

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Richland County

R. Knox McMahon, Circuit Court Judge

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SC Court of Appeals

THE STATE,

RESPONDENT,

V.

TYRIS BERNARD GLOVER,

APPELLANT

APPELLATE CASE NO. 2012-211983

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the trial court erred by refusing to suppress evidence seized during a warrantless search of appellant's bag because appellant's purported consent to the search was involuntary and the search violated appellant's rights under the Fourth Amendment?

STATEMENT OF THE CASE

On February 8, 2012, a Richland County grand jury indicted Tyris Glover (“Glover”) for burglary, second degree, and larceny (third or subsequent offense). On April 26 – 27, 2012, Glover was tried before the Honorable R. Knox McMahon and a jury. R. 1. Jeremy MacNealy and James Cooper represented Glover. R. 1. Britton All and Dolly Justice Garfield represented the State. R. 1. The jury convicted Glover on both counts and Judge McMahon sentenced him to concurrent terms of twelve years’ imprisonment for burglary and ten years’ imprisonment for larceny. R. 161, ll. 5 – 22. On May 2, 2012 Glover served his notice of appeal. This appeal follows.

ARGUMENT

The trial court erred by refusing to suppress evidence seized during a warrantless search of appellant's bag because appellant's purported consent to the search was involuntary and the officer violated appellant's rights under the Fourth Amendment.

Relevant Facts

Theft of Forty-five Packs of Cigarettes

On the morning of June 28, 2011, Ron Hubbard ("Hubbard"), the general manager of Sharky's (a bar in Five Points in Columbia), arrived at work and found things in disarray. R. 32, l. 16 – 33, l. 6. Liquor bottles were strewn around the bar. R. 32, ll. 16 – 21. The cigarette machine was open and empty. R. 32, ll. 21 – 25. The cash register had been damaged. R. 37, ll. 6 – 14. No cash was missing. R. 37, ll. 15 – 25. After conducting an inventory, Hubbard determined that forty-five packs of cigarettes were missing. R. 52, l. 22 – 54, l. 5. Nothing else was missing. R. 52, l. 22 – 54, l. 5. Hubbard called the police. R. 38, l. 24 – 39, l. 7.

Hubbard then reviewed the bar's surveillance video. R. 39, ll. 11 – 14. Hubbard testified that he saw an "African-American male passing by the bar and stops and looks inside and then pushes on the doors and gets in." R. 42, ll. 19 – 21. Hubbard described the male as removing packs of cigarettes and playing with the cash register. R. 43, ll. 2 – 5. The person left after a couple walked by outside with a barking dog. R. 43, ll. 10 – 15. Hubbard claimed that he could identify Glover as the man in the bar based solely on the video. R. 44, ll. 9 – 16. However, Hubbard admitted that the video was only "75 [percent] chance clear." R. 44, ll. 18 – 21.

Officer Kevin Schmidt of the Columbia Police Department was dispatched to Sharky's. R. 58, l. 9 – 59, l. 25. Schmidt reviewed the surveillance video. R. 58, ll. 1 – 12. After reviewing the video, Schmidt began driving around the area in his patrol car looking for the suspect. R. 70, ll. 16 – 20. Schmidt ultimately encountered Glover. R. 70, l. 21 – 71, l. 12. Inside a bag, Schmidt found “three or four” packs of cigarettes matching the common name brands (Camel and Newport) missing from Sharky's. R. 71, ll. 3 – 12. Two packs were unopened. R. 84, ll. 11 – 12. One pack was open and barely used. R. 84, ll. 13 – 14. One pack was open and empty. R. 84, ll. 15 – 16. No other packs of cigarettes were ever found. R. 85, ll. 8 – 9. Based on Schmidt's search, Glover ultimately was arrested and charged with the theft of the cigarettes from Sharky's.

Glover's Motion to Suppress

Prior to trial, Glover moved to suppress the cigarettes found in Glover's bag by Schmidt. R. 6, l. 2 – 11, l. 9. The State presented Schmidt's testimony at the suppression hearing. R. 11, ll. 19 – 22. Schmidt claimed that on the surveillance tape, he “observed a black male wearing a white shirt, blue jeans, hat. He also had a limp. And I was told during training a good way to identify someone is by a limp because no one has the same walk.” R. 12, ll. 15 – 23. Schmidt admitted he could not see the suspect's face. R. 13, ll. 11 – 13. He claimed to be able to recognize the suspect's height and build. R. 13, ll. 14 – 16.

Approximately fifteen minutes after viewing the video, Schmidt saw Glover on Millwood Avenue. R. 13, l. 17 – 22. He claimed to recognize Glover from the video because of his clothing and his walk. R. 14, ll. 9 – 12. Schmidt got out of his patrol car. R. 14, l. 23 – 15, l. 1. Schmidt told Glover to come towards him. R. 17, ll. 9 – 19. While

Schmidt initially tried to claim that Glover voluntarily walked towards him, he admitted the following:

Q. Okay. Now, in the streets of Columbia if a black man is approached by a white cop and told walk the line for me is that the same thing as that arms length deal?

A. No.

R. 18, ll. 18 – 21. Schmidt claimed that Glover consented to a search of his bag, but admitted this was only after Schmidt had ordered Glover towards him. R. 18, l. 22 – 20, l. 8. Schmidt's testimony was confusing concerning whether Glover voluntarily gave consent to search his bag:

Q. Okay. And after telling him what to do you told him to open the bag too, didn't you?

A. No, I did not.

Q. You didn't?

A. No, I did not.

Q. But you felt like he was in arms length deal and had free and voluntary consent?

A. No.

Q. After you told him to walk towards you, do you feel that he had that free and voluntary consent at that time?

A. He could have walked away.

Q. He could have? After you told him to walk towards you so you could see his limp? What would you have done had he said no?

A. I would have kept trying to talk to him **and if not I would have came towards him.**

R. 19, ll. 5 – 21 (errors in original) (emphasis added). During his trial testimony, Schmidt admitted that he had given Glover an order to come towards him. R. 82, ll. 2 – 6. At no point did Schmidt testify that he gave Glover warnings pursuant to Miranda v. Arizona, 384 U.S. 436 (1966).

Glover argued to the trial judge that Schmidt's search of Glover's bag violated the Fourth Amendment. R. 20, l. 19 – 21, l. 10. Glover asserted that Schmidt did not have probable cause and that Glover's consent could not have been voluntarily given. R. 20, l. 19 – 21, l. 10. The trial judge ruled that Schmidt had probable cause, that Glover gave his consent, and upheld the search. R. 22, l. 4 – 23, l. 11. When the State entered the cigarettes into evidence, Glover's renewed objection was overruled. R. 75, l. 15 – 76, l. 10

Discussion

Glover's consent to the search of his bag was involuntary because his will was overborne by Schmidt's actions. "A warrantless search generally offends the Fourth Amendment." State v. Willard, 374 S.C. 129, 134, 647 S.E.2d 252, 255 (2007). "Whether a consent to search was voluntary or the product of duress or coercion, express or implied, is a question of fact to be determined from the 'totality of the circumstances.'" State v. Wallace, 269 S.C. 547, 550, 238 S.E.2d 675, 676 (1977). Failure to give Miranda warnings is a factor "to be considered in determining the voluntary nature of the consent." State v. Forrester, 343 S.C. 637, 645, 541 S.E.2d 837, 841 (2001).

"Voluntariness is incompatible with official coercion, actual or implicit, overt or subtle." People v. Packer, 851 N.Y.S.2d 40, 42 (App. Div. 2008). The State bears the burden of showing a defendant's consent was voluntary. Wallace at 550, 238 S.E.2d at 676. In this case, the State has failed to meet its burden. It is undisputed that Officer Schmidt

detained Glover. He ordered Glover to walk towards him. R. 82, ll. 2 – 6. Officer Schmidt also admitted that a black suspect would feel compulsion from a white policeman in Columbia. R. 18, ll. 18 – 21. The officer's testimony regarding compulsion and the coerciveness of the detention was vague and confusing.

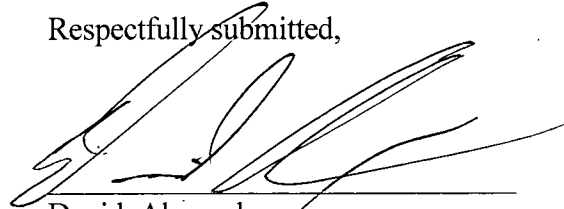
Furthermore, Officer Schmidt never gave Glover any Miranda warnings. He never told Glover that he had the right to refuse the request to look into his bag. Forrester, at 645, 541 S.E.2d at 841. The State did not present any evidence regarding the defendant's education and intelligence. See Wolf v. State, 137 S.W.3d 797, 805 (Tx. Ct. App. 2004) (holding defendant's education and intelligence is a factor to consider in Fourth Amendment consent cases). Nor did the State present any evidence regarding whether Glover believed that no incriminating evidence would be found. Id.

When considering these factors as applied to the facts of this case, the State failed to meet its burden that Glover's consent was voluntarily given. Therefore, the trial court erred in denying Glover's suppression motion. Application of the exclusionary rule is necessary to deter the police misconduct of overbearing Glover's will and forcing his consent. See Davis v. United States, 131 S.Ct. 2419, 2432 (2011) (stating that purpose of exclusionary rule is to deter police misconduct).

CONCLUSION

For the foregoing reasons, Glover's conviction should be reversed and this case remanded for a new trial with instructions that any evidence flowing from the illegal search of Glover's bag shall be excluded.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'David Alexander', written over a horizontal line.

David Alexander
Appellate Defender

ATTORNEY FOR APPELLANT

This 7TH day of August, 2013.

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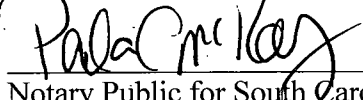
CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Julie Kate Keeney, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 this 7th day of August, 2013.


David Alexander
Appellate Defender

ATTORNEY FOR APPELLANT

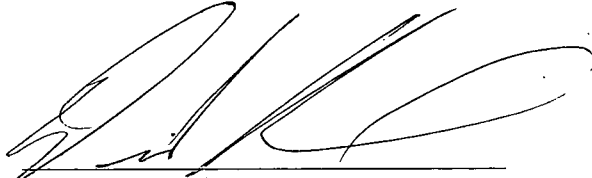
SUBSCRIBED AND SWORN TO before me
this 7th day of August, 2013.


_____(L.S.)
Notary Public for South Carolina
My Commission Expires: July 24, 2013.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

August 7th, 2013



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