STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Richland County
Honorable R. Knox McMahon, Circuit Court Judge
Appellate Case No. 2012-211983

THE STATE,

Respondent,

vs.

TYRIS BERNARD GLOVER,

Appellant.

FINAL BRIEF OF RESPONDENT

ALAN WILSON
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JULIE KATE KEENEY
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ATTORNEYS FOR RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

I.

The trial judge properly denied Appellant's motion to suppress the evidence seized during a search of Appellant's bag because Appellant voluntarily consented to the search.

STATEMENT OF THE CASE

On February 8, 2012, a Richland County Grand Jury indicted Appellant on one count of second-degree burglary and one count of larceny (third or subsequent offense). On April 26, 2012, Appellant proceeded to trial. Jeremy MacNealy and James Cooper represented Appellant at trial, and Assistant Solicitors Britton All and Dolly Justice Garfield represented the State at trial. On April 27, 2012, a jury convicted Appellant on both counts. The Honorable R. Knox McMahon sentenced Appellant to twelve years for the second-degree burglary conviction and ten years (concurrent) for the larceny conviction.

On May 2, 2013, Appellant served a notice of appeal. This appeal follows.

STATEMENT OF FACTS

On the morning of June 28, 2011, Appellant entered Sharky's Bar ("the bar") while it was closed and stole forty-five packs of cigarettes. (R. pp. 42-43; R. p. 52.) When Ron Hubbard, the general manager of the bar, arrived at work, he found liquor bottles scattered around the bar, the cigarette machine was open and empty, and the cash register was damaged. (R. p. 32; R. p. 37.)

Shortly thereafter, Officer Schmidt arrived at the bar and reviewed the surveillance video. (R. p. 12; R. p. 60.) Officer Schmidt saw "a black male wearing a white shirt, blue jeans, [and a] hat" on the video. (R. p. 12; R. p. 60.) Officer Schmidt believed that the suspect was wearing a New York hat and carrying a book bag at the time of the burglary. (R. p. 14; R. p. 64.) The suspect also had a limp. (R. p. 12; R. p. 64.) Additionally, the suspect was caught on the video riding a bicycle past the bar. (R. p. 14; R. p. 62.) Officer Schmidt left the bar and started to patrol the area in order to try to find the suspect. (R. p. 70.)

Approximately fifteen minutes after Officer Schmidt left the bar, he encountered Appellant on a public street in an area near the bar. (R. pp. 13-14; R. pp. 70-71.) Appellant was pushing a bicycle and wearing a white shirt, blue jeans, and a hat. (R. p. 14; R. pp. 71-73.) Appellant also had a book bag. (R. p. 14.) Officer Schmidt recognized Appellant from the surveillance video of the bar. (R. p. 14.)

Thereafter, Officer Schmidt got out of his vehicle and asked Appellant for Appellant's name. (R. pp. 14-15.) Officer Schmidt told Appellant to walk towards him in order to see if Appellant had the same limp as the suspect in the video. (R. p. 15.) Officer Schmidt testified that Appellant had the same distinct limp as the suspect on the video. (R. p. 74.) Additionally, Officer Schmidt asked Appellant if he could pat Appellant down.

(R. p. 15.) Further, Officer Schmidt asked for Appellant's consent to search Appellant's book bag. (R. p. 15; R. p. 16; R. p. 71.) Appellant gave Officer Schmidt verbal consent to search the book bag and handed the book bag to Officer Schmidt. (R. p. 15; R. p. 71; R. p. 82.) When Officer Schmidt looked in Appellant's book bag, he found cigarettes of the same brand that were stolen from the bar. (R. pp. 15-16; R. p. 73.)

At trial, two experts in latent fingerprint analysis testified that Appellant's fingerprint matched a fingerprint found on a liquor bottle that the suspect touched in the bar. (R. p. 104; R. p. 113.)

ARGUMENT

I.

The trial judge properly denied Appellant's motion to suppress the evidence seized during a search of Appellant's bag because Appellant voluntarily consented to the search.

Appellant's argument on appeal fails because Appellant voluntarily consented to the search of his book bag. Viewing the totality of the circumstances, the record supports the trial judge's factual finding that Appellant's consent was voluntary. Although there is no evidence that the officer informed Appellant of his rights under Miranda,[1] there is no requirement that an officer must do so in order to obtain consent to search. A suspect's knowledge of his rights under Miranda is ***merely one factor*** in determining whether the suspect's consent was voluntary. Further, there is absolutely no evidence that Appellant was coerced into giving consent. Thus, there was no Fourth Amendment violation and this Court should affirm.

Standard of Review

In Fourth Amendment search and seizure cases, the appellate court is limited to determining if there is *any* evidence to support the trial court's findings and can only reverse due to clear error. State v. Flowers, 360 S.C. 1, 5, 598 S.E.2d 725, 727 (Ct. App. 2004) (emphasis added). The appellate court will not reverse merely because it would have reached a different conclusion than the trial judge. State v. Rivera, 384 S.C. 356, 361, 682 S.E.2d 307, 310 (Ct. App. 2009).

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[1] Miranda v. Arizona, 384 U.S. 436 (1966); see State v. Lynch, 375 S.C. 628, 633 n. 5, 654 S.E.2d 292, 295 n. 5 (Ct. App. 2007) ("The well-known Miranda rights are that the accused must be informed of: the right to remain silent; any statement made may be used as evidence against him or her; and the right to the presence of an attorney.") (citations omitted).

A. The Fourth Amendment

The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. This guarantee protects against unreasonable searches and seizures, including those involving only a brief detention. State v. Pichardo, 367 S.C. 84, 97, 623 S.E.2d 840, 847 (Ct. App. 2007). However, "[t]he 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, 553-554 (1980) (quoting United States v. Martinez-Fuerte, 428 U.S. 543, 554 (1976)).

Any evidence seized as the result of an unreasonable search and seizure must be excluded from trial. State v. Weaver, 374 S.C. 313, 319, 649 S.E.2d 479, 482 (2007). Further, it is a well-settled rule that a warrantless search is unreasonable per se unless it falls under an exception to the Fourth Amendment's warrant requirement. State v. Peters, 271 S.C. 498, 501, 248 S.E.2d 475, 476 (1978).

B. Consent: An Exception to the Warrant Requirement

One of the exceptions to the warrant requirement is consent. State v. Bailey, 276 S.C. 32, 36, 274 S.E.2d 913, 915 (1981). In order for this exception to apply, the State must prove that the consent to search was voluntary. State v. Wallace, 269 S.C. 547, 550, 238 S.E.2d 675, 676 (1977). If the consent to search was the product of duress or coercion, express or implied, then the exception does not apply. See Id. Further, the voluntariness of the consent "is a question of fact to be determined from the 'totality of the circumstances.' " Id. Courts apply the totality of the circumstances test regardless of

whether the consent to search was given in a custodial situation or noncustodial situation. Id.

Some of the factors that courts look at in determining whether the consent to search was voluntary include the following: 1) the suspect's age; 2) the suspect's intelligence and education; 3) whether the suspect was intoxicated or under the influence of drugs when he or she consented; 4) whether the suspect was advised of his or her right to withhold consent or his or her rights under Miranda; 5) whether the suspect had been previously arrested and therefore was aware of the protections afforded to suspected criminals by the legal system; 6) whether the suspect was detained and questioned for a long or short period of time; 7) whether the suspect was threatened, physically intimidated, or punished by the police; 8) whether the suspect relied upon promises or misrepresentations made by the police; 9) whether the suspect was in custody or under arrest when he or she gave consent; 10) whether the suspect was in a public or secluded place; or 11) whether the suspect objected to the search or stood by silently while the search occurred. See Schneckloth v. Bustamonte, 412 U.S. 218, 226, 248 (1973); United States v. Twomey, 884 F.2d 46, 51 (1st Cir. 1989); United States v. Chaidez, 906 F.2d 377, 381 (8th Cir. 1990); United States v. Kim, 27 F.3d 947, 955 (3d Cir. 1994); United States v. Boone, 245 F.3d 352, 362-363 (4th Cir. 2001).

C. Appellant's Consent was Voluntary

Here, viewing the totality of the circumstances, the record supports the trial judge's factual finding that Appellant's consent to search was voluntary.

First, Appellant was 44 years old when he consented to the search. (Supp. R. p. 5.)[2] Thus, the age factor weighs in favor of voluntariness.

Second, Appellant graduated from high school; therefore, the intelligence factor weighs in favor of voluntariness. (Supp. R. p. 7.)[3]

Third, Appellant did not appear to be under the influence of drugs or alcohol. (Supp. R. 1.) Thus, this factor also weighs in favor of admissibility.

Fourth, there is no evidence that Appellant was advised of his right to refuse consent or of his rights under Miranda. Although this factor could weigh against voluntariness, this factor alone is not dispositive. See Wallace, 269 S.C. at 551-552, 238 S.E.2d at 677 (where our Supreme Court held that the defendant voluntarily consented to the search even though he was not advised of his right to refuse consent or of his rights under Miranda, and the Court pointed out that knowledge of the right to refuse consent and of the rights under Miranda are ***merely*** a factor in the totality of the circumstances test); State v. Forrester, 343 S.C. 637, 645, 541 S.E.2d 837, 841 (2001) (rejecting the defendant's argument that consent to search should be dependent on a Miranda-like warning given prior to the search and holding that lack of such warnings was just ***one*** factor to be considered in the totality of the circumstances test); Schneckloth, 412 U.S. at 231 (noting that the argument that the Fourth Amendment requires a person who is asked to consent to a search to be first warned of his right to refuse consent and that anything found can and will be used against him has been categorically rejected).

[2] Although the State did not present evidence of Appellant's age during the suppression hearing, the State presented evidence of Appellant's age at trial. (Supp. R. p. 5.)

[3] Appellant did not testify during the suppression hearing; therefore, the State was unable to elicit testimony regarding Appellant's educational background during the suppression hearing. But Appellant subsequently testified at trial that he graduated from high school. (Supp. R. p. 7.)

Fifth, the State presented evidence during trial that Appellant had two prior burglary convictions. (Supp. R. pp. 2-3; Supp. R. pp. 5-6.) Further, Appellant's trial counsel conceded that Appellant had two prior convictions for burglary, two prior convictions for automobile breaking, and a few other prior convictions for property related offenses. (Supp. R. p. 8.) Because Appellant had been arrested in the past, he was aware of the protections afforded to suspected criminals by the legal system. Thus, the fifth factor weighs in favor of voluntariness.

Sixth, Appellant was not detained or questioned for a long period of time. The officer who obtained Appellant's consent merely approached Appellant on the public street, asked for Appellant's name, asked if he could pat Appellant down, and asked for consent to search the bag. (R. pp. 14-15; R. pp. 70-71.) Thus, this factor also weighs in favor of voluntariness.

Seventh, there is absolutely no evidence that Appellant was threatened, physically intimidated, or punished by the police. See Schneckloth, 412 U.S. at 247 (noting that courts do not presume coercion); State v. Brannon, 347 S.C. 85, 90, 552 S.E.2d 773, 775 (Ct. App. 2001) (holding that the defendant voluntarily consented to the search where there was no evidence of any force or threat of force against the defendant, no evidence of any promises made to the defendant, and no evidence of any other form of coercion); State v. Mattison, 352 S.C. 577, 585, 575 S.E.2d 852, 856 (Ct. App. 2003) (holding that the defendant voluntarily consented to the search where there was no evidence that the defendant was incompetent when he gave consent and no evidence that there was an overt act, threat of force, or other form of coercion involved in obtaining the defendant's consent). Appellant asserts that his will was overborne by the officer's actions. Specifically, Appellant points to the fact that the officer told Appellant to walk towards

him and the fact that the officer admitted that a black suspect being asked by a white officer to "walk the line" would not be an arm's length deal. (R. p. 18; App. Br. pp. 8-9). But Appellant's argument is misplaced. An officer does not act coercively by simply asking a suspect to walk towards him or her on a public street. Thus, the seventh factor weighs in favor of voluntariness.

Eighth, there is absolutely no evidence or any contention that Appellant relied upon any promises or misrepresentations made by the police. Thus, this factor weighs in favor of voluntariness.

Ninth, Appellant was not in custody or under arrest at the time he consented to the search. Thus, the ninth factor weighs in favor of voluntariness.

Tenth, Appellant was on a public street when the officer asked for his consent. Thus, this factor also weighs in favor of voluntariness.

Finally, Appellant did not object or stand by silently when the officer asked for Appellant's consent to search the bag. Appellant gave verbal consent. (R. p. 15.) Thus, the eleventh factor weighs in favor of voluntariness.

In summary, the majority of the factors used in determining whether a suspect's consent to search was voluntary under the totality of the circumstances weigh in favor of voluntariness. Accordingly, this Court should affirm Appellant's convictions and sentences because the trial judge's factual finding that Appellant voluntarily consented to the search was supported by the evidence.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT

August 14, 2013

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CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent 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."

ALAN WILSON
Attorney General

JULIE KATE KEENEY
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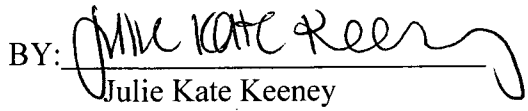
BY: 
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PROOF OF SERVICE

I, Angela Bennett, certify that I have served the within Final Brief of Respondent on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

David Alexander, Esquire
S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
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I further certify that all parties required by Rule to be served have been served.
This 14th day of August, 2013.

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ALAN WILSON
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August 14, 2013

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RE: State v. Tyris Bernard Glover
Appellate Case No. 2012-211983

Dear Mr. Alexander:

I am enclosing two (2) copies of the Final Brief of Respondent, with proof of service, in the above-referenced case.

Sincerely,

Julie Kate Keeney

Julie Kate Keeney
Assistant Attorney General
SC Bar # 100145

JKK/ab
Enclosures

cc: Honorable Jenny A. Kitchings (original and one enclosed)
Victim Services