STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Richland County
Robert E. Hood, Circuit Court Judge

THE STATE,

Respondent,

vs.

ERIC TERRELL SPEARS,

Appellant.

Appellate Case No. 2015-000390

STATE'S PETITION FOR REHEARING

Pursuant to Rules 221 and 240, SCACR, the Petitioner State now requests a rehearing on the following points that this Court may have overlooked or misapprehended:

I.

This Court reversed the conviction and sentence for Appellant Spears on the basis that he was seized without reasonable suspicion because he would not feel free to leave when law enforcement walked briskly to catch up with him and speak with Appellant and his companion as they walked away from the bus stop and because officers asked him if he carried any illegal weapons on his person or luggage.

The State respectfully submits that this Court overlooked clear Fourth Amendment precedent and the standard of review in finding Spears was seized when agents made contact

with him or alternatively when he was asked whether or not he carried any weapons. "South Carolina appellate courts review Fourth Amendment determinations under a clear error standard." State v. Provet, 405 S.C. 101, 107, 747 S.E.2d 453, 456 (2013). "When reviewing a Fourth Amendment search and seizure case, an appellate court must affirm if there is any evidence to support the ruling." State v. Wright, 391 S.C. 436, 442, 706 S.E.2d 324, 326 (2011).

The State is especially concerned with the proposition that merely asking a person if they are carrying a weapon will turn a consensual encounter into a seizure. For officer safety, this is problematic. Additionally, the opinion inhibits good, fair, community policing in response to the infiltration of dangerous controlled substances in our community. See United States v. Mendenhall, 446 U.S. 544, 561-62 (1980) ("The public has a compelling interest in detecting those who would traffic in deadly drugs for personal profit. Few problems affecting the health and welfare of our population, particularly our young, cause greater concern than the escalating use of controlled substances. . . . And many drugs . . . may be easily concealed. As a result, the obstacles to detection of illegal conduct may be unmatched in any other area of law enforcement.").

Law enforcement may approach an individual on a public street and ask questions without implicating Fourth Amendment protections. Florida v. Bostick, 501 U.S. 429, 434 (1991). "Without such an ability law enforcement officials would be neutralized to the point of being ineffective." Unites States v. Weaver, 282 F.3d 302, 309 (1st Cir. 2002).

Our United States Supreme Court observed, "[C]haracterizing every street encounter between a citizen and the police as a 'seizure,' while not enhancing any interest secured by the Fourth Amendment, would impose wholly unrealistic restrictions upon a wide variety of

legitimate law enforcement practices." Mendenhall, 446 U.S. at 554 (1980). The Mendenhall court noted the need for police questioning for effective enforcement: "Without such investigation, those who were innocent might be falsely accused, those who were guilty might wholly escape prosecution, and many crimes would go unsolved. In short the security of all would be diminished." Id. (citation and quotation marks omitted).

When a law enforcement officer "accosts an individual and restrains his freedom to walk away, [the officer] has 'seized' that person." Terry v. Ohio, 392 U.S. 1, 66 (1968). However, "not all personal intercourse between policemen and citizens involves 'seizures' of persons." Id. at 19, n.16. "Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred." Id. "[L]aw enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place, by asking him if he is willing to answer some questions, by putting questions to him if the person is willing to listen, or by offering in evidence in a criminal prosecution his voluntary answers to such questions." Florida v. Royer, 460 U.S. 491, 497 (1983). "[E]ven when police officers have no basis for suspecting a particular individual, they may generally ask questions of that individual, ask to see identification, and request to search his or her luggage – as long as the police do not convey a message that compliance with their request is required." Bostick, 501 U.S. at 434-35 (1991) (citations omitted).

"While most citizens will respond to a police request, the fact that people do so, and do so without being told they are free not to respond, hardly eliminates the consensual nature of the response." INS v. Delgado, 466 U.S. 210, 216 (1984) (concluding "police questioning by itself,

is unlikely to result in a Fourth Amendment violation."); see O'Malley v. City of Flint, 652 F.3d 662, 669 (6th Cir. 2011) (finding the officer approaching defendant, stating he was a police officer, and indicating he wanted to talk to O'Malley, was clearly a consensual encounter, officer "did not use language or a tone of voice compelling compliance").

"[A] person is seized within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." Mendenhall, 446 U.S. at 554.

This Court relied on State v. Williams, 351 S.C. 591, 571 S.E.2d 703 (Ct. App. 2002), which posited a list of non-exhaustive factors to consider whether a reasonable person would consider themselves free to leave during a street encounter with law enforcement. While in the instant case the majority viewed these factors as indicative of a seizure, reasonable minds could differ and find the encounter was consensual when examining the Williams factors:

(1) Time and place of encounter: The encounter took place during daylight in a public setting, near a post-office building. Accordingly, the encounter took place in a setting that was not inherently coercive. Further, Spears and his companion were pedestrians who could have walked away from the encounter. Unites States v. Weaver, 282 F.3d 302, 311-12 (1st Cir. 2002) (noting Weaver, as a pedestrian, could have walked away from the encounter; pedestrian encounters "are much less restrictive of an individual's movements" than situations occurring during a traffic stop).

(2) Number of officers present: Three officers approached Spears and his girlfriend. In other words, Spears and his companion were outnumbered three to two. See United States v. Tavolacci, 895 F.2d 1423 (D.C. Cir. 1990) (noting "the presence of two officers does not itself

transform a contact into a seizure, citing United States v. Carrasquillo, 877 F.2d 73, 75 (D.C. Cir. 1989); United States v. Palen, 793 F.2d 853 (7th Cir. 1986); and United States v. Viegas, 639 F.2d 42 (1st Circ. 1981) ("all involving two officers")). Notably, the officers did not position themselves to prevent Spears or his companion from walking away. Commonwealth v. Depeiza, 868 N.E.2d 90 (Mass. 2007) (finding officers positioned on either side of the defendant did not block defendant's path or otherwise restrict his freedom of movement).

(3) Whether the officers were uniformed: The officers were in plain clothes. The officers badges were visible, but they did not flash their badges. Officers did not use their badges to obtain compliance with their requests.

(4) Length of detention: The encounter was brief before it became apparent that Spears was hiding something in his waistband, which officers reasonably feared might be a weapon.

(5) Move to a different location or isolate: Law enforcement did not take any action to isolate Spears or move him to a different location. The encounter occurred as Spears and his companion walked towards apartments and occurred out in the open.

(6) Law enforcement did not inform Spears he was free to leave. Of course, this factor alone is not dispositive. See United States v. Ringold, 335 F.3d 1168 (10th Cir. 2003).

(7) Whether law enforcement indicated the person was a suspect in a crime: Law enforcement advised Spears of problems such as drug trafficking on the so-called Chinese bus lines, but did not directly accuse Spears of violating any law. See United States v. Ringold, 335 F.3d 1168 (10th Cir. 2003) (finding no seizure when the officer advised Ringold that he had heard of transportation of drugs and weapons on the interstate and asked Ringold if he had

anything like that); United States v. Tavolacci, 895 F.2d 1423, 1425 (D.C. Cir. 1990) (Tavolacci asked what the questioning was about and the officer advised Tavolacci he was with the drug interdiction unit investigating narcotics before asking for Tavolacci's ID again).

(8) Whether law enforcement retained person's documents: Law enforcement asked for identification, and he produced his New York identification, but the record fails to indicated that they kept his identification. Any retention of the identification was not accompanied by any other action compounding any sense of restraint. Further, Spears was free to refuse showing identification, unlike a motorist in a traffic stop. See United States v. Ford, 548 F.3d 1, 6 (1st Cir. 2008) (finding while retaining the license was an important consideration, declining to elevate it above other factors and noting that Ford was on foot on a public street, differing the case from airport cases, where citizens need documentation to move from place to place); United States v. Weaver, 282 F.3d 302, 313 (4th Cir. 2002) (finding retaining pedestrian's identification differs from officers retaining a driver's license during a traffic stop; unlike a traffic stop, an individual is free to refuse when asked for identification); Tavolacci at 1425-26 (finding retention of papers may transform an interview into a seizure where it is prolonged or accompanied by some other act compounding an impression of restraint).

(9) Finally, officers did not exhibit threatening behavior or contact. While two officers may have been carrying visible weapons, all indications were the weapons were holstered and officers did not display or draw the weapons. When asked if she could see the officers' guns, Spears' companion responded, "I guess you could." R. p. 56. This indicates that the holstered weapons did not make much of an impression. Further, at a minimum, reasonable minds may differ on the significance that officers quickened their pace to reach Spears and his

companion. The officers did not run or exhibit any threatening behavior as they approached. The manner of approaching Spears and the companion was simply appropriate. Officer Tracy testified that as they were closer to Spears and his companion, they said "something nonthreatening like, 'Excuse us, do you mind if we have a word with you.'" R. p. 14, lines 4-6. This is representative of the professional, respectful manner law enforcement undertook in the encounter. Officer Tracy testified that beforehand, the officers met and discussed "steps about not to impede the person's movement." R. p. 15, lines4-8. Officer Tracy described catching up to Spears and his companion as follows: "They're walking, we're walking behind them, we didn't run. However quickly we could walk **a little faster than they did** to make contact with them." R. p 31. Officer Tracy explained to the jury that "us running after somebody is more of a show of force so we didn't want to run after them." R. p. 134, line 24 – p. 135, line 2. He denied defense counsel's suggestion they were chasing Spears. Tr. p. 135, lines 6-8. The trial court could reasonably conclude that merely walking more briskly, "a little faster," did not signal to a reasonable person that they were not free to walk away.

On the last point, courts have found more dramatic approaches to not turn an encounter into a seizure. See United States v. Ford, 548 F.3d 1, 5 (1st Cir. 2008) (finding non-threatening that officers drove their vehicle the wrong way on a one way street to approach Ford, a pedestrian, and speak with him); O'Malley, at 669 (finding when officer parked his vehicle behind O'Malley's vehicle in the driveway as O'Malley walked towards his house. O'Malley not only reasonably thought he was free to leave, but was walking away; officer's subsequent approach and statement to O'Malley that he was an officer and wanted to talk to him was likewise consensual, fact O'Malley stopped to speak with the officer did not by itself transform

the encounter into a seizure); Tavolacci, at 1425 (finding the presence of officers in the doorway of a train roomette who questioned Tavolacci and asked for his ticket and identification did not defeat the "free to leave test."); Delgado, at 218-19 (finding factory workers were not seized during INS surveys where INS agents were placed near the exits of the factory sites; "the mere possibility that they would be questioned if they sought to leave the buildings should not have resulted in any reasonable apprehension by any of them that they would be seized or detained in any meaningful way."); DePeiza, (finding no seizure occurred when officers passed Depeiza a second time, called out to him, asked questions, and then both got out of patrol vehicle. Seizure only occurred when officers first attempted to frisk DePeiza).

In Ringold, two officers observed a vehicle on the highway and after it exited the highway, they turned the vehicle around and observed it at a gas station. The officers parked their patrol car, each bought a soft drink, and approached the vehicle, beginning a conversation with Ringold. Ringold's passenger had already gone into the convenience store. The conversation started as casual conversation about weather and travel plans. Then the officer told Ringold that he heard reports of illegal drugs or weapons being transported from Los Angeles to Philadelphia (Ringold's professed destination) and asked if Ringold was carrying any of those things. Id. at 1170-71.

The Tenth Circuit rejected the argument likening the encounter to a traffic stop, noting the defendants themselves chose to leave the highway and voluntarily stopped their vehicle at the highway station. The court also rejected the Ringold's claim that he would not feel free to decline the officer's questioning because Ringold was encircled between them, the gas pump, and Ringold's vehicle, noting "nothing prevented Ringold from simply entering his vehicle and

driving away." Id. at 1173.

Finally, the court rejected Ringold's claim that the encounter became an investigative detention because the officer asked Ringold potentially incriminating questions about drugs and weapons, opining "what matters instead is 'the manner' in which such questions were posed." Id. (citations omitted). The court noted that "even the latter questions were not worded or delivered in such a manner as to indicate that compliance with any officer directives (or even inquiries) was required." Id.

In the instant case, Spears and his companion chose to walk from the bus stop towards the apartments. Further, like Ringold, while the officers asked potentially incriminating questions, they asked the questions in a polite manner. Finally, because Spears was free to walk away, just like the defendants in Ford, O'Malley, and Ringold, the street encounter only turned into a seizure when the officers necessarily performed a Terry frisk.

WHEREFORE, Petitioner/Respondent requests this Court to grant the petition for rehearing and affirm the conviction and sentence.

Respectfully submitted,

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ATTORNEYS FOR PETITIONER/RESPONDENT

June 15, 2017

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The Honorable Robert E. Hood, Circuit Court Judge

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PROOF OF SERVICE

I, Anne Mueller, certify that I have served the Petition for Rehearing on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to his attorney of record LaNelle C. DuRant, Esquire, S.C. Commission on Indigent Defense, Division of Appellate Defense, Post Office Box 11589, Columbia, South Carolina 29211-1589.

I further certify that all parties required by Rule to be served have been served.

This 15th day of June, 2017.

Anne Mueller

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ALAN WILSON
ATTORNEY GENERAL

June 15, 2017

The Honorable Jenny Abbott Kitchings
Clerk of Court, South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29201

Re: The State v. Eric Terrell Spears
Appellate Case No: 2015-000390

Dear Ms. Kitchings:

Enclosed please find an original and six (6) copies of the Petition for Rehearing, including proof of service, in the above-referenced case.

Sincerely,

David Spencer
Senior Assistant Attorney General
S.C. Bar No: 68571

DS/aam
Enclosures

cc: LaNelle C. DuRant (with two copies)
Ms. Trisha Allen