STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Marion County

William H. Seals, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

V.

DARRELL LEE BIRCH,

APPELLANT

APPELLATE CASE NO. 2012-213215

FINAL BRIEF OF APPELLANT

CARMEN V. GANJEHSANI
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

ATTORNEY FOR APPELLANT

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(1) Appellant's mere presence at a private residence being searched pursuant to the consent of the homeowner did not provide probable cause for the officer to search Appellant;

(2) the officer lacked reasonable suspicion that Appellant was engaged in criminal activity to justify an investigatory detention and frisk where Appellant was merely standing in the home being searched with his hand in his pocket and made no movements toward the officer; and

(3) the officer exceeded the scope of a pat-down search of the outer clothing of Appellant where the officer forcibly removed Appellant's hand from his pocket.

II. The Trial Court erred in denying Appellant's motion for a continuance where he was denied his right to effective assistance of counsel where his appointed counsel only had one day to prepare for trial.

III. The Trial Court erred in refusing to grant a mistrial where the police officer testified that that the county drug unit was looking for Appellant because this testimony constituted improper evidence of prior bad acts.

STATEMENT OF THE CASE

On May 14, 2009, Appellant Darrell Lee Birch was indicted by the Marion County Grand Jury for (1) possession of cocaine base with intent to distribute in violation of S.C. Code Ann. § 44-53-375(B)(2); and (2) possession of ecstasy in violation of § 44-53-370(d)(2). R. 192.

Birch was tried before the Honorable William H. Seals, Jr. and a jury on November 28-30, 2011. R. 1. Birch was represented by William Vickery Meetze, and the State was represented by Assistant Solicitors Todd S. Tucker and Matthew R. Ozment. Id.

On November 30, 2011, the jury found Birch guilty on both charges as indicted. R. 182, ll. 9-19. Because Birch was only present for the first day of trial, the sentence was sealed and subsequently read on October 17, 2012. Sentencing R. 188. Judge Seals sentenced Birth to thirty years for possession of cocaine base with intent to distribute and one year consecutive for possession of ecstasy. Id.; Sentencing sheets, R. 194.

Birch timely filed and served his Notice of Appeal on October 17, 2012.

STATEMENT OF FACTS

On December 3, 2008, Sergeant Aurelius Cribb, a lieutenant for the Marion Police Department and a sergeant for the Marion County Combined Drug Unit, received a call from Officer Ernie Grice that he had seen an individual named Byron Horné at the IGA grocery store. Mr. Horne had warrants out for his arrest, and Sergeant Cribb served the warrants on him and placed him under arrest at the IGA. R. 82, l. 20 – 84, l. 18; 103, l. 4 – 104, l. 17.

Sergeant Cribb then verbally asked Horne if he could search his residence, and Horne consented to the search of his residence. R. 104, l. 18 – 107, l. 20. After Horne gave consent to search his residence, Sergeant Cribb, Officer Grice, and Agent Collins went to search Horne's residence. R. 107, l. 21 – 108, l. 2.

Officer Grice assisted Agent Collins in clearing the house. R. 85, l. 23 – 86, l. 1. After Officer Grice entered the home, he came in contact with the appellant in this case, Darrell Birch. Officer Grice testified that when he entered the residence, there was an individual in the front room wearing a ball cap, coat, and jeans. Officer Grice claimed that the individual had his left hand in his pants pocket and that Officer Grice told the individual several times to remove his hand. Officer Grice said that when the individual refused to remove his hand from his pocket, Officer Grice "forcibly removed his hand and when [he] did an object fell out on the floor." R. 86, l. 11 – 87, l. 8.

Officer Grice described what fell on the floor as a medicine bottle wrapped in black electric tape. R. 87, ll. 9-11.

After this container fell on the floor, Officer Grice removed the individual's ball cap and said he recognized the individual as Darrell Birch and knew that the Marion County Combined Drug Unit for looking for Birch. R. 88, ll. 1-8.

Officer Grice arrested Birch and searched him further, finding an Icebreakers canister containing several different colored pills. R. 91, ll. 2-22. He also opened the black container and found white rock like substances consistent with crack cocaine. R. 91, l. 24 – 92, l. 8.

Birch was ultimately indicted for possession of crack cocaine with intent to distribute and possession of ecstasy.

ARGUMENT

I. The officer's search of Appellant's person violated the Fourth Amendment and the evidence seized as a result of the unlawful search should be suppressed where:

(1) Appellant's mere presence at a private residence being searched pursuant to the consent of the homeowner did not provide probable cause for the officer to search Appellant;

(2) the officer lacked reasonable suspicion that Appellant was engaged in criminal activity to justify an investigatory detention and frisk where Appellant was merely standing in the home being searched with his hand in his pocket and made no movements toward the officer; and

(3) the officer exceeded the scope of a pat-down search of the outer clothing of Appellant where the officer forcibly removed Appellant's hand from his pocket.

Prior to trial, Birch moved to suppress the drug evidence because the drug evidence was seized in violation of the Fourth Amendment. More specifically, Birch argued the search of his person constituted an unlawful search and seizure and that while officers had consent from Horne to search Horne's residence, officers were not entitled to search Birch who was inside Horne's residence. R. 34, l. 9 – 58, l. 19.

The Fourth Amendment, made applicable to the States by way of the Fourteenth Amendment, guarantees "[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; Mapp v. Ohio, 367 U.S. 643 (1961). The United States Supreme Court has observed time and time again that "searches and seizures 'conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment – subject only to a few specifically established and well delineated exceptions.'" Minnesota v. Dickerson, 508 U.S. 366, 372 (1993) (emphasis in original) (internal citations omitted).

There is no exception to the Fourth Amendment authorizing the search of Birch in this case. "A person's mere presence at the scene of suspected criminal activity does not entitle the police officers to search that individual." State v. Broadnax, 654 P.2d 96, 104 (Wash. 1982). While the officers may have had consent from Horne to search Horne's residence, Horne's consent did not extend to authorize the search of an individual like Birch who was found on the premises. Id. at 103.

In Ybarra v. Illinois, the United States Supreme Court held that while a search warrant gave police officers authority to search the premises of a tavern and to search the bartender for narcotics, a pat-down search and seizure of a tavern patron was not constitutionally permissible. 444 U.S. 85 (1979). The court observed that while police may have probable cause to search a certain location, "a person's mere propinquity to other independently suspected of criminal activity does not, without more, give rise to probable cause to search that person." Id. at 91. The court further expounded:

> Where the standard is probable cause, a search and seizure of a person must be supported by probable cause particularized with respect to that person. This requirement cannot be undercut or avoided by simply pointing to the fact that coincidentally there exists probable cause to search or seize another or to search the premises where the person may happen to be. The Fourth and Fourteenth Amendments protect the "legitimate expectations of privacy" of persons, not places.

Id. (internal citations omitted).

The court ultimately concluded that while a search warrant issued on probable cause gave officers authority to search the premises and the bartender, "it gave them no authority whatsoever to invade the constitutional protections possessed individually by the tavern's customers." Id. at 91-92.

This same principle applies in this case. Horne may have given the officers consent to search the premises of his residence, but Horne's consent did not extend to a pat-down search of any individual found in his home. See Broadnax, 654 P.2d at 103-04.

In Michigan v. Summers, 452 U.S. 692 (1981), the United States Supreme Court did permit officers executing a search warrant to *detain* the *occupant* of the home while the search was completed. The basis for that limited instruction was that:

> [t]he connection of an occupant to that home gives the police officer an easily identifiable and certain basis for determining that suspicion of criminal activity justifies a detention of that occupant.

Id. at 703-04. Discussing Summers, the Washington Supreme Court in Broadnax observed that "an occupant's constructive control over the premises which is the subject of a search warrant provides a sufficient connection with the suspected illegal activities to permit a detention of that individual." Broadnax, 654 P.2d at 103. The Washington Supreme Court further discussed Summers in conjunction with Ybarra to conclude:

> A footnote in Summers, however, suggests that while occupants of a private residences may be "seized" while a proper search of the premises is conducted, any search of those occupants or others on the premises must meet the standards of Ybarra. Summers, 452 U.S. at 695-96 n.4.
>
> When Summers is read in conjunction with Ybarra, ***it becomes clear that persons not directly associated with the premises and not named in the warrant cannot be detained or searched without some independent factors tying those persons to the illegal activities being investigated.*** In other words, "mere presence" is not enough; there must be "presence plus" to justify the detention or search of an individual, other than an occupant, at the scene of a valid execution of a search warrant. See generally Carr, *Michigan v. Summers: Detentions Permitted While Search Warrant is Executed, 8 Search & Seizure* L.Rep. 115–19 (1981). It is well established that a warrant authorizing the search of a premises does not also extend to authorize the search of an individual found on the premises.

Broadnax, 654 P.2d at 103 (emphasis added).

United States Supreme Court jurisprudence is therefore quite clear that individuals found on premises being searched pursuant to a proper warrant cannot be automatically detained and searched for their mere presence alone; there must be some more to justify the detention and search of such an individual. Officers may not place their hands on citizens "in search of anything" without "constitutionally adequate, reasonable grounds for doing do." Sibron v. New York, 392 U.S. 40, 64 (1968).

Here, officers searched Birch because he was present at Horne's home. Officers were not searching Horne's home pursuant to a valid search warrant, but only on the consent of Horne. Horne's consent to the search of his home did not authorize the detention and search of Birch simply because Birch was found at the home. Accordingly, the officers had no probable cause to search Birch on this basis.

During the pre-trial suppression hearing, Officer Grice testified that he "forcibly remove[d] [Birch's] hand from his pocket" when Birch refused to remove his hand. Officer Grice testified he removed Birch's hand for officer safety. When an object fell out of Birch's pocket after Officer Grice forcibly removed Birch's hand, Officer Grice then pulled off Birch's ball cap and arrested Birch based on prior knowledge that Birch had some outstanding warrants. R. 39, ll. 5-19.

The State argued during the suppression hearing that Birch's refusal to remove his hand from his pocket justified the search of Birch. R. 58, ll. 10-16.

As discussed above, Officer Grice's encounter with Birch on premises being searched did not authorize any sort of search of Birch. "A police officer may elevate a police-citizen encounter into an investigatory detention only if the officer has a reasonable suspicion supported by articulable facts that criminal activity may be afoot

even if the officer lacks probable cause." United States v. Burton, 228 F.3d 524, 527-28 (4th Cir. 2000) (internal citations omitted). "Reasonable suspicion is something more than an inchoate and unparticularized suspicion or hunch, and it is the government's burden to articulate facts sufficient to support reasonable suspicion." Id. (internal citations omitted).

"Once an officer had a basis to make a lawful investigatory stop, he may protect himself during that stop by conducting a search for weapons if he has reason to believe that the suspect is armed and dangerous. . . . But an officer may not conduct this protective search for purposes of safety until he has a reasonable suspicion that supports the investigatory stop." Id. at 528 (internal citations omitted). Therefore, before an officer an conduct a protective search, the officer "must first have reasonable suspicion supported by articulable facts that criminal activity may be afoot.' Id.

When officers entered Horne's home to search Horne's residence, they did not have any reason to suspect that Birch was engaged in criminal activity merely because he was present in Horne's residence. See Broadnax, 654 P.2d at 101 ("Merely associating with a person suspected of criminal activity does not strip away the protections of the Fourth Amendment to the United States Constitution."). Birch was simply just "standing in the front room" of Horne's residence with his hand in his pocket. R. 29, ll. 5-7. Such conduct does not justify an officer's reasonable suspicion that criminal activity must be afoot.

Birch's refusal to remove his hand from his pocket also did not establish that reasonable suspicion that criminal activity was afoot to justify a protective search of Birch. "An individual's refusal to cooperate, without more, does not furnish the minimal

level of objective justification needed for detention or seizure." Burton, 228 F.3d at 529 (quoting Florida v. Bostick, 501 U.S. 429, 437 (1991)); see also United States v. Flowers, 912 F.2d 707, 712 (4th Cir. 1990) (noting that a defendant has "the right to refuse to speak with . . . officers, who in turn possess no right to detain citizens who decline to talk or otherwise identify themselves).

In Burton, the United States Court of Appeals for the Fourth Circuit held that the refusal of the defendant to remove his hand from his pocket at the insistence of the police officer was not sufficient to establish reasonable suspicion that criminal activity was afoot. The court further held that in the absence of reasonable suspicion, the officer in Burton could not frisk the defendant "merely because he felt uneasy about his safety." The court concluded that the officer's reaching inside the defendant's coat was an unlawful search and the handgun discovered as a result of the unlawful search should have been suppressed at trial. Burton, 228 F.2d at 528-59.

Similarly, Birch's refusal to remove his hand from his pocket was also not sufficient to establish reasonable suspicion that criminal activity was afoot. The record is devoid of any evidence that Birch made any furtive movements as Office Grice approached. As in Burton, Officer Grice only forcibly removed Birch's hand from his pocket because Office Grice felt uneasy about his safety. But just as the court in Burton concluded that this was an insufficient basis to frisk the defendant in that case, Birch's refusal to remove his hand from his pocket was insufficient to justify Officer Grice forcibly removing Birch's hand from his pocket. Any evidence seized as a result of Office Grice unlawfully searching Brice and then subsequently arresting Birch after

Officer Grice removed Birch's ball cap and discovered Birch's identity should have been suppressed and trial and accordingly, Birch's convictions reversed.

Even assuming *arguendo* that the search of Birch was justified, the scope of the search was impermissible. In conducting a constitutionally acceptable pat-down search, a law enforcement officer is confined to "patting the outer clothing of the suspect for concealed objects which might be used as instruments of assault." Sibron v. New York, 392 U.S. 40, 65 (1968). In Sibron, the United States Supreme Court found that a search was not reasonably limited in scope where the officer "with no attempt at an initial limited exploration for arms, . . . thrust his hand into Sibron's pocket and took from him envelopes of heroin." , the United States Supreme Court found that a search was not reasonably limited in scope where the officer "with no attempt at an initial limited exploration for arms, . . . thrust his hand into Sibron's pocket and took from him envelopes of heroin." Id. Officer Grice's forcible removable of Birch's hand from his pocket and the pulling off of Birch's ball cap to reveal Birch's identity likewise exceeded the scope of a lawful pat-down.

In summary, the officer in this case was not justified in searching Birch merely because Birch was present at the scene of premises being searched. In addition, the officer lacked any reasonable suspicion that criminal activity was afoot with respect to Birch, and the officer was therefore not entitled to conduct a protective search of Birch merely because Birch refused to remove his hand from his pocket. Finally, the pat-down search conducted by the officer was not reasonably limited in scope where the officer did not pat-down the outer clothing of Birch but instead forcibly removed Birch's hand from his pocket and pulled off Birch's ball cap. For these reasons, the evidence seized as a

result of this unlawful search of Birch should be suppressed and his convictions based on that evidence reversed.

II. The Trial Court erred in denying Appellant's motion for a continuance where he was denied his right to effective assistance of counsel where his appointed counsel only had one day to prepare for trial.

Prior to trial, Birch's defense counsel moved for a continuance. The day before trial began, Birch thought he was being represented by counsel he retained. That particular counsel for unknown reasons decided to no longer represent Birch. The public defender did not know he would be represented Birch until the day before trial. The public defender requested a continuance so that he could have adequate time to prepare for Birch's trial and speak to certain witnesses that he only learned about that day. The Trial Court denied Birch's motion for a continuance. R. 4, l. 5 – 9, l. 14.

While the granting of a motion for continuance is within the sound discretion of the trial court and will not be disturbed absent a clear showing of an abuse of discretion, if a defendant is not granted sufficient time after the appointment of counsel to prepare his defense, it amounts in substance to the denial of the right to counsel. See Jones v. State, 371 N.E.2d 1314 (Ind. Ct. App. 1978), see also State v. Colden, 372 S.C. 428, 641 S.E.2d 912 (Ct. App. 2007). "The constitutional right to have the assistance of counsel . . . carries with it a reasonable time for consultation and preparation, and a denial is more than a mere abuse of discretion; it is a denial of due process of law." State v. Sain, 663 P.2d 493 (Wash. Ct. App. 1983).

There is no evidence that Birch was at fault for his non-representation where he believed he had retained an attorney to represent him even though ultimately that retained attorney decided not to represent him. Birch's appointed attorney should have been granted additional time to prepare rather than have been compelled to begin trial the next day. See Bacon v. State, 246 S.E.2d 475 (Ga. Ct. App. 1978) (holding where it was

unclear whether fault of nonrepresentation lay with defendant rather than his attorney, newly appointed public defender was entitled to a continuance to prepare for trial rather than have to start trial on the same afternoon as appointment).

The Trial Court denied Birch his Sixth Amendment right to effective assistance of counsel by not allowing his newly appointed attorney more time to prepare for trial. There is no evidence that this continuance would have delayed the trial unreasonably or that the State or witnesses would have been inconvenienced had the trial been continued. The delay was not purposeful. See United States v. McClendon, 146 Fed. Appx. 23 (6th Cir. 2005). Therefore, Birch requests this Court to reverse the Trial Court's denial of his motion to continue and grant a new trial.

III. The Trial Court erred in refusing to grant a mistrial where the police officer testified that that the county drug unit was looking for Appellant because this testimony constituted improper evidence of prior bad acts.

During his trial testimony, Officer Grice testified as to the following:

> After the container fell out of his pocket, like I said, he had a ball cap on, pulled down like he may be concealing his identity, I removed the ball call, I knew him as Darrell Birch and I also knew that the Marion County Combined Drug Unit was also looking for him as well.

R. 87, ll. 3-8.

Defense counsel objected to this testimony as improper bad act evidence and moved for a mistrial. R. 87, l. 19 – 88, l. 8. The Trial Court denied the motion for mistrial and gave a curative charge to which defense counsel also objected. R. 88, l. 9 – 89, l. 24.

Evidence that a defendant has committed other unrelated crimes or bad acts is inadmissible to prove the defendant's propensity to commit the crime with which he is charged. State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923). This is so because under our system of justice, a conviction must be based upon evidence of the offense for which the accused is on trial rather than upon prior criminal or immoral acts. State v. Gore, 283 S.C. 118, 322 S.E.2d 12 (1984). It is only in exceptional cases that another crime or bad act is relevant to an issue other than the accused's character. Such exceptions to the general rule which permit the admission of evidence of other crimes or bad acts are applicable only where the prior bad act directly supports some substantial element of the State's case or is relevant to establish a material fact or element of the crime charged. State v. Bell, 302 S.C. 18, 393 S.E.2d 364 (1990), *cert. denied*, 498 U.S. 881, 111 S.Ct. 227, 112 L.Ed.2d 182 (1990).

Evidence introduced for the sole purpose of implying a defendant has a prior criminal record is improper. State v. Tate, 288 S.C. 104, 341 S.E.2d 380 (1986). In Tate, the Supreme Court held that mug shots that implied a prior criminal record are inadmissible because they improperly placed Tate's character into evidence. Id. at 104, 341 S.E.2d at 381. The court found that the state did not have a demonstrable need to introduce the mug shots. Similarly, here there was no need for the officer to have testified that he specifically knew the Marion County Combined Drug Unit was looking for Birch. Birch was on trial for drug crimes and it was highly prejudicial for the jury to have heard that he was also previously wanted for other drug crimes. This prior bad act evidence was inadmissible and the Trial Court should have granted a mistrial after the jury heard this evidence.

In addition, although the Trial Court gave a curative charge, a curative instruction is not always sufficient to alleviate prejudice. State v. Jones, 343 S.C. 562, 541 S.E.2d 813 (2001). In this case, Officer Grice had already revealed to the jury the very prejudicial information that Birch was wanted for previous drug-related crimes. This created a great danger the jury would infer that he was also guilty of drug-related crimes for which he was on trial.

Therefore, the Trial Court erred in refusing to grant a mistrial upon defense counsel's motion.

CONCLUSION

For the reasons set forth herein, Appellant Darrell Lee Birch respectfully requests that the evidence seized in violation of the Fourth Amendment be suppressed and his convictions reversed. Alternatively, Appellant requests that his convictions be reversed and the case be remanded for a new trial.

Respectfully submitted,

Carmen V. Ganjehsani
Appellate Defender

ATTORNEY FOR APPELLANT

This 6th day of March, 2014.

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."

March 6th, 2014

Carmen V. Ganjehsani
Appellate Defender

S.C. Commission on Indigent Defense
Division of Appellate Defense
1330 Lady Street, Suite 401
Post Office Box 11589
Columbia, South Carolina 29211-1589

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APPELLANT

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 William M. Blitch, Jr., Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 6th day of March, 2014.

Carmen V. Ganjehsani
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 6th day of march, 2014.

(L.S.)
Notary Public for South Carolina
My Commission Expires: July 3, 2023.