STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Lexington County

Honorable R. Knox McMahon, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

RONALD DOUGLAS MICHAUX,

APPELLANT

APPELLATE CASE NO 2016-001797

INITIAL BRIEF OF APPELLANT

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II. Whether the trial judge erred in allowing officer qualified as an expert witness in narcotics trafficking to testify about the value of cocaine when the testimony did not assist the jury in understanding the evidence or determining a fact in issue, when the testimony was unnecessary and cumulative, and when the testimony's probative value was substantially outweighed by the danger of unfair prejudice?

STATEMENT OF THE CASE

A Lexington County Grand Jury indicted Appellant at the July 2015 term of court for trafficking cocaine, one hundred grams or more but less than two hundred grams. R. __ (Indictment). His case was called to trial on May 17, 2016 before the Honorable R. Knox McMahon. Assistant Solicitors Lester Bell, Jr. and Bradley Pogue appeared on behalf of the State, and David Mauldin represented Appellant. Tr. 1.

At the conclusion of the trial, the jury found Appellant guilty as indicted. Tr. 258, ll. 16 – 20. He sentenced Appellant to twenty-five years' imprisonment and gave him credit for time served.[1] Tr. 5, ll. 12 – 18.

This appeal follows.

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[1] Appellant was not present during the final day of trial, so his sentence was sealed. The Honorable William Keesley unsealed and read the sentence on August 25, 2016. There was a separate transcript for this hearing.

ARGUMENT

Relevant facts

On March 20, 2014, Trooper Michael Harrison was monitoring traffic on the side of Interstate 20 in Lexington County. Tr. 7, ll. 17 – 23; R. __ (In-Car Video). He ostensibly noticed a white Volkswagon Passat "slow down abruptly." Tr. 8, ll. 1 – 2. A tractor trailer truck, perhaps following too closely, changed lanes to avoid the Passat, according to Harrison. Tr. 8, ll. 2 -3. Harrison maneuvered his car to the interstate in order to follow the Passat. Tr. 8, ll. 6 – 7. Harrison testified that, while following the car, he noticed it "weav[ed] within [its] lane" even though the car never left its lane. Tr. 8, ll. 7 – 12. Based upon the alleged "erratic behavior coming from the white vehicle," he decided to pull it over.

While approaching the Passat, Harrison came to the conclusion that it was most likely a rental car. Tr. 9, ll. 2 – 9. He testified that the driver, later identified as Appellant, seemed nervous. Tr. 9, ll. 17 – 23. Harrison also claimed to have seen two cans of air freshener within the car, along with some shavings from a cigar. Tr. 9, l. 24 – Tr. 10, l. 1. Although none was found, he also claimed to have smelled marijuana. Tr. 10, ll. 1 – 2; Tr. 25, ll. 14 – 15.

According to Harrison, Appellant did not have a driver's license in his possession. Tr. 11, ll. 4 – 7. Although Harrison claimed that was a violation under South Carolina law, he testified that he had no reason to arrest Appellant. Tr. 16, ll. 2 – 4. Nonetheless, Appellant was not free to leave based upon Harrison's claims of "criminal activity [he] observed within the vehicle." Tr. 15, ll. 12 – 18.

Harrison then "continued the enforcement action with a warning" for "improper lane usage." Tr. 16, ll. 5 – 12; Tr. 26, ll. 5 - 7. Next, he indicated to Appellant that he was going to

search the car. Tr. 17, ll. 2 – 11. He testified that the marijuana smell was the "only reason to search [the] vehicle." Tr. 17, ll. 9 – 11.

Harrison allegedly located a black plastic bag with a knot tied in it. Tr. 18, ll. 20 – 23. After finding this bag which he allegedly believed contained cocaine or heroin, he placed Appellant in custody. Tr. 19, ll. 1 – 18. Officer Rogers testified that his field-test for the powder substance came back as positive for cocaine. Tr. 199, ll. 16 – 18.

Harrison did not recall whether there were any other belongings in the car, although it is unclear whether he checked the trunk. Tr. 19, ll. 19 – 24; Tr. 27, ll. 1 – 8. Harrison estimated that the traffic stop lasted about fifteen minutes. Tr. 20, ll. 7 – 9. During that time he never read Appellant his Miranda rights.[2] Nor did Harrison elect to run his K-9 around Appellant's car. Tr. 22, ll. 3 – 9; Tr. 25, ll. 21 – 22. No money was found in the car or on Appellant. Tr. 27, ll. 13 – 19.

During cross-examination, Harrison could not recall the speed of Appellant's car and admitted that he did not know the speed of the tractor trailer. Tr. 22, ll. 16 – 25. He further admitted that he did not know the distance between Appellant's car and the tractor trailer. Tr. 23, ll. 10 – 14.

Counsel for Appellant moved pre-trial to suppress any evidence found as a result of the traffic stop. Tr. 5, ll. 8 – 16. At the conclusion of the pre-trial suppression hearing, counsel for Appellant argued in favor of his motion to suppress the evidence found as a result of the traffic stop:

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[2] 348 U.S. 436, 86 S.Ct. 1602, 16 L.Ed. 2d 694 (1966).

> Your Honor, in order to stop a vehicle, the officer must have a reasonable suspicion of criminal activity or probable cause that there is a traffic violation [.] [T]he trooper's testimony is that he was facing eastbound looking in the side-view mirror at eastbound traffic. He could only see the front of the vehicles coming towards him. He believes that the defendant slowed down and that the truck had to slow down and swerve.
>
> He did not indicate that anybody was speeding above the maximum speed limit on the highway nor below the minimum limit on the highway. He couldn't testify how far the tractor trailer was behind the car to be traveling too close or as to what the speed of the tractor trailer was other than to say, I don't believe he was speeding.
>
> I don't see that there was probable cause that Mr. Michaux committed any kind of traffic violation. He [ ] mentioned following him a bit and he did not maintain the center position of his lane. That in itself is not a traffic violation and I think that does not lead to a probable cause that a traffic violation - - no reasonable suspicion that criminal activity was afoot.

Tr. 31, l. 8 – Tr. 32, l. 3.

As articulated by counsel, it was impossible for the trooper to see whether Appellant's brake lights flashed, since he was facing the opposite direction. Tr. 33, ll. 6 – 7. Additionally, counsel argued that after the officer issued the warning ticket, Appellant should have been free to go, under Article 1 of the Fourth Amendment. Tr. 38, ll. 15 – 23.

Therefore, under the Fourth Amendment of the United States Constitution as well as the South Carolina Constitution, counsel for Appellant moved to suppress any evidence seized as a result of the illegal stop and search of Appellant's car. Tr. 33, ll. 15 – 16. The trial judge disagreed and found that the officer "clearly had probable cause to stop the white vehicle for the traffic violation and there was some reasonable suspicion that criminal activity was afoot to search the vehicle." Tr. 38, ll. 6 – 13. Furthermore, the trial judge stated:

> I would say for the record, I don't know what the term, free to go, exactly the precise definition, he certainly wasn't free to drive the vehicle away, nor as I understand it can you be a pedestrian on an interstate highway. However, the officer never placed him under arrest until post search. Post search.

Tr. 39, ll. 1 – 6.

I. The trial judge erred in denying Appellant's motion to suppress evidence found as the result of an unreasonably and immeasurably delayed traffic stop that was initiated without probable cause where law enforcement could have issued a warning ticket and concluded the stop but instead continued to investigate without reasonable suspicion in violation of the Fourth Amendment of the United States Constitution and the South Carolina Constitution.

"Temporary detention of individuals during the stop of an automobile by the police, even if only for a brief period and for a limited purpose, constitutes a 'seizure' of 'persons' within the meaning of [the Fourth Amendment]." Whren v. United States, 517 U.S. 806, 809–10, 116 S.Ct. 1769, 135 L.Ed.2d 89 (1996). Thus, an automobile stop is "subject to the constitutional imperative that it not be 'unreasonable' under the circumstances." Id. at 810, 116 S.Ct. 1769. Where probable cause exists to believe that a traffic violation has occurred, the decision to stop the automobile is reasonable per se. Id. See also State v. Williams, 351 S.C. 591, 597–98, 571 S.E.2d 703, 707 (Ct. App. 2002).

The Fourth Amendment guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend IV; see State v. Woodruff, 344 S.C. 537, 544 S.E.2d 290 (Ct.App.2001). Thus, the Fourth Amendment protects against unreasonable searches and seizures, including seizures that involve only a brief detention. United States v. Mendenhall, 446 U.S. 544, 100 S.Ct. 1870, 64 L.Ed.2d 497 (1980). An officer is permitted to make an investigative detention or stop only if supported "by a reasonable and articulable suspicion that the person seized is engaged in criminal activity." Reid v. Georgia, 448 U.S. 438, 440, 100 S.Ct. 2752, 65 L.Ed.2d 890 (1980). "And in justifying

the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." Terry v. Ohio, 392 U.S. 1, 21, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). Thus, a court must look to the totality of the circumstances in determining whether the officer had a particularized and objective basis for suspecting criminal activity. United States v. Arvizu, 534 U.S. 266, 273, 122 S.Ct. 744, 151 L.Ed.2d 740 (2002). "While such a detention does not require probable cause, it does require something more than an "inchoate and unparticularized suspicion or hunch.' " United States v. Sprinkle, 106 F.3d 613, 617 (4th Cir.1997) (quoting Terry, 392 U.S. at 27, 88 S.Ct. 1868).

It is nevertheless clear that a seizure that is lawful at its inception can violate the Fourth Amendment if its manner of execution unreasonably infringes interests protected by the Constitution. United States v. Jacobsen, 466 U.S. 109, 124, 104 S.Ct. 1652, 80 L.Ed.2d 85 (1984). A seizure that is justified solely by the interest in issuing a warning ticket to the driver can become unlawful if it is prolonged beyond the time reasonably required to complete that mission. Illinois v. Caballes, 543 U.S. 405, 407, 125 S. Ct. 834, 837, 160 L. Ed. 2d 842 (2005).

The traffic stop involved in Appellant's case became unlawful when Harrison sought to develop probable cause to pull Appellant over even though Appellant never left his lawful lane of travel.

"A routine traffic stop is a relatively brief encounter and 'is more analogous to a so-called Terry stop ... than to a formal arrest.' " Knowles v. Iowa, 525 U.S. 113, 117, 119 S.Ct. 484, 142 L.Ed.2d 492 (1998) (quoting Berkemer v. McCarty, 468 U.S. 420, 439, 104 S.Ct. 3138, 82 L.Ed.2d 317 (1984)). Illinois v. Caballes, 543 U.S. 405, 420, 125 S. Ct. 834, 844, 160 L. Ed. 2d 842 (2005).

An investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop and the scope of the detention must be carefully tailored to its underlying justification. Florida v. Royer, 460 U.S. 491, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983). The officer's purpose in an ordinary traffic stop is to enforce the laws of the roadway, and ordinarily to investigate the manner of driving with the intent to issue a citation or warning. Ferris v. State, 355 Md. 356, 735 A.2d 491 (1999). Once the purpose of that stop has been fulfilled, the continued detention of the car and the occupants amounts to a second detention. Id.; see also United States v. Jones, 234 F.3d 234, 241 (5th Cir.2000) ("The basis for the stop was essentially completed when the dispatcher notified the officers about the defendants' clean records, three minutes before the officers sought consent to search the vehicle. Accordingly, the officers should have ended the detention and allowed the defendants to leave. And the failure to release the defendants violated the Fourth Amendment."); United States v. Mesa, 62 F.3d 159, 162 (6th Cir.1995) ("Once the purposes of the initial traffic stop were completed, there is no doubt that the officer could not further detain the vehicle or its occupants unless something that occurred during the traffic stop generated the necessary reasonable suspicion to justify a further detention."); United States v. Beck, 140 F.3d 1129, 1136 (8th Cir.1998) ("Because the purposes of [the officer's] initial traffic stop of Beck had been completed ... [the officer] could not subsequently detain Beck unless events that transpired during the traffic stop gave rise to reasonable suspicion to justify [the officer's] renewed detention of Beck."); People v. Redinger, 906 P.2d 81, 85–86 (Colo.1995) ("When, as here, the purpose for which the investigatory stop was instituted has been accomplished and no other reasonable suspicion exists to support further investigation, there is no justification for continued detention and interrogation of citizens."); Davis v. State, 947 S.W.2d 240, 243 (Tex.Crim.App.1997) ("[O]nce the reason for the stop has

been satisfied, the stop may not be used as a 'fishing expedition for unrelated criminal activity.' ") (citations omitted). State v. Pichardo, 367 S.C. 84, 98–99, 623 S.E.2d 840, 848 (Ct. App. 2005).

A traffic stop supported by reasonable suspicion of a traffic violation remains valid until the purpose of the traffic stop has been completed. Arizona v. Johnson, 555 U.S. 323, 333, 129 S.Ct. 781, 172 L.Ed.2d 694 (2009). The officer may not extend the duration of a traffic stop in order to question the motorist on unrelated matters unless he possesses reasonable suspicion that warrants an additional seizure of the motorist. See United States v. Sullivan, 138 F.3d 126, 131 (4th Cir.1998). The officer cannot avoid this rule by employing dilatory tactics. See United States v. Jones, 234 F.3d 234 (5th Cir.2000) (driver's Fourth Amendment rights violated when, after dispatcher reported no problems and officer had completed warning citation except for obtaining the driver's signature, officer deliberately delayed completing the stop for several more minutes until canine search unit arrived). State v. Provet, 405 S.C. 101, 108, 747 S.E.2d 453, 457 (2013).

Like the officer in State v. Jones, Officer Harrison went on a "fishing expedition" and prolonged his detention for the purpose of performing a search. 364 S.C. 51, 610 S.E.2d 846 (Ct. App. 2005). In Jones, the defendant asserted that "the questioning of the passengers and the extended conversation the officer had with him about where they had been and what they were doing was merely a 'ruse' so he could eventually search the car." Id. at 55, 610 S.E.2d at 848. Jones maintained "anything this officer did with [him] pursuant to this stop after a reasonable period of time had expired for him to issue him the summons ... [was] unreasonable" and was therefore an illegal detention. Id. Similarly, Officer Harrison stated that otherwise innocent activity such as driving a rental car, having air freshener, or giving generalized statements about

his destination gave rise to a conclusion of criminality. Additionally, although he testified that there was nothing that would indicate he was on an extended road trip, **by his own admission** he could not recall the contents of the car's trunk. The traffic stop ceased being lawful when Harrison went on a "fishing expedition" and continued questioning Appellant when he could have cited him and allowed him to call for someone to pick him up.

Upon a lawful traffic stop, an officer "may order the driver to exit the vehicle ... [,] request a driver's license and vehicle registration, run a computer check, and issue a citation." State v. Pichardo, 367 S.C. 84, 98, 623 S.E.2d 840, 847 (Ct.App.2005) (citations omitted). However, a lawful traffic stop "can become unlawful if it is prolonged beyond the time reasonably required to complete [its] mission." Illinois v. Caballes, 543 U.S. 405, 407, 125 S.Ct. 834, 160 L.Ed.2d 842 (2005); see also Pichardo, at 98, 623 S.E.2d at 848 ("Once the purpose of that stop has been fulfilled, the continued detention of the car and the occupants amounts to a second detention."). The extension of a lawful traffic stop is permitted if (1) the encounter becomes consensual or (2) the officer has a reasonable, articulable suspicion of other illegal activity. Pichardo, 367 S.C. at 99, 623 S.E.2d at 848. The proper inquiry is not whether an officer "unreasonably" extended the duration of the traffic stop with his off-topic questions but whether he "measurably" extended it. Arizona v. Johnson, 555 U.S. 323, 129 S.Ct. 781, 172 L.Ed.2d 694 (2009). This is a temporal inquiry, not a reasonableness inquiry. State v. Provet, 405 S.C. 101, 111, 747 S.E.2d 453, 458 (2013).

"Any further *detention* for questioning is beyond the scope of the [] stop and therefore illegal unless the officer has a reasonable suspicion of a serious crime." United States v. Sullivan, 138 F.3d 126, 131 (4th Cir.1998) (emphasis added); see Florida v. Royer, 460 U.S. 491, 500, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983) (plurality opinion) ("[A]n investigative detention must be

temporary and last no longer than is necessary to effectuate the purpose of the stop."); Ferris v. State, 355 Md. 356, 735 A.2d 491, 499 (1999) ("Once the purpose of [the] stop has been fulfilled, the continued detention of the car and the occupants amounts to a second detention."). State v. Williams, 351 S.C. 591, 598, 571 S.E.2d 703, 707 (Ct. App. 2002).

The State should not use "whatever facts are present, no matter how innocent, as indicia of suspicious activity." U.S. v. Foster, 634 F.3d 243, 248 (4th Cir. 2011). Rather, it must "be able to either articulate why a particular behavior is suspicious or logically demonstrate, given the surrounding circumstances, that the behavior is likely to be indicative of some more sinister activity than may appear at first glance." Id. See Ornelas v. U.S., 517 U.S. 690, 695, 116 S.Ct. 1657 (1996) (defining reasonable suspicion as a "commonsense, nontechnical conception[ ] that deal[s] with 'the factual and practical considerations of everyday life' " (quoting Illinois v. Gates, 462 U.S. 213, 231, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983)); United States v. Cortez, 449 U.S. 411, 417, 101 S.Ct. 690, 66 L.Ed.2d 621 (1981)) ("[I]nvestigatory stop must be justified by some objective manifestation that the person stopped is, or is about to be, engaged in criminal activity.").

There was nothing exceptional about Appellant's actions in the car, and Harrison's interactions with Appellant failed to add any certainty to his instinctive concerns. The State "cannot rely upon post hoc rationalizations to validate those seizures that happen to turn up contraband." United States v. Martinez-Fuerte, 428 U.S. 543, 565, 96 S.Ct. 3074, 49 L.Ed.2d 1116 (1976).

Under Berkemer v. McCarty, the only relevant inquiry for custody is "how a reasonable man in the suspect's position would have understood his situation." Berkemer v. McCarty, 468 U.S. 420, 442, 104 S. Ct. 3138, 3151, 82 L. Ed. 2d 317 (1984). "It is settled that the safeguards

prescribed my Miranda become applicable as soon as a suspect's freedom of action is curtailed to a 'degree associated with formal arrest.'" California v. Beheler, 463 U.S. 1121, 1125, 103 S.Ct. 3517, 3520, 77 L.Ed.2d 1275 (1983).

Harrison testified that Appellant was **not free to leave** after the smell of marijuana was observed. Tr. 15, ll. 12 – 18. Therefore, he was in custody and should have been issued Miranda warnings.

As argued by defense counsel, Harrison had no knowledge of the speed of either vehicle. He should not have been able to utilize the improper braking claim as grounds to pull over Appellant; Harrison was unable to see any brake lights. He had no idea whether Appellant was traveling above the maximum or below the minimum speed limit. The tractor trailer driver could have been gaining on Appellant and needed to make a lane change in order to maintain his speed.

Similarly, Harrison's testimony regarding Appellant's weaving within his own lane do not give rise to erratic driving. Upon information and belief, South Carolina does not have a statute pertaining to erratic driving. Reckless driving, codified at S.C. Code Ann. § 56-5-2920, defines the offense as any person driving a vehicle in such a manner "as to indicate either a wilful or wanton disregard for the safety of persons or property." There was no testimony to indicate such conduct took place; Appellant's actions were legal and did not create probable cause for Harrison to pull him over.

Harrison was forced to make too many assumptions in order to create probable cause, and the resulting stop was illegal. Similarly, the search of Appellant's car took place after a warning was given; Appellant should have been free to leave, but instead the scope of the initial stop was exceeded. Counsel for Appellant was correct: Appellant should have been free to go after the warning ticket was issued. Coupled with the illegal traffic stop which was unsupported by

probable cause, there was no articulable reasonable suspicion which could have given rise to the search of Appellant's car. As a result, the cocaine which was seized should have been suppressed.

II. The trial judge erred in allowing an officer qualified as an expert witness in narcotics trafficking to testify about the value of cocaine when the testimony did not assist the jury in understanding the evidence or determining a fact in issue, when the testimony was unnecessary and cumulative, and when the testimony's probative value was substantially outweighed by the danger of unfair prejudice.

Prior to trial, Appellant sought to exclude testimony from any expert which the State intended to offer regarding drug expertise. Tr. 5, l. 22 – Tr. 6, l. 3; Tr. 41, l. 20 – Tr. 41, l. 10. The State indicated its intent to have Corporal Justin Rogers qualified as an expert in the area of narcotics trafficking and did so during trial. Tr. 202, ll. 5 – 7. Moving pretrial under State v. Robinson, Appellant argued:

> I believe all the State has to prove is possession of the drug and that the drug weighed so much and I don't think that the testimony of an expert would be relevant under Rule 702; and I believe that such an expert could confuse the jury on the issues prejudicially and deny a fair trial under the U.S. Constitution and the State Constitution and due process under the Fifth and Fourth Amendments and Article one of the State Constitution.

Tr. 41, l. 20 – Tr. 42, l. 10.

The trial judge indicated his intent to allow testimony from the State's expert regarding the valuation of drugs based on State v. Jamison, 372 S.C. 649, 643 S.E.2d 700 (Ct. App. 2007). Tr. 158, l. 1 – Tr. 159, l. 11. In response, Appellant sought to distinguish Jamison from the matter *sub judice*:

> I'm asking you to exclude the expert. I believe that the Federal cases they relied on in Jamison to make that ruling were dealing with cases where intent to distribute was an element. I believe intent to distribute is an element in the Federal level of trafficking or what they mentioned as trafficking. It's not an element in South Carolina; and therefore, I believe that the expert should be [excluded] under [SCRE] 702, because there is no intent to distribute.

Tr. 161, ll. 17 – 25.

In particular, Appellant pointed to the underlying cases in Jamison, namely United States v. Gastiaburo, 16 F.3d 582, 589 (4th Cir. 1994) and United States v. Johnson, 54 F.3d 1150, 1156-57 (4th Cir. 1995). The former, as articulated by Appellant, dealt with possession with intent to distribute and the latter involved drug conspiracy and criminal enterprise charges under 21 U.S.C. § 846 (1988) and 21 U.S.C. § 848 (1988), respectively.

In Gastiaburo, trial counsel did not object to the proposed expert's testimony at trial so the standard of review was plain error. 16 F.3d at 587. Additionally, the charges facing the defendant in that case were possession of drugs with intent to distribute, carrying a firearm during and in relation to a drug trafficking crime, and possession of a firearm by a convicted felon. Id. at 582. Similarly, Johnson, supra, did not involve charges which directly mirrored Appellant's. 54 F.3d 1150. In fact, the attempt and conspiracy charge as outlined in Johnson and codified at 21 U.S.C. § 846 (1988) requires three elements:

1) the defendant entered into an agreement with one or more persons to engage in conduct that violated 21 U.S.C. § 841;
2) the defendant had knowledge of that conspiracy; and
3) the defendant knowingly and voluntarily participated in the conspiracy.

United States v. Howard, 773 F.3d 519, 525 (4th Cir. 2014).

The offenses in those cases required more than the simple weight and possession metrics as outlined in South Carolina law. Therefore, counsel for Appellant repeatedly objected to Rogers' testimony both before and after it took place. Tr. 194, ll. 11 – 12; Tr. 202, ll. 9 – 11; Tr. 211, ll. 14 – 19; Tr. 263, ll. 20 – 23; Tr. 5, l. 20 – Tr. 6, l. 6.[3]

[3] Counsel for Appellant moved for a new trial after Appellant's sentence was unsealed.

Appellant was indicted for trafficking cocaine under S.C. Code Ann. 44-53-370(e)(2)(c), which provides that:

> Any person who knowingly sells, manufactures, cultivates, delivers, purchases, or brings into this State, or who provides financial assistance or otherwise aids, abets, attempts, or conspires to sell, manufacture, cultivate, deliver, purchase, or bring into this State, or who is knowingly in actual or constructive possession or who knowingly attempts to become in actual or constructive possession of:
>
> (2) ten grams or more of cocaine or any mixtures containing cocaine, as provided in Section 44-53-210(b)(4), is guilty of a felony which is known as "trafficking in cocaine" and, upon conviction, must be punished as follows if the quantity involved is:
>
> (c) one hundred grams or more, but less than two hundred grams, a mandatory term of imprisonment of twenty-five years, no part of which may be suspended nor probation granted, and a fine of fifty thousand dollars;

S.C. Code Ann. § 44-53-370.

The statute is silent as to value; evidence of weight alone controls the severity of the crime. As read by the clerk following the jury's deliberations, Appellant was found guilty of the crimes listed in the indictment: trafficking in cocaine one hundred grams or more but less than two hundred grams. Tr. 258, ll. 16 – 20.

Rule 702 of the South Carolina Rules of Evidence governs when the admission of expert testimony is proper and supplies the bases by which an expert may be qualified to give an opinion. Specifically, the Rule provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to **understand the evidence or to determine a fact in issue**, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Rule 702, SCRE (emphasis added).

Thus, several criteria must be met prior to the admission of expert testimony. First, the trial court must determine that such evidence will assist the jury to understand the evidence or determine a fact in issue. Second, the witness must be qualified as an expert due to experience or training.

Third, the trial court must determine whether the proposed expert testimony satisfies a reliability threshold for the jury's ultimate consideration. State v. White, 382 S.C. 265, 269, 676 S.E.2d 684, 686 (2009).

The first criterion requires the trial judge to determine whether the proffered testimony, which is based upon specialized knowledge, will assist the jury in understanding evidence or determining a fact. The trial judge erred in qualifying Rogers as an expert in narcotics trafficking, because the cocaine valuation was neither relevant nor a fact in issue.

Rogers' testimony about the value of cocaine was not necessary in order to assist the jury in determining the weight of the evidence or to determine a fact in issue. Appellant did not testify, and he offered no evidence regarding ownership of the cocaine.

As a result, the probative value of Rogers' testimony in describing the value of the cocaine was substantially outweighed by the danger of unfair prejudice.

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Rule 403, SCRE.

There is a reasonable probability that the jury's verdict was influenced by Rogers' testimony, especially since he was the State's last witness. Rogers was called to testify regarding the value of cocaine even though the value of cocaine was a non-issue. His irrelevant testimony characterized Appellant as a major drug dealer based on the value of the cocaine alone, when the monetary value of the drugs was irrelevant.

During closing arguments, the prosecution characterized the drugs as "a golden goose or at least the egg it laid" based on Rogers' testimony regarding value. Tr. 237, ll. 6 – 13. Such a remark, as well as the underlying testimony, were irrelevant and thereby likely confused the jury.

Defense counsel reminded the jury during closing arguments that "it's [ ] a real possibility that people lose or misplace valuable items." Tr. 241, ll. 3 – 11.

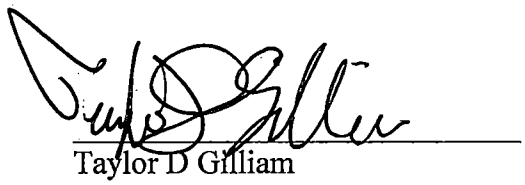
"[A]lthough an expert's testimony theoretically is to be given no more weight by a jury than any other witness, it is an inescapable fact that jurors can have a tendency to attach more significance to the testimony of experts." State v. Kromah, 401 S.C. 340, 357, 737 S.E.2d 490, 499 (2013).

The qualification of a witness as an expert and the subsequent admission of that witness' opinion testimony are matters within the sound discretion of the trial judge. State v. Price, 368 S.C. 494, 498, 629 S.E.2d 363, 365 (2006); Lee v. Suess, 318 S.C. 283, 285, 457 S.E.2d 344, 345 (1995); Manning v. City of Columbia, 297 S.C. 451, 453, 377 S.E.2d 335, 336-337 (1989); Honea v. Prior, 295 S.C. 526, 530, 369 S.E.2d 846, 849 (Ct. App. 1988). Therefore, an appellate court reviews a trial judge's ruling concerning an expert witness' qualification and the admission of opinion testimony for an abuse of discretion. Strange v. South Carolina Dep't of Highways & Pub. Transp., 307 S.C. 161, 163, 414 S.E.2d 138, 139 (1992); Honea, 295 S.C. at 530; 369 S.E.2d at 849. "An abuse of discretion occurs when the ruling is based on an error of law or a factual conclusion that is without evidentiary support." Fields v. Reg'l Med. Ctr. Orangeburg, 363 S.C. 19, 26, 609 S.E.2d 506, 509 (2005); see also, Suess, 318 S.C. at 285, 457 S.E.2d at 345. If the ruling is "manifestly arbitrary, unreasonable, or unfair," then the trial court abused his discretion. Id.

The admission of Rogers' testimony resulted in prejudicial opinions which never materialized in the form of probative evidence. His testimony was unnecessary and irrelevant; its lack of probative value likely confused the jury and certainly prejudiced Appellant. Rogers was the prosecution's last witness, and his testimony about the value of the cocaine should have been excluded.

CONCLUSION

Appellant's conviction should be reversed and this case remanded to the Lexington County Court of General Sessions for a new trial.



Taylor D Gilliam
Appellate Defender

ATTORNEY FOR APPELLANT

This 24th day of July, 2017.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

RECEIVED
JUL 24 2017
SC Court of Appeals

Appeal from Lexington County

Honorable R. Knox McMahon, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

RONALD DOUGLAS MICHAUX,

APPELLANT

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. Ben 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 Ronald Douglas Michaux, #369511, at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 24th day of July, 2017.

Taylor D Gilliam
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 24th day of July, 2017.

_____ (L.S)
Notary Public for South Carolina
My Commission Expires: May 12, 2025