THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GEORGETOWN COUNTY
Court of General Sessions

Edward B. Cottingham, Circuit Court Judge

Case No. 2011-GS-22-01298

State of South Carolina .....Respondent

vs.

FRANKLIN EZEKIEL DENNISON .....Appellant.

BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1. Did the court err in offering its own motions and opinions on evidence?
2. Did the court err in distracting the jury panel from the testimony and evidence presented before it?
3. Did the court err in demonstrating prejudice toward the Defendant and/or his counsel?
4. Did the court err in admitting evidence despite the lack of a complete chain of evidence?
5. Did the court err in admission of law enforcement records?
6. Did the court err in ruling that the validity of the chain of evidence was a matter for the jury to determine?
7. Did the court err in admitting evidence from a traffic stop that was made without articulable reasonable suspicion on the part of the police officer?
8. Did the court err in the admission of evidence which was the result of an illegal search of the defendant's vehicle and/or person?

STATEMENT OF THE CASE

The Appellant, Franklin E. Dennison, was indicted for Possession With Intent to Distribute Cocaine Base Second Offense and with Attempted Taking of a Firearm or Other Weapon from a Law Enforcement Officer. A jury trial was held on September 30 – October 3, 2013, the Honorable Edward B. Cottingham presiding. The Appellant was represented by Bobby G. Frederick and Laura L. Hiller. The State was represented by Alicia Richardson, Assistant Solicitor for the Fifteenth Judicial Circuit. Grace L. Hurley was the court reporter. The jury returned a verdict of guilty on the charge of Possession With Intent to Distribute Cocaine Base and a verdict of not guilty on the charge of Attempted Taking of a Firearm or Other Weapon from a Law Enforcement Officer. The Appellant was sentenced to a term of twenty years on the charge of Possession With Intent to Distribute Cocaine Base Second Offense. Appellant timely filed notice of appeal. Zachary D. Ellis represents the Appellant on the appeal of this case.

I. THE COURT ERRED BY PREJUDICING DEFENDANT'S RIGHT AND ABILITY TO HAVE A FAIR AND IMPARTIAL TRIAL.

A. THE COURT ERRED IN OFFERING ITS OWN MOTIONS AND/OR OPINIONS REGARDING EVIDENCE.

The right to a fair and impartial trial by a jury of one's peers is one of the most fundamental and significant rights afforded to an individual under the Constitutions of both the United States of America and the State of South Carolina. The concept of a trial by an impartial jury traces its origins to England before the idea of the United States of America had even been conceived, and it is one of our nation's most basic rights as noted in the Bill of Rights. In the present case before the Court, the Appellant's ability to exercise and enjoy this right was damaged by the words, actions and attitude of the trial court toward the Appellant and his trial counsel.

The Sixth Amendment to our nation's Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

U.S. Const. amend. VI. See also S.C. Const. art. 1, § 14 (providing that the right of trial by jury shall be preserved inviolate, and that any person charged with an offense shall enjoy the right to a speedy and public trial by an impartial jury).

In the present case, the trial court's bias against the Appellant and/or his trial counsel was so apparent as to deny Appellant his right to an impartial trial by jury. During the opening statement of Appellant's trial counsel, the trial court interrupted counsel's statement by objecting to counsel's statement *sua sponte* in the presence of the jury panel as counsel was beginning to

discuss the presumption of innocence, which is an inherent right enjoyed by every criminal defendant in our nation. R. 72.

The court again interjected its own opinions *sua sponte* in the presence of the jury during the direct testimony of Officer Walton. Appellant's counsel timely objected to testimony on the grounds of hearsay regarding portions of the State's documentation relating to the drugs at issue in this matter. The court ruled that the documentation was a business record which is admissible despite the lack of mention of said hearsay exception by the assistant solicitor and prior to the assistant solicitor laying a proper foundation for such evidence. R. 123.

The court continued to preside in this fashion, as evidenced by another objection made by the court *sua sponte* during Appellant's testimony in the presence of the jury. As Appellant related his account of the events surrounding his arrest, the court interrupted Appellant's testimony to lodge its own objection on the grounds of hearsay, despite the lack of any motion or objection by the assistant solicitor. R. 163. Such repeated offerings of the court's own opinions and motions throughout the trial, all of which were made in favor of the State and without the State first lodging an objection or making an argument or motion on its own accord, serves to prejudice and influence the jury, even if inadvertently, against Appellant.

Courts in our state have long embraced the notion that all defendants have a right to enjoy a trial from an impartial jury without influence from the court. As noted in State v. White, "the real object...is to leave the decision of all questions of fact to the jury exclusively, uninfluenced by any expressions of opinion by the judge, whose position would very naturally add great weight to any opinion he might express." State v. White, 15 S.C. 381, 392 (S.C. 1881). See also State v. Lynch, 279 N.C. 1, 181 S.E.2d 561 at 567 (N.C. 1971) (stating that every person charged with a crime has the right to the assistance of counsel at a trial before an impartial judge and an

unprejudiced jury in an atmosphere of judicial calm).

As such, courts throughout the nation have long held that trial courts should not improperly comment on the evidence presented at trial. In the case of Kelvin v. State, the Florida Court of Appeals concluded that the trial court exceeded its bounds and prejudiced the appellant because the trial judge interrupted a line of questioning by defense counsel by stating, "I don't know why the state isn't objecting, but I'm going to start objecting. This is going to be a long trial, let's go on to something more relevant." Kelvin v. State, 610 So.2d 1359, 1364 (FL Ct App. 1 Dist. 1992). See also State v. Lynch, 181 S.E.2d 561 at 567 (holding that in his manner of ruling upon objections, the judge must exercise the same caution as at other stages of the trial not to express an opinion as to the credibility of the witness or the merits of the case). Such statements from the court, particularly in the presence of the jury panel as in Kelvin, cannot help but influence the jury in favor of one party over the other. Where, as in the present case, the court repeatedly offers its own thoughts and objections against only one party in the presence of the jury and particularly when not called upon by either party's counsel to so issue a ruling, the jury may become less than impartial in its efforts to decide a case upon its merits.

B. THE COURT ERRED BY DISTRACTING AND/OR INFLUENCING THE JURY PANEL THROUGH ITS WORDS AND ACTIONS.

For similar reasons, a trial judge should take care not to influence a jury panel through any words, actions, expressions, etc. In the present case, the court repeatedly interrupted Appellant's trial counsel, spoke loudly with his law clerk during counsel's cross-examination of a State's witness, and exhibited various mannerisms and expressions to indicate approval or disapproval of various portions of testimony.

Throughout the trial, the court regularly interrupted Appellant's trial counsel and treated

counsel, particularly Mr. Frederick, with hostility. During one motion alone, which was heard outside of the jury's presence, the court interrupted trial counsel on seven different occasions, referenced an unrelated case in the past wherein the trial court disagreed with Appellant's trial counsel, and instructed trial counsel not to argue with the court any further. R. 74-78. This motion was brought by Appellant's trial counsel only after the trial court objected *sua sponte* to trial counsel's opening statement as she was discussing the presumption of innocence.

Furthermore, during the cross examination of State's witness Donald Tempalsky by Appellant's trial counsel, the court was "leaning forward with clear expressions of aggravation and exasperation towards Defense counsel which was in full view of the jury and they were looking at Your Honor." R. 115. Appellant's trial counsel also noted that the court "throughout the cross examination...was again speaking with Your Honor's law clerk in front of the microphone and on at least two occasions audibly...was talking about jury nullification where I could hear it and I'm certain the jury as well could hear it." R. 115. Although the court later saw fit to issue a curative instruction to the jury on any inferences that the jury panel might have drawn from any statements, expressions or mannerisms made by the court during the trial, such repeated displays of bias for or against one party over the other cannot help but sway the jury such that a fair and impartial trial is no longer possible.

A trial judge is more than a moderator or an umpire; he or she has the responsibility to preside in such a way as to promote a fair and expeditious development of the facts unencumbered by irrelevances. See U.S. v. Harris, 501 F.2d 1, 10 (9th Cir. 1974). The Harris court continued by stating that "a trial court must be ever mindful of the sensitive role it plays in a jury trial and avoid even the appearance of advocacy or partiality." Id. Due to the trial court's repeated interruptions and "excessive participation," the Harris court found that a new trial was

warranted so as to afford the defendant a right to an impartial trial. See also State v. Coggins, 210 S.C. 242, 42 S.E.2d 240 (S.C. 1947) (*Taylor, J., dissenting*); U.S. v. Pritchard, No. 10-50438 (9th Cir. 2012) (unpublished opinion) (noting that repeated interruptions by the trial judge of one party and other *sua sponte* statements from the bench prevented the possibility of an objectively fair trial). Due to the respect and attention afforded the trial court by the jury panel, the court must take special care not to demonstrate bias toward one party or the other, as it may be impossible to un-ring the bell once partiality has been demonstrated.

C. THE COURT ERRED BY OVERLY RESTRICTING APPELLANT'S TRIAL COUNSEL.

A significant factor in a criminal defendant's ability to receive a fair trial derives from the ability of the defendant's trial counsel to zealously defend his or her client. It is well-known in this nation that the "aid of counsel is guaranteed by the Constitution to every person accused of crime, and this is universally recognized as one of the surest safeguards against injustice and oppression. Any conduct or statement on the part of the court that tends to impair the influence or destroy the usefulness of counsel is palpable and manifest error." State v. Lynch, 181 S.E.2d at 568.

A court's actions or statements against a party at trial may produce a chilling effect on that party's counsel and his or her abilities to adequately advocate for a client. As noted above, when Appellant's trial counsel first made an objection during the course of the trial, the court interrupted counsel on seven separate occasions in just one short exchange. R. 74-78. Moreover, during this exchange, as counsel attempted to state his objection, the court responded in an exasperated manner despite the fact that the trial had just begun, at one point going so far as to order counsel not to argue further. R. 76.

Similarly, when trial counsel attempted later in the trial to object, the court responded angrily and proceeded to inform counsel that his motion was "absurd and ridiculous." R. 115. Although counsel attempted to follow up on his objection by requesting that the court speak more quietly with his law clerk, the court again responded angrily and informed counsel that he "will speak with [his] law clerk in a manner that [he deemed] appropriate." R. 117. The court continued to engage Appellant's trial counsel in this hostile and sarcastic manner throughout the trial as evidenced in an exchange off the record regarding a curative instruction given by the court as well as a docketing conference with the assistant solicitor. R. 152-155. This attitude from the court continued even after a verdict was rendered as the court accused Appellant's trial counsel of "trying to mistry this case from the day it started." R. 245.

Courts always have enforced the rule that witnesses must not be treated with indignity or discourtesy by court or counsel, and counsel certainly are entitled to be treated with equal consideration. State v. Lee, 166 N.C. 250, 80 S.E. 977, 979 (N.C. 1914). Moreover, counsel are not only entitled to this on their own account, but because derogatory remarks from the bench towards counsel are calculated to injuriously affect the client and the cause which the counsel represents. Id. This is true even if the court did not intend to damage the client's case or reflect upon counsel, as the result in the minds of the jury panel might well be the same. Id.

Moreover, when trial counsel's efforts to make a trial record sufficient for appellate review are met not only by failure or refusal of the court to make such a record, but are met also by overt hostility of the trial judge to such efforts, the risks that a good trial record will not be made are significantly increased. State v. Rudd, 60 N.C.App. 425, 299 S.E.2d 251, 253 (N.C. Ct. App. 1983). As held by the court in Rudd, should the actions of the trial judge substantially inhibit the defendant's defense, and if a complete trial record was not made to the prejudice of

defendant's rights, a new trial should be granted. Id. See also State v. Wright, 271 S.C. 534, 248 S.E.2d 490 (S.C. 1978) (finding that a new trial should be ordered when counsel is so inhibited by an improper rebuke that he could not conduct an adequate defense); State v. Pace, 316 S.C. 71, 447 S.E.2d 186 (S.C. 1994) (holding that remarks of the court that tend to impugn the credibility of counsel and to diminish him and his defense of his client in the eyes of the jury create prejudice to the defendant since an attorney's credibility is crucial to a defense); Alley v. State, 619 So.2d 1013, 18 Fla. L. Weekly D1268 (Fla. Ct. App. 4 Dist. 1993) (ruling that a mistrial is required if the judge's comments and conduct were reasonably likely to create a prejudicial effect on the defendant).

II. THE COURT ERRED BY ADMITTING DRUGS AND DOCUMENTS RELATING TO DRUGS DESPITE THE LACK OF A PROPER FOUNDATION.

The State offered documentation relating to a best bag that contained the drugs at issue in this case as Exhibits 3, 4 and 5 in an attempt to present a proper chain of evidence in the present matter. Appellant timely objected to the testimony and evidence presented by the State as being inadmissible on the ground of hearsay. R. 122-123. The evidence was introduced by Sergeant Kyle Walton who testified that he was not the evidence custodian when the evidence at issue was submitted in this case. R. 120. Following the objection from Appellant's trial counsel, the trial court ruled to admit the evidence after opining *sua sponte* that the evidence at issue constituted a business record that is admissible, as noted above. R. 123. The Court's ruling was clearly erroneous.

Information contained in the documents was hearsay under Rule 803, SCRE. Although hearsay, certain business records kept in the normal course of business may qualify as an exception to the hearsay rule if certain criteria is met. Rule 803 SCRE provides:

> **(6) Records of Regularly Conducted Activity**. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness; provided, however, that subjective opinions and judgments found in business records are not admissible. The term "business" as used in this subsection includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

Rule 803(6), SCRE, emphasis added.

The record fails to establish the required elements necessary under Rule 803(6) by a custodian or other qualified witness. The original custodian who accepted the best bag into evidence and who generated the documents introduced at Appellant's trial was not available for court and did not testify to authenticate the records. Sergeant Walton was not the evidence custodian at the time the records were generated, and he did not receive the best bag into evidence or create the evidence used by the State at trial. Moreover, the court interjected *sua sponte* during the objection by Appellant's trial counsel to assert in the presence of the jury that the exhibits were admissible under the business records exception despite the fact that the State had not yet sought to avail itself of that hearsay exception. R. 122-123. As such, the chain of custody demonstrated by the State was incomplete, and the drugs and the subsequent analysis of the drugs also constitute evidence that was presented to the jury and admitted as evidence in error.

Furthermore, the court's role is to ensure that evidence is not admitted into evidence or presented to the jury unless it is properly before the court. A jury panel composed of ordinary citizens cannot be expected to know the Rules of Evidence or the meaning behind the hearsay

rule and the exceptions to it. Yet, the court ruled that it would "leave it for the jury to consider as to whether or not there's a proper chain with regard to this issue." R. 123. Such an assignment of responsibility to the jury was in error unless or until the State sufficiently had proven that it had presented a complete chain of custody and thereby properly presented the evidence to the court.

III. THE COURT ERRED BY DENYING DEFENDANT'S MOTION TO EXCLUDE EVIDENCE FROM THE TRAFFIC STOP DESPITE A LACK OF ARTICULABLE REASONABLE SUSPICION FOR SAID TRAFFIC STOP.

In order to effect a traffic stop, a police officer must possess reasonable suspicion that a crime is occurring. In the present case, no such reasonable suspicion existed to justify the traffic stop. Officer Tempalsky testified that he thought he observed someone hand currency to the driver of a vehicle, who was later determined to be Appellant, while that vehicle was temporarily stopped in the roadway. R. 9. Officer Tempalsky could not testify with certainty that he saw money change hands or that anything was handed from the occupants of the car back to the individual. R. 19. Testimony also was offered to demonstrate that the officer observed this incident from approximately two hundred forty (240) feet away. R. 26. Based on these observations, the officer repositioned his vehicle and prepared to pull out into the roadway to make a traffic stop. R. 10. Subsequent to that action, the officer noted that the suspect vehicle began traveling at a speed of 38 miles per hour in a 30 miles per hour zone, and that one rear passenger appeared to not be wearing a seat belt. R. 10.

As our courts have long held, reasonable suspicion requires a "particularized and objective basis that would lead one to suspect another of criminal activity." State v. Rogers, 368 S.C. 529, 629 S.E.2d 679, 682 (S.C. Ct. App. 2006). Moreover, reasonable suspicion is

something more than an inchoate and unparticularized suspicion or hunch. Id. citing State v. Butler, 343 S.C. 198, 202, 539 S.E.2d 414, 416 (S.C. Ct. App. 2000).

In the present case, the officer testified that he could not be certain that he had in fact witnessed a drug transaction. Testimony also was offered to demonstrate the officer did not have a clear vantage point to see any criminal activity occurring. However, based on these facts, the officer repositioned his car in an attempt to ready himself to make a traffic stop, which, according to his testimony, he ultimately did make by activating his overhead lights and flashing headlights after observing two additional minor infractions that generally do not give rise to a traffic stop in the ordinary course of the lives of most drivers within this State. As such, the traffic stop should have been ruled to be improper, and the trial judge erred in allowing the introduction of any evidence discovered as a result of the investigatory stop.

IV. THE COURT ERRED BY NOT EXCLUDING EVIDENCE FROM THE TRAFFIC STOP AS BEING OBTAINED AS THE RESULT OF AN ILLEGAL SEARCH AND SEIZURE.

The Fourth Amendment guarantees individuals the right to be free from unreasonable searches and seizures. U.S. Const. amend. IV; S.C. Const. art. I, § 10. Temporary detention of individuals during the stop of an automobile by the police, even if only for a brief period and for a limited purpose, constitutes a seizure of persons with the meaning of the Fourth Amendment. State v. Pichardo, 367 S.C. 84, 623 S.E.2d 840, 847 (S.C. Ct. App. 2005). An investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop and the scope of the detention must be carefully tailored to its underlying justification. Id. at 848. The officer's purpose in an ordinary traffic stop is to enforce the laws of the roadway, and ordinarily to investigate the manner of driving with the intent to issue a citation or warning.

Id.

In the present case, after informing Appellant of the reason for the traffic stop, Officer Tempalsky removed the keys from the ignition of Appellant's vehicle before deploying his taser into Appellant's torso despite never having seen a weapon in the vehicle or being presented with a credible threat from Appellant. R. 11-13. Officers ultimately used their tasers on three separate occasions to incapacitate Appellant on the roadside that day after which time they discovered that Appellant had an amount of cocaine base on his person. R. 13.

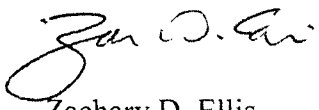
At the time of the traffic stop, Officer Tempalsky knew only that the vehicle driven by Appellant had stopped briefly in the roadway, and that Appellant had interacted with another man, as well as the fact that Appellant's vehicle was traveling at a speed of eight miles per hour above the speed limit while one rear passenger was not wearing a seat belt. These facts do not give rise to a reasonable suspicion of additional criminal activity. As the court in State v. Moore stated, the State "must do more than simply label a behavior as suspicious to make it so." State v. Moore, 404 S.C. 634, 746 S.E.2d 352, 357 (S.C. Ct. App. 2013).

Such an extended and violent detention by law enforcement constitutes an unreasonable detention for the purposes of a roadside traffic stop. As such, any evidence gathered from such a traffic stop should have been suppressed as improperly gathered.

CONCLUSION

Based on the foregoing, the convictions and sentences of the Appellant should be reversed.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that I have served a copy of the Brief of Appellant on the Respondent by placing a copy of same in the United States Mail, first class postage prepaid, this 20th day of March, 2015, addressed as follows:

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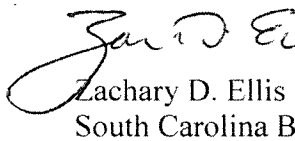

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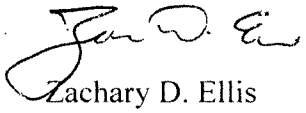

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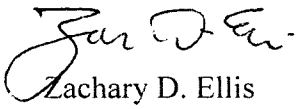

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APPEAL FROM GEORGETOWN COUNTY
Court of General Sessions

Edward B. Cottingham, Circuit Court Judge

Case No. 2011-GS-22-01298

State of South Carolina .....Respondent

vs.

Franklin E. Dennison .....Appellant.

Certificate

I certify that the Brief of Appellant is in compliance with Rule 211(b).

Respectfully submitted,

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