

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM COUNTY OF GREENVILLE
Court of General Sessions

Edward W. Miller, Circuit Court Judge

Appellate Case No.: 2016-002476
Indictment Nos: 2014-GS-23-06783 and 2014-GS-23-07319

RECEIVED

NOV 01 2017

SC Court of Appeals

The State of South CarolinaRespondent,

vs.

Kendall Leamon,Appellant.

INITIAL BRIEF OF APPELLANT

Kenneth Gibson (S.C. Bar No. 0069288)
THE LAW OFFICE OF KENNETH GIBSON
Post Office Box 5536
Greenville, SC 29606
(864) 241-6699

Attorney for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES..... 1

STATEMENT OF ISSUES ON APPEAL2

STATEMENT OF THE CASE2

STATEMENT OF FACTS.....2

ARGUMENT4

STANDARD OF REVIEW4

THE TRIAL COURT ERRED WHEN IT DENIED APPELLANT’S MOTION TO SUPPRESS4

CONCLUSION8

TABLE OF AUTHORITIES

Cases

State v. Adams, 409 S.C. 641, 647, 763 S.E.2d 341 (2014).....4

State v. Anderson, 415 S.C. 441, 783 S.E.2d 51 (2016)6

State v. Hewins, 409 S.C. 93, 760 S.E.2d 814 (2014)6

State v. Moore, 415 S.C. 245, 254, 781 S.E.2d 897, 902 (2016), cert denied, 136 S.Ct. 2473
(2016).....5

State v. Pichardo, 367 S.C. 84, 99, 623 S.E.2d 840, 848 (2005).....5

State v. Provet, 391 S.C. 494, 499, 706 S.E.2d 513, 515 (2011).....4, 5

State v. Spears, (SC. App. 2017).....6

State v. Tindall, 388 S.C. 518, 521, 698 S.E.2d 203, 205 (2010).....4

Whren v. United States, 517 US 806, 810, 116 S.Ct. 1769, 135 L.Ed.2d 89 (1996)4

STATEMENT OF ISSUES ON APPEAL

I. DID THE TRIAL COURT ERR IN DENYING APPELLANT'S MOTION TO SUPPRESS?

STATEMENT OF THE CASE

Defendant and Appellant Kendall Leamon was charged with the offenses of Possession of Cocaine with the Intent to Distribute, Resisting Arrest, and Assault and Battery in the 3rd Degree. Contesting his extended detention after the traffic stop of his vehicle, Mr. Leamon filed a Motion to Suppress the evidence against him. A hearing was held on Mr. Leamon's motion prior to his trial on November 17-18, 2016. Mr. Leamon's motion was denied. Mr. Leamon was ultimately convicted of Simple Possession of Cocaine and Resisting Arrest. He was acquitted of Possession of Cocaine with Intent to Distribute and Assault and Battery in the 3rd Degree. Mr. Leamon was sentenced to three years suspended upon 90 days to be followed by 30 months of probation on the Simple Possession of Cocaine charge and one year suspended upon probation on the Resisting Arrest Charge. Mr. Leamon now appeals the Trial Court's denial of his motion to suppress and the Criminal Judgment entered against him.

STATEMENT OF FACTS

On May 7, 2014, Appellant Kendall Leamon went to 7 Traynham Street in Greenville County, South Carolina to pick up two individuals that lived on that Street. (69-70) Upon exiting Traynham Street, Deputy Darrell Kicklighter of the Greenville County Sheriff's Office conducted a traffic stop on Mr. Leamon for allegedly failing to properly utilize his turn signal. (28).

Mr. Leamon stopped in a parking lot off of Augusta Road in Greenville County, and Kicklighter then approached Mr. Leamon's vehicle. In the vehicle with Mr. Leamon were two passengers – one in the front and one in the rear. Kicklighter asked for Mr. Leamon's drivers' license and registration. (30).

Kicklighter contends that at this time, Mr. Leamon was "extremely nervous." (30). When asked further what Mr. Leamon was doing that made Kicklighter state that he was nervous, Kicklighter stated that Mr. Leamon was "fumbling through paperwork" (30), breathing heavy, and shaking (53).

As requested, Mr. Leamon provided Kicklighter his driver's license. He didn't have the registration for the vehicle. Mr. Leamon stated that the reason why he did not was because he was borrowing the vehicle from another person. He instead went through the vehicle and gave Kicklighter all the documents that he could find in hopes that he could get her name from the documents.

Kicklighter then ran Mr. Leamon's drivers' license, identified the passengers, and checked them all for warrants. According to Kicklighter everything, in Kicklighter's own words, "checked out" - meaning presumably that the Mr. Leamon's driver's license was in order, the vehicle was not reported as stolen, and none of the vehicle occupants had any outstanding warrants. (31).

Nevertheless, despite the fact that everything had "checked out," Kicklighter decided to extend the traffic stop in order to attempt to search Mr. Leamon and his vehicle. (46) At the time that Kicklighter made the decision to extend the traffic stop, by his own admission, he had already done everything that he needed to do in regard to the need for the initial traffic stop save for actually giving Mr. Leamon a citation. (46) Moreover, by his own admission, there was nothing that kept Kicklighter from writing the citation at that point other than his desire to attempt to search Mr. Leamon and his vehicle. (Id.)

After deciding to extend the traffic stop, Kicklighter approached Mr. Leamon's vehicle again and ultimately asked him to exit the vehicle. (31-32). Mr. Leamon did as asked.

This is, however, where the stories substantially diverge. The officers claim that they noticed an unidentified object in Mr. Leamon's hand that appeared to be an amber colored pill bottle. Kicklighter contends that at this point he told Mr. Leamon that he was going to have to detain him for the officers' safety. The officers further contend that at this time Mr. Leamon shoved Deputy Curtis, another Deputy that had responded to the scene, and started to flee. The Officers further contend that at this time they saw Mr. Leamon toss an amber colored pill bottle that was later recovered and contained a quantity of cocaine sufficient to create a presumption of an intent to distribute.

Mr. Leamon, on the other hand, contends that when he got out of the car, he had his wallet in one hand and nothing in the other. He states that after he got out, Kicklighter had him place both hands flat against his vehicle and Kicklighter patted him down. Kicklighter did not locate any contraband or weapons. But after the search was over one of the other officers told Kicklighter to search him again. Mr. Leamon contends that after that he opened both hands up to show the officers that he only had his wallet in one hand and nothing in the other. Mr. Leamon contends that despite this Kicklighter reached for his arm to hand cuff him and he panicked and ran. He was ultimately caught while attempting to run up a hill. He further says that even after he stopped running he was repeatedly tased, kicked and otherwise beaten. (71-74). Mr. Leamon continues to this day to deny that he had any drugs on him. He believes that the drugs were planted by the police to provide justification for the beating that he received upon running.

Mr. Leamon, however, has no proof of this other than his word. Upon stopping Mr. Leamon, Deputy Kicklighter initiated his blue lights and activated his unit's video recorder. At a subsequent preliminary hearing and later at trial, Deputy Kicklighter confirmed that he had a video recording of his encounter with Mr. Leamon. This video would have shown the entirety of the traffic stop including where Mr. Leamon opened his hands and proved that he did not have any item including a pill bottle in his hand. However, despite acknowledging the existence of this video and despite numerous requests from Defense counsel the State failed and refused to make this video available.

Mr. Leamon was subsequently charged and called to trial on three offenses: Possession with Intent to Distribute Cocaine, Assault and Battery 3rd Degree for the alleged shove of the officer, and Resisting Arrest. Prior to trial, Mr. Leamon moved to suppress all evidence obtained after Kicklighter made the decision to extend the traffic stop in order to attempt to search Mr. Leamon and his vehicle.

At the suppression hearing, the State did not contest whether Mr. Leamon's detention had in fact been extended beyond the purpose of the initial traffic stop nor did it contend that the extended detention had become consensual. It instead argued that there existed sufficient evidence that criminal activity was occurring to justify the lengthening of the detention.

The Trial Court agreed with the State and denied Mr. Leamon's motion. In refusing to grant Mr. Leamon's motion to suppress, the Court cited the following factors to support its finding that there was sufficient evidence of criminal activity to extend the traffic stop: "extreme nervousness, car not put into park, didn't stop immediately...did not have the registration of the owner. In running his license, the officer saw he had a history or drug offenses in a high crime area." (88).

ARGUMENT

STANDARD OF REVIEW

"On appeals from a motion to suppress based on Fourth Amendment grounds, this [c]ourt applies a deferential standard of review and will reverse if there is clear error." *State v. Adams*, 409 S.C. 641, 647, 763 S.E.2d 341 (2014) (quoting *State v. Tindall*, 388 S.C. 518, 521, 698 S.E.2d 203, 205 (2010))

THE TRIAL COURT ERRED WHEN IT DENIED APPELLANT'S MOTION TO SUPPRESS

"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....'" *State v. Provet*, 391 S.C. 494, 499, 706 S.E.2d 513, 515 (2011) (alteration in original) (quoting U.S. Const. amend. IV). "Generally, the decision to conduct a traffic stop is [a] reasonable [seizure] when the police have probable cause to believe a traffic violation has occurred." *Id.* at 499, 706 S.E.2d at 515-16 (citing *Whren v. United States*, 517 US 806, 810, 116 S.Ct. 1769, 135 L.Ed.2d 89 (1996)).

"Lengthening the detention for further questioning beyond that related to the initial stop is acceptable in two situations: (1) the officer has an objectively reasonable and articulable suspicion illegal activity has occurred or is occurring; or (2) the initial detention has become a

consensual encounter.” *Id.* at 500, 706 S.E.2d at 516 (citing *State v. Pichardo*, 367 S.C. 84, 99, 623 S.E.2d 840, 848 (2005)).

It is well settled, however, that when a traffic stop is extended beyond that related to the initial stop without either (1) objective and reasonable suspicion illegal activity has occurred or is occurring; or (2) the initial detention becoming a consensual encounter, that the appropriate remedy is for any and all evidence obtained after such lengthening to be suppressed.

Here, neither the State nor the Court disputed that Mr. Leamon was detained beyond the time necessary for the initial traffic stop. Nor has the State or the Trial Court contended that the initial detention became a consensual encounter. Instead, the State argued, and the Trial Court agreed that there the extended detention was justified due to sufficient evidence of criminal activity.

Both the State and the Trial Court, however, were wrong. There was not sufficient evidence of criminal activity to justify extending Mr. Leamon’s detention and the Motion to Suppress should have been granted.

In denying Mr. Leamon’s motion to suppress, the Trial Court cited a number of factors that it believed justified a finding that criminal activity was occurring. Those factors were: 1) Mr. Leamon being nervous; 2) Mr. Leamon allegedly not stopping immediately; 3) Mr. Leamon not having the registration to the vehicle; 4) A history of drug offenses; and 5) Mr. Leamon’s presence in a high crime area. None of these factors, however, either individually or collectively, give rise to a sufficient reasonable suspicion that Mr. Leamon was involved in criminal activity.

While nervousness may be a pertinent factor in determining reasonable suspicion, this Court has repeatedly recognized that some degree of “nervousness will almost be invariably present with a traffic stop.” *State v. Moore*, 415 S.C. 245, 254, 781 S.E.2d 897, 902 (2016), cert denied, 136 S.Ct. 2473 (2016).

While presence in a high crime area can also be a consideration of reasonable suspicion, there is no basis under these circumstances to believe that Mr. Leamon presence coming from Traynham street was indicative in any way whatsoever that he was engaged in criminal activity. First, the so called high crime area that Kicklighter sought to use to justify the stop wasn’t a high crime area at all. It was two houses – numbers 10 and 12 – on Traynham Street that police had received complaints of possible narcotics activity. Kicklighter didn’t see Mr. Leamon visit either of those two houses. He simply saw him exiting the street.

Moreover, Mr. Leamon provided a reasonable, credible, and perfectly legal explanation to the Court as to why he was on Traynham Street. He was there, because he was asked by his cousin to pick up Jason Cook and his Aunt who lived on Traynham Street. (69).

But even if Mr. Leamon had been at either 10 or 12 Traynham Street, and did not have an explanation for being there, his presence would still not be sufficient to create a reasonable suspicion that he was in fact engaged in ongoing criminal activity. See *State v. Spears*, (SC.

App. 2017) and *State v. Anderson*, 415 S.C. 441, 783 S.E.2d 51 (2016) (both finding that a Defendant's presence in a high crime area, even when considered with other factors, was insufficient to justify a finding of reasonable suspicion that a Defendant was engaged in criminal activity). See Also *State v. Hewins*, 409 S.C. 93, 760 S.E.2d 814 (2014) (Finding reasonable suspicion to extend a traffic stop did not exist when the Defendant was found driving through a known "drug hub").

The Trial Court also cited Mr. Leamon having a prior history of drug offenses. In support of this factor, Kicklighter testified that when he ran Mr. Leamon's driving record he saw a prior controlled substance violation. He was not, however, able to identify the nature of the violation or even how long ago it had occurred.¹ (44-45). He was also unable to provide any evidence, basis, nexus or foundation to support a finding that the fact the fact that Mr. Leamon had a controlled substance violation was likely to be engaged in criminal activity at the time of the time of the traffic stop. In fact, Kicklighter testified to just the opposite: When asked whether the presence of such a violation would be probative of a person being engaged in criminal activity at any time in the future, Kicklighter answered in the negative. (45). Accordingly, there was no basis whatsoever for the Court to identify that as a probative factor in determining whether Mr. Leamon was engaged in criminal activity when stopped by Kicklighter.

The Trial Court also cited the fact that Mr. Leamon did not have the owner's registration as somehow demonstrative of him being engaged in criminal activity at the time of the traffic stop. There was no evidence submitted, however, that not having the registration of the car that you are driving is indicative that you are engaged in some criminal activity. Mr. Leamon explained to the Court and to Kicklighter that he was driving a vehicle owned by someone else. He told Kicklighter where he could find the rightful owner of the car. In order to help Kicklighter, he gave him all of the documents that he could find in the car to help him find her name. More importantly, after Kicklighter checked the registration of the car, he didn't find any problems. The car wasn't reported as stolen. And according to Kicklighter everything "checked out." Accordingly, there was no evidence whatsoever that was presented, which would allow the court to see this as indicative of Mr. Leamon being engaged in criminal activity.

Finally, the Trial Court cites Mr. Leamon allegedly not stopping immediately as evidence of his being engaged in ongoing criminal activity. In addition to there not being any connection between the circumstances alleged by Kicklighter in this regard to Mr. Leamon being engaged in ongoing criminal activity, this circumstance is not even true.

Although, it is not clear from the record, the geography of Augusta Road where this traffic stop occurred is a matter of local knowledge. If one leaves Traynham Street and makes a right hand turn as Mr. Leamon did on the evening in question, they would find themselves travelling north. After travelling about a tenth of a mile they would find themselves at the intersection of Augusta and Patton Road. After travelling about another tenth of a mile they would then find themselves at the intersection of Augusta and Lydia Street. And finally, after

¹ The only controlled substance violation on Mr. Leamon's record was a simple possession of marijuana forfeiture from 2009.

travelling approximately another tenth of a mile they would find themselves at the Old Colony Furniture Store.

In trying to make it seem as if Mr. Leamon travelled an unreasonably long distance after he activated his blue lights, Kicklighter repeatedly claimed that Mr. Leamon travelled all the way to the furniture store, which would have been Old Colony Furniture Store. Kicklighter initially contended that Mr. Leamon continued to roll a “couple hundred yards” into the parking lot of “an old furniture store.” (30). Kicklighter then restated his testimony on at least two other occasions that Mr. Leamon continued to drive and did not stop until he reached the furniture store parking lot. (52-53) and (49-50).

However, even Kicklighter’s own fellow officers dispute this claim. Deputies Robert Curtis and Mason Hubber, who also responded to the scene directly contradicted this testimony. Deputy Curtis testified that Mr. Leamon in fact had stopped in the parking lot of a burned-out club that was not as far up the road as the furniture store. (63). Consistent with this testimony, Deputy Hubber testified that there were no buildings or stores at the parking lot in which Mr. Leamon had stopped, and that the closest intersection to where they had stopped was Augusta Road and Patton Road, which would have been the nearest intersection to Traynham Road and only about a tenth of a mile away. (64).

In further dispute of Kicklighter’s claims, Mr. Leamon confirmed that rather than not stopping immediately, he in fact stopped at the earliest possible opportunity upon seeing the blue lights. Specifically, Mr. Leamon testified that Kicklighter did not activate his blue lights until after Mr. Leamon had already passed the first empty parking lot. But as soon as he saw the blue lights, he pulled into the next empty parking lot. And consistent with the testimony of Deputies Curtis and Hubber it was an empty lot and not as far as the furniture store. (70).

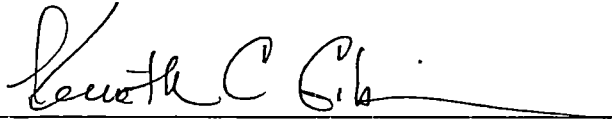
So, there is significant cause to question Kicklighter’s testimony on this point. But even if Kicklighter were telling the truth, the circumstances that he alleges would not be sufficient to support a finding that Mr. Leamon was somehow engaged in criminal activity. Kicklighter testified that Mr. Leamon had rolled a “couple hundred yards” before stopping. Kicklighter didn’t say that he sped away or tried to flee in any way. He did not say that the distance that he “rolled” was even very great. Under the circumstances, being stopped at night with limited light and limited options to pull off the road, a couple hundred yards is not a great distance. It certainly was not sufficient for Mr. Leamon to be charged with Failure to Stop for a Blue Light as he most certainly would have had Kicklighter found the distance to be unreasonable at the time of the stop.

CONCLUSION

For the foregoing reasons, this Court should find that the Trial Court erred in denying Mr. Leamon's motion to suppress the evidence in this case and reverse the Judgment of the Circuit Court.

October 27, 2017

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Kenneth C. Gibson", written over a horizontal line.

Kenneth Gibson
THE LAW OFFICE OF KENNETH GIBSON
220 North Main Street, Ste. 500
Post Office Box 5536
Greenville, SC 29606
(864) 241-6699

Attorney for Defendant

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM COUNTY OF GREENVILLE
Court of General Sessions

Edward W. Miller, Circuit Court Judge

Appellate Case No.: 2016-002476
Indictment Nos: 2014-GS-23-06783 and 2014-GS-23-07319

RECEIVED
NOV 01 2017
SC Court of Appeals

The State of South CarolinaRespondent,

vs.

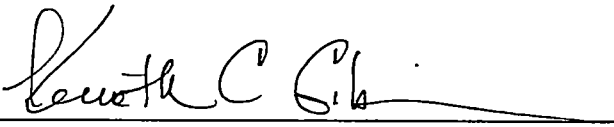
Kendall Leamon,Appellant.

PROOF OF SERVICE

The undersigned hereby certifies that he is a person of such age and discretion as to be competent to serve process and that on the 27th day of October 2017, he served a copy of the attached **INITIAL BRIEF OF APPELLANT AND DESIGNATION OF MATTER TO BE INCLUDED IN RECORD UPON APPEAL** upon The State of South Carolina by regular mail addressed to:

J. Benjamin Applin
Alan M. Wilson
Office of the South Carolina Attorney General
Post Office Box 11549
Columbia, SC 29211-1549.

Date: October 27, 2017



Kenneth Gibson

Kenneth C. Gibson
Attorney at Law

220 North Main Street, Ste. 500 (29601)
Post Office Box 5536 • Greenville, SC 29606
Phone: (864) 241-6699 • Facsimile: (864) 241-6211

October 27, 2017

The Honorable Jenny Abbott Kitchings
Clerk of the South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

RECEIVED
NOV 01 2017
SC Court of Appeals

RE: State of South Carolina v. Kendall Leamon
Appellate Case No. 2016-002476
Indictment Nos.: 2014-GS-23-06783 and 2014-GS-23-07319

Dear Honorable Ms. Kitchings:

Please find enclosed for filing the Initial Brief of Appellant, Appellant's Designation of Matter to Be Included in the Record Upon Appeal and Proof of Service.

Should you have any questions please contact me at your earliest convenience.

Sincerely,



Kenneth Gibson

Enclosures

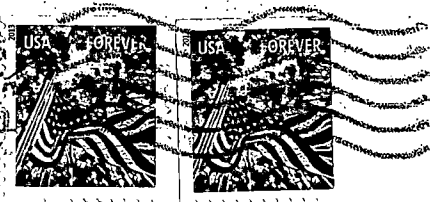
cc: J. Benjamin Applin, Esquire

Kenneth C. Gibson
Attorney at Law

Post Office Box 5536 • Greenville, SC 29606

GREENVILLE SC 29606

30 OCT 2017 PM 3:11



The Honorable Jenny Abbott Kitchings
Clerk of the South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

RECEIVED
NOV 01 2017
SC Court of Appeals

29211-11629

