STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Spartanburg County
Honorable J. Mark Hayes, II, Circuit Court Judge
Appellate Case No. 2012-213390

THE STATE,

Respondent,

vs.

RICKY HEWINS MACK,

Appellant.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

In March of 2010, a Spartanburg County Grand Jury indicted Appellant for trafficking in cocaine base, trafficking in cocaine, and trafficking in marijuana. On October 24, 2012, Appellant proceeded to trial. The Honorable J. Mark Hayes, II presided over the jury trial. Attorney J. Roger Poole represented Appellant at trial, and Assistant Solicitor Joseph Hayes Holliday represented the State. The jury found Appellant guilty of each charge. Judge Hayes sentenced Appellant to 25 years of imprisonment for each charge, which were to run concurrently.

Appellant filed a timely notice of appeal. This appeal follows.

STATEMENT OF FACTS

On November 5, 2009, Appellant and Keith Johnson bought marijuana from a confidential informant ("CI"). (R. p. 11; R. pp. 37-39.) The controlled buy took place in inside the CI's vehicle, which was actually the police department's vehicle. (R. p. 41.) Before the controlled buy took place, the police searched the vehicle it provided to the CI. (R. p. 41.) There were no illegal substances in the CI's vehicle at that time. (R. p. 42.) Thereafter, the police provided the CI with marijuana. (R. p. 42.) The police monitored the CI's vehicle and saw Appellant and Johnson exit an Acura and enter the CI's vehicle. (R. pp. 39-42.) Once the police confirmed that the CI received the money for the drugs, the police surrounded the CI's vehicle and secured the suspects. (R. pp. 39-42.) After the police secured the suspects, they searched the CI's vehicle and found the marijuana that the police provided the CI. (R. p. 41.) Surprisingly, the police found cocaine and approximately $13,650 in cash in the CI's vehicle where Appellant was sitting. (R. pp. 41-42; R. p. 45; R. p. 62.) Thereafter, the police searched the Acura and found crack cocaine inside the center console. (R. p. 48.)

Before trial, Appellant moved to suppress the crack cocaine found in the Acura. (R. pp. 6-7.) During the pre-trial hearing, Investigator Norris testified that the police department routinely conducts an inventory search of any automobile it decides to tow. (R. pp. 16-17.) Additionally, in the normal course of inventorying a vehicle, the police search the center console for valuables, which is where the police found the crack cocaine in this case. (R. p. 13; R. p. 17.)

After the pre-trial hearing, the trial judge ruled that the State "met its burden by a preponderance of the evidence of establishing that an inventory search would have resulted in that particular compartment of the car being look at . . . ." (R. pp. 24-25.)

ARGUMENT

I.

Appellant waived his objection to the admission of the crack cocaine when he stated he had no objection to its admission at the time the State offered the crack cocaine into evidence. Further, the trial judge properly denied Appellant's suppression motion because the search was proper under the inventory exception, search incident to arrest exception, and the automobile exception to the warrant requirement.

On appeal, Appellant argues that the police violated his Fourth Amendment rights when they searched his sister's Acura without a warrant.[1] But Appellant's argument on appeal fails for four reasons: First, Appellant waived his objection to the admission of the crack cocaine when he stated he had no objection to its admission. Second, the discovery of the crack cocaine occurred during a proper inventory search. Third, the search of the Acura was proper under the search incident to arrest exception because the police found cocaine in the CI's vehicle, which was not present before the controlled buy took place, near where Appellant was sitting. Thus, the police had a reasonable belief that the Acura, which Appellant had just exited, contained evidence of the offense of the arrest. Finally, because the police found the cocaine in the CI's car after Appellant exited the Acura and entered the CI's car, under the automobile exception, the police had probable cause to believe the Acura contained contraband.

Standard of Review

In criminal cases, appellate courts sit to review errors of law only. State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). In Fourth Amendment search and seizure cases, the appellate court is limited to determining if there is any evidence to

[1] Appellant only challenges the admission of the crack cocaine found in his sister's Acura. He does not appeal his trafficking convictions for marijuana and cocaine. Notably, the trial judge sentenced Appellant to 25 years of imprisonment for each trafficking conviction, which were to run concurrently.

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); see State v. Brockman, 339 S.C. 57, 66, 528 S.E.2d 661, 666 (2000) ("[W]e will review the trial court's ruling like any other factual finding and reverse if there is clear error. We will affirm if there is any evidence to support the ruling."). The reviewing court may conduct its own review of the record to determine whether the trial judge's ruling is supported by the evidence. State v. Khingratsaiphon, 352 S.C. 62, 70, 572 S.E.2d 456, 460 (2002). However, the appellate court must affirm the trial court if there is any evidence in the record to support the ruling. State v. Pichardo, 367 S.C. 84, 96, 623 S.E.2d 840, 846 (Ct. App. 2005). 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).

A. Issue Preservation

First, Appellant waived the issue on appeal when he stated he had "[n]o objection" to the admission of the crack cocaine, which was State's exhibit 10.[2] (R. p. 75.)

In order for an issue to be preserved for appellate review, the issue must have been: (1) raised to and ruled upon by the trial court; (2) raised by the appellant; (3) raised in a timely manner; and (4) raised to the trial court with sufficient specificity. State v. Rogers, 361 S.C. 178, 183, 603 S.E.2d 910, 912-913 (Ct. App. 2004). "If a party fails to properly object, the party is procedurally barred from raising the issue on appeal." State v. Johnson, 363 S.C. 53, 58-59, 609 S.E.2d 520, 523 (2005).

[2] State's Exhibit 10 contained both the cocaine and crack cocaine. (R. pp. 74-75.) Defense counsel was aware of this fact before the State offered State's Exhibit 10 into evidence. (R. p. 48.)

Generally, a motion in limine seeks a pre-trial evidentiary ruling to prevent the disclosure of potentially prejudicial evidence to the jury, and a ruling on such a motion is preliminary and subject to change based on developments during trial. State v. Smith, 337 S.C. 27, 32, 522 S.E.2d 598, 600 (1999). A ruling on a motion in limine does not constitute a final ruling on the admissibility of evidence. State v. Simpson, 325 S.C. 37, 42, 479 S.E.2d 57, 60 (1996). Therefore, an objection must be made at the time the evidence is introduced during trial in order to preserve the issue for appellate review. State v. Schumpert, 312 S.C. 502, 507, 435 S.E.2d 859, 862 (1993). "However, where a judge makes a ruling on the admission of evidence on the record immediately prior to the introduction of the evidence in question, the aggrieved party does not need to renew the objection." State v. Forrester, 343 S.C. 637, 642, 541 S.E.2d 837, 840 (2001); see State v. Wiles, 383 S.C. 151, 156-157, 679 S.E.2d 172, 175 (2009) ("This exception is based on the fact that when the trial court's ruling is not preliminary, but instead is clearly a final ruling, there is no need to renew the objection.").

In this case, any issue with the admission of the crack cocaine discovered during the inventory search of the Acura was not properly preserved for appellate review. At the outset of trial, defense counsel made a motion in limine seeking the suppression of the crack cocaine, and the trial judge issued a preliminary ruling denying the suppression motion after conducting a pre-trial hearing on the matter. Thereafter, when the solicitor moved to introduce the crack cocaine, which was State's Exhibit 10, defense counsel did not renew his pre-trial objection and, instead, affirmatively stated the evidence could be admitted without objection. See State v. Dicapua, 373 S.C. 452, 455, 646 S.E.2d 150, 152 (Ct. App. 2007) ("Dicapua's sole objection to the videotape came in the form of a motion in limine to suppress the videotape because of its lack of audio. Once the State moved to

enter the videotape into evidence and publish it to the jury, however, Dicapua's counsel specifically stated he had 'no objection.' We find this amounted to a waiver of any issue Dicapua had with the videotape."). By indicating he had no objection to the admission of the crack cocaine, defense counsel expressly waived his pre-trial objection to the introduction of that evidence. See Burke v. AnMed Health, 393 S.C. 48, 55, 710 S.E.2d 84, 88 (Ct. App. 2011) ("When a party states to the trial court that it has no objection to the introduction of evidence, even though the party previously made a motion to exclude the evidence, the issue raised in the previous motion is not preserved for appellate review."); see also State v. Carlson, 363 S.C. 586, 595, 611 S.E.2d 283, 287 (Ct. App. 2005) ("A party cannot complain of an error which his own conduct induced."); State v. Burton, 326 S.C. 605, 613, 486 S.E.2d 762, 766 (Ct. App. 1997) ("This testimony was admitted without objection. Because Burton failed to object, he is barred from raising this issue on appeal."). Thus, any issue related to the introduction of the crack cocaine cannot properly be raised or reviewed on appeal. See Dicapua, 373 S.C. at 455-456, 646 S.E.2d at 152 (finding the appellate court could not consider an objection to the admission of evidence where Dicapua's counsel expressly waived his pre-trial objection to the evidence during trial). Accordingly, Appellant's conviction should be affirmed.

B. Inventory Search

Second, pursuant to their standard procedures, the police properly conducted an inventory search of the Acura; therefore, the crack cocaine they found in the Acura was admissible.

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. "The touchstone of the Fourth Amendment is reasonableness." Florida

v. Jimeno, 500 U.S. 248, 250 (1991). Thus, only unreasonable searches and seizures are prohibited. State v. Foster, 269 S.C. 373, 378, 237 S.E.2d 589, 591 (1977); see Maryland v. Buie, 494 U.S. 325, 331 (1990) ("It goes without saying that the Fourth Amendment bars only unreasonable searches and seizures[.]").

Generally, police must have a warrant in order to conduct a search. State v. Weaver, 374 S.C. 313, 319, 649 S.E.2d 479, 482 (2007). Any evidence seized as the result of an unreasonable search and seizure must be excluded from trial. Id. The well-settled rule is warrantless searches are unreasonable per se unless they fall 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). "These exceptions include: (1) search incident to a lawful arrest; (2) 'hot pursuit'; (3) stop and frisk; (4) automobile exception; (5) 'plain view' doctrine; (6) consent; and (7) abandonment." State v. Moore, 377 S.C. 299, 309, 659 S.E.2d 256, 261 (Ct. App. 2008). Further, the police may inventory impounded property, including closed containers, if they are following their standard procedures. Colorado v. Bertine, 479 U.S. 367, 372-73 (1987). The purpose behind the inventory exception to the warrant requirement is to secure the valuables located in the car and protect against false claims of loss or damage. See Whren v. United States, 517 U.S. 806, 812, n.1 (1996) ("An inventory search is the search of property lawfully seized and detained, in order to ensure that it is harmless, to secure valuable items (such as might be kept in a towed car), and to protect against false claims of loss or damage.").

In this case, pursuant to their standard procedures, the police properly conducted an inventory search of the Acura.

After the pre-trial hearing, the trial judge ruled that the State "met its burden by a preponderance of the evidence of establishing that an inventory search would have

resulted in that particular compartment of the car being look at . . . ." (R. pp. 24-25.) Appellant's contention that the State failed to present evidence of "standardized criteria" or "established routines" regulating impoundment is without merit. During the pre-trial hearing, Investigator Norris testified that the police department routinely conducts an inventory search of any automobile it decides to tow. (R. pp. 16-17.) Additionally, in the normal course of inventorying a vehicle, the police search the center console for valuables, which is where the police found the crack cocaine in this case. (R. p. 13; R. p. 17.)

Accordingly, the trial judge's ruling that the police properly conducted an inventory search was supported by the evidence. See Brockman, 339 S.C. at 66, 528 S.E.2d at 666 ("[W]e will review the trial court's ruling like any other factual finding and reverse if there is clear error. We will affirm if there is any evidence to support the ruling."). Therefore, this Court should affirm.

C. Search Incident to Arrest

Third, the search of the Acura was proper under the search incident to arrest exception to the warrant requirement because the police had a reasonable belief that the Acura contained evidence of the offense of the arrest.

In Arizona v. Gant, the Supreme Court held that the search of the defendant's vehicle was not proper under the search incident to arrest exception. 556 U.S. 332, 351 (2009). The police arrested the defendant for driving with a suspended license and placed the defendant in the back seat of the patrol car. Id. at 336. Thereafter, the police searched the car and found a gun and a bag of cocaine. Id. The Court determined that the defendant did not have the ability to access the vehicle at the time of the search. Id. at 344. Moreover, because the defendant was arrested for driving with a suspended license, the

officers could not have expected to find evidence concerning the offense of the arrest in the vehicle. Id.

Although the first Gant exception probably does not apply in this case because the suspects were already handcuffed when the police conducted the search of the Acura, the second Gant exception does apply in this case. The facts in Gant are easily distinguishable from the facts in this case. Unlike the police officers in Gant, the police officers in this case had a reasonable belief that the vehicle contained evidence of the offense of the arrest. In Gant, the defendant was arrested for driving with a suspended license; therefore, the officers could not have expected to find evidence concerning the offense of the arrest in the vehicle. 556 U.S. 344.

In this case, the police arrested Appellant on drug related charges. Before the controlled buy took place, the police searched the vehicle it provided to the CI. (R. p. 41.) There were no illegal substances in the CI's vehicle or on the CI at that time. (R. p. 42.) Thereafter, the police provided the CI with marijuana. (R. p. 42.) The police monitored the CI's vehicle and saw Appellant and Johnson enter the CI's vehicle. (R. pp. 39-42.) After the police secured the suspects, they searched the CI's vehicle and found the marijuana that the police provided the CI. (R. p. 41.) Surprisingly, the police found cocaine and approximately $13,650 in cash in the CI's vehicle where Appellant was sitting. (R. pp. 41-42; R. p. 45; R. p. 62.) Thus, it was reasonable for the police to suspect the Acura, which Appellant just exited, contained more contraband. See Gant, 556 U.S. at 343-44 ("In many cases, as when a recent occupant is arrested for a traffic violation, there will be no reasonable basis to believe the vehicle contains relevant evidence. But in others, including Belton and Thornton, the offense of arrest will supply a basis for searching the passenger compartment of an arrestee's vehicle and any containers

therein.") (internal citations omitted); see also Thornton v. United States, 541 U.S. 615, 618 (2004) (where police patted the defendant down and found drugs on his person right after he exited his car).

Accordingly, the search was proper under the search incident to arrest exception.

D. Automobile Exception

Fourth, the search of the vehicle was proper under the automobile exception to the warrant requirement because the police had probable cause to believe the vehicle contained contraband.

"Pursuant to the automobile exception, if there is probable cause to search a vehicle, a warrant is not necessary so long as the search is based on facts that would justify the issuance of a warrant, even though a warrant has not been actually obtained." Weaver, 374 S.C. at 320, 649 S.E.2d at 482. Moreover, "[t]he automobile exception does not contain a separate exigency requirement. If a vehicle is readily mobile and probable cause exists to believe it contains contraband, the Fourth Amendment permits police to search the vehicle without more." Id. (internal citations omitted). Further, our Supreme Court advised the following:

> [I]t is no answer to say the police could have obtained a search warrant, for the relevant test is not whether it is reasonable to procure a search warrant, but whether the search was reasonable. The justification to conduct such a warrantless search does not vanish once the car has been immobilized.

Id. at 321, 649 S.E.2d at 482.

If probable cause exists supporting the search of a lawfully stopped automobile, the search can be extended to every part of the vehicle and all contents potentially containing the object of the search. State v. Bultron, 318 S.C. 323, 332, 457 S.E.2d 616,

621 (Ct. App. 1995), see also Wyoming v. Houghton, 526 U.S. 295, 307 (1999) ("We hold that police officers with probable cause to search a car may inspect passengers' belongings found in the car that are capable of concealing the object of the search."). "The scope of a warrantless search based on probable cause is no narrower – and no broader – than the scope of a search authorized by a warrant supported by probable cause." United States v. Ross, 456 U.S. 798, 823 (1982). "The scope of a warrantless search of an automobile is defined by the object of the search and the places in which there is probable cause to believe that it may be found." State v. Perez, 311 S.C. 542, 546, 430 S.E.2d 503, 505 (1993).

Probable cause is "a justifiable determination, based upon the totality of the circumstances and in view of all the evidence available to law enforcement officials at the time of the search, that there exists a practical, nontechnical probability that a crime is being committed or has been committed and incriminating evidence is involved." Bultron, 318 S.C. at 332, 457 S.E.2d at 621. "Probable cause may be found somewhere between suspicion and sufficient evidence to convict." State v. Blassingame, 338 S.C. 240, 250, 525 S.E.2d 535, 540 (Ct. App. 1999). A probable cause determination depends upon the totality of the circumstances. State v. Adams, 291 S.C. 132, 133-134, 352 S.E.2d 483, 485 (1987).

Here, the police had probable cause to believe the vehicle contained contraband. The police found cocaine and a large amount of money in the CI's vehicle next to where Appellant was sitting. Because the police searched the CI's vehicle and the CI before the controlled buy and monitored the vehicle the entire time, they knew that either Appellant or Johnson brought the cocaine into the CI's vehicle. Thus, the police had probable cause to believe Appellant's car, which he and Johnson had just exited, contained more drugs.

See United States v. Baker, 719 F.3d 313, 319 (4th Cir. 2013) ("After Officer Nelson found a gun, drugs, $980 in cash, and a digital scale on Brown's person, he had probable cause to search the passenger compartment of Baker's vehicle. Probable cause to search a vehicle exists when 'reasonable officers can conclude that what they see, in light of their experience, supports an objective belief that contraband is in the vehicle.' This standard is satisfied when a police officer lawfully searches a vehicle's recent occupant and finds contraband on his person.") (internal citation omitted); see also United States v. Johnson, 383 F.3d 538 (7th Cir. 2004) ("Cook's discovery of a banned substance (drugs) on Johnson's person clearly provided him with probable cause to search the trunk of the vehicle, including any containers (*i.e.,* the briefcase) therein, since the officer had a reasonable basis for believing that more drugs or other illegal contraband may have been concealed inside."); People v. Baez, 24 A.D.3d 112, 115-16 (N.Y. App. Div. 2005) ("[T]here clearly was a nexus between defendant's arrest and the probable cause for the search of the van for additional contraband, since defendant was being arrested for his connection to the drugs in the brown paper bag that apparently had been taken from the van.").

Accordingly, the search of the Acura was proper under the automobile exception.

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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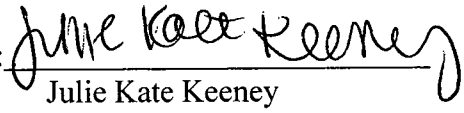
BY: 
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February 10, 2014

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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."

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PROOF OF SERVICE

I, Ellen R. DuBois, 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:

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I further certify that all parties required by Rule to be served have been served.
This 10th day of Febaruary, 2014.

Ellen R. DuBois

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