

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenwood County

Edward W. Miller, Circuit Court Judge

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MAY 11 2016

SC Court of Appeals

THE STATE,

RESPONDENT,

V.

/ JAMAL HAKEEM,

APPELLANT

APPELLATE CASE NO. 2015-001542

ANDERS BRIEF OF APPELLANT

KATHRINE H. HUDGINS
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
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TABLE OF CONTENTS

TABLE OF CONTENTS.....	1
TABLE OF AUTHORITIES	2
STATEMENT OF ISSUE ON APPEAL.....	3
STATEMENT OF THE CASE.....	4
ARGUMENT	5
CONCLUSION	9
PETITION TO BE RELIEVED AS COUNSEL.....	10

TABLE OF AUTHORITIES

Cases

<u>Schneckloth v. Bustamonte</u> , 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973)).....	7
<u>State v. Greene</u> , 330 S.C. 551, 499 S.E.2d 817, (Ct. App. 1997),	7,8
<u>State v. Rochester</u> , 301 S.C. 196, 391 S.E.2d 244 (1990)	7,8
<u>State v. Wallace</u> , 269 S.C. 547, 238 S.E.2d 675 (1977)	7

STATEMENT OF ISSUE ON APPEAL

Did the trial judge err in refusing to suppress photos of clothing and cigarettes found pursuant to a coerced consent to search Appellant's home given by Appellant's wife?

STATEMENT OF THE CASE

In June of 2015, the Greenwood County Grand Jury indicted Appellant Hakeem for armed robbery and possession of a firearm during the commission of a violent crime, indictments #15-GS-24-855, 856. On July 13, 2015, Appellant proceeded to jury trial before the honorable Edward W. Miller. Geddes Anderson represented Appellant at trial. C. Yates Brown and Wade Dowtin prosecuted the case. The jury returned verdicts of guilty. Judge Miller sentenced Appellant to twenty five (25) years for armed robbery and five (5) years for the weapon charge. A timely notice of intent to appeal was served on July 18, 2015. This appeal follows.

ARGUMENT

The trial judge erred in refusing to suppress photos of clothing and cigarettes found pursuant to a coerced consent to search Appellant's home given by Appellant's wife.

On April 11, 2013, an individual robbed the Shell Station in Greenwood. The clerk working at the Shell Station at the time of the robbery, Shkuntula "Shea" Smith, testified that the robber took a beer from the back cooler, placed it on the counter and asked for three packs of Newport cigarettes. (R. p. 104, line 20 – p. 105, lines 1-24). Smith testified that she turned to get the cigarettes and asked for a date of birth. (R. p. 105, lines 3-13). The clerk testified that the individual gave a date of birth of November 26th. (R. p. 105, lines 8-9). The clerk testified that when she turned around the individual pointed a gun at her and asked for all of the money from the register. (R. p. 105, lines 11-20). Both the store video surveillance and a copy of the 911 call placed by the clerk after the robbery were introduced in evidence.

Whitfield Brooks with the Greenwood County Sheriff's Office testified that when he arrived at the Shell Station pursuant to a 911 call from the clerk, the clerk handed him a printed receipt where she had entered the full date of birth, including the year, given by the robber. (R. p. 134, line 22 – p. 135, lines 1-6). A database search of names with the birth date given by the robber produced Appellant's name. (R. p. 135, lines 18-24). As a result, Appellant's photograph was placed in a photo line up and shown to the clerk. (R. pp. 136-137). The clerk identified Appellant as the robber.

After the clerk identified Appellant, members of the Greenwood Sheriff's Office went to Appellant's house where they spoke with his wife, Bird Hakeem. (R. p. 140, lines 1-25). Mrs. Hakeem testified that officers surrounded the house with guns drawn. (R. p. 53, line 1 – p. 54, lines 1-25). The Appellant was not at home when the officers arrived but his wife called him and

asked him to come home. (R. p. 141, lines 1-6). When Appellant voluntarily returned home in his truck, he was arrested. (R. p. 142, lines 15-21). Officers photographed a pack of Newport cigarettes in the center console of Appellant's truck. (R. p. 143, lines 19-25).

After Appellant's arrest, officers returned to the Hakeem house and obtained a consent to search from Appellant's wife. (R. p. 146, lines 2-10). The consent to search was introduced, over objection, as State's Exhibit #1. (R. p. 123, line 1 – p. 124, lines 1-4). Pursuant to the consent to search, officers found a hooded plaid sweatshirt, consistent with what the robber was wearing, with two packs of Newports in the pocket, a pair of jeans and a white T-shirt. (R. p. 147, lines 20 – p. 148, 149, lines 1-24). Trial counsel objected to the photos of the items, State's Exhibits #21 through #24, (R. p. 148, lines 16-19) and objected to State's Exhibit #25, the blue jeans, (R. p. 150, lines 2-8) but told the trial judge that State's Exhibit #26, the hooded plaid sweatshirt, was without objection¹. (R. p. 151, lines 5-9).

Prior to trial Appellant moved to suppress the items seized pursuant to a warrantless search of Appellant's home. (R. p. 22, lines 19-21). During the pre-trial hearing Appellant's wife testified:

A little after 6:00. It was a little after 6:00. And Officer Strickland pulled me to the side and we were talking. He said, now, I have some officers here. He said, we'd like to do a search. He said, I don't have a search warrant. He said, but if you go on and let us do it, he said, they won't rough up your furniture. He said but me, myself, I won't do it. He said, but some of the other officers might be upset that they have to go back and get a search warrant. So I signed.

(R. p. 58, lines 10-18). Officer Strickland did not testify at the pre-trial hearing and did not testify at trial.

The trial judge denied the motion to suppress stating:

¹ Trial counsel's failure to object to the introduction of the hooded plaid sweatshirt may need to be addressed in post conviction relief.

You can get the material at lunch if you want to, but I'm going to find that in the totality of the circumstances that Ms. Hakeem lives there. She has custody of the house. She has testified she gave free and voluntary consent. I don't find from the totality of the circumstances that this search should – any of the fruits from the search should be suppressed.

(R. p. 71, lines 13-18). The judge additionally stated, "Well, I think that they would have gotten a search warrant had not Ms. Hakeem consented to the search. I don't find that her will was overborne. I find that she's educated. She is a resident of the house with the authority to grant consent. She never limited the scope. And so I am going to – I deny your motion." (R. p. 72, lines 10-15). The trial judge erred.

Whether the consent to search was voluntary or the product of duress or coercion, express or implied, is a question of fact to be determined by the totality of the circumstances. State v. Wallace, 269 S.C. 547, 238 S.E.2d 675 (1977) (citing Schneckloth v. Bustamonte, 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973)). The burden is on the State to show voluntariness. Wallace, supra. The issue of voluntary consent, when contested by contradicting testimony, is an issue of credibility to be determined by the trial judge. Id. A trial judge's conclusions on issues of fact regarding voluntariness will not be disturbed on appeal unless so manifestly erroneous as to be an abuse of discretion. State v. Rochester, 301 S.C. 196, 391 S.E.2d 244 (1990) (dealing with voluntariness of a statement).

In State v. Greene, 330 S.C. 551, 499 S.E.2d 817, (Ct. App. 1997), this Court found that the trial judge did not abuse her discretion in finding that the defendant's wife voluntarily consented to the search of her mother's home where police had been told that the defendant stored drugs. In Greene the wife testified that an Officer Reyes told her she could consent to the search of her mother's home or the officers could obtain a search warrant. The wife testified that Officer Reyes told her she could prolong the ordeal by not consenting or consent and the officers

would get out of her way. Officer Reyes did not testify at trial. This Court wrote, “. . . [W]hile a threat to obtain a warrant is a factor to be considered in determining the voluntariness of consent, it does not necessarily vitiate that consent. State v. Wallace, 269 S.C. 547, 238 S.E.2d 675 (1977) (per curiam). Reyes's statement alone does not make Pamela's [wife's] consent involuntary as a matter of law, but rather is simply one of the factors to consider in the totality of the circumstances.” State v. Greene, 330 S.C. 551, 558, 499 S.E.2d 817, 820 (Ct. App. 1997).

In contrast, the threat in the present case was more than just a threat to obtain a search warrant. In the present case the officer implied that if the wife did not consent to the search, other officers would be upset about having to obtain a search warrant and would “rough up her furniture.” In not calling Officer Strickland to testify as to what he told Appellant's wife, the State failed to meet its burden of proving the consent was voluntary. Under the totality of the circumstances in the present case where police surrounded the house with guns drawn and threatened to rough up furniture inside the house if the wife did not consent, the wife's consent was involuntary as a matter of law. The trial judge erred in refusing to suppress photographs taken and items seized as a result of the involuntary coerced consent to search.

CONCLUSION

Based on the above argument, Appellant's convictions and sentences should be reversed and the case remanded for a new trial.

Respectfully submitted,



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

This 11th day of May, 2016.

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Edward W. Miller, Circuit Court Judge

THE STATE,

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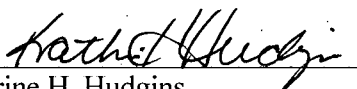
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Jamal Hakeem states:

1. She is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent appellant.
2. She has reviewed the record of appellant's trial before Judge Edward W. Miller, which was held on July 14, 2015, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. She has, pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967), briefed an arguable legal issue which arose during the course of the trial.

WHEREFORE, she asks the Court to relieve her as counsel for Jamal Hakeem.

Respectfully submitted,


Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

This 11th day of May, 2016.

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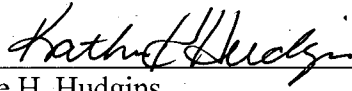
**DESIGNATION OF MATTER TO BE
INCLUDED IN RECORD ON APPEAL**

Appellant proposes the following be included in the Record on Appeal:

- (1) True-billed indictments;
- (2) Trial transcript;
- (3) State's Exhibit #1 Consent to Search;
- (4) State's Exhibit #2 Photo Lineup – to be transported;
- (5) State's Exhibit #3 Photo of Jamal Hakeem – to be transported;
- (6) State's Exhibit #5 Video Surveillance Video – to be transported;
- (7) State's Exhibits #21 through #24 Photos- to be transported.

I certify that this designation contains no matter which is irrelevant to this appeal.

May 11th, 2016


Kathrine H. Hudgins
Appellate Defender

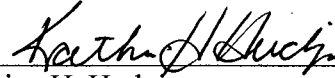
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Attorney for Appellant

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Anders Brief of Appellant 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."

May 11, 2016



Kathrine H. Hudgins
Appellate Defender

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