STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

ORIGINAL



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Appeal from York County

Honorable John C. Hayes, Circuit Court Judge

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THE STATE,

RESPONDENT,

V.

JAYQUAN DANTE WILMORE,

APPELLANT

APPELLATE CASE NO. 2016-001511

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# ANDERS BRIEF OF APPELLANT

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## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Cases**



**Constitutional Provisions**

## STATEMENT OF ISSUE ON APPEAL

Whether the court erred by refusing to suppress evidence of the gun and appellant's claim of ownership of the gun, since both pieces of evidence were obtained as a result of an illegal prolonged traffic stop that was a subterfuge to search for contraband, and appellant's admissions were obtained without Miranda warnings where he was not free to leave?

## STATEMENT OF THE CASE

Appellant was indicted at the June 16, 2016 term of the York County Grand Jury for unlawfully carrying of a pistol. His case was called to trial on July 12 – 13, 2016, before the Honorable John C. Hayes, III, and a jury. Zachary Merritt and Melissa Inzerillo represented appellant. Christopher Epting was the Assistant Solicitor. R. 1.

On July 13, 2016, the jury found appellant guilty. R. 318, ll. 21-24. Judge Hayes sentenced appellant to one year's imprisonment on the unlawful carrying of a pistol charge, and imposed a concurrent sentence for appellant's probation violation. R. 327, l. 20 – 328, l. 3.

This appeal follows.

## ARGUMENT

The court erred by refusing to suppress evidence of the gun and appellant's claim of ownership of the gun, since both pieces of evidence were obtained as a result of an illegal prolonged traffic stop that was a subterfuge to search for contraband, and appellant's admissions were obtained without *Miranda* warnings where he was not free to leave.

**Relevant Facts**

During the suppression hearing, Rock Hill police officer Marshall Bryson testified that late at night on December 21, 2015, he was a passenger in the police car driven by police officer trainee Revels. They were sitting in a church parking lot on Flint Hill Street next to the police car driven by Officer William Little. The three police officers in these two police car were apparently collaborating on "training paperwork." Bryson recalled: "We observed a dark sedan go by without a tag light. Officer Little advised he was [going to] make a traffic stop on the vehicle and as auxiliary we backed him up on the traffic stop." R. 45, l. 14 – 46, l. 7.

The sedan was driven by "Mr. Govan." Appellant was in the passenger seat. Training Officer Revels approached the passenger side, and Officer Little "made contact with the driver's side." Bryson watched from behind the vehicle since his role was apparently to critique how well Revels handled the situation. R. 46, l. 8 – 47, l. 18.

Govan and appellant were both asked to get out of the sedan. "They conducted a Terry frisk of their person just after removing them from the vehicle and checked for weapons." R. 46, ll. 19-24. All three of the police officers, Bryson, Little, and Revels, would testify that appellant was "very cooperative," and that driver, Govan, was conversely "belligerent and agitated." In fact, a third party invaded the area of the traffic stop, and provided Govan with a cell phone.

Govan used the phone to call an attorney, or someone he wanted the police to believe was an attorney. R. 48, ll. 7-16.

The officers, Little and Revels, apparently conversed about the fact they allegedly smelled marijuana smoke near the vehicle. R. 48, l. 17 – 49, l. 7. Bryson remembered that Revels began searching the driver's side of the vehicle but he stopped his search for some reason. R. 48, l. 20 – 49, l. 7. As will be seen infra, Govan was apparently vocal that the police were violating his rights by wanting to search, or searching the car he was driving.

Bryson said he walked over to the passenger side of the sedan where appellant was standing outside. "Immediately upon walking up to the *driver side*, I shined my flashlight inside the vehicle; the first thing I saw was [under the] passenger seat there was a pistol. I could see the handle of the pistol between under the passenger seat between there and the running board . . . I stepped back and notified Officer Little." Bryson had Officer Little photograph the pistol. R. 48, l. 20 – 49, l. 14.

Bryson called NCIC about the pistol, and "it came back as a stolen weapon." Tr. 49, ll. 15-18. On cross-examination, Bryson said it took about sixteen minutes for the officers to have both men removed from the vehicle, to do the Terry pat down, and for Bryson to shine his flashlight inside the car. R. 57, l. 10 – 58, l. 20. Bryson said nothing of significance was uttered during this sixteen minute period. R. 58, l. 10 – 59, l. 25.

The pistol was located in the car approximately *twenty-two minutes* after the "normal" traffic stop for a tag light being out started. R. 60, l. 17 – 61, l. 5.

Bryson testified that Govan asked the police why he was being arrested and handcuffed. Bryson said: "I was advising him that *until we could figure out whose weapon it is that they*

*were both going to be detained in handcuffs . . . at which time Mr. Wilmore said it's mine twice.*" R. 50, ll. 1-12. (emphasis added).

Apparently, when Govan was told that both men were going to be detained because of the pistol, Govan looked at appellant and *further* prompted him by saying "Bro?" Appellant then told the officers that the gun belonged to him or that it might have been his girlfriend's gun, since Govan was driving appellant's girlfriend's sedan. R. 50, l. 1 – 52, l. 22. It was *not* Govan's gun, defense counsel argued, that was the gist of appellant's admission in the heat of protecting Govan given Govan's irrational behavior towards the police.

Officer Little claimed during the traffic stop "there was the odor of marijuana coming from the car." R. 73, ll. 9-11. Little confirmed that Govan was belligerent during the traffic stop, that a "third party" approached during Govan, and gave Govan a cell phone. R. 75, ll. 12-18.

Little was naturally concerned about both Govan and the third party invading the scene. After this occurred, Little recalled that Bryson alerted him that there was a pistol under the passenger seat. Little recalled appellant claimed ownership of the pistol. Again, appellant always remained calm, and not confrontational, like Govan, during the traffic stop. R. 74, l. 7 – 77, l. 24.

After appellant's admission that the gun belonged to him, he was given Miranda[1] warnings, and he asked Officer Little to "grab his hoodie out from the vehicle." R. 79, ll. 2-8. Little retrieved the hoodie from the sedan. Little confirmed that appellant was not read his Miranda rights until after he admitted ownership of the pistol. R. 78, ll. 4-14.

[1] Miranda v. Arizona, 384 U.S. 436 (1966).

On cross-examination, Officer Little testified that once the officers smelled the marijuana, they did not need consent to search, and that they had probable cause to search the vehicle. Little confirmed that the gun was found *twenty-two minutes or twenty-two minutes and thirty seconds into the alleged normal traffic stop for the tag light violation.* R. 105, l. 9 – 109, l. 12.

**Arguments of Counsel**

Defense counsel argued that appellant's statements made before Miranda warnings were given -- where they had been on the roadside for more than fifteen minutes -- had to be suppressed. The inculpatory statements were that the gun was appellant's gun. R. 120, l. 22 – 122, l. 6.

The solicitor argued that appellant's statements about the gun were not elicited in response to interrogation. The solicitor also argued that the marijuana smell was part of the res geste of the traffic stop. The solicitor maintained that appellant could be seen on the videotape -- that is before this Court -- walking "off several times to talk to this third party who has entered." Defense counsel responded that the traffic stop had gone on for an unreasonable length *before* appellant claimed ownership of the gun. R. 122, l. 9 – 123, l. 15.

The judge ruled that he did not think the time it took to conduct the stop was excessive. He also ruled that the police had a right to detain appellant and Govan when they smelled marijuana smoke. The judge reasoned that smelling the marijuana smoke provided probable cause to search the vehicle. R. 123, l. 16 – 124, l. 1.

Defense counsel further argued under Rodriguez v. United States, 135 S.Ct. 1609 (2015), that the time of the traffic stop in this case was excessive. Counsel correctly noted that in

Rodriguez that seven to eight minutes had passed before the normal duties attendant to a traffic stop were completed, and a written warning given.

The United States Supreme Court in Rodriguez held that the authority for the seizure ended when the tasks tied to the traffic infraction were -- or reasonably should have been -- completed. The majority in Rodriguez found that the government's argument that the officer who completed the traffic stop tasks should be given *extra time* to pursue an unrelated criminal investigation was unpersuasive. The Supreme Court found that a remand to the Eighth Circuit for more specific fact-finding was therefore mandated. R. 124, ll. 2-12.

Here, the judge responded to defense counsel's Rodriguez argument by stating, "Yeah, I heard the argument and I said that I find it is unreasonably long." It appears that judge meant not unreasonably long, as he earlier stated. The judge also disagreed that appellant was not free to leave – meaning that he was in custody -- at the time he claimed ownership of the gun where it was undisputed he had not been given Miranda warnings. The judge ruled that appellant's statements about owning the gun, and the gun itself were both admissible into evidence. R. 123, l. 12 – 128, l. 8.

**The Trial**

During the trial before the jury, defense counsel made the proper contemporaneous objections to the admission of appellant's statements, and to the gun itself. R. 165, l. 4 – 166, l. 6.[2] Defense counsel also contemporaneously objected when Officer Little began to testify that appellant claimed ownership of the gun. R. 166, l. 22 – 167, l. 25.

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[2] The serial number of the gun that was introduced over objection did not match the serial number that was read into the record. The judge refused to strike the introduction of the gun for the record, noting it was only "one digit off," he reasoned defense counsel he could cross-examine on this matter, and argue that fact to the jury. R. 172, l. 2 – 175, l. 22.

The testimony of the officers before the jury was mostly consistent with their testimony during the suppression hearing. However, Officer Little, before the jury, testified that when the third party gave Govan a cell phone, Govan claimed to be talking with a lawyer on the phone. R. 221, ll. 3-5. In the presence of the jury, Officer Little was not as critical of Govan's behavior. In fact, Little told the jury that Govan was only protecting his "Fourth Amendment rights," and that Govan was explaining to the police how what was occurring was unconstitutional. R. 222, l. 4 – 224, l. 3.

Officer Bryson also testified that Govan did not consent to the search of the car, and that he did not want the police to search. R. 267, ll. 6-19.

During his closing argument, defense counsel reminded the jury of Govan's "ridiculous" behavior during the traffic stop. He also told the jury that appellant only claimed ownership of the gun because of Govan's behavior at the time. He urged that the jury should not accept appellant's statements at face value where they were made at the time to protect Govan. R. 298, l. 10 – 302, l. 17.

The judge charged the jury that none of the exceptions contained in South Carolina Code §16-23-20 pertaining to legally carrying a pistol applied in this case, and that the jury had to decide whether appellant possessed the pistol or was merely present in the car where the gun was discovered. R. 310, l. 12 – 311, l. 18.

**Discussion**

In Rodriguez v. United States, 135 S.Ct. 1609 (2015), the Supreme Court noted that in Illinois v. Caballes 543 U.S. 405 (2005) that it had held a dog sniff conducted during a lawful traffic stop did not violate the Fourth Amendment's proscription of unreasonable seizures. The

Court in Rodriguez reasoned that it now had to decide the question of whether the Fourth Amendment tolerated a dog sniff conducted *after completion of the traffic stop.*

The Court held that "a traffic stop exceeding the time needed to handle the matter for which the stop was made violates the Constitution's shield against unreasonable seizures. A seizure justified only by a police-observed traffic violation, therefore, 'becomes unlawful if it is prolonged *beyond the time reasonably required to complete the mission*' of issuing a ticket for the violation." Rodriguez v. United States, 135 S.Ct. at 1612, quoting Illinois v. Caballes, 543 U.S. at 407. (emphasis added).

In State v. Tindall, 388 S.C. 518, 698 S.E.2d 203 (2010), our Supreme Court held that the continued detention in that case exceeded the scope of the traffic stop, that the police officer lacked reasonable suspicion of a serious crime being committed or having been committed, and the driver's consent to search therefore was not valid.

In Tindall, the defendant was stopped for speeding and following another car too closely. The defendant was placed in the police car. The police officer questioned the defendant. Approximately fifteen to twenty minutes into the stop, the officer asked the defendant if he could search his car. The defendant said he "did not mind" or he did "not care." The officer searched the car and found a large quantity of cocaine hidden beneath the right bumper. The defendant was then arrested and given Miranda warnings. The defendant then admitted that he was being paid $1,500 to drive the vehicle from Atlanta to Durham, North Carolina. The defendant admitted knowing the drugs were hidden in the car.

Our Supreme Court noted that where probable cause existed to believe a traffic violation had occurred, that the traffic stop constituting the seizure was reasonable per se. Whren v. United States, 517 U.S. 806 (1996). This Court also stated that when carrying out a routine

traffic stop, such as in this case, a law enforcement officer may request the driver's license, the vehicle registration, run a computer check, and issue a citation. See United States v. Sullivan, 138 F.3d 126, 131 (4th Circuit, 1998). However, any further detention for questioning is beyond the scope of the stop and therefore illegal unless the officer has reasonable suspicion of a serious crime. State v. Tindall, 388 S.C. 518, 521, 698 S.E.2d 203, 205 (2010).

As in Tindall, appellant here acknowledged the initial traffic stop was legal, but the police officers exceeded the scope of the stop without reasonable suspicion of a serious crime, or any crime, for that matter. The police went on a fishing expedition where they were unsuccessful in locating any marijuana despite their claim that they smelled marijuana smoke. The fact someone may have smoked marijuana, or smoked marijuana in the car at some point would not have alarmed or alerted a reasonable police officer into thinking a crime was being committed or that evidence of a crime was probably going to be found if the car was searched.

The police here were successful in locating a pistol *twenty-two minutes or more into the traffic stop*, and then in obtaining appellant's admission that the pistol belonged to him during the functional equivalent of questioning without Miranda warnings.

Unlike the facts of Tindall, the driver, here Govan, did not consent to the search of his vehicle.[3] Conversely, here, it apparently was like asking Laurence Tribe to consent to a search of his car. Govan was just protecting his Fourth Amendment rights as Officer Little told the jury.

**The admissions of ownership**

Further, the judge erred in admitting evidence that appellant admitted ownership of the gun where he was not free to leave, he was in handcuffs, and therefore in custody. Appellant was not read his Miranda warnings, and the police said that both Govan and appellant would be

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[3] The search in Tindall was found illegal despite the consent.

detained indefinitely unless one of the men admitted ownership of the gun. They were not free to go. Under Rhode Island v. Innis, 446, U.S. 291 (1980), the police knew, or should have known, that their statements about someone claiming ownership of the gun or the damage would fall upon their friend was likely to elicit an incriminating response. It therefore was the "functional equivalent" of interrogation.

The police technique here of getting an incriminating response, and then giving Miranda warnings has been declared an unconstitutional evasion of Miranda. See State v. Navy, 386 S.C. 294, 688 S.E.2d 638 (2010), and Missouri v. Seibert, 542 U.S. 600 (2004).

In sum, the police detention of Govan and appellant in this case exceeded the scope of a normal traffic stop, it was twenty-two minutes or longer, and the police did not have a reasonable suspicion that a crime was afoot, or probable cause to believe that contraband was located in the car. The police were on a fishing expedition to find contraband or weapons, and appellant's admission to ownership of the gun, without Miranda warnings, should have been suppressed. Without these admissions, it was very unlikely the jury would have convicted appellant given the mere presence issue.

Since the judge admitted appellant's inculpatory statements without Miranda warnings have been given, and admitted the weapon found during the illegal search of the car -- where the scope of the traffic stop had been exceeded -- appellant should be granted a new trial. See Rodriguez v. United States, 135 S.Ct. 1609 (2015); State v. Tindall, 388 S.C. 518, 698 S.E.2d 203 (2010); State v. Navy, 386 S.C. 294, 688 S.E.2d 638 (2010).

## CONCLUSION

By reason of the foregoing arguments, appellant's conviction should be reversed, and this case remanded to the York County Court of General Sessions for a new trial.

Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

This 29th day of June, 2017.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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Appeal from York County

Honorable John C. Hayes, Circuit Court Judge

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THE STATE,

RESPONDENT,

V.

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APPELLANT

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PETITION TO BE RELIEVED AS COUNSEL

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Counsel for Jayquan Dante Wilmore states:

1. He is Chief Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent appellant.

2. He has reviewed the record of appellant's trial before Judge John C. Hayes, which was held on July 12-13, 2016, and, in his opinion, the appeal is without legal merit sufficient to warrant a new trial.

3. He has, pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967), briefed an arguable legal issue which arose during the course of the trial.

WHEREFORE, He asks the Court to relieve him as counsel for Jayquan Dante Wilmore.



Respectfully Submitted,

Robert M. Dudek
Chief Appellate Defender
ATTORNEY FOR APPELLANT

This 29th day of June, 2017.