ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenwood County

Frank R. Addy, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JERRY JEROME ANDREWS, III

APPELLANT

APPELLATE CASE NO. 2015-001176

FINAL BRIEF OF APPELLANT

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I. Did the trial judge err by ruling that the officer had reasonable suspicion of criminal activity to justify stopping Appellant where Appellant and two other men were walking down the street near Lander University at 2:15 a.m., the officer initially drove past the three men, only two men were walking when the officer turned around and drove back up the street, and the officer vaguely stated he did not recognize the two men?

II. Did the trial judge err by ruling that the officer had reasonable suspicion to search Appellant for weapons where neither officer articulated any specific facts which led them to believe that Appellant may have been armed and dangerous, other than a generalized concern for their own safety?

STATEMENT OF THE CASE

On March 27, 2015, the Greenwood County Grand Jury indicted Appellant for resisting arrest and possession of marijuana. R. 251 On May 12, 2015, Appellant's case proceeded to a jury trial before the Honorable Frank R. Addy, Jr., and a jury. R. 1. Thomas Adducci represented Appellant. Brian Moroney and Demetri Andrews represented the State. R. 1.

After a three-day trial, Appellant was found guilty of both charges.[1] R. 239 – 40. Judge Addy sentenced Appellant to four months for the resisting arrest charge and thirty-days for the possession of marijuana charge, to run concurrently. R. 248 – 49.

Appellant appealed his convictions and sentences. This brief follows.

[1] Appellant was also indicted for unlawful carrying of a pistol and possession of a firearm by a convicted felon from the same incident. The jury was hung on those two charges. R. 237 – 39.

ARGUMENT

I. The trial judge erred by ruling that the officer had reasonable suspicion of criminal activity to justify stopping Appellant where Appellant and two other men were walking down the street near Lander University at 2:15 a.m., the officer initially drove past the three men, only two men were walking when the officer turned around and drove back up the street, and the officer vaguely stated he did not recognize the two men.

Motion to Suppress the Marijuana and Gun

Prior to trial, defense counsel moved to suppress the marijuana and gun recovered from the scene of Appellant's arrest on June 30, 2012. R. 23, ll. 22 – 25. Counsel contended that the officers illegally seized and searched Appellant. R. 23, ll. 22 – 25.

Officer Steven Osborne, who worked for the Lander University Police Department at the time of the alleged incident, testified during the pre-trial suppression hearing. R. 25. Osborne stated that he was patrolling the Lander University campus in Greenwood County, South Carolina, at around 2:00 a.m. on June 30, 2012. R. 26, ll. 8 – 13. While driving through the main area of campus, Osborne "observed three gentlemen walking southbound on Wilson Street." R. 26, ll. 16 – 22. After turning around and driving back up Wilson Street, Osborne "noticed that there were only two gentlemen now walking southbound." R. 26, l. 23 – R. 27, l. 2. It was the same group of men, but the third person was no longer walking with the other two men who were later identified as Appellant and Shantavius Johnson. R. 27, ll. 2 – 5.

According to Officer Osborne, when he did not see the third person as he drove back up Wilson Street, it "aroused [his] suspicions." R. 27, ll. 20 – 21. Further, the men had been walking in the roadway. R. 28, ll. 15 – 20. Osborne stated that there were only about

thirty summer school students living on campus and he recognized most of them "by face." R. 26 – 27. Because he did not recognize Appellant and Johnson, he became suspicious. R. 26 – 27. Osborne "radioed" his supervisor, Lieutenant Peppers, and told him that he was going to stop the two men who were walking. Osborne asked Peppers to meet him at that location. R. 27, ll. 11 – 14.

Osborne initiated the blue lights on his patrol car as he pulled up behind the two men. R. 30, ll. 8 – 14. The officer stated that he observed Johnson toss a silver colored can over to the side of the road. R. 30, ll. 8 – 14. Lieutenant Peppers and Corporal Link, who was riding with Peppers, arrived shortly after. The officers discovered that Johnson had an active warrant and immediately handcuffed him. R. 30, ll. 8 – 25. Officer Osborne claimed that as Johnson was being handcuffed, Appellant "had been fidgeting with his hands." R. 31, ll. 23 – 25. Osborne asked Appellant whether he would mind being pat down. However, Appellant declined. R. 32, ll. 1 – 9.

According to Osborne, Corporal Link "grabbed" Appellant's arms to stop him from fidgeting and patted him down. R. 32 – 33. A tussle ensued between Link and Appellant and a sliver-colored handgun fell onto the ground. R. 32 – 33. After the gun fell, Appellant ran across the road, stumbled, and fell onto the ground. R. 33, ll. 7 – 16. He was placed under arrest and 2.3 grams of marijuana was recovered from his pants pocket. R. 165, ll. 12 – 13.

Officer Osborne admitted that he initially drove past the group of men. R. 39, ll. 15 – 18. What peaked the officer's interest was the fact that when he turned around and drove back up Wilson Street, the third man was no longer walking with Appellant and Johnson. R. 39, ll. 15 – 18. Appellant did not have a can in his hand when the officer pulled up

behind him and Johnson. R. 39, ll. 19 – 21. Appellant was also cooperative and had no active warrants. R. 40 – 41.

Corporal Link, however, stated that Appellant's demeanor was unusual because:

> "He was - - he was moving nervously, had his hands together a lot, touched his face several times, and was constantly looking at all the different officers, changing his view around to each one of us."

R. 48, ll. 6 – 9.

According to Link, Appellant's actions:

> "They heightened my sense that he was possibly in - - in violation of some law; that he had committed some kind of criminal infraction and he was nervous about a contact with law enforcement."

R. 48, ll. 12 – 15.

Citing Terry v. Ohio, 392 U.S. 1 (1968), defense counsel argued that Officer Osborne had no reasonable suspicion to stop Appellant. Counsel argued that Appellant was seized at the moment Osborne initiated his blue lights and stopped the two men. Counsel asserted that there were no reasonable articulable facts given by the officer which justified stopping Appellant. R. 66 – 69.

Counsel further contended:

> "They need reasonable articulable suspicion that criminal activity was afoot. The --- Officer Osborne was the individual who initiated this traffic – this stop. He indicated that the – his purpose and his reason was that, first, there were three people walking and he turned around and then there were two people, and that's when he decided he was going to stop these two individuals. Then he indicated that Mr. Johnson threw that he thought was a beer can onto the ground. That

> does not lead to reasonable articulable suspicion for Mr. Andrews. Mr. Johnson potentially littering or having an open can – container of alcohol has nothing to do with whether there's reasonable articulable suspicion for Mr. Andrews to be stopped and seized."

R. 68, ll. 8 – 23.

Counsel continued:

> "Even if the Court believed there was reasonable articulable suspicion to stop Mr. Andrews, which we clearly believe there is not, there is no reasonable suspicion that Defendant was armed and dangerous. The only reason that they say that they are going to search him is because he was in the company of somebody who has an arrest warrant for armed robbery. They indicate that he was touching his face and seemed nervous. That does not account for specific articulable facts which through rational inferences reasonable warrant the intrusion."

R. 69, ll. 15 – 24.

Counsel concluded:

> "Everything that is seized after that; the gun; marijuana, the arrest itself, should all be suppressed because it is all the fruit of the poisonous tree from the initial unreasonable seizure at the moment that the blue lights get hit or at any of those other points along the timeline in the encounter between the police and Mr. Andrews."

R. 70, ll. 5 – 11.

The solicitor conceded that a seizure did occur "at the outset of the stop when the officers were surrounding him and they retained his ID's (sic) and did not return the ID's (sic) during the warrant check." R. 72, ll. 9 – 14.

However, the solicitor contended:

> "[I]t was entirely appropriate for Officer Osborne's suspicions to be raised based on the time of night, the three becoming two, the beer can, although that was attributed to Mr. Johnson, that was a reason for the stop. Them walking in the roadway was clearly a safety issue and he had reasonable suspicion – articulable suspicion to conduct a Terry stop of both Mr. Andrews and Mr. Johnson. It's important case law on – with respect to Terry stops. It's established that we look at the totality of the circumstances, and that's very important in this case."

R. 74, ll. 5 – 16.

Judge's Ruling on Motion to Suppress

The trial judge denied defense counsel's motion to suppress. However, the judge agreed with counsel that Appellant was seized at the moment the officer initiated his blue lights, stopped the men, and asked them not to go anywhere. R. 76, ll. 19 – 25. The judge ruled that Officer Osborne "had the authority to figure out exactly why these two folks were walking down the middle of the street . . . at that time of the evening." R. 77, l. 23 – R. 78, l. 1. The judge also found that the officer had "sufficient reason" to stop Appellant and Johnson to "determine what the circumstances [were]." R. 78, ll. 9 – 12.

Discussion

Officer Osborne had no reasonable suspicion of criminal activity to justify stopping Appellant. The fact that Appellant and two other men were walking down the street near Lander University at 2:15 a.m., one of the men had already left the group when the officer turned around and drove back up the street, and the officer did not recognize the men were

insufficient to indicate criminal activity. Therefore, the marijuana and weapon recovered as a result of the stop should have been suppressed.

The Fourth Amendment to the United States Constitution ensures "the right of the people to be secure. . . [from] unreasonable searches and seizures." U.S. Const. amend. IV; Mapp v. Ohio, 367 U.S. 643 (1961). "[S]earches and seizures 'conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment – subject only to a few specifically established and well delineated exceptions.'" Minnesota v. Dickerson, 508 U.S. 366, 372 (1993) (emphasis in original) (internal citations omitted).

In Terry v. Ohio, 392 U.S. 1 (1968), the United States Supreme Court recognized one such exception. The "police may stop, and briefly detain, a person for investigative purposes when an officer has reasonable suspicion supported by articulable facts the person is involved in criminal activity." State v. Fowler, 322 S.C. 263, 266, 471 S.E.2d 706, 708 (Ct. App. 1996) (citing Terry).

Reasonable suspicion requires "a particularized and objective basis that would lead one to suspect another of criminal activity." United States v. Cortez, 449 U.S. 411, 417 (1981); State v. Lesley, 486 S.E.2d 276 (Ct. App. 1997). A court must consider "the totality of the circumstances – the whole picture" when determining whether reasonable suspicion exists. Cortez, 449 U.S. at 417. See State v. Woodruff, 344 S.C. 537, 546, 544 S.E.2d 290, 295 (Ct. App. 2001) ("The term 'reasonable suspicion' requires a particularized and objective basis that would lead one to suspect another of criminal activity. In determining whether reasonable suspicion exists, the whole picture must be considered."). Reasonable suspicion "entails. . . something more than an inchoate and unparticularized suspicion or

'hunch,' but less than the level of suspicion required for probable cause" Butler, 343 S.C. at 202, 539 S.E.2d at 416.

Here, Osborne was not justified in stopping and detaining Appellant. The officer maintained that when he initially drove by the group of men in his patrol car, there were three men walking. When the officer turned around and drove past the group again, there were only two men walking – Appellant and Johnson. However, the officer did not see the third man leave. Osborne could not say whether the third person ran or walked away from the group. In fact, the officer acknowledged that he initially drove past the three men walking and did not become suspicious until he had turned around, drove past the men again, and noticed that there were only two men walking instead of three.

While the men were walking near the Lander campus at 2:15 a.m., that was an insufficient reason to stop them. Further, the fact that Officer Osborne did not recognize Appellant or Johnson did not indicate they were engaged in any criminal activity.

Officer Osborne vaguely testified that there had been crimes on campus during the months previous. However, there was no evidence presented that Appellant had any connection to the prior crimes on campus. Further, the officer testified that **Johnson** had the beer can – not Appellant.

Other than a "hunch," Officer Osborne had no reasonable articulable facts which indicated Appellant had been engaged in any criminal activity. Therefore, Appellant's detention was unlawful. The marijuana and weapon recovered as a result of the unlawful detention was inadmissible and should have been suppressed.

II. The trial judge erred by ruling that the officer had reasonable suspicion to search Appellant for weapons where neither officer articulated any specific facts which led them to believe that Appellant may have been armed and dangerous, other than a generalized concern for their own safety.

Relevant Facts

See Issue I, supra.

Discussion

Neither officer had reasonable suspicion to search Appellant for weapons at the time Appellant and Johnson were stopped. The officers failed to articulate any specific facts which led them to believe that Appellant may have been armed and dangerous other than a generalized concern for their own safety. Therefore, the weapon and marijuana recovered from the unlawful search of Appellant was inadmissible and should have been suppressed.

Even if a Terry stop is proper, "before the police may frisk a defendant, they must have a reasonable belief the defendant is armed and dangerous." Ybarra v. Illinois, 444 U.S. 85 (1979). In "determining whether the officer acted reasonably in such circumstances, due weight must be given, not to his inchoate and unparticularized suspicion or 'hunch,' but to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience." Terry, 392 U.S. at 27.

An officer "must be able to specify the particular facts on which he or she based his or her belief the suspect was armed and dangerous." State v. Fowler, 322 S.C. at 267, 471 S.E.2d at 708. See State v. Butler, 353 S.C. 383, 577 S.E.2d 498 (Ct. App. 2003), holding that an officer lacked reasonable suspicion to search the defendant during a traffic stop where the defendant was the front passenger, the officer smelled alcohol on the driver and

was "suspicious" of alcohol being inside the vehicle, but the officer "failed to articulate any facts indicating he believed [the defendant] was armed and dangerous, or that he feared for his safety or that of others."

Here, Officer Osborne failed to articulate **any** facts which indicated that Appellant was armed and dangerous. Johnson was observed tossing what he later admitted was a beer can. Johnson had an open arrest warrant for a serious crime – Appellant did not. Osborne even admitted that Appellant had been cooperative when he and Johnson were initially detained and questioned.

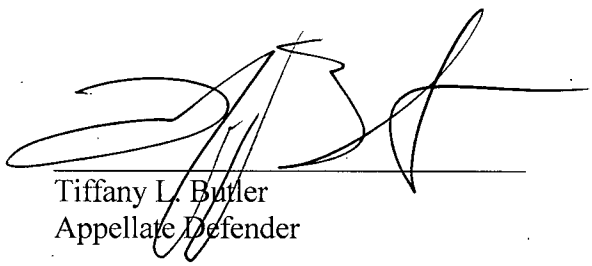
Osborne stated that Appellant appeared nervous and jittery when Johnson was being placed under arrest. However, nervousness does not indicate a person is armed and dangerous. In fact, there were **three** police officers "triangulated" around Appellant and Johnson. R. 32. Moreover, Osborne asked for Appellant's consent to conduct a pat down search. Asking for Appellant's consent prior to patting him down is **inconsistent** with the officer's assertion that he was concerned for "officer safety." See R. 31 – 33.

Because Osborne had no individualized, reasonable suspicion that **Appellant** was armed and dangerous, the pat down of Appellant was not justified. The marijuana and weapon subsequently recovered was, therefore, inadmissible and should not have been admitted at trial.

CONCLUSION

Based on the reasons argued above, Appellant Jerry Jerome Andrews respectfully requests this Court to reverse his convictions and sentences and remand to the lower court for a new trial.

Respectfully submitted,



Tiffany L. Butler
Appellate Defender

ATTORNEY FOR APPELLANT

This 25th day of April, 2016.

CERTIFICATE OF COUNSEL FOR APPELLANT

The undersigned certifies that to the best of my ability the Final Brief 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."

April 25, 2016

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APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon William Schumacher, IV, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and this 25th day of April, 2016.

Tiffany L. Butler
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 25th day of April, 2016.

Christian Ford (L.S.)
Notary Public for South Carolina
My Commission Expires: March 1,2026.