

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

ORIGINAL

Appeal from Horry County

Honorable Steven H. John, Circuit Court Judge

RECEIVED
FEB 14 2018
SC Court of Appeals

THE STATE,

RESPONDENT,

V.

EUGENE HARDY,

APPELLANT

APPELLATE CASE NO. 2017-001934

ANDERS BRIEF OF APPELLANT

JOANNA K. DELANY
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
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ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Did the judge err in denying Appellant's motion to suppress cocaine found as the result of a traffic stop effected to serve outstanding arrest warrants when no traffic violation was committed and no criminal activity was suspected?

STATEMENT OF THE CASE

Appellant was indicted by the Horry County Grand Jury on January 19, 2017, for possession with intent to distribute cocaine. R. 185-186. His case was called to trial before the Honorable Steven John and a jury, from September 13 – 14, 2017. R. 1. Eric Fox represented Appellant; David Caraker and George Henry Martin appeared on behalf of the state. R. 1.

The jury returned a verdict of guilty, and Judge John sentenced Appellant to incarceration for fifteen years, as enhanced for a third offense. R. 175; R. 187. This appeal follows.

ARGUMENT

The judge erred in denying Appellant's motion to suppress cocaine found as the result of a traffic stop effected to serve outstanding arrest warrants when no traffic violation was committed and no criminal activity was suspected.

Relevant facts

Agent Curry of the Surfside Beach Police Department testified on behalf of the state about Appellant's arrest. R. 77, ll. 11-15. Curry testified he had three warrants for Appellant's arrest for distribution of crack cocaine that were obtained the day of Appellant's arrest. R. 31, ll. 3-8; R. 38, ll. 21-22. Curry said he knew Appellant was employed by a utility contractor, so he decided wait outside the business for Appellant to leave work. R. 81, ll. 20-25.

Curry acknowledged he asked Deputy Cooper of the Sheriff's Office to use a marked patrol car "to conduct a traffic stop on [Appellant's] vehicle when he left work and was away from everyone." R. 31, ll. 13-16. When Curry saw Appellant leaving work, he instructed Cooper to pull Appellant over. R. 32, ll. 7-8. Curry testified that after Cooper pulled Appellant over, "I pulled up behind the traffic stop, behind the police car. We instructed Officer Cooper to ask him to step out of the car and walk him to the back where we could talk to him." R. 32, ll. 14-19.

Curry said: "We had a deputy sheriff in a marked unit and uniform to pull him over to arrest him on the warrants **and try to further our investigation going on at that time.**" R. 81, l. 25 – 82, l. 3. Curry's reasoning for the stop was to get Appellant "where no one would pay us any attention and we would have an opportunity to talk with him." R. 31, ll. 16-18. Interestingly, Curry did not place Appellant under arrest when he was brought back to Curry's unmarked vehicle. R. 39, ll. 2-7. Curry stated that after Cooper walked Appellant back behind the patrol car, Curry identified himself and "asked him to step in my vehicle where we could talk,"

“explained I have three warrants for your arrest,” and “spoke to him about other people involved in this investigation.” R. 32, l. 25 – 33, l. 4.

Curry asserted that he requested help from the Sheriff’s Department, in a marked patrol car, due to safety concerns. “If you walk up to someone based on our protocol, one we do not make traffic stops on the vehicles. They are unmarked, undercover vehicles. Plus, it was going to draw a lot more attention if blue lights come on in an undercover vehicle behind someone, and in past we’ve had people run from the vehicles, et cetera. This is the safest way to do it for the public and everyone involved.” R. 38, ll. 3-13.

After speaking with Appellant, Curry informed Appellant he was going to be arrested and told him to step out of the car. R. 33, ll. 4-6. Curry said that as Appellant opened the door and was stepping out, he saw Appellant take off his shoe and remove a plastic bag which Appellant threw on the ground and tried to step on. R. 33, ll. 8-16. Curry then arrested Appellant and retrieved the bag. R. 33, ll. 16-20. The contents of the bag were the basis for Appellant’s charge of possession with intent to distribute in this case. R. 36, ll. 14-20.

Defense counsel Fox moved to “suppress the drugs that were found as a result of an illegal stop.” R. 28, ll. 10-11. Fox stated “this was a traffic stop that was pretextual,” and was “bootstrapped after the fact.” R. 51, ll. 15-17. Defense counsel argued Appellant was “stopped without cause under a pretextual basis for a made-up traffic violation that they then used to make a contact and serve these warrants.” R. 51, ll. 19-22.

The state responded that Curry identified Appellant to make sure that he had the right person, and had arrest warrants when he directed the sheriff’s deputy to pull over Appellant. R. 52, ll. 2-5. The state did not present any evidence of or argue that Appellant had committed a traffic violation to justify the stop, relying on service of the warrants as its basis. R. 52, ll. 11-15.

Judge John ruled the drugs were admissible. He reasoned that Curry saw Appellant, identified him and his vehicle, and “for public safety reasons and safety of himself, the defendant and the public in general, he had a duly authorized law enforcement agent stop the vehicle so as to effect the service of the lawful arrest warrants that they had on the defendant.” R. 52, l. 17 – 53, l. 3.

Discussion

The Fourth Amendment to the Constitution of the United States protects the right of people to be secure against unreasonable searches and seizures. U.S. CONST. amend. IV. Temporary detention by the police during an automobile stop constitutes a seizure of an individual within the meaning of the Fourth Amendment. *Delaware v. Prouse*, 440 U.S. 648, 653 (1979). “Therefore, an automobile stop implicates the Fourth Amendment prohibition against unreasonable searches and seizures, imposing a standard of ‘reasonableness’ upon the exercise of discretion by state law enforcement officials.” *State v. Banda*, 371 S.C. 245, 252, 639 S.E.2d 36, 40 (2006).

“[A] police officer may stop a vehicle when the officer has probable cause to believe a **traffic violation has occurred, or when the officer has reasonable suspicion the occupants are involved in criminal activity.** *State v. Burgess*, 394 S.C. 407, 412, 714 S.E.2d 917, 919 (Ct. App. 2011) (citations omitted) (emphasis added). *E.g.*, *State v. Corley*, 392 S.C. 125, 708 S.E.2d 217 (2011). The test for determining whether reasonable suspicion of criminal activity exists is the totality of the circumstances. *State v. Edwards*, 415 S.C. 401, 409, 782 S.E.2d 124, 128 (Ct. App. 2016).

The Fourth Circuit addressed pretextual stops in *United States v. Hassan El*, 5 F.3d 726, 729 (4th Cir. 1993). Hassan El argued police used a minor traffic violation as a pretext to stop his

car and conduct a search for more serious criminal activity. The Fourth Circuit found the traffic violation was not a pretext, and held “that when an officer observes a traffic offense or other unlawful conduct, he or she is justified in stopping the vehicle under the Fourth Amendment.” *Id.* at 730.

Similarly, the Tenth Circuit has held that “a traffic stop is valid under the Fourth Amendment if the stop is based on an observed traffic violation or if the police officer has reasonable articulable suspicion that a traffic or equipment violation has occurred or is occurring.” *United States v. Botero-Ospina*, 71 F.3d 783, 787 (10th Cir. 1995). The Court found irrelevant whether the officer may have had other subjective motives for stopping the vehicle, and stated that their sole inquiry is whether this particular officer had reasonable suspicion that this particular motorist violated a traffic or equipment regulation. *Id.*

Evidence obtained by searches and seizures in violation of the Constitution is inadmissible in state court. *Mapp v. Ohio*, 367 U.S. 643, 655 (1961). Evidence that is obtained or derived as a result of an unlawful search or seizure is excluded as “fruit of the poisonous tree.” *Wong Sun v. United States*, 371 U.S. 471, 484–85 (1963). Such tainted evidence includes tangible physical evidence. *United States v. Crews*, 445 U.S. 463, 470 (1980).

The United States Supreme Court has consistently held that a search or seizure unlawful at its inception may not be validated by evidence found pursuant to the unlawful search or seizure. *Wong Sun v. United States*, 371 U.S. at 484. In *Wong Sun*, Toy was unlawfully arrested and made statements to police about the location of narcotics he was eventually charged with transporting and concealing. *Id.* at 487. The Court found the narcotics were obtained by law enforcement’s exploitation of the illegality of Toy’s arrest, and as such were fruit of the poisonous tree to be suppressed. *Id.* at 488.

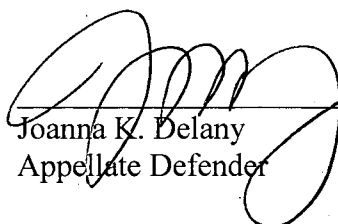
The Court also noted that “testimony as to matters observed during an unlawful invasion has been excluded in order to enforce the basic constitutional policies.” *Wong Sun v. United States*, 371 U.S. at 485 (citing *McGinnis v. United States*, 1 Cir., 227 F.2d 598 (1st Cir. 1955)). In *McGinnis*, the Court found the prohibition on unreasonable searches and seizures protects an accused from conviction based on evidence illegally taken and evidence illegally observed. *McGinnis v. United States*, 227 F.2d at 603.

Testimony established that Appellant was pulled over leaving his workplace, which was determined by law enforcement to be a location “where no one would pay them any attention,” and they could talk to Appellant so they might try to “further [their] investigation.” Appellant did not commit a traffic violation. Nor was there testimony that law enforcement had any suspicion that Appellant was engaged in criminal activity when he was stopped. Cooper’s seizure of Appellant at the behest of Curry so that Curry might execute arrest warrants issued that morning and conduct additional investigation was an improper pretextual stop prohibited by the Fourth Amendment. The removal of the cocaine from Appellant’s shoe was a matter observed during a pretextual stop, rendering the cocaine fruit of the poisonous tree that should have been suppressed by the trial court.

Respectfully, this Court should reverse the ruling of the trial judge and remand for a new trial.

CONCLUSION

Based on the foregoing argument, Appellant respectfully requests this Court reverse his conviction and sentence and remand for a new trial.



Joanna K. Delany
Appellate Defender

ATTORNEY FOR APPELLANT

This 14th day of February, 2018.

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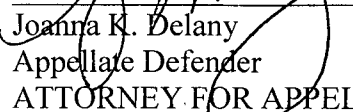
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Eugene Hardy states:

1. She is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent appellant.
2. She has reviewed the record of appellant's trial before Judge Steven H. John, which was held on September 13 - 14, 2017, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. She 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, she asks the Court to relieve her as counsel for Eugene Hardy.

Respectfully Submitted,


Joanna K. Delany
Appellate Defender
ATTORNEY FOR APPELLANT

This 14th day of February, 2018.

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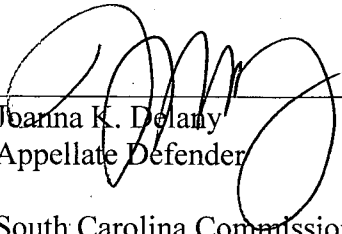
**DESIGNATION OF MATTER TO BE
INCLUDED IN RECORD ON APPEAL**

Appellant proposes the following be included in the Record on Appeal:

- (1) True-billed indictment;
- (2) Transcript of September 13 – 14, 2017 General Sessions trial;
- (3) Arrest warrant;
- (4) Sentence sheet.

I certify that this designation contains no matter which is irrelevant to this appeal.

February 14, 2018.



Joanna K. Delany
Appellate Defender

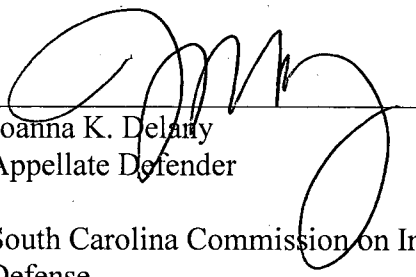
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ATTORNEY FOR APPELLANT

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Anders Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

February 14, 2018.



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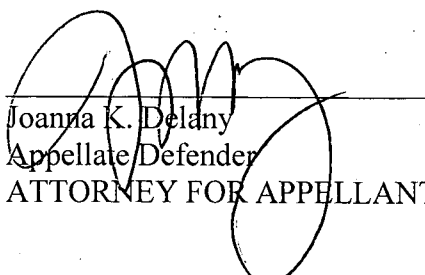
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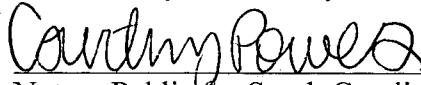
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Anders Brief of Appellant and Designation of Matter in the above referenced case has been served upon J. Benjamin Aplin, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Anders Brief of Appellant and Designation of Matter have been served on Eugene Hardy, 238491, at Lee Correctional Institution, 990 Wisacky Hwy., Bishopville, SC 29010, this 14th day of February, 2018.



Joanna K. Delany
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 14th day of February, 2018.

 (L.S)

Notary Public for South Carolina
My Commission Expires: May 2, 2027.