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STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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S.C. SUPREME COURT

Certiorari to Greenville County

Honorable Benjamin H. Culbertson, Circuit Court Judge

Opinion No. 2016-UP-320 (S.C. Ct. App. Filed 8/18/2016)

THE STATE,

RESPONDENT,

V.

EMMANUAL M. RODRIGUEZ,

PETITIONER

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

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CERTIFICATE OF COUNSEL

Counsel for petitioner certifies that the Petition for Rehearing was filed in the case on July 7, 2016, and was denied by the Court of Appeals on 8/18/2016.

*

QUESTION PRESENTED

Whether the Court of Appeals erred in affirming the trial court's refusal to suppress heroin foind in petitioner's luggage when the police acted on an anonymous tip that lacked sufficient indicia of reliability to establish reasonable suspicion for a Terry investigatory stop?

STATEMENT OF THE CASE

Petitioner was convicted of trafficking in heroin after a jury trial held before the Honorable Benjamin H. Culbertson on September 8 – 10, 2014, in Greenville County. A forty (40) year sentence was imposed along with a $200,000 fine. John Crangle, Esquire was trial counsel. Ryan Holloway, Esquire was the assistant solicitor.

Petitioner appealed his conviction and a final brief was submitted to the Court of Appeals on August 25, 2015. The Court of Appeals affirmed the conviction on June 22, 2016, in an unpublished opinion. A petition for rehearing was filed on July 7, 2016, and was denied on August 18, 2016.

This petition follows.

ARGUMENT

The Court of Appeals erred in affirming the trial court's refusal to suppress heroin found in petitioner's luggage when the police acted on an anonymous tip that lacked sufficient indicia of reliability to establish reasonable suspicion for a Terry investigatory stop:

Facts Underlying the Issue

Trooper Rogers (Rogers) with the South Carolina Highway Patrol testified at the suppression hearing that on April 17, 2013, they received information from the Drug Enforcement Agency (D.E.A.) that there was a "possible" load of heroin that would be coming northbound on the La Cubana, a passenger bus line. They knew the bus line made a regular stop at a location on White Horse Road. It was a scheduled stop. They were not given the subject's name. They only knew it would be a light-skinned, "possibly" black male. They went to the scheduled stop site about 15 minutes before the bus would arrive. Rogers and his corporal were there along with Lance Corporal Harrison. They had two unmarked vehicles and Corporal Dowis had a K-nine vehicle. (R. p. 4, line 7 – p. 5, line 24.)

While in the parking lot, the bus arrived. Rogers approached as the driver was exiting down the steps. (R. p. 5, line 25 – p. 6, line 4.) He asked the driver if there were any problems with any of the passengers on this particular trip. The driver said everything was okay. Corporal Dowis, the K-nine officer, was walking toward the bus. The K-nine shepherd was still secured in the vehicle. (R. p. 7, line 19 – p. 8, line 19.) Rogers told the driver that drug traffickers would use passenger bus lines as a means of transporting drugs. He asked the driver if he had a problem while he conducted his business because it was their policy even in a consensual encounter – he still had to document

with what in this case would have been a "warning ticket." (emphasis supplied.) This testimony highlights the questionable nature of the search. The bus was packed and the driver had done nothing to be warned about. For some reason, invalid searches seem to commence with a "warning" ticket, e.g. State v. Woodruff, 344 S.C. 537, 544 S.E.2d 290 (Ct. App. 2001.) He then asked the driver if it would be a problem for Corporal Dowis to go around the exterior of the bus. The driver told him it was not a problem. (R. p. 9, lines 3-25.) At that time, Corporal Dowis went back to his car to get the K-nine and walked him around the exterior of the bus. Rogers said there were between 20-25 passengers on the bus. None of the passengers were trying to exit. (R. p. 10, line 7 – p. 11, line 5.)

The K-nine alerted to the "possible presence of an illegal odor coming from the stowaway compartment. Rogers said because there was a K-nine alert, they would have all the passengers identify their luggage. He had the bus driver go in the bus and explain to all the passengers that everybody would "have" to come out of the bus and they would be asked if they had luggage. (R. p. 12, lines 4-24.) In spite of this, he said "They had free range to do what they pleased," (R. p. 13, line 1), but they were never told this. As the police "had" the passengers exit, they would "have" them claim their luggage in "designated" spots in the parking lot. As the passengers came out they were asked if they had luggage. If they did, they were asked to present their claim ticket. (R. p. 14, lines 16-25.)

Petitioner was the eighteenth passenger that had come off the bus. He presented a claim ticket and retrieved his luggage. (R. p.15, lines 7-22.) Corporal Dowis was not there. Rogers said this was his encounter just as a "traffic stop." (R. p. 17, lines 11 – p. 23, line 10.) Rogers said there was a definite level of uncomfortable tension as he was asking petitioner questions and he was giving his answers. Petitioner clutched his luggage and did not want to let go of it. (R. p. 20, lines

19 – 23.) Petitioner was asked to move away from the group. (R. p. 21, lines 10-11.) Rogers said they retrieved the luggage. (R. p. 21, lines 22-23.) He asked petitioner for consent to search and he told them to go ahead. (R. p. 22, lines 6-7.) With a screwdriver and a knife, Rogers was able to retrieve a black package and petitioner was placed under arrest. (R. p. 23, lines 16-22.)

On cross-examination, Rogers was asked who or what was the source of the tip. He said the tip was told to the D.E.A. He did not know how the D.E.A. got the information. He knew nothing more about the source of the tip. (R. p. 26, line 24 – p. 27, line 17.) He said it was himself and three other officers at the scene and the K-nine. Two of their cars were unmarked Crown Victorias. A third car was semi-marked with a light bar, stripes, and "State Trooper" on the vehicle. He said they would not have been at the station that night but for the tip. It was not a random encounter with the bus. All of the officers were in uniform. (R. p. 29, line 2 – p. 30, line 17.) Rogers said petitioner did not come off the bus until 40 minutes after it was stopped. He admitted petitioner was Hispanic and not a light-skinned, black male. He said to his recollection there were not many light-skinned black males on the bus. (R. p. 35, line 11 – p. 36, line 1.)

Defense counsel moved to suppress the heroin found in the luggage because of the illegal seizure and resulting search. None of the passengers were told they were free to leave or that they could refuse a search. (R. p. 46, line 16 – p. 47, line 10.) This Terry stop was a seizure. No reasonable passenger would feel free to leave and none tried to leave. The bus was seized with all of the passengers inside. There was no reliability shown of the anonymous tip and who gave it to the D.E.A. The burden was on the State to prove that the information supplied to the D.E.A. was reliable and credible. The State did not meet that burden. The State did not prove they had a reasonable suspicion to do what they did. (R. p. 48, line 3 – p. 54, line 8.)

The trial court denied the motion to suppress. It found that law enforcement did not stop the bus! The bus stopped on its own. The bus driver gave consent to search the luggage area. The trial court realized none of the passengers left the bus but said they were not held there against their will. (R. p. 66, line 14 – p. 67, line 25.) That ruling was in error and was based on an incorrect premise of the law.

In Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868 (1968), the Supreme Court of the United States held that the police may make a brief investigatory stop if they observe unusual conduct, that leads to a reasonable suspicion that criminal activity may be afoot and they are able to point to specific and articulable facts to justify their suspicion.

In Florida v. J.L., 529 U.S. 266, 120 S.Ct. 1375 (2000), the Court applied a Terry stop situation to a case involving an anonymous tip. In J.L., an anonymous caller reported to the Miami Dade Police that a young black male standing at a particular bus stop and wearing a plaid shirt was carrying a gun. Two officers later responded to the bus stop and saw three black males. One of the three, J.L, was wearing a plaid shirt. Apart from the tip, the officers had no reason to suspect any illegal conduct. They did not see a firearm and J.L. did not make a threatening or unusual movement. One of the officers told J.L. to put his arms up. He was then frisked and a gun was found in his pocket. 529 U.S. at 268, 120 S.Ct. at 1377.

The Court observed the following:

> In the instant case, the officers' suspicion that J.L. was carrying a weapon arose not from any observations of their own but solely from a call made from an unknown location by an unknown caller. Unlike a tip from a known informant whose reputation can be assessed and who can be held responsible if her allegations turn out to be fabricated, see *Adams v. Williams*, 407 S.S. 143, 146-147, 92 S.Ct. 1921, 32 L.Ed.2d 612 (1972), "an anonymous tip alone seldom demonstrates the informant's basis of knowledge or veracity," *Alabama v. White*, 496 U.S. at

> 329, 110 S.Ct. 2412. As we have recognized, however, there are situations in which an anonymous tip suitably corroborated, exhibits "sufficient indicia of reliability to provide reasonable suspicions to make the investigatory stop." *Id*, at 327, 110 S.Ct. 2412. The question we here confront is whether the tip pointing to J.L. had those indicia of reliability.
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> The tip in the instant case lacked the moderate indicia of reliability present in *White* and essential to the Court's decision in that case. The anonymous call concerning J.L. provided no predictive information and therefore left the police without means to test the informant's knowledge or credibility. That the allegation about the gun turned out to be correct does not suggest that the officers prior to the frisks, had a reasonable basis for suspecting J.L. of engaging in unlawful conduct: The reasonableness of official suspicion must be measured by what the officers knew (before) they conducted their search. All the police had to go on in this case was the bare report of an unknown, unaccountable informant who neither explained how he knew about the gun nor supplied any basis for believing he had inside information about J.L. If *White* was a close case on the reliability of anonymous tips, this one surely falls on the other side of the line. 529 U.S. at 270-271, 120 S.Ct. at 1378-1379.
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> An accurate description of a subject's readily observable location and appearance is of course reliable in this limited sense: It will help the police correctly identify the person whom the tipster means to accuse. Such a tip, however, does not show that the tipster has knowledge of concealed criminal activity. The reasonable suspicion here at issue requires that a tip be reliable in its assertion of illegality, not just in its tendency to identify a determinate person. 529 U.S. at 272, 120 S.Ct. at 1379.

In the present case the police did not even have an accurate description of the suspect. There was nothing to show the reliability of the scant information passed along by the D.E.A. or the

reliability of the person who gave the information to the D.E.A. The fruits of the search do not justify the initial seizure of petitioner and the bus occupants. In Smith v. Ohio, 494 U.S. 451, 543, 110 S.Ct. 1288, 1290 (1990), the Court wrote:

> That reasoning, however, "justify[ing] ... the search by the arrest," just "will not do." *Johnson v. United States,* 333 U.S. 10, 16-17, 68 S.Ct. 367, 370, 92 L.Ed. 436 (1948). As we have had occasion in the past to observe, "[i]t is axiomatic that an incident search may not precede an arrest and serve as part of its justification." *Sibron v. New York,* 392 U.S. 40, 63, 88 S.Ct. 1889, 1902, 20 L.Ed.2d 917 (1868); see also *Henry v. United States*, 361 U.S. 98, 102, 80 S.Ct. 168, 171, 4 L.Ed.2d 134 (1959); *Rawlings v. Kentucky,* 448 U.S. 98, 111, n. 6, 100 S.Ct. 2556, 2564, n. 6, 65 L.Ed.2d 633 (1980).

The police in this case failed to make any effort to corroborate the tip they received to see if it had a sufficient indicia of reliability to provide reasonable suspicion to make the investigatory stop.

Any notion that there was a consensual search in this case is nonsense. All of the passengers of this bus were seized because they yielded to a show of authority. California v. Hodari D., 499 U.S. 621, 111 S.Ct. 1547 (1991.) They were not free to leave and they were not told they were free to leave. They all stayed on the bus and followed the orders of the police concerning getting off the bus and being paired up with their luggage claim tickets and/or luggage. A consent to search procured during an unlawful stop is invalid. Such consent cannot be the exploitation of the unlawful stop. State v. Robinson, 306 S.C. 399, 412 S.E.2d 411 (1991).

The decision of the Court of Appeals failed to recognize the following:

There were four uniformed officers at the scene plus a k-nine where the bus was. None of the passengers left the bus showing they did not feel they were free to leave. Petitioner did not come off the bus until 40 minutes after it was stopped. The bus was seized with all of the

passengers inside. There was no reliability shown of the anonymous tip and who gave it to the D.E.A. The police did not even have an accurate description of the suspect. The burden was on the State to prove that the information supplied to the D.E.A. was reliable and credible. The State did not meet that burden. They did not prove that they had a reasonable suspicion to do what they did.

CONCLUSION

Petitioner's writ should be granted and his conviction should be reversed.

Respectfully Submitted,

Robert M. Pachak

Robert M. Pachak
Appellate Defender

ATTORNEY FOR PETITIONER

This 16th day of September, 2016.

STATE OF SOUTH CAROLINA
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THE STATE,

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PETITIONER

CERTIFICATE OF SERVICE

I certify that a copy of the Petition for Writ of Certiorari and a copy of the Appendix in this case has been served on Mark Reynolds Farthing, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Emmanual M. Rodriguez, #361467, at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 16th day of September, 2016.

Robert M. Pachak
Appellate Defender
ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 16th day of September, 2016.

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