

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Union County

Honorable Lee S. Alford, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

TYRONE DEANGELO FLEMING,

APPELLANT

APPELLATE CASE NO 2018-000727

ANDERS BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Did the trial court err in denying Appellant's motion to suppress the cocaine allegedly found in the anal cavity of Appellant because the police officer exceeded the scope of a search incident to arrest by touching the private "rectal" area of Appellant, while still on the roadside, where the officer allegedly found a "tied knot" that he believed indicated drugs in the anal cavity?

STATEMENT OF THE CASE

On August 17, the Union County Grand Jury indicted Appellant Fleming on the charges of possession of cocaine, driving under suspension, and possession of marijuana. On April 10-11, 2018, Appellant Fleming proceeded to trial before the Honorable Lee Alford and a jury. Fleming was represented by Erik Delaney, and the state was represented by Meghan M. Gilmer. R. 1. The jury found Appellant Fleming guilty of the three charges as indicted. R. 252, ll. 1 – 25. The judge sentenced Fleming to eight years on the possession of cocaine third offense; to 60 days on the DUS second offense; and 30 days on the possession of marijuana. All sentences were to run concurrent. R. 258, ll. 8 – R. 259, ll. 11. Trial counsel filed a notice of appeal. This appeal follows.

STANDARD OF REVIEW

“The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion.” State v. Hatcher, 392 S.C. 86, 91, 708 S.E.2d 750, 753 (2011) (quoting State v. Pagan, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006)). “An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law.” Id.; see also State v. Brockmeyer, 406 S.C. 324, 340, 751 S.E.2d 645, 653 (2013).

ARGUMENT

The trial court erred in denying Appellant's motion to suppress the cocaine allegedly found in the anal cavity of Appellant because the police officer exceeded the scope of a search incident to arrest by touching the private "rectal " area of Appellant, while still on the roadside, where the officer allegedly found a "tied knot" that he believed indicated drugs in the anal cavity.

Relevant Facts

On March 14, 2017, Officer Jonathan Montjoy, with the Jonesville Police Department, was patrolling downtown. R. 32, ll. 1 -25. He saw a car proceeding down main street with a shattered windshield on the passenger side which was about the size of a small basketball. R. 34, ll. 7 – 22. It was about 4:40 in the afternoon with full daylight according to the officer. R. 34, ll. 7 – R. 35, ll. 17.

Officer Montjoy activated his blue lights and the car stopped. The driver was the only occupant, but the driver did not have any identification. He gave the officer his name and date of birth. R. 35, ll. 1 – 25. The officer said that he could smell the odor of marijuana in the vehicle when he stood by the car at the driver's window. R. 36, ll. 1 – 4.

When the officer provided the driver's name and birth date to dispatch, he learned from dispatch that the driver's license had been suspended. Officer Montjoy then returned to the car and had the driver get out of the car. The officer did a quick pat down of the pockets of the driver then. The officer told the driver that the officer could smell marijuana coming from the car and because of that, the officer had probable cause to search the car. When the officer searched the car, he found "light traces of marijuana residue in the carpet of the car." R. 36, ll. 11 – R. 37, ll. 7; R. 104, ll. 9 – R. 105, ll. 25.

After placing the driver under arrest for driving under suspension (DUS), Officer Montjoy conducted a search incident to arrest of the driver. The officer found a small baggy of marijuana in the groin/crotch area of the driver. According to the officer, he searched only on the outside of the driver's clothing. R. 106, ll. 17 – R. 107, ll. 25.

Officer Montjoy continued to search the driver after he found the baggy of marijuana. The officer patted down the driver in the “rectum area of the butt” and felt what he described as a “hard knot” as though “it was a knot on a plastic bag.” The officer did not retrieve the alleged bag as the officer “did not enter the driver's clothing.” However, the driver was put in handcuffs and transported to the detention center. The officer said he “allowed them to do the strip search at the detention center.” R.108, ll. 14 – 23.

The driver, who had been identified as Appellant Fleming, was transported to the detention center. Appellant Fleming was taken to the room for strip searches. R. 103, ll. 22 – 24; R. 110, ll. 1 -8; R. 113, ll. 10 – 23. Officer Montjoy described the search. Fleming removed his clothing himself. The officer described Fleming's behavior at that point as “hostile” as he did not want to comply with removing his lower clothing. However, once his pants were removed, Fleming was required to “squat and cough” which was a normal procedure to check the body cavity. R. 114, ll. 1 – R. 115, ll. 9; R. 179, ll. 1 – 24.

When Fleming did squat and cough, a bag of cocaine came from his rectum according to Officer Montjoy. Appellant Fleming was charged with DUS, simple possession of marijuana, and possession of cocaine. He was not given a citation for the cracked windshield. R. 117, ll. 1 – 12.

In a pretrial motion, defense counsel made two motions concerning the traffic stop and the validity of the search of Appellant Fleming. A pretrial hearing was held where Officer Montjoy and Appellant Fleming testified. R. 31, ll. 4 - 25.

Following the hearing, defense counsel argued there was not probable cause to stop the vehicle. However, counsel asked the court to “focus more” on the search of Fleming which counsel argued was too intrusive. Counsel argued that if it was suspected that a person had something in their “rectum,” that search needed to be done in a more “secured environment.” Counsel said that an officer should not be going into someone’s “rectum” and looking. R. 75, ll. 1 – 22. Counsel argued that that search “exceeded the scope of searching incident to arrest.” Therefore, counsel argued, the cocaine later found at the jail should be suppressed. R. 76, ll. 11 – 21.

The judge denied the motion. R. 76, ll. 22 – R. 81, ll. 9.

During the trial, Dr. Doug Robinson, the forensic chemist at SLED, testified that he performed the analysis on the cocaine found. It was cocaine C-2 and weighed .72 grams. When the drugs were admitted into evidence, defense counsel objected. The judge admitted the drugs over counsel’s objection. R.158, ll. 1 – 21; R. 164, ll. 19 – R. 165, ll. 19.

Counsel moved for a directed verdict at the close of the state’s case based on the “unlawful search at the scene of Mr. Fleming.” The judge denied the motion. R. 187, ll. 23 – R. 190, ll. 10.

Appellant Fleming testified that he never had any cocaine. It did not belong to him. R. 199, ll. 1 – 23. The bag that the police said came from his anal cavity was already on the floor when they went into the bathroom to do the strip search at the detention center. R. 208, ll. 11 – R. 211, ll. 3. It was not his. R. 211, ll. 1 – 6.

Fleming testified that Officer Montjoy went under Fleming's sweat pants and put his finger in Fleming's "rectum." R. 198, ll. 1 – R. 199, ll. 23. Fleming did still have on shorts under the seat pants. This occurred while they were still on the highway. R. 197, ll. 1 – R. 198, ll. 23.

Discussion

The Fourth Amendment protects the right of the people to be secure in their persons, house, papers, and effects, against unreasonable searches and seizures. U.S. Const. amend. IV. This guarantee protects against unreasonable searches and seizures. “The purpose of the Fourth Amendment is not to eliminate all contact between the police and the citizenry, but ‘to prevent arbitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals.’” United States v. Mendenhall, 446 U.S. 544, 553–54 (1980) (quoting United States v. Martinez-Fuerte, 428 U.S. 543, 554 (1976).)

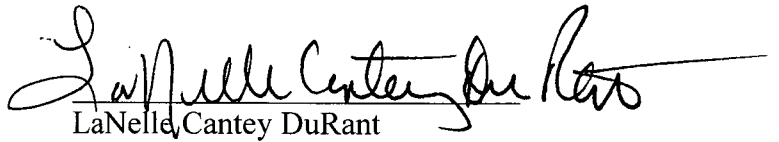
The Fourth Amendment prohibits unreasonable search and seizure, and requires that evidence seized in violation of the Amendment be excluded from trial. U.S.C.A. Const.Amend. IV.; State v. Gamble, 405 S.C. 409, 747 S.E.2d 784 (2013); State v. Freiburger, 366 S.C. 125, 620 S.E.2d 737 (2005) The security and protection of persons and property provided by the Fourth Amendment are fundamental values. U.S.C.A. Const.Amend. IV.; State v. Gamble, 405 S.C. 409, 747 S.E.2d 784 (2013).

Strip searches are “demeaning, dehumanizing, undignified, humiliating, terrifying, unpleasant, embarrassing, repulsive, [and] signifying degradation and submission.” Mary Beth G. v. City of Chicago, 723 F.2d 1263, 1272 (7th Cir.1983) [quoting Tinetti v. Wittke, 479 F.Supp. 486, 491 (E.D.Wis.1979), *affirmed* 620 F.2d 160 (7th Cir.1980)]. Strip searches may be necessary in a custodial setting where an individual has decreased expectations of privacy and the State has a legitimate security interest. However, beyond the custodial context, strip searches must be premised upon a clear showing of exigent circumstances. Washington v. Whitaker, 317 S.C. 108, 116, 451 S.E.2d 894, 899 (1994)

Although Officer Montjoy did not conduct a strip search of Appellant, he did conduct a search of a very private area of Appellant Fleming's body. The touching and searching of the anal area of a person is demeaning, and should not be conducted on the roadside as defense counsel argued. R. 75, ll. 1 - 22. Any touching of this private area in conducting a search should have been done in private at the detention center. The cocaine should have been suppressed.

CONCLUSION

Based on the above, Appellant's convictions should be reversed, and the case remanded for a new trial.


LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR APPELLANT

This 5th day of December, 2018.

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Honorable Lee S. Alford, Circuit Court Judge

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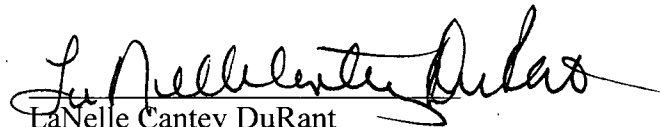
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Tyrone Deangelo Fleming 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 Lee S. Alford, which was held on April 10 - 11, 2018, 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 Tyrone Deangelo Fleming.

Respectfully Submitted,


LaNelle Cantey DuRant
Appellate Defender
ATTORNEY FOR APPELLANT

This 5th day of December, 2018.

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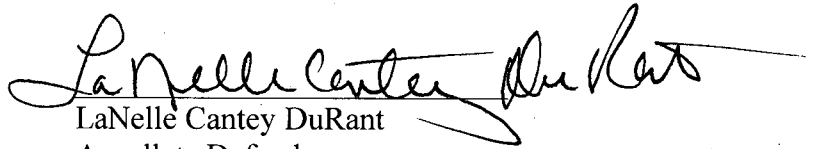
**DESIGNATION OF MATTER TO BE
INCLUDED IN RECORD ON APPEAL**

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

- (1) True-billed indictment(s):
- (2) Sentence sheets
- (3) Trial Transcript April 10-11, 2018
- (4) State's Exhibit No. 1
- (5) State's Exhibit No. 4

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

December 5, 2018


LaNelle Cantey DuRant
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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."

December 5, 2018.


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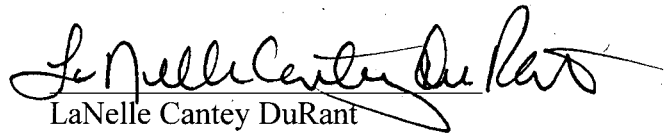
V.

TYRONE DEANGELO FLEMING,

APPELLANT

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 Tyrone Deangelo Fleming, 321777, at Manning Correctional Institution, 502 Beckman Drive, Columbia, SC 29203, this 5th day of December, 2018.


LaNelle Cantey DuRant
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 5th day of December, 2018.

 (L.S)
Notary Public for South Carolina
My Commission Expires: September 27, 2028.