STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenville County

Honorable Letitia H. Verdin, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

EVELYN CHRISTINE NIXON,

APPELLANT

APPELLATE CASE NO 2016-002170

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the trial judge erred in denying Appellant's motion to suppress evidence found as the result of an unconstitutional frisk that was initiated without reasonable suspicion where a law enforcement officer mistakenly believed he saw a methamphetamine pipe which turned out to be a plastic bowl and extended a purported courtesy to Appellant by detaining her in his police car after frisking her in violation of the Fourth Amendment of the United States Constitution?

STATEMENT OF THE CASE

A Greenville County Grand Jury indicted Appellant at the April 2016 term of court for possession of methamphetamine and possession of drug paraphernalia. R. __ (Indictments). Her case was called to trial on October 13, 2016 before the Honorable Letitia H. Verdin. Howard Steinberg appeared on behalf of the State, and Jake Erwin represented Appellant. Tr. 1.

At the conclusion of the one-day bench trial, Judge Verdin found Appellant guilty as indicted. Tr. 82, ll. 15 – 22. She sentenced Appellant to two years' imprisonment suspended to eighteen months of probation, with credit for time served. Tr. 87, ll. 11 – 16.

This appeal follows.

ARGUMENT

The trial judge erred in denying Appellant's motion to suppress evidence found as the result of an unconstitutional frisk that was initiated without reasonable suspicion where a law enforcement officer mistakenly believed he saw a methamphetamine pipe which turned out to be a plastic bowl and extended a purported courtesy to Appellant by detaining her in his police car after frisking her in violation of the Fourth Amendment of the United States Constitution?

On the night of February 18, 2015, Deputy Judson Belding pulled over a Dodge Caravan which allegedly had a broken tail light. Tr. 8, ll. 22 – Tr. 9, ll. 12. The record does not indicate that he issued a ticket for the broken tail light. After Belding turned on his blue lights, the driver of the Dodge Caravan "abruptly" stopped by turning left into a gas station. Tr. 10, ll. 7 – 18. Belding testified that Appellant "immediately" turned into the gas station. Tr. 26, ll. 4 – 6.

Belding's report of the incident indicated that the van pulled up to a gas pump. Tr. 27, ll. 1 – 7. The driver, later determined to be Appellant, got out of the van and acknowledged Belding. Tr. 10, l. 19 – Tr. 11, ll. 7.

While standing approximately five feet from the van, Belding allegedly saw what he thought to be a "meth pipe or a glass pipe, the kind they use to smoke methamphetamines" in the floorboard area. Tr. 11, l. 23 – Tr. 12, l. 6; Tr. 28, ll. 6 – 16. He later determined that it was not a meth pipe. Tr. 12, ll. 10 – 13; Tr. 29, ll. 4 – 11. Neither Belding nor the other officer who responded to the scene took any pictures of this item or collected it for evidence. Tr. 21, l. 18 – Tr. l. Tr. 22, l. 5; Tr. 29, ll. 12 – 25; Tr. 42, ll. 13 – 17. Belding proceeded with the traffic stop, requesting Appellant's driver's license and registration. Tr. 12, ll. 18 – 20.

Belding refused to allow Appellant to get back in her van, based on his belief that he had seen a methamphetamine pipe. Tr. 12, l. 18 – Tr. 13, l. 3. Additionally, he testified that he had concerns with her behavior:

> There was a combination of things. Number one, from my experience, upon a traffic stop, any person trying to distance themselves from a vehicle is a suspicion that there is some sort of contraband or crime or some reason they are trying to distance themselves from the vehicle. A second thing would be the shattered out window and the fact that she left the door open with the keys in the ignition, told me at the time that she didn't particularly care to keep the vehicle secure. And my suspicion is that the vehicle was probably stolen because if she's willing to leave it at that intersection with the keys in it and the driver door open, she has no concern for what happens to the vehicle.

Tr. 13, ll. 8 – 20.

As a result, Belding detained Appellant "due to the investigation [he] would need to conduct. Tr. 14, ll. 3 – 4. He claimed the scope of the investigation included reviewing "any information on her through the Department of Motor Vehicles, through warrant search or NCIC, and probable cause to search the vehicle... [a]nd all its occupants." Tr. 31, ll. 5 – 11. He specifically told Appellant that she was not under arrest. Tr. 14, ll. 5 – 6. He testified that he had probable cause to search the van due to Appellant's actions. Tr. 31, ll. 1 – 4.

At the time, Belding claimed to have believed that Appellant was in possession of drug paraphernalia and was "possibly operating a stolen vehicle." Tr. 31, ll. 19 – 23. He testified that the facts giving rise to this assertion included the broken tail light, the broken window, the plastic container on the floor of the van, and Appellant's "actions distancing herself from the vehicle." Tr. 31, l. 24 – Tr. 32, l. 4.

Ostensibly for Appellant's best interests, Belding decided to handcuff Appellant and place her in his police car.[1] Tr. 14, ll. 7 – 18. As it turns out, Appellant was a licensed driver and allowed to drive the van. Tr. 15, ll. 1 – 3.

Belding testified that it was department policy to pat down any individuals who were going to be placed in the back seat of his police car. Tr. 15, l. 21 – Tr. 16, l. 2. Belding claimed to have "immediately felt what [he] knew to be a glass meth pipe" in Appellant's front right pants pocket. Tr. 16, ll. 3 – 7. At this time, Appellant notified Belding that he was violating her rights. Tr. 16, ll. 20 – 21.

Belding claimed to have removed "a glass meth pipe, a razor blade, and a small bag containing a clear crystal substance which field tested positive for methamphetamine." Tr. 17, ll. 14 – 19. Appellant repeatedly stated that none of the items in her pockets belonged to her. Tr. 17, ll. 3 – 5; Tr. 19, ll. 16 – 19. Belding subsequently arrested Appellant. Tr. 20, ll. 16 – 19.

Counsel for Appellant moved to suppress all evidence which was garnered as a result of the stop and search. Tr. 4, ll. 14 – 17. Following the testimony from the two law enforcement officers, Counsel argued his motion:

> [W]hat we have here is a ... classic traffic stop, Terry stop, Terry frisk situation ... Where we start to have problems is with the next two phases of the investigation ... Under Terry, and the cases that go off of that, in order to initiate a Terry stop, or investigative detention as the officers described, what they would need to have is reasonable suspicion that a serious crime has taken place, that criminal activity was going on... I would argue at that point that they did not have that.

Tr. 43, l. 22 – Tr. 44, l. 18.

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[1] Belding testified that he "was trying to be kind to [Appellant]" by placing her in his car and affording himself the alleged right to frisk her. Tr. 33, ll. 6 – 19.

Belding asserted that the outside temperature was eighteen degrees Fahrenheit and that the wind was blowing at eleven miles per hour, according to his research on The Weather Channel's website. Tr. 32, ll. 12 – 17. Therefore, he placed her in the back of his police car:

Q: And you couldn't - - you said you couldn't have the detention in the street right there or in the parking lot.
A: I was trying to be kind to her and not [have] her be cold.
Q: Oh, okay. So did she say that she was cold?
A: No.
Q: She didn't? Did she asked to be placed in your car or did she ask can we go somewhere else or anything else like that?
A: No.
Q: No. You felt that she might be cold and so you put her in her - - into your car, right?
A: Correct.
Q: Okay. Okay. So now, you put her in your car which means, by department policy, that you need to frisk her, right?
A: Yes.

Tr. 33, ll. 6 – 23.

Belding testified that in his experience, "females … in the area, I would say, 100 percent of the time, always have a knife on them." Tr. 34, ll. 6 – 10. Therefore, he was going to frisk her just to check for weapons. Tr. 33, l. 24 – Tr. 34, l. 1. Defense counsel argued that Belding's justifications for the frisk, a "bad neighborhood and [the fact that Appellant is] a girl," were insufficient. He believed that the officer was using the policy of the sheriff's department as a pretense in order to search Appellant. Tr. 56, ll. 1 – 9. Even though Appellant had been driving the van and was comfortable with the temperature, Belding sought to take advantage of a departmental policy which allegedly afforded him the right to frisk Appellant. As defense counsel articulated:

> If [the officer] could justify that search, [he would have said] I thought she had a gun. Here's why I thought she had a gun. Or I thought she had a knife and here's why I thought she had a knife. That is better than she's a girl in a bad neighborhood. Then, perhaps they would have a good search here. But I think that's where we go off the rails. I think that that moment when [Belding] decided

> to frisk her is where we cross over from constitutional behavior, maybe questionable behavior, to absolutely not constitutional behavior on the part of the government in searching her in that way.

Tr. 56, ll. 10 – 22.

After hearing arguments from both sides, the trial court ruled that the officer could have had reasonable suspicion to believe that Appellant was armed and therefore was justified in the frisk. Tr. 75 ll. 11 – 21. Noting that this was a close call, the trial court denied Appellant's motion to suppress. Tr. 75, l. 11 - Tr. 77, l. 8.

The Fourth Amendment prohibits unreasonable searches and seizures. U.S. Const. amend. IV. Evidence obtained in violation of the Fourth Amendment must be excluded from trial. Mapp v. Ohio, 367 U.S. 643, 648, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961). The Fourth Amendment applies to all seizures of a person, including only a brief detention. United States v. Brignoni—Ponce, 422 U.S. 873, 878, 95 S.Ct. 2574, 45 L.Ed.2d 607 (1975). Pursuant to Terry, a police officer with a reasonable suspicion based on articulable facts that a person is involved in criminal activity may stop, briefly detain, and question that person for investigative purposes, without treading upon his Fourth Amendment rights. State v. Khingratsaiphon, 352 S.C. 62, 69, 572 S.E.2d 456, 459 (2002). Reasonable suspicion requires a particularized and objective basis that would lead a person to suspect another of criminal activity. United States v. Cortez, 449 U.S. 411, 418, 101 S.Ct. 690, 66 L.Ed.2d 621 (1981). In determining whether reasonable suspicion exists, the totality of the circumstances must be considered. Khingratsaiphon, 352 S.C. at 69, 572 S.E.2d at 459. "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). Therefore, in reviewing reasonable suspicion determinations, a court must look to the totality of

the circumstances "to see whether the detaining officer has a particularized and objective basis for suspecting legal wrongdoing." United States v. Arvizu, 534 U.S. 266, 273, 122 S.Ct. 744, 151 L.Ed.2d 740 (2002).

Moreover, "[w]hile nervous behavior is a pertinent factor in determining reasonable suspicion ... the single element of nervousness [should not be parlayed by law enforcement] into a myriad of factors supporting reasonable suspicion." State v. Moore, 415 S.C., 245 254-55, 781 S.E.2d 897, 902 (2016). "The police officer may make reasonable inferences regarding the criminality of a situation in light of his experience, but he must be able to point to articulable facts that, in conjunction with his inferences, 'reasonably warrant' the intrusion." Robinson v. State, 407 S.C. 169, 182, 754 S.E.2d 862, 869 (2014). (quoting Terry, 392 U.S. at 21, 27, 88 S.Ct. 1868).

The State bears the burden to demonstrate that it was entitled to conduct the search or seizure under an exception to the Fourth Amendment's warrant requirement. State v. Gamble, 405 S.C. 409, 416, 747 S.E.2d 784, 787 (2013). The State also bears the burden to show that the warrantless entry was limited in scope and duration in accordance with the exigent circumstances which required its presence. Florida v. Royer, 460 U.S. 491, 500, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983).

Belding did not have a particularized and objective basis to suspect illegal activity that would justify the detention and subsequent frisk of Appellant. A shattered window on the van, leaving a door open, and leaving the keys in the ignition are not particularized reasons to suspect illegal activity. It is unlikely that one hundred percent of females in the area were armed with knives. As a result, Appellant's gender and presence in a high crime area are insufficient to give rise to reasonable suspicion.

Arguing under State v. Anderson, defense counsel posited that the proximity of a high crime area alone is insufficient to justify reasonable suspicion. 415 S.C. 441, 783 S.E.2d 51 (2016). As articulated by counsel, "the court in that case said that that is not enough for a Terry stop. You don't get to have an investigative detention just because of where you are." Tr. 45, ll. 8 – 21. The argument is supported by the law: "[B]eing in a high crime area does not provide police officers carte blanche to stop any person they meet on the street ... A person's proximity to criminal activity, without more, cannot establish reasonable suspicion to detain that individual." Anderson at 448, 783 S.E.2d at 55.

Nonetheless, the State argued that the officer was justified in placing Appellant in the back seat of the police car:

> [W]ho would put somebody in their car? They might drive away. Second of all, he had a suspicion that there was a meth pipe in the vehicle. He can't put her back in that vehicle. He shouldn't leave her out there. He said it was a courtesy. **It was courteous, a female, 18 degrees, to not put her on the street**, to let - - not put her on the street, to put her in the patrol car.

Tr. 61, l. 16 – Tr. 62, l. 19 (emphasis added).

Many traffic stops involve the occupants staying in their respective vehicles. Furthermore, the purported courtesy which Belding believed he was extending to Appellant was precisely the pretext for frisking her. Belding circumvented consent and reasonable suspicion under the guise of keeping a female from being cold based upon the mistaken belief that she had a meth pipe in her van. Departmental policy does not supersede the Fourth Amendment. Belding was unable to discern a plastic bowl-like container from a glass meth pipe from five feet away. Rather than further investigating the object, he detained Appellant.

At trial, the State sought to defend Belding's actions by arguing that law enforcement is entitled to make reasonable mistakes. Defense counsel distinguished the State's reliance on United States v. Leon, 468 U.S. 897, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984):

> In the Leon case, we have a case where an officer makes a traffic stop, looks on his computer or calls - - I don't know what year it is. He looks at his computer. He calls in. The word that he gets is that there is a ... search warrant on this person. He does the search, finds something illegal, turns out later that that was a mistake. There was no search warrant.

Tr. 65, ll. 10 – 18.

Furthermore, as conveyed by defense counsel, in both Leon and Herring v. United States[2]:

> [W]hat the officer is relying on is information that he got from a police clerk in another county ... So in both of those cases, what you have is a police officer who is relying on information, bad information, that they got from a third party. **From an entirely different person.** That they relied on it, because they have no reason to doubt that it would be wrong. It turns out that information was wrong and the search would not have been justified had they known that. You can't blame the officer for searching, right? Okay.
>
> In this case, what **you have is an officer who made his own mistake and is, therefore, relying on his own mistake.** Right? That's factually different from those cases.

Tr. 65, l. 23 – Tr. 66, l. 10 (emphasis added).

There is a public policy problem with allowing officers to justify a bad search by saying "I goofed and I thought that it was a pipe and it wasn't," because "then we'd never have a ... bad search." Tr. 67, ll. 5 – 16. Additionally, it is difficult to characterize Belding's mistake as reasonable. By his own admission, he was "five or six feet" from Appellant's van when he saw the object which he believed to be a meth pipe. Belding was driving a police car at night; his

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[2] 555 U.S. 135, 129 S. Ct. 695, 172 L. Ed. 2d 496 (2009).

eyesight should have been sufficient enough to distinguish a "glass meth pipe" from a plastic container. Tr. 28, l. 6 – Tr. 29, l. 11.

Defense counsel also argued that the fact that Appellant's van was allegedly seen at a house suspected of being involved in drug distribution was insufficient due to a lack of evidence:

> [Law enforcement] saw her car at the house at the drug house earlier, which I will point out that there's no evidence about when earlier was. We know it was the same night. It doesn't sound like they followed her from that drug house. Really - - you know, we don't have anything that says other than it was a similar car, that that was actually her car.

Tr. 46, ll. 9 – 19.

The trial judge recited her understanding of the facts during the suppression hearing:

> [L]et me be clear that our understanding of the facts is the same....The officer activates his blue lights. [Appellant] pulls into a gas station and stops ... Whether close to the pump or not close to the pump. And then she very quickly gets out ... Not running from the car ... [b]ut gets out as if she's going into the convenience store ... Leaves her door open ... And the officer is able to see something that looks like a meth pipe or he believes could be a meth pipe or to be a meth pipe --- and then detains her --- at that point.

Tr. 46, l. 25 – Tr. 47, l. 24.

Belding testified on recross examination that he did not arrest Appellant for failure to stop for a blue light. Tr. 37, ll. 20 – 22. In fact, Deputy Joseph Corneroli, the other responding officer, testified that he witnessed Belding activate his blue lights and saw when Appellant pulled into the gas station. Tr. 39, ll. 16 – 23.

Nonetheless, the question of why Appellant may have walked away from Belding after getting out of her van arose. Countering the contention that Appellant sought to evade Belding, defense counsel argued that perhaps Appellant was already going to the gas station, or even that she was already turning left as the blue lights came on. Tr. 49, ll. 19 – 25. It is conceivable that Appellant did not see the blue lights, as she was likely checking oncoming traffic in order to

complete a left-hand turn. She was probably looking ahead, not in her mirror. In fact, as soon as Belding made himself known to Appellant, she asks whether he wants to see her driver's license. Tr. 50, ll. 1 – 10. Simply put, "[s]he's not running away." Tr. 50, l. 10.

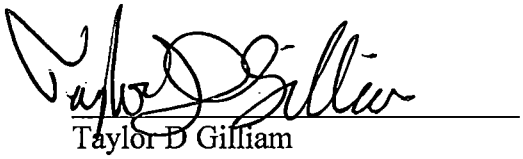
Counsel's arguments notwithstanding, the trial judge asked whether Belding was justified in placing Appellant in his car based on the reasonable suspicion that she did not stop for a blue light. Tr. 52, ll. 18 – 23. Counsel responded in the negative, and the trial judge further pressed, questioning whether Belding had probable cause to arrest Appellant for failing to stop for a blue light. Again answering in the negative, defense counsel asserted that had Belding believed he had probable cause, he would have testified accordingly. Tr. 53, ll. 6 – 10. Counsel for the State interrupted defense counsel and put the issue to rest: "Your Honor, I could speak. The State's not going to assert that. I don't want to make more of an issue on that argument." Tr. 53, ll. 11 – 13.

Even though the State asserted that it was not going to make an issue of the failure to stop for blue lights, the trial court indicated that "the officer could probably - - that he probably did have probable cause at that point to arrest her and detail her for failure to stop for a blue light" but did not take that into consideration. Tr. 76, ll. 4 – 12.

As requested by defense counsel, Appellant "ask[s] you to find that the search was unconstitutional under the Fourth Amendment and, therefore, that the drugs and the paraphernalia that were the fruit of this search are not admissible." Tr. 69, ll. 2 – 7.

CONCLUSION

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



Taylor D Gilliam
Appellate Defender

ATTORNEY FOR APPELLANT

This 26th day of July, 2017.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenville County

Honorable Letitia H. Verdin, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

EVELYN CHRISTINE NIXON,

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 Evelyn C. Nixon, #, at 302 Fair Street, , Greenville, SC 29609, this 26th day of July, 2017.

Taylor D Gilliam
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 26th day of July, 2017.

_____ (L.S)
Notary Public for South Carolina
My Commission Expires: 5/12/2025