

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM KERSHAW COUNTY
Court of Common Pleas

Robert E. Hood, Circuit Court Judge

RECEIVED

DEC 19 2018

SC Court of Appeals

Case No. 2018-001710

City of Camden,..... Appellant,

v.

Jerry Michael Yates,..... Respondent.

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

- I. THE CIRCUIT COURT DID NOT ERR IN AFFIRMING THE SUMMARY COURT'S CONSIDERATION OF RESPONDENT'S PRETRIAL MOTION TO DISMISS FOR LACK OF PROBABLE CAUSE IN A MATTER ARISING WITHIN ITS OWN TRIAL JURISDICTION.

- II. THE CIRCUIT COURT DID NOT ERR IN AFFIRMING THE SUMMARY COURT'S DETERMINATION THAT THE CALL TO DISPATCH WAS NOT SUFFICIENTLY RELIABLE TO COMPLY WITH THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

STATEMENT OF THE CASE

Based upon a factual situation presented to the Camden municipal court and the charging tickets, on May 13, 2017 Respondent was arrested and charged with alleged violations of Driving Under the Influence, .15% BAC, under Section 56-5-2930(A)(1) of the South Carolina Code of Laws and Open Container of Beer or Wine in a Motor Vehicle under Section 61-4-110 of the South Carolina Code of Laws. (Mun. Order, p. 1; Transcript p. 4, LL 2-5). At the *call of the case*, presumably audio recorded on July 12, 2018, the Defendant Yates, through his attorney, orally moved the Honorable Roderick M. Todd, Jr., City of Camden municipal court judge, for an order to suppress the arrest and subsequent search of the Respondent Yate's vehicle on the grounds "that the City of Camden lacked probable cause to stop the Defendant," (Return from City of Camden, p. 1, LL 7-10). No testimony was taken during that hearing, whether on behalf of Appellant or Respondent nor was any objection made by the Appellant to arguing the motion before a jury was seated or after the municipal court judge's ruling, until the Appeal filings in the circuit court from the municipal court. The municipal court's return states that "Mr. Wright, on behalf of the City vigorously opposed the motion" (Return from the City of Camden p. 1, L 13) but does not state that he opposed hearing the motion at that July 12, 2018 call of the

case. The court recording device was apparently inoperable or not employed since there is no transcript.

As a result of the motion and the argument of both Appellant's Attorney and Respondent's Attorney, an Order was issued by Judge Todd on August 24, 2017 granting Respondent's Motion (Mun. Order p. 1- 2.). This Order was timely appealed to the circuit court (Notice of Appeal, p.1-3), the municipal court return was filed on February 8, 2018 with oral arguments being heard by the Honorable Robert E. Hood on July 28, 2018, (Return, p. 1-2). Judge Hood issued an Order affirming the summary court decision "that the City of Camden lacked probable cause to stop the defendant" on August 21, 2018 (Cir. Ct. Order, p. 1). Appellant filed a Motion to Alter or Amend and for Reconsideration pursuant to Rules 52 and 59 of the South Carolina Rules of Civil Procedure on August 30, 2018, (Motion to Reconsider). Judge Hood issued a Form 4 Order denying Appellants Motion for Reconsideration, (Form 4 Order), on August 31, 2018. Appellant filed its Notice of Appeal on September 19, 2018.

In the Appellant's Notice of Intent to Appeal before the circuit court, and for the first time, the Appellant made the argument that a pre-trial hearing on a motion to dismiss for lack of probable cause was not permitted. It should be noted that the Appellant's City Solicitor is responsible for calling the case; setting of hearing and establishing the time and the place and not the Municipal Court Judge.

STATEMENT OF THE FACTS

The Order of the City of Camden municipal court judge indicated that a "factual situation" was presented to the court, (Mun. Order p. 1, L 8). There was no witness testimony presented by Appellant or Respondent and there is no indication in the Return that testimony was

proffered by either the Appellant or Respondent (Mun. Order P. 1-4). There is no evidence that the municipal court judge precluded testimony from either Appellant or Respondent (Mun. Order p 1-4).

The “factual situation” submitted indicates that the underlying traffic stop was the result of an anonymous call to the City of Camden Police Department. The details of the call were that a “black Toyota pickup with Tag # 6879HQ was parked at Gadgets Sports Bar and that the driver’s license was suspended and he was dealing heroin and methamphetamine at the business” (Mun. Order, p. 1, LL 9-11; Transcript p. 6, LL 4-5 and p. 7, LL 5-9). It was further presented that two responding officers set up to observe the vehicle in the parking lot of the sports bar and as a result of that observation, the tag and registration allegedly matched the subject of the call (Mun. Order p. 1, LL 11-16; Transcript p. 6, LL 21-24). However, the Respondent driver was observed entering and driving the vehicle, subsequently stopped even though he was not confirmed to be under suspension nor the same individual who was the subject of the call. The officers did not have any separate independent probable cause such as driving violations to support a stop. (Mun. Order, p. 1, LL 11-14; Transcript p. 7, LL 2-3). “It turns out that the individual wasn’t driving under suspension and was in fact, driving under the influence and had an open container of alcohol,” (Transcript, p. 7, LL 24-25).

It is significant to note that in addition to there not being any traffic violations, and Respondent’s license not being revoked, there was no evidence of any drug activity (the actual reason for the stop) as alleged by the anonymous caller.

STANDARD OF REVIEW

“In criminal appeals from a municipal court, the circuit court does not conduct a *de novo* review; rather, it reviews the case for preserved errors raised to it by an appropriate exception. City of Cayce v. Norfolk S. Ry. Co., 391 S.C. 395, 399, 706 S.E.2d 6, 8 (2011); see S.C. Code Ann Section 14-25-105 (Supp. 2010) (“There shall be no trial *de novo* on any appeal from a municipal court”). Therefore, the appellate court’s review in criminal cases is limited to correcting the order of the circuit court for any errors of law, City of Rock Hill v. Suchenski, 374 S.C. 12, 15, 646 S.E. 2d 879, 880 (2007).

ARGUMENT

I. THE CIRCUIT COURT DID NOT ERR IN AFFIRMING THE SUMMARY COURT’S CONSIDERATION OF RESPONDENT’S PRETRIAL MOTION TO DISMISS FOR LACK OF PROBABLE CAUSE IN A MATTER ARISING WITHIN ITS OWN TRIAL JURISDICTION.

“To preserve an issue for appellate review, an appellant must object at his first opportunity.” State v. Sullivan, 310 S. C. 311, 314, 426 S. E.2d 766, 768 (1993). The Appellant knew at every stage of the hearing on the motion that suppression of the stop and arrest rendered their case unprovable. The pretrial motion was an oral motion to dismiss from the time it was uttered by Respondent’s Motion, (Return of Municipal Court, p. 1, LL 7-10). To claim otherwise would be disingenuous. The Appellant’s own argument through their representative City Solicitor Wright stated, “In terms of the bulk of the discussion that Mr. Speedy and I had with the court on that July hearing, we focused on the anonymous tip that was provided...” Both Appellant and Respondent knew that the case rose and fell on the admission into evidence of the anonymous tip and the subsequent police stop based solely on that tip.

The City Solicitor called the case, as is his prerogative, was advised by Respondent's counsel that he had an oral motion to dismiss based on the lack of probable cause, and as City Solicitor, he set the time and place of the hearing. There is absolutely no evidence that the Appellant objected to the municipal court hearing that motion and even after the matter was heard and an order issued, no objection to the Order was made by way of a Motion for Reconsideration. It appears that the Appellant, after having participated in the process, did not like the ruling and instead raised the issue for the very first time in its appeal to the circuit court. Therefore, the Appellant failed to make its motion "at the first opportunity" as required under Sullivan.

Notwithstanding the above, the Circuit Court was correct in ruling that the hearing held in this case was a pre-trial hearing and not a preliminary hearing (Transcript, p. 3, LL 6-8). There is no dispute on the issue of whether a summary court has jurisdiction to hold a preliminary hearing on an offense that is in the jurisdiction of that municipal court. It does not. However, there was no preliminary hearing held in this case. At no point did either the municipal court judge or the circuit court judge even allege, much less cite, the preliminary hearing statute as the justification for the hearing that was held.

Appellant relies upon State v. Ramsey, 381 S.C. 375 (S.C. 2009) and State v. Williams, 417 S.C. 209 (Ct. App. 2016). In Ramsey, the trial court actually held a preliminary hearing pursuant to, Section 22-5-710, S.C. Code of Laws. Likewise, in Williams the Court held that "There is no authority for the proposition that magistrates are authorized to conduct preliminary hearings on matters within their own trial jurisdiction." Those two cases are distinguishable from what happened in the case at hand in that a Motion here was made pursuant to Rule 4 and not pursuant to Rule 2 of the South Carolina Rules of Criminal Procedure as alleged by Appellant.

Rule 4 provides in part that “An application to the court for an order shall be by motion which, unless made during a hearing or trial in open court with a court reporter present shall be in writing, shall state with particularity the grounds therefor, and shall set forth the relief of order sought”. Respondent made his motion to dismiss for lack of probable cause at the trial that was set and noticed by Appellant at the *call of the case* in the City of Camden municipal court.

Respondent’s motion was based upon State of South Carolina vs. Alonzo Clinton Greene, 341 S. C. 214, 532 S.E. 2d 896, (Ct. App. 2000). Respondent’s motion alleged, as did the Defendant in Greene, a violation of his Fourth Amendment rights under the United States Constitution due to an improperly corroborated anonymous call. The court in Greene held that the anonymous caller provided no predictive information. Since the call was anonymous, the caller did not place his/her credibility at risk and could lie with impunity. Therefore, The Court found that they could not judge the credibility of the caller and the risk of fabrication was unacceptable. Respondent’s motion was clearly a motion to suppress although presented as a motion to dismiss. It seems that either way, if it was a motion to dismiss or a motion to suppress, the ruling that it was an unreliable anonymous tip would be the same.

The circuit court was correct in ruling that the pretrial hearing was not a preliminary hearing. There was no request for a preliminary hearing. The hearing was held pursuant to a motion made in open court during a hearing that was set and noticed by Appellant, not Respondent. The scope of the hearing actually held was a suppression hearing and not a preliminary hearing. After Respondent made his motion, he was granted a hearing on his alleged constitutional violation. “To be entitled to a suppression hearing under Blassingame, a defendant must, by way of oral or written motion to the trial court, articulate specific factual and legal grounds to support his contention that evidence was obtained by conduct violative of his

constitutional rights. The trial court shall, in the exercise of its discretion, grant a suppression hearing if the defendant's grounds are sufficiently definite, specific, detailed, and nonconjectural to enable the court to conclude that contested issues of fact going to the validity of the search are in question” State v. Patton, 322 S.C. 408, 472 S.E.2d 245 (1995). Once Respondent made the motion that the arrest was a result of an unreliable anonymous tip, the burden shifts back to Appellant as the prosecutor to show that the evidence or testimony should not be suppressed. Appellant’s burden of proof included both the burden of producing testimony or evidence to refute the claim and also the burden of persuading the trial judge to deny that motion. After Respondent made his motion, it was the Appellant, and not the summary court judge or Respondent, who made the decision to not present witness testimony on the issues raised in Respondent’s motion.

It is interesting that Appellant further cites State v. Williams, 321 S.C. 381, 385, 468 S.E.2d 656, 658 (1996), where the court stated “We agree with the State that the trial judge abused his discretion by dismissing the charges without first allowing the State to present its case”. Appellant appears to be claiming the summary court judge to be at fault for Appellant’s decision to not present testimony or prove his case.

What was presented as a factual scenario was a summary of a City of Camden Incident Report. Taken on its face, this report was prepared by a City of Camden Officer who did not testify. Rule 801 of the South Carolina Rules of Evidence defines hearsay as “a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” Rule 802 of these Rules excludes hearsay evidence unless it falls into an exception under Rule 803. The only exception under Rule 803 that would appear relevant would be subsection (6) or (8). Subsection (6) is what is commonly known as

the business records exception. Subsection (8) is known as the public records exception. What is notable is that both of these two exceptions require that the documents, here a summary of an Incident Report, be authenticated. That was not done here. Respondent would submit that summary of the incident report should be excluded from any consideration as evidence due to it being excluded by the hearsay rule.

Respondent would submit that as a result of the failure of Appellant to present any admissible evidence or testimony to meet Appellant's burden of proof in responding to Respondent's motion, there is no factual basis to support overturning the decision of either the Summary Court or Circuit Court judges in this case.

II. THE CIRCUIT COURT DID NOT ERR IN AFFIRMING THE SUMMARY COURT'S DETERMINATION THAT THE CALL TO DISPATCH WAS NOT SUFFICIENTLY RELIABLE TO COMPLY WITH THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

In Navarette v. California, 572 U. S. 393, 134 S. Ct. 1683 (2014) the United States Supreme court states as follows:

The Fourth Amendment permits brief investigative stops-such as a traffic stop in this case-when a law enforcement officer has a "particularized and objective basis for suspecting the particular person stopped of criminal activity." United States v Cortez, 449 U. S. 411, 417-418, 101 S. Ct. 690, 66 L.Ed.2d (1981); see also Terry v Ohio, 392 U. S. 1, 21-22, 88 S. Ct. 1868, 20 L.Ed. 889 (1968). The "reasonable suspicion" necessary to justify such a stop "is dependent upon both the content of information possessed by police and its degree of reliability." Alabama v. White, 496 U. S. 325, 330, 110 S. Ct. 2412, 110 L. Ed.2nd 301 (1990). The standard takes into account "the totality the circumstances-the whole picture." Cortez, supra, at 417, 101 S. Ct. 690. Although a mere "hunch" does not create reasonable suspicion, Terry, supra, at 27, 88 S. Ct. 1968, the level of suspicion the standard requires is "considerably less than proof of wrongdoing by a preponderance of the evidence," and "obviously less" than is necessary for probable cause, United States v Sokolow, 490 U. S. 1, 7, 109 S.Ct. 1581, 104 L. Ed2nd 1 (1989). [135 S. Ct. 1688]

These principles apply with full force to investigate stops based on information from anonymous tips. We have firmly rejected the argument “that reasonable cause for investigate stop can only be based on the officer’s personal observation, rather than on information by another person.” Adams v. Williams, 407 U. S. 143, 147, 92 S. Ct. 1921, 32 L. Ed.2nd 612 (1972). Of course “an anonymous tip alone Seldom demonstrates the informant’s basis for knowledge or veracity,” White, 496 U. S., at 329, 110 S. Ct 2412. That is because “ordinary Citizens generally do not provide extensive recitations of the basis of Their everyday observations,” and an anonymous tipster’s veracity is “by hypothesis largely unknown, and unknowable.” “Ibid. But under appropriate circumstances, an anonymous tip can demonstrate “sufficient indicia of reliability to provide reasonable suspicion to make an investigatory stop.” Id., at 327, 110 S. Ct. 2412.

Our decision in Alabama v. White, 496 U. S. 325, 110 C. Ct. 2412, 110 L.Ed.2nd 301 (1990), and Florida v. J. L., 529 U. S. 266, 120 S. Ct. 1375, 146 L. Ed. 254 (2000), are useful guides. In White, an anonymous tipster told the police that a woman would drive from a particular apartment building to a particular motel in a brown Plymouth station wagon with a broken right tail light. The tipster further asserted that the woman would be transporting cocaine. 496 U. S. at 327, 110 S. Ct. 2412. After confirming the innocent details, officers stopped the station wagon as it neared the motel and found cocaine in the vehicle. Id. at 331, 110 S. Ct. 2412. We held that the corroboration of certain details made an anonymous tip sufficiently reliable to create reasonable suspicion of criminal activity. By accurately predicting future behavior, the tipster demonstrated “a special familiarity with respondent affairs,” which in turn implied that the tipster had “access to had “access to reliable information about the individual’s illegal activities.” Id., at 332, 110 S. Ct. 2412. We also recognize that an informant who is proved to tell the truth about some things is more likely to tell the truth about other things, “including the claim that the object of the tip is engaged in criminal activity,” Id., at 331, 110 S. Ct. 2412 (citing Illinois v. Gates, 462 U. S. 213, 244, 103 S. Ct. 2317, 76 L. Ed. 527 (1983)).

In J. L., by contrast, we determined that no reasonable suspicion arose from a bare-bones tip that a young black male in a plaid shirt standing at the bus stop was carrying a gun. 529 U. S., at 268, 120 S. Ct. 1375. The tipster did not explain how he knew about the gun, nor did he suggest that he had any special familiarity with the young man’s affairs. Id., at 271, 120 S. Ct. 1375. As a result, police had no basis for believing “that the tipster had knowledge of concealed criminal activity.” Id., at 272, 120 S. Ct. 1375. Furthermore, the tip included no

predictions of future behavior that could be corroborated to assess the tipster's creditability. *Id.*, at 271, 120 S. Ct. 1375. We accordingly concluded that the tip was insufficiently reliable to justify a stop and frisk. Navarrete v. California, 134 S. Ct. 1683, 188 L. Ed. 2n 680, 82 USLW 4282 (2014)

As outlined above, in order for an anonymous tip to be sufficient to constitute reasonable suspicion it must have, first; corroboration of the details of the anonymous tip, second; the basis of the tipster's familiarity of the subject's activities and thirdly, some prediction from the tipster of the future activity of the subject, all of which and in combination go directly to determining the tipster's veracity and/or reliability. The actual motion Respondent made was based upon State of South Carolina vs. Alonzo Clinton Greene, 532 S.E. 2d 896, 341 S.C. 214 (Ct. App. 2000). Respondent would submit that there is less indicia of reliability in this case than what was presented in Greene, Alabama v. White, *supra*, or Florida v. J. L., *supra*.

The court in Greene held that the anonymous caller provided no predictive information. Since the call was anonymous, the caller did not place his/her credibility at risk and could lie with impunity. Therefore, the Court found that they could not judge the credibility of the caller and the risk of fabrication was unacceptable. In Greene, the officer knew the suspect by name and sight and identified Greene as the driver. Here, there was a call to the City Police, and not a traceable 911 call, that identified an individual who was allegedly dealing drugs at a sports bar, and was driving a particular truck. Here, the officers identified the truck as being the one referenced in the call but made no attempt to identify the driver before the truck left the parking lot. The officers also did not make any attempt to determine the owner of the truck or whether his license was under suspension. In Greene, the Court held that the ability to judge credibility and the danger of fabrication in that case was unacceptable. Again, in Greene, the suspect was

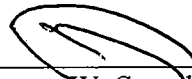
visually confirmed to be the subject of the tip. In the present case, there is neither any independent traffic violation to support a stop nor was it confirmed that the Respondent was the individual that was the subject of the tip. Respondent would submit that like in Greene, there is no way to determine reliability of the tipster and the dangers of fabrication are even more present here than in Greene. Respondent would also submit that even if the “factual summary” is taken as evidence, the summary court judge was correct in his ruling and that the circuit court judge was correct in upholding it.

CONCLUSION

In conclusion, for the forgoing reasons, Respondent would submit that the decisions of both the summary court and circuit court should be affirmed.

Respectfully submitted,

December 18, 2018



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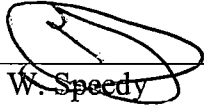
Jerry Michael Yates,..... Respondent.

PROOF OF SERVICE

I certify that I have served the Initial Brief of Respondent and Respondent's Designation of Matter to be Included in the Record on Appeal on the Appellant by depositing a copy of it in the United States Mail, postage prepaid, on December 18, 2018, addressed to the following as counsel of record:

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