STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

ORIGINAL

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SEP 14 2016

SC Court of Appeals

Appeal from Greenville County

Honorable Doyet A. Early, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

KEYON ROBINSON

APPELLANT

APPELLATE CASE NO 2014-002434

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Did the trial court err in denying Appellant Robinson's motion to suppress drugs found in a purple Crown Royal bag which Appellant had dropped in the rear seat of a vehicle just prior to being arrested outside the Waffle House for disorderly conduct for profanity and the deputy violated Appellant's Fourth Amendment rights by reaching inside the vehicle and retrieving the purple bag after Appellant was arrested and placed in handcuffs which was an unlawful search?

STATEMENT OF THE CASE

On July 31, 2012, the Greenville County Grand Jury indicted Keyon D. Robinson on the charges of trafficking cocaine base (crack) more than ten grams, and resisting arrest. On November 5, 2014, Appellant Robinson proceeded to a bench trial before the Honorable Doyet A. Early. Robinson was represented by Jake Erwin, and the state was represented by Katrina Salisbury. Tr. 1. Judge Early found Appellant Robinson guilty of both charges as indicted. Judge Early sentenced Robinson to eight years on the trafficking crack cocaine to run concurrent with the probation revocation Robinson was then serving. He also sentenced Robinson to one year on the resisting arrest to run concurrent with the eight year sentence. Tr. 43, ll. 8 – 16. Robinson's attorney filed a notice of appeal. This appeal follows.

STATEMENT OF FACTS

On December 18, 2011, Deputy Chris Hinton was on patrol in Greenville County when he received a call from a customer at Waffle House about "subjects giving security a problem." The customer described two cars involved: a black Lexus and a red Volvo. Tr. 22, ll. 18 – Tr. 23, ll. 18.

When Deputy Hinton arrived at the Waffle House, the black Lexus was leaving but the red Volvo was still there. The deputy saw Robinson walking from the Waffle House front door area towards the red Volvo with a purple bag in his hand. Robinson was allegedly using profane language towards security and generally. When Deputy Hinton approached Robinson, he saw Robinson drop the purple bag into the rear seat of the red Volvo. Tr. 23, ll. 19 – Tr. 24, ll. 1; Tr. 25, ll. 14 – 24.

Deputy Hinton placed Robinson in handcuffs and told him that he was under arrest for disorderly conduct "in connection with the profanity." The deputy said he could also smell alcohol on Robinson's person as well. Then Deputy Hinton retrieved the purple bag from the red Volvo. Tr. 24, ll. 2 – 8.

There were three other "suspects who were already in the Volvo" when Deputy Hinton arrived. Two were in the rear seat; one person was in the driver's seat. Tr. 6, ll. 20- Tr. 7, ll. 19; Tr. 10, ll. 15 – 25. When the back up officer arrived after Deputy Hinton had arrested Robinson, the back up officer watched the three suspects while Deputy Hinton placed Robinson in his patrol car. At that point, Deputy Hinton then looked in the purple bag which he noticed was a Crown Royal bag. He saw narcotics in the purple bag and secured the bag in the front compartment of his car. Tr. 24, ll. 9- 19. The testimony on direct was:

> **Q:** Now, once you restrained the defendant and placed him in your patrol car, you testified that you dealt with what was inside that bag.
>
> **A:** Yes. I briefly looked in the bag and could tell.

Tr. 27, ll. 12 – 15.

Deputy Hinton locked his patrol car and returned to the other three suspects to try to determine what they were doing there. He heard a noise and saw Robinson running from the patrol car. The deputy pursued Robinson and finally subdued him after a "little bit of a struggle." He placed Robinson in handcuffs again and returned him to the patrol car. He charged him with resisting arrest. Tr. 24, ll. 18 – Tr. 25, ll. 13.

At trial, when asked if any of the other three manipulated the purple bag in any way, Deputy Hinton responded that he could not definitely say "one way or the other." Tr. 27, ll. 1 – 11. He performed a field test and the drugs tested positively for crack cocaine. There were seven baggies for a total weight of 30.6 grams. Tr. 29, ll 1 – 10. He charged Robinson with trafficking crack cocaine and resisting arrest and took him to the detention center. Tr. 25, ll. 7 – 13.

On cross examination at trial, Deputy Hinton said there was no video from his car as he never activated his blue lights. He admitted that Robinson never entered the red Volvo but his report said Robinson tried to enter the car but the deputy did not know to what extent. The bag was in the car, and the deputy reached in the car and got the bag. He admitted that he did not have a warrant, and no one gave consent. The other three people were not charged with anything. Tr. 32, ll. 10 – Tr. 33, ll. 22. He did not have the name of the owner of the red Volvo. Tr. 11, ll. 23- Tr. 12, ll. 12.

In a pretrial motion, defense counsel moved to suppress the drugs because Robinson's rights were violated during the search. Tr. 3, ll. 1 – 25. Deputy Hinton testified in a pretrial hearing to the facts of the incident. After he saw Robinson drop the purple bag in the car, he

arrested Robinson for disorderly conduct, and placed him in handcuffs. The deputy then opened the door of the car and the bag was there. He agreed that the bag was not "immediately recognizable" to him as a Crown Royal bag but just a purple bag. He said: "I couldn't tell it was that logo at that time." Tr. 5, ll. 9 – Tr. 8, ll. 14.

Immediately after the hearing, defense counsel asked that the drugs be excluded because there was no warrant to search the vehicle and there was not consent. Counsel argued: "A search incident to arrest I don't believe would apply in this situation." Tr. 13, ll. 6 – 14. Counsel pointed out that when Robinson was arrested, the bag was not on his person but was in the car. Tr. 13, ll. 15 – 18.

The state argued that Arizona v. Gant, 556 U.S. 332 (2009), applied to Robinson's case. The solicitor argued that the United States Supreme Court held in Arizona v. Gant, id. that " where the defendant was arrested, law enforcement could search the portion of the passenger compartment to which the defendant has ready access or in which evidence of the offense for which the defendant was being arrested could be located." The solicitor argued that both of those "alternatives" applied in Robinson's case. Tr. 14, ll. 9 – 20.

The judge said that Robinson "was only being arrested for disorderly conduct." He asked what evidence of that offense did the bag indicate? The solicitor responded that the deputy said that Robinson smelled of alcohol. The solicitor said: " one of the components ...of disorderly conduct is the defendant's boisterous behavior which would include this public profanity or public intoxication." She continued that the Crown Royal bag was a packaging bag for alcohol so there was a possibility that the bag contained evidence of the disorderly conduct. Tr. 14, ll. 25 – Tr. 15, ll. 13.

The solicitor also argued that Robinson had access to the passenger compartment because it "was the wing span of the defendant at the time of his arrest." Tr. 15, ll. 14 – 24. She also argued that as an alternative, the automobile exception applied as well. Tr. 16, ll. 2 – 20.

Defense counsel argued that the deputy did not recognize the purple bag as a liquor bag or Crown Royal bag until later. He could not see inside the bag at that time of arrest. Counsel argued against the automobile exception because that exception applied to an arrest inside the vehicle and was a search incident to arrest. It did not apply in Robinson's case because Robinson was never inside the vehicle. The people in the car were not arrested. Tr. 16, ll. 21 – Tr. 17, ll. 25.

The judge ruled by stating on the record:

> Let the record reflect we had a brief in-chambers discussion generally discussing what my ruling was perhaps was going to be which I told the lawyers that I felt I was going to deny your motion to suppression and now I am officially doing so and will allow the evidence into the record.

Tr. 19, ll. 17 – 22.

Defense counsel stipulated to the drug analysis that the amount was 30.6 grams although three of the seven bags contained powder cocaine and the other four contained crack cocaine. Tr. 34, ll. 17 – Tr. 35, ll. 24.

The state then offered the drugs and the purple bag into evidence. Defense counsel objected based on his reasons at the prior hearing. The judge said that defense counsel was protected on the record. Tr. 35, ll. 25 – Tr. 36, ll. 8.

ARGUMENT

The trial court erred in denying Appellant Robinson's motion to suppress drugs found in a purple Crown Royal bag which Appellant had dropped in the rear seat of a vehicle just prior to being arrested outside the Waffle House for disorderly conduct for profanity; the deputy then violated Appellant's Fourth Amendment rights by reaching inside the vehicle and retrieving the purple bag after Appellant was arrested and placed in handcuffs which was an unlawful search.

The Fourth Amendment prohibits unreasonable searches and seizures and provides that no warrants shall be issued except upon probable cause. Warrantless searches and seizures are unreasonable except under an exception to the Fourth Amendment's warrant requirement. The exclusionary rule bars the prosecution from introducing evidence obtained in violation of the Fourth Amendment. U.S.C.A. Const.Amend.4; State v. Brown, 401 S.C. 82, 736 S.E.2d 263 (2013).

The South Carolina Constitution provides that the right of the people to be secure in their houses, papers, and effects, against unreasonable searches and seizures and unreasonable invasions of privacy shall not be violated. S.C. Const. Art 1, Section 10.

In Arizona v. Gant, 556 U.S. 332 (2009), the United States Supreme Court held that police may search a vehicle incident to a recent occupant's arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest. Gant was the driver of the car and was arrested for driving on a suspended license. He was placed in the patrol car before officers searched the vehicle and found cocaine in a jacket pocket. The Court of Appeals of Arizona reversed the conviction and the United States Supreme Court affirmed that decision.

In State v. Brown, *supra,* the South Carolina Supreme Court held that the search incident to arrest exception to the warrant requirement did not apply to justify the search of Brown's duffel bag which was removed from the vehicle in which Brown was a passenger following his arrest for an open container. The officer removed Brown from the vehicle after Brown revealed the beer can in his lap and arrested him for open container. The officer noticed the small duffel bag on the floor board between Brown's legs. When the officer removed Brown from the vehicle, he removed the duffel bag and put it on the sidewalk. He then placed Brown, handcuffed, on the back of the patrol car. He asked Brown if the duffel bag was his, and Brown said yes. After Brown was secured in the patrol car, the officer looked in the duffel bag and saw what appeared to be powder cocaine.

The Supreme Court agreed with the Court of Appeals that the two part rule of Gant applied to Brown's case and that the search violated his Fourth Amendment rights because neither part of the rule was met. The Court wrote that Brown could not have accessed the vehicle or the duffel bag during the arrest, and there was no indication that the duffel bag contained further evidence of the open container violation.

However, the Court found that the exclusionary rule did not apply in Brown's case to exclude the evidence because United States Supreme Court had issued the case of Davis v. United States, 131 S.Ct 2419 (2011). The Court in Davis ruled that the new rule in Gant would apply to cases pending on direct review but the exclusionary rule would not because the officers had relied on existing appellate precedent, and the exclusionary rule would not serve a deterrent purpose which was its purpose.

Appellant Robinson's case is similar to the situation in Brown and Gant in that Robinson could not access the passenger compartment of the vehicle during the search of the purple bag as he was handcuffed and in the patrol car when the deputy searched the bag.

The solicitor argued that the second part of the rule in Gant would apply as the purple bag was a Crown Royal bag meant to carry alcohol and public intoxication was a component of disorderly conduct. Tr. 14, ll. 25 – Tr. 15, ll. 13.

South Carolina Code Section 16-17-530 defines disorderly conduct as any person who (a) shall be found on any highway or public place in a grossly intoxicated condition OR otherwise conducting himself in a disorderly or boisterous manner; (b) uses obscene or profane language at any public place:...

When the deputy retrieved the bag from the vehicle, he admitted that he did not know it was a Crown Royal bag as he could not tell it was that logo on the bag. Tr. 5, l. 9 – Tr. 8, ll. 14.

There was no evidence that Robinson was "grossly intoxicated." There was no evidence presented that the complaint received by Deputy Hinton included any thing other than profane language directed at security and generally. Deputy Hinton testified that he arrested Robinson for disorderly conduct based on the profanity. The deputy did say that he detected the odor of alcohol on Robinson. The smell of alcohol does not equate to "gross intoxication. Therefore, the second part of the Gant rule did not apply to Robinson's case as there was no evidence that the purple bag contained anything related to the offense of disorderly conduct.

Deputy Hinton did not know it was a Crown Royal bag until he started to search it. Tr.5, ll. 9 – Tr. 8, ll. 14. The deputy did not need the purple bag to arrest Robinson for disorderly conduct as he had sufficient evidence based on the complaint and Robinson's loud profanity.

There was no evidence the deputy asked Robinson if the bag was his as it could have easily belonged to one of the three people in the vehicle and Robinson was returning it to them.

In Brown's case, the court could have found that the duffel bag could have contained beer cans which would be related to the open container offense. However, the Court ruled that there was no indication that the duffel bag contained any evidence related to the offense of arrest.

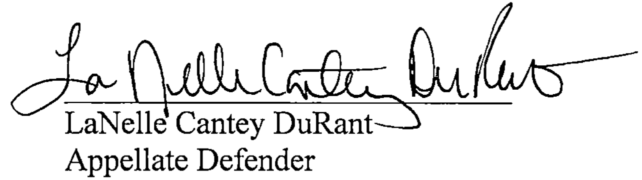
Robinson's case is distinguished from Brown in that the exclusionary rule can apply in Robinson's case as Davis v. United States, 131 S.Ct. 2419 (June 16, 2011) does not apply to Robinson. Robinson's incident occurred after Davis. Therefore, the evidence of the drugs found in the purple bag should be excluded.

The solicitor argued that the automobile exception should apply as an alternative. The automobile exception was first decided in Carroll v. United States, 45 S.Ct. 280 (1925) where the Court held that an officer could search a vehicle without a search warrant if he had probable cause to believe that evidence or contraband was located in the vehicle.

Robinson's case did not fit this automobile exception because the officer searched the vehicle by opening the door and removing the bag before he had probable cause to believe there was any evidence of disorderly conduct in the bag. And, as defense counsel argued, Robinson was never in the car during this incident. The deputy did not see Robinson in the car. Robinson could have been a passenger in the black Lexus when he arrived at the Waffle House. None of the three people in the car were arrested. Counsel argued that the automobile exception applied to an arrest inside the vehicle, and a search incident to that arrest. This was not Robinson's case.

CONCLUSION

Based on the above, Robinson's convictions and sentences should be reversed.



LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR APPELLANT

This 14th day of September, 2016.

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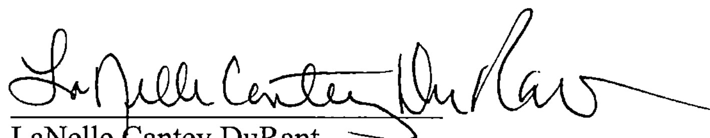
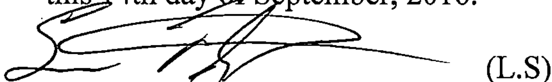
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Initial Brief of Appellant and Designation of Matter in the above referenced case has been served upon J. Benjamin Aplin, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Initial Brief of Appellant and Designation of Matter have been served on Keyon Deshawn Robinson, #318623, at McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29899, this 14th day of September, 2016.



LaNelle Cantey DuRant
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 14th day of September, 2016.


____________________ (L.S)
Notary Public for South Carolina
My Commission Expires: October 30, 2022.