ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Lexington County

Doyet A. Early, III, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JAMES MILLER,

APPELLANT

APPELLATE CASE NO. 2015-002664

INITIAL BRIEF OF APPELLANT

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[2] See Florida v. Jardines, ___U.S.____, 133 S.Ct. 1409 (2013).

STATEMENT OF THE CASE

Appellant James B. Miller was convicted of possession of altered pseudoephedrine and manufacturing methamphetamine during the November 2015 term of the Lexington County General Sessions Court before Judge Doyet A. Early III. Appellant was sentenced to imprisonment for a period of three years on the possession conviction and ten years or a $10,000.00 fine on the methamphetamine conviction. Ola Johnson represented appellant at trial, and Assistant Solicitors Lester M. Bell and Casey Rankin appeared on behalf of the state.

Appellant appealed his convictions and sentences. This brief follows.

QUESTION I

The trial judge erred in denying appellant's motion to suppress the drugs found at the scene because the discovery of the drugs via the search and seizure of the same violated the Fourth Amendment where the tip given to police was **uncorroborated** and **unverified**[3] and thus failed to justify the police officers' knock and talk and subsequent intrusion onto the premises.

Federal Constitution Violation

In the case at bar, a knock and talk investigation occurred pursuant to a police tip sent to the Cayce Police Department on January 8, 2014, at 5:46 pm alleging that drug activity in the form of methamphetamine production was in progress at room 126 at Motel 6 on Knox Abbott Drive in West Columbia, South Carolina. Prior to trial, counsel moved to have the drugs and items allegedly used to manufacture methamphetamine found in motel room 126 suppressed because there was no reasonable suspicion to support the officers knock and talk to the individuals based inside the motel room. Tr. 5, lines 13-22; Tr. 87, lines16-24. A pretrial hearing was held in the matter. Tr. 5, l. 22 – p. 86, l. 10. The Fourth Amendment protects individuals from unreasonable searched and seizures where no warrant exists.

Officer Jonathan Garcia testified that he arrived at the morel to investigate and knocked on motel room door #126 on the day in question. When the door was opened, he observed three males and one female located inside and noticed that there was an chemical odor that smelled similar to fingernail remover emanating from inside the room and a chemical smell also coming from a coffee pot that contained a clear liquid that was seen in the room. Tr. 24, l. 1 –p. 25, l. 5. Officer Findley Wihlidal testified that he arrived at the motel room as Officer Garcia's back up shortly thereafter,

[3] See Florida v. Jardines, ___U.S.____, 133 S.Ct. 1409 (2013).

and that he also smelled the scent of nail polish coming from inside the motel room. Tr. 37, l. 17 – p. 41, l. 11.

Officer James Gleaton testified that he participated in the motel 6 drug investigation at issue and that when he walked into the room, he saw the white container believed to hold acetone, i.e. nail polish remover, which is used to manufacture methamphetamine. Also, Officer Gleaton stated that he smelled an odor emanating from a clear liquid contained in a coffee pot found inside a Walmart bag located inside the room. Officer Gleaton claimed that initially he smelled something similar to a chemical odor after parking and exiting and walking in the breezeway of the motel. Tr. 67, l. 8 – p. 76, l. 25.

Also, Officer William Dongall testified that he was dispatched to that motel room on the evening in question and took steps to obtain a search warrant after learning from Sergeant Gleaton that the liquid in a coffee pot in the room was evidence that a methamphetamine production had been in progress, and that as a result, the occupants of the room had been detained. Office Dougall added that he observed appellant making movements behind his back and that upon approaching appellant, he later found a wallet behind the wall where appellant stood. The wallet contained identification reflecting appellant's name and picture and white crushed powder, which was later identified as pseudoephedrine. Tr. 54, l. 14 – p. 60, l. 18.

At the close of the hearing, the trial judge entertained arguments by counsel in support of the motion to suppress the search that uncovered the drugs and the seizure that followed. Appellant's counsel argued that there was no reasonable suspicion or probable cause for the knock and talk and subsequent intrusion into the hotel room because the tip that led officers to the scene was uncorroborated and insufficiently detailed in light of the Counts[4] case where the Court held that

[4] State v. Counts, 413 S.C. 153, 776 S.E.2d 59 (2015).

the detailed tips supported the knock and talk and entry into the dwelling. App. 87, l. 21 – p. 99, l. 20. The motion was denied. App. 114, lines 2-10.

In Terry v. Ohio, 392 U.S. 1 (1968), the Court held that a citizen can be stopped if there is a reasonable suspicion that criminal activity is afoot. Reasonable suspicion is a specific and objective basis, supported by articulable facts, for suspecting another of criminal activity based on the totality of the circumstances. State v. Burgess, 394 S.C. 407, 714 S.E.2d 917 (2011), citing to U.S. v. Cortez, 449 U.S. 411 (1981).

Here, there was a naked tip in existence sans corroboration that methamphetamine production was in progress at a motel 6 room. Without more, this tip was uncorroborated and unverified and thus did not constitute reasonable suspicion to support the officers' knock and talk and their subsequent entry into the motel room, particularly when compared to Florida v. Jardines, 133 S.Ct. 1409 (2013), where the police received an "unverified tip," which meant the motion to suppress was ultimately granted because there was insufficient probable cause for the dog sniff that lead to the search and seizure in the case. To the contrary, the scenario in Counts by contrast involved a drug tip was sufficiently corroborated which justified the search and seizure that occurred.

In Florida v. Jardines, supra, police officers approached the defendant's house per an "unverified tip" that marijuana was being grown inside, and then allowed a dog sniff on the front porch of the house; and as a result, the Court held that the dog sniff was an unreasonable search of the "curtilage" or the house, which meant that the following search that ultimately uncovered marijuana was illegal due to the unverifiable tip. To the contrary, the tipster in Counts, identified the suspect by name and his multiple fake identifications, and by his phone number and vehicle, and by his girlfriend's name and number. In addition, there were two prior drug tips wherein Counts'

name and involvement had been mentioned. Note finally that there were exigent circumstances that led police to enter and detain Counts after it appeared that Counts was armed with a gun when he opened the door, and also because drugs were seen in plain view after the door was opened. Compare also State v. Wright, 391 S.C. 436, 706 S.E.2d 324 (2011), where the search and seizure on private property pursuant to a tip was upheld because the anonymous tip (accusations of dog-fighting occurring at a particular residence) was corroborated by surveillance of the home in question, and where a spotlight was seen and many cars were parked at the house prior to the bust, and where many people with dogs ran from the house as police approached the scene. See also, United States v. Johnson, 170 F.3d 708 (7th Cir. 1999), where the court found no reasonable suspicion where the officers acted only on a tip sans corroboration before the knock and talk and ultimate entry into the defendant's apartment.

In the case at bar, the lack of corroboration of the naked tip rendered it unverifiable and thus did not give rise to reasonable suspicion to support the officers' knock and talk and entry in the motel room, which ultimately led to the detention of appellant and seizure of the drug pseudoephedrine and items used to manufacture methamphetamine located inside the room.

South Carolina State Constitution Violation

Additionally, there is a heightened protection of privacy for citizens (express right to privacy) outlined in the South Carolina State Constitution. See S.C. Constitution Article 1 § 10, which mandates a higher level of privacy protection than the Fourth Amendment. In Counts, the Court held that the question of the reasonableness of any warrantless invasion regardless of any expectation of privacy envisioned by any citizen is paramount and went on to hold that the threshold requirement in defining our state constitution privacy right under article 1, §10 means that there must be a "reasonable suspicion of illegal activity at the targeted residence prior to approaching the

residence and knocking on the door." Again, based on the uncorroborated naked tip in the instant case, there was no reasonable suspicion in existence to warrant the officers' knock and talk at the motel room in question and the entry that followed, which in turn led to the illegal drug search and seizure.

QUESTION II

The trial judge erred in denying counsel's motion for a mistrial due to the prejudice that resulted after prior bad acts evidence surfaced regarding appellant's numerous prior convictions for obtaining pseudoephedrine because appellant was on trial for a possession of pseudoephedrine charge and a manufacturing methamphetamine charge which requires the use of pseudoephedrine as an ingredient.

At trial, appellant testified that he was merely present inside the motel room on the day the police arrived to investigate and that he had just stopped by room 126 at Motel 6 to collect his friend John McFadden, who had called previously asking for a ride to a grocery store. Appellant stated that he had only been inside ten/fifteen minutes when the police knocked on the room door. Appellant added that the room "wasn't [his] room" and that he was only "visiting." Regarding the drugs found in the wallet, appellant stated that he always carried a money clip, but never a wallet. Appellant stated that he did not come to the room to manufacture methamphetamine and that he didn't even know that methamphetamine production was underway in the motel room. Tr. 249, lines 10 – p. 250, l. 8. Tr. 229, l. 14 – p. 233, l. 19. Then, on cross examination, the following colloquy occurred:

> Solicitor: Isn't it true you ...bought pseudoephedrine some 60 plus times?
>
> Counsel: Objection.
>
> Trial Judge: Sustained.

Counsel: I have to make a motion at this time. Tr. 241, lines 11-19.

Outside of the presence of the jury, defense counsel moved for a mistrial due to the prejudice of the jury hearing about appellant's previous connection to multiple prior buys of pseudoephedrine and cited to the pre-trial motion to exclude such information. The solicitor discontinued that line of questioning, and the trial judge denied the mistrial motion and issued a curative instruction to the jury. Tr. 242, l. 25 – p.247, l. 21. See motion at Tr. ---; Tr. 87, lines 7-10.

Evidence of prior bad acts is inadmissible to show that the accused is a bad person or has the propensity to commit the crime charged. State v. Peake, 302 S.C. 378, 396 S.E.2d 362 (1990). Prior bad acts are not admissible unless relevant to the crime with which that defendant is on trial and there is clear and convincing proof of the bad acts exist, and the probative value must not be outweighed by the prejudice. State v. McCombs, 410 S.C. 90, 762 S.E.2d 744 (2014) citing to Rule 404 (b), SCRE. See also State v. Lyle, 125 S.C. 406, 118 S.E.2d 803 (1923) Furthermore, prior bad acts are admissible only if they establish motive, intent, absence of mistake or accident, common scheme or plan or identity. State v. McCombs, supra.

Additionally, there is heightened prejudice in admitting prior crimes that are similar to Compare the Court's reversal in State v.Tuffour, 364 S.C. 497, 613 S.E.2d 814 (2005), where the court found error where the prior bad act of the defendant's sale of crack cocaine to an undercover operative on several prior occasions in the past was not relevant to the charge of trafficking for which the defendant was on trial. See also the reversal in State v. Campbell, 317 S.C. 449, 454 S.E.2d 899 (Ct. Ap. 1994), where the court held that the state's introduction of evidence of the defendant's prior cocaine sales was an attempt to demonstrate that because he had done so in the past, then he was guilty on the charge of distribution of crack cocaine for which he was being tried. In State v. Carter, 323 S.C. 465, 476 S.E.2d 916 (1996), the Court reversed and held that testimony

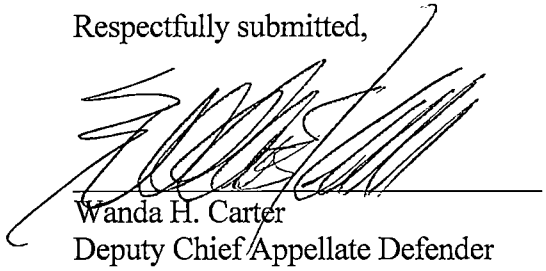
concerning a prior sale of crack cocaine to a certain person by the defendant on January 14, 1994, was not necessary to establish the defendant's guilt regarding the January 18, 1994 sale of crack cocaine that was made to the same person. In State v. Bostick, 307 S.C. 226, 414 S.E.2d 175 (1992), the court reversed and held that since the defendant was being tried for distribution of crack cocaine, evidence that the defendant made prior drug sales from the same location was held to have been more prejudicial than probative. In State v. Garner, 304 S.C. 220, 403 S.E.2d 63 (1991), the Court held that the defendant, who was convicted of trafficking in cocaine, was prejudiced by the admissions of portions of a taped conversation between him and another regarding negotiations for a future a sale of kilo of cocaine.

The prior bad acts evidence in the case at bar prejudiced appellant and denied him the right to a fair trial in violation of the Fourteenth Amendment to the United States Constitution article 1, section 3 of the South Carolina State Constitution.

CONCLUSION

Based on the foregoing arguments, appellant's case should be reversed and his case remanded to the lower court for a new trial.

Respectfully submitted,



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This 13th day of June, 2016.