ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenville County

Honorable Edward W. Miller, Circuit Court Judge

RECEIVED

SEP 12 2016

S.C. SUPREME COURT

THE STATE,

RESPONDENT,

V.

KARACUS KOREAN FREEMAN,

APPELLANT

APPELLATE CASE NO. 2016-000800

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Did the court err by denying Appellant's motion to suppress evidence seized from the vehicle he was driving where there were insufficient indicia of reliability of the information provided by an "informant" for the police to make an investigatory stop, where the "informant" had never given police information before and had never been proven reliable, and where officers made no personal observations and had no reason, besides the information provided by the "informant," to suspect Appellant of illegal conduct?

STATEMENT OF THE CASE

A Greenville County Grand Jury indicted Appellant on June 30, 2015 for trafficking heroin more than four grams, but less than fourteen grams. R. 102-103. His case was called to trial on April 5, 2016 before the Honorable Edward W. Miller, and a jury. R.1. Assistant Solicitors Hunter Blouin and Stan Overby represented the state, and Scott D. Robinson represented Appellant. R. 1.

After the court denied Appellant's motion to suppress, the jury found him guilty. R. 98, ll. 6-15. Judge Miller sentenced him to ten years' imprisonment. R. 101, l. 19.

This appeal follows.

STATEMENT OF FACTS

Around 7:42 PM on May 26, 2014, Robert Arnold was arrested for trespassing at Shemwood Crossing Apartments. While Arnold was being booked at the Greenville County Detention Center, Officer Andrew Sturman found three prescription pills in his pocket. In exchange for Officer Sturman's "assistance with his charges," Arnold agreed to make a telephone call to his heroin "supplier."[1] Just outside the detention center, in Officer Sturman's presence, Arnold called an individual who he identified only as "K." This call was placed sometime between 8:40 PM and 9:00 PM from Arnold's cellular telephone. Sturman claimed he listened to the conversation on "speaker phone." R. 10, l. 9 – 11, l. 23.

During the conversation, Arnold allegedly talked to "K" about purchasing heroin and asked "K" where he was currently located. According to Sturman, he learned from the conversation that "K" was "in the area of Joe Louis Street." Sturman also claimed Arnold told him "K" would be driving a white Monte Carlo with blue racing stripes and large rims. R. 12, l. 24 – 13, l. 11. The telephone call between Arnold and the individual identified as "K" was not recorded in any fashion and Sturman never learned nor documented what telephone number Arnold had called. R. 14, l. 25 – 15, l. 2. Sturman admitted he had "no idea" who the person was on the other end of the telephone call. R. 15, ll. 3-8.

Neither Sturman nor any other officer with the Greenville City Police Department had ever worked with Arnold as a confidential informant before. R. 12, ll. 18-23. All Sturman knew about Arnold was that he had been "caught" with marijuana and heroin in his possession on previous occasions. R. 13, l. 23 – 14, l. 1. Sturman further admitted he had *no idea* whether

[1] Officer Sturman never charged Arnold with any offense related to the pills. Arnold was only booked that day for trespassing. R. 48, ll. 4-7.

Arnold or the information he provided was reliable. R. 13, ll. 15-17; R. 15, ll. 14-20. However, he claimed that, during his prior encounters with Arnold, Arnold had "always been honest with [him]."[2] R. 13, ll. 6-14. Moreover, based on the telephone call, Sturman "felt" the information Arnold provided was "good." R. 13, ll. 18-22.

Around 9:00 PM, Sturman relayed the information he had learned from Arnold and the telephone call to Officer Mauricio Reyes, who was on uniform patrol near Joe Louis Street. R. 14, ll. 10-17; R. 17, ll. 6-22. When Reyes received this information, he contacted Officer Eric Koepke, a K-9 handler. R. 18, ll. 6-13. Shortly thereafter, Reyes observed a vehicle matching the description given by Arnold turning right off of Joe Louis Street. He immediately stopped the vehicle. The stop occurred at 9:18 PM, about twenty minutes after the telephone call. Reyes admitted that, before he stopped the car, he did not observe the occupants engage in any illegal activity nor did he see the driver commit any traffic violations. R. 24, ll. 7-23. He stopped the vehicle based solely on the information Sturman had relayed to him.

There were two occupants in the car. Officer Reyes immediately asked the driver to step out of the vehicle and placed him in handcuffs. The driver was later identified as Appellant. R. 18, l. 1 – 19, l. 20. Appellant told Officer Reyes that the vehicle belonged to his mother. R. 20, ll. 5-6.

Appellant ultimately refused to consent to a search of the car. Consequently, Officer Koepke, who had arrived as soon as the traffic stop occurred, "ran his K-9 around the vehicle." Before conducting the "narcotic sniff," Koepke asked Appellant "if there was any reason that

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[2] Officer Sturman failed to provide any details regarding his prior encounters with Arnold. It appears Sturman was merely familiar with Arnold through his work on uniform patrol. Sturman said he knew Arnold was on trespass notice from Shemwood Crossing Apartments and that he had previously been arrested for possession of marijuana and heroin. See R. 9, ll. 13-15. However, being involved in criminal activity does not give you credibility.

[his] police dog would alert to the presence of narcotic odor in his vehicle." Appellant allegedly said "he had just smoked reefer before he got in the car." R. 29, ll. 7-16.

The K-9 allegedly "alerted" to the presence of narcotics. R. 20, ll. 3-14. After the dog "alerted," Officer Reyes searched the vehicle and claimed he found a bag containing "a chalky brown substance" in the "gear shift" that he suspected was heroin. R. 25, ll. 12-21; R. 71, ll. 3-6. However, the results of a field test were inconclusive. R. 21, ll. 1-7.

Neither Appellant nor the woman in the front passenger seat "claimed ownership" of the alleged heroin. However, after the woman was "placed into custody," Appellant allegedly "claimed ownership of the bag." R. 21, l. 21 – 22, l. 9.

The "chalky brown substance" allegedly found in the car Appellant was driving was later tested by a forensic chemist at the Greenville County Department of Public Safety. It tested positive for heroin. R. 76, ll. 10-12. The forensic chemist determined the substance weighed 7.54 grams. R. 78, ll. 1-4. However, when weighed at the scene by Officer Reyes, the substance supposedly weighed 11.8 grams, a difference of 4.26 grams. R. 57, l. 23 – 58, l. 1; R. 85, l. 21 – 86, l. 1. Law enforcement could not account for the significant difference between the weight determined in the field and the weight determined by the forensic chemist.

The state called Arnold as a witness during both a pretrial suppression hearing and before the jury. Arnold stated that he had seen Appellant "around a couple of times," but he did not "know him [Appellant] like that." Arnold further stated that he did not know Appellant's name nor did he know his nickname. He denied placing a telephone call in Officer Sturman's presence after his arrest on May 26, 2014. Lastly, Arnold testified that he did not remember getting arrested by Sturman or speaking with him about cooperating with law enforcement. R. 5, l. 17 – 7, l. 5; R. 40, l. 13 – 41, l. 18.

Motion to Suppress

Appellant moved pretrial to suppress the heroin allegedly found in the vehicle he was driving on grounds that Officer Reyes did not have reasonable suspicion to justify the traffic stop. Defense counsel argued that Officer Reyes stopped Appellant based solely on the information provided by Arnold and the telephone call. He stressed that Reyes admitted during his *in camera* testimony that he did not observe Appellant commit any traffic violations or engage in "any sort of illegal activity." Moreover, officers did not conduct any investigation to corroborate the information Arnold provided nor did they observe any actions or events that corroborated the information. R. 31, l. 17 – 33, l. 6.

Counsel further asserted that Arnold had never been proven to be reliable and that Officer Sturman admitted he had never worked with Arnold before and "had no idea" about his reliability. Lastly, counsel stated, "What we have is a phone call that *they don't know what number he [Arnold] called, they didn't know who he called, could be anybody.* He said it was 'K.' But that's all they really have in this case." R. 31, l. 17 – 33, l. 6 (emphasis added).

The court ultimately found "there was a particularized objective basis for the reasonable suspicion" and denied the motion. R. 35, ll. 21-23.

ARGUMENT

The court erred by denying Appellant's motion to suppress evidence seized from the vehicle he was driving where there were insufficient indicia of reliability of the information provided by an "informant" for the police to make an investigatory stop, where the "informant" had never given police information before and had never been proven reliable, and where officers made no personal observations and had no reason, besides the information provided by the "informant," to suspect Appellant of illegal conduct.

The trial judge should have granted Appellant's motion to suppress the heroin found in the vehicle he was driving because Officer Reyes did not have reasonable suspicion Appellant was engaged in criminal activity to justify the investigatory stop. Reyes admitted that, before he stopped the car, he did not observe the occupants engage in any illegal activity nor did he see the driver commit any traffic violations. R. 24, ll. 7-23. He stopped the vehicle based solely on the information provided by Arnold, an informant who had *never been proven reliable*.

The Fourth Amendment, made applicable to the states by way of the Fourteenth Amendment, guarantees the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV; Mapp v. Ohio, 367 U.S. 643 (1961). A traffic stop constitutes a Fourth Amendment seizure and, therefore, must be reasonable under the circumstances. State v. Vinson, 400 S.C. 347, 351, 734 S.E.2d 182, 184 (Ct. App. 2012) (internal citations omitted).

"Our courts have held that in South Carolina, an officer may stop and briefly detain the occupants of a car without treading on Fourth Amendment rights, even without probable cause to arrest, if he has a reasonable suspicion that the occupants are involved in criminal activity." State v. Rogers, 368 S.C. 529, 533-534, 629 S.E.2d 679, 681-682 (2006).

"Reasonable suspicion requires a particularized and objective basis that would lead one to suspect another of criminal activity." Id. at 534, 629 S.E.2d at 682 (quoting State v. Khingratsaiphon, 352 S.C. 62, 69, 572 S.E.2d 456, 459 (2002) (internal quotation marks omitted). "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 (Ct. App. 2000)).

Here, law enforcement did not have reasonable suspicion to justify the traffic stop. While Arnold was not an anonymous informant, Officer Sturman admitted neither he nor any other officer with the Greenville City Police Department had ever worked with Arnold as a confidential informant before. R. 12, ll. 18-23. All Sturman knew about Arnold was that he had been "caught" with marijuana and heroin in his possession on previous occasions. R. 13, l. 23 – 14, l. 1. *Sturman admitted he had no idea whether Arnold or the information he provided was reliable*. R. 13, ll. 15-17; R. 15, ll. 14-20.

Moreover, the specific information Arnold provided was insufficient to justify an investigatory stop. All law enforcement learned from Arnold was that a person who he identified only as "K" had allegedly sold him heroin in the past, a description of the car "K" would allegedly be driving, and "K's" general location. These items do not supply sufficient indicia of reliability. Arnold provided no predictive information preventing law enforcement from testing his credibility and from corroborating the information through personal observation. Arnold did not even provide the individual's name so that officers could verify whether this person was known to drive the vehicle Arnold described or, for example, whether the individual had prior drug convictions or was known by law enforcement as being involved in drug transactions.

Additionally, Officer Sturman failed to learn what telephone number Arnold had called or verify the identity of the person on the other line.

In Florida v. J.L., 529 U.S. 266 (2000), "the police received an anonymous tip that a young black male, standing at a particular bus stop, wearing a plaid shirt, was carrying a gun. Officers went to the bus stop and observed three black males, one of whom was wearing a plaid shirt. They frisked all three males, based only on the anonymous tip, and found a gun in J.L.'s pocket. The [United States Supreme] Court found that the tip provided no predictive information and therefore left the police no way to test the knowledge or credibility of the anonymous caller." State v. Green, 341 S.C. 214, 217 532 S.E.2d 896, 897 (Ct. App. 2000) (citing J.L., 529 U.S. at 271).

In State v. Green, an anonymous caller told police a black male by the name of Alonzo Green was leaving the area of Bayside Manor. The caller also reported Green was driving a gray four-door Maxima and had just left a residence in Bayside Manor with a large sum of money and narcotics. Immediately upon receiving this information, an officer saw Green, whom he knew by sight, driving a gray Maxima traveling away from Bayside Manor. Based solely on the anonymous tip, the officer pulled Green over. Id. at 216, 532 S.E.2d at 896. This Court held that the information the anonymous caller provided, specifically Green's name, a description of the car he was driving, and the location he would be departing, were readily observable and did not supply sufficient indicia of reliability to establish reasonable suspicion to justify an investigatory stop. Id. at 218, 532 S.E.2d at 897. Moreover, the Court held the officer made no personal observations and had no reason, aside from the anonymous tip, to suspect Green of illegal conduct. Id. at 218, 532 S.E.2d at 897-898.

Like in J.L. and Green, Arnold, while not an anonymous informant, provided Officer Sturman with no predictive information from which law enforcement could test his credibility. Additionally, Officer Reyes failed to corroborate the information through personal observation. Reyes merely saw a vehicle matching the description given by Arnold turn right off of Joe Louis Street. R. 18, ll. 14-23. These facts failed to establish reasonable suspicion to justify an investigatory stop.

At trial, the state relied on State v. Rogers, 368 S.C. 529, 629 S.E.2d 679 (Ct. App. 2006) and State v. Willard, 374 S.C. 129, 647 S.E.2d 252 (Ct. App. 2007), both of which are easily distinguishable from this case.

In Rogers, a confidential informant, *who was working with the Kingstree Police Department on various cases*, told an officer in person about a robbery that was to take place that afternoon at Cash U.S.A. The informant named four individuals, including Rogers, who were involved in the armed robbery and told the officer the men were supposed to use a white Honda automobile that Rogers had been seen driving. *The officer had worked with this informant on numerous prior occasions and testified that the past information the informant had provided proved to be reliable.* As the officer was driving the confidential informant home, a call came over the radio indicating there had been an armed robbery at the Cash U.S.A. After dropping the informant off, the officer drove to Rogers' house and observed a white Honda with four occupants pull up to a stop sign and eventually pulled the car over. Rogers, 368 S.C. at 532-533, 629 S.E.2d at 681.

In holding that the officer had reasonable suspicion to justify the investigatory stop, this Court emphasized that the information came "from a known, accountable informant whose reputation could be assessed." This Court also stated that officers were not investigating the

possibility that a crime may be occurring, but were investigating a crime that had occurred and had been independently reported. Lastly, the Court noted that *law enforcement verified the information through personal observation.* Specifically, the Court stated the officer drove to the area where Rogers lived, observed a white Honda with four occupants, and recognized the vehicle as the one Rogers had been seen driving. Id. at 534-536, 629 S.E.2d at 682-683 (emphasis added).

Here, not only was Arnold's reliability unknown since he had never worked with the Greenville City Police Department before, but Officers Sturman and Reyes did not conduct any independent investigation or corroborate the information Arnold provided through personal observation.

In Willard, a confidential informant, who had been arrested on a family court bench warrant and found with a quantity of methamphetamine, told an officer he and Willard were related, that he had purchased drugs from Willard before, and that he intended to purchase drugs from Willard that day. In exchange for help with his drug charge, the informant called Willard from the officer's cellular telephone and arranged to meet Willard at a local movie theater parking lot at an agreed upon time. The conversation was recorded. While the officer had never worked with this individual as an informant before, *he knew the informant had accurately described Willard's black Honda Civic with dark tinted windows.*[3] Later that day, another officer observed Willard within a half mile of the movie theater. At that same time, the officer's telephone rang reporting a call from the number the informant had called earlier. After Willard

[3] While the opinion does not specifically state that law enforcement was familiar with Willard and knew what vehicle he drove, it certainly suggests so. See Willard, 374 S.C. at 132, 647 S.E.2d at 254.

pulled into the movie theater parking lot, officers stopped him and blocked his vehicle from leaving.

This Court noted that although the informant was not previously proven reliable, he correctly identified Willard's vehicle and knew Willard's telephone number. The Court ultimately held there was reasonable suspicion for the stop. While not discussed in the Court's opinion, the information supplied by the informant in Willard was predictive, which allowed the officers to corroborate it through personal observation. Specifically, the officers first observed Willard within a half mile of the movie theater, then received a telephone call from the number the informant had called earlier, and finally observed Willard pull into the movie theater parking lot at the agreed upon time.

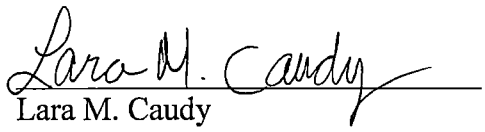
In this case, on the other hand, law enforcement had no means to determine if Arnold was reliable, unlike in Willard where officers knew the informant had correctly identified Willard's vehicle. Additionally, as mentioned, Officer Reyes was unable to verify any of the information Arnold provided through personal observation unlike the officers in Willard.

Consequently, the court erred by denying Appellant's motion to suppress when Officer Reyes did not have reasonable suspicion that Appellant was involved in criminal activity to justify an investigatory stop. Respectfully, this Court should hold the evidence should have been suppressed and, since the charge against Appellant cannot be sustained without this evidence, reverse Appellant's conviction. See Green, 341 S.C. at 219, 532 S.E.2d at 898.

CONCLUSION

Based on the foregoing argument, this Court should find the evidence recovered during the investigatory stop should have been suppressed and reverse Appellant's conviction and sentence.

Respectfully submitted,



Lara M. Caudy
Appellate Defender

ATTORNEY FOR APPELLANT

This 12th day of September, 2016.

CERTIFICATE OF COUNSEL FOR APPELLANT

Counsel for appellant certifies that this Record on Appeal contains all material proposed to be included by any of the parties and not any other material and that this Record on Appeal complies to the best of my ability with 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."

Respectfully Submitted,

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case have been served upon Mark R. Farthing, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 12th day of September, 2016.

Lara M. Caudy

Lara M. Caudy
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 12th day of September, 2016.

_____ (L.S.)
Notary Public for South Carolina
My Commission Expires: April 27, 2026.