the car. Sgt. Ray asked the driver, Clarence Robinson, to get out of the vehicle and he patted him down. He was asked if he asked anyone else to get out of the car and he said yes. All four defendants were removed from the car. App. 231, ll. 5 – 25; App. 232, ll. 1 – 25; App. 233, ll. 1 – 25; App. 234, ll. 1 – 25; App. 235, ll. 1 – 25; app. 236, ll. 1 – 25; App. 237, ll. 1 – 25; App. 238, l. 1 – 25; App. 239, ll. 1 – 16.

At that point, Brown's attorney asked for an in-camera hearing.[3] He argued that there was no articulable suspicion to hold the four men, and the police should have let them go. App. 236, ll. 6 – 24.

An in-camera examination was held. Sgt Ray said when Brown was removed from the vehicle he saw a silver-black handgun on the floorboard of the car in the back passenger seat where Brown had been sitting. . The handgun was a .22 caliber with no serial number. All of the defendants were placed under arrest and were read their Miranda rights. Sgt. Ray continued to search the car. App. 239, ll. 17 – 25; App. 240, ll. 1 – 25. The car was registered to Colin Boston. App. 242, ll. 25; App. 243, ll. 1. Sgt Ray found other items when he searched the car. Three more handguns were found in the trunk along with clothing, gloves, a knit hat, handkerchiefs and a pair of red and black Nike shoes. App. 243, ll. 2 – 25.

When asked if he had a key for the trunk, Sgt Ray responded that he did not. He discovered the guns and other items in the truck because he pulled the backseat forward about three to four inches, and he could see into the trunk then. That was how he saw the guns. App. 244, ll. 1 – 13. He had to call a locksmith to open the truck. App. 248, ll. 6 – 13.

Attorney Howell argued that this was a seizure because the men could not leave, and the police needed articulable suspicion to hold the men. He said all the police knew was that four men were involved in a robbery, and did not know whether they left on foot or in a car. App. 252, ll. 6 – 25; App. 253, ll. 1. The judge stated that all that was needed was reasonable articulable suspicion of criminal activity afoot. App. 253, ll. 1 – 25; App. 254, ll. 1 – 9. The judge said that the search of the trunk was a search incident to arrest after they

[3] At the beginning of the trial, Robinson's attorney, Stephen Harris, told the court that he was joining in the motions made by David Brown's attorney, Donald Howell.

had been arrested for the .22 pistol in the floorboard and were Mirandized. App. 256, ll. 8 – 12.

As the in-camera hearing continued on cross examination, Sgt Ray testified that he saw the gun after the four men were removed from the vehicle. They were placed in handcuffs, and he then retrieved the gun from the floorboard of the car. The men were then placed under arrest for the unlawful carrying of a gun. App. 258, ll. 1 – 25.

Robinson's attorney argued that there was no reason to stop and detain this vehicle. He argued that there was no traffic stop, and there was no suspicion of the men doing anything wrong. They were simply sitting in a car in a parking lot that was not illegal to sit in. There were not any "no trespassing" signs posted. App. 259, ll. 20 – 25; app. 260, ll. 1 – 20. Counsel argued that there was nothing in the record indicating that the officers detained the men for trespassing. The driver's license checked out as well as the license plate. App. 261, ll. 1 – 25; App. 262, ll. 1 – 16.

The judge denied the motion to suppress the evidence from the search relying on State v. Culbreath, 300 S.C. 232, 387 S.E.2d 255 (1990). App. 265, ll. 15 – App. 273, ll. 16.

After the lunch break, Brown's attorney objected to the search of the trunk incident because there was no warrant. The judge refused to hear his suppression motion because she said she had ruled on it and was not going to revisit the issue. She said the attorney had waived the issue. App. 277, ll. 1 – 25.

Later, the judge allowed Attorney Harris to put his objection on the record . App. 285, ll. 13 – 25; App. 286, ll. 1 – 25; App. 287, ll. 1 – 25; App. 288, ll. 1 – 25; App. 289 – 307, ll. 12.

Brown's attorney argued then cited Arizona v. Gant, 556 U.S. 332 (2009) which held that the scope of the search incident to arrest was limited to the inside of the car. App. 283, ll. 6 – 25.

Sgt Ray testified that he did not get a warrant to search the trunk. App. 299, ll. 2 – 22. He said that following an arrest, the police would search the vehicle which would include anywhere within access of the interior or anywhere within reach of the passengers of the vehicle. App. 302, ll. 1 – 25. He explained that they searched the passenger compartment and searched the trunk after they could see the gun from the backseat. App. 303, ll. 1 – 13.

When asked if a person could reach through the opening made by pulling the backseat out and grab the guns, Sgt. Ray said: "I think you probably could, but I didn't try." App. 306, ll. 3 – 15.

On cross examination by Robinson's attorney, Sgt. Ray admitted that when he pulled the back seat out, the opening was only two to three inches wide. App. 308, ll. 6 – 23.

The trial judge noted for the record that she allowed the defense to enlarge their argument from what was previously argued regarding the motion to suppress, and had taken additional evidence about the issue. However, she denied the motion to suppress. App. 307, ll. 13 – 25; app. 308, ll. 1 – 2. The judge ruled the evidence was admissible under the automobile exception to the Fourth Amendment requirement of a warrant. App. 312, ll. 7 - App. 315, ll. 6.

In State v. Culbreath, Id., the Supreme Court held that the police may briefly detain and question a person upon reasonable suspicion, short of probable cause for arrest, that he is involved in criminal activity, and if the officer's suspicions are confirmed or further

aroused, the stop may be prolonged and the scope enlarged as required by the circumstances.

In State v. Blassingame, 338 S.C. 240, 525 S.E.2d 535 (Ct. App. 1999), the Court of Appeals held that a police officer may stop and briefly detain and question a person for investigative purposes, without treading upon his Fourth Amendment rights, when the officer has a reasonable suspicion supported by articulable facts, short of probable cause for arrest, that the person is involved in criminal activity; reasonable suspicion" requires a particularized and objective basis that would lead one to suspect another of criminal activity.

In State v. Burgess, 394 S.C. 407, 714 S.E.2d 017 (Ct. App. 2011), the Court of Appeals cited U.S. v. Foster, 634 F.3d 243, 248 (4th Cir. 2011), by stating that the Court was mindful of concerns regarding the state "using whatever facts are present, no matter how innocent, as indicia of suspicious activity" and that the state "must do more than simply label a behavior as 'suspicious' to make it so." The Court continued to say that the state "must be able to either articulate why a particular behavior is suspicious or logically demonstrate, given the surrounding circumstances, that the behavior is likely to be indicative of some more sinister activity than may appear at first glance." Id.

In State v. Lesley, 326 S.C. 641, 486 S.E.2d 276 (1997) this court wrote:

> Police may stop a motor vehicle and briefly detain and question an occupant if they have a reasonable suspicion that the occupant is involved in criminal activity. Michigan v. Long, 463 U.S. 1032, 103 S.Ct. 3469, 77 L.Ed.2d 1201 (1983); State v. Robinson, 306 S.C. 399, 412 S.E.2d 411 (1991). This suspicion must be based on "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." Terry v. Ohio, 392 U.S. 1, 21, 88 S.Ct. 1868, 18780, 20 L.Ed.2d 889, 906 (1968). The police may also order an occupant out of the vehicle and, if the exercise of

> reasonable caution so warrants, frisk the occupant for weapons. Pennsylvania v. Mimms, 434 U.S. 106, 98 S.Ct. 330, 54 L.Ed.2d 331 (1977).
>
> The term "reasonable suspicion" requires "a particularized and objective basis" that would lead one to suspect another of criminal activity. Untied States v. Cortez, 449 U.S. 411, 417, 101 S.Ct. 690, 695, 66 L.Ed.2d 621, 629 (1981).

In Lesley the police had reasonable suspicion to stop a motor vehicle because it matched "the description of the suspect's car, including color, make and particular dealer's paper tags, and driven by a black male near complainant's residence." In appellant's case there was no description of the vehicle and there was no reasonable suspicion based on specific and articulable facts to support hemming the vehicle in front of the fence.

In Brendlin v. California, 551 U.S. 249, 127 S.Ct. 2400 (2007) the United States Supreme Court ruled that passengers of vehicles may challenge the constitutionality of a stop. The court noted that "the stopping of a vehicle and the detention of its occupants constitute a "seizure" within the meaning of the Fourth Amendment." 551 U. S. at 256, 127 S.Ct. at 2406 quoting Colorando v. Bannister, 449 U.S. 1, 4, n. 3, 101 S.Ct. 42 (1980) In Brendlin the court ruled that the passenger was seized from the moment the driver's car came to a halt on the side of the road. In our case appellant was seized when their car was detained. "Inarticulate hunches" do not support detentions. Delaware v. Prouse, 440 U.S. 648, 99 S.Ct. 99 S.Ct. 1391 (1979); Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868 (1968). The search was not constitutional because the fruits justified the arrests. Smith v. Ohio, 494 U.S. 541, 110 S.Ct. 1288 (1990).

The United States Supreme Court held in Arizona v. Gant, 556 U.S. 332 (2009), that among the exceptions to the warrant requirement is a search incident to lawful arrest. The

Court held that the police may search the passenger compartment of a vehicle incident to occupant's recent arrest only if it is reasonable to believe that the arrestee might access the vehicle at the time of the search or that the vehicle contains evidence of the offense of arrest. The Court also wrote that the limitation to a search incident to arrest, that it may only include the arrestee's person and the area within his immediate control, that is the area from within which he might gain possession of a weapon or destructible evidence, defines the boundaries of this exception to the warrant requirement and ensures that the scope of a search incident to arrest is commensurate with its purposes of protecting the arresting officers and safeguarding any evidence of the offense of arrest that an arrestee might conceal or destroy. Id.

The trial court should have suppressed the evidence found as a result of the stop. This was an illegal stop and violated Robinson's Fourth Amendment rights because the police did not provide any specific facts as to why there was articulable suspicion to detain Robinson and the three other men. The officer said he thought there might have been a couple parked at the site in the car. When Robinson's driver's license was clean, and the car tag was clean, the officer should have released them at that point. There was no evidence of criminal activity.

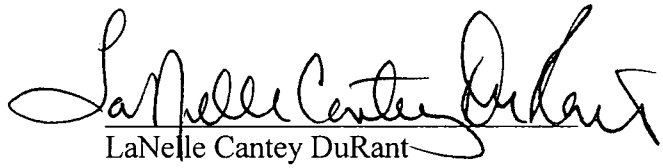
The search incident to arrest exceeded the scope of a search incident to arrest for the automobile exception. The officers' safety was not an issue because the men were out of the car and handcuffed before the officers searched the car after finding the first gun.

The trunk was not within the interior of the car, and there was no evidence presented that the men could have accessed the guns in the trunk from the backseat. There was no search warrant for the trunk.

CONCLUSION

Based on the above, the convictions should be reversed, and the case remanded for a new trial.

Respectfully submitted,



LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR APPELLANT

This 3rd day of January, 2012.

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RESPONDENT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Brief of Appellant pursuant to White v. State in the above referenced case has been served upon Matthew J. Friedman, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and upon Clarence Robinson, this 3rd day of January, 2012.

LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 3rd day of January, 2012.

(L.S.)
Notary Public for South Carolina

My Commission Expires: December 4, 2017 .