

 ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Beaufort County

G. Thomas Cooper, Jr. Circuit Court Judge

RECEIVED

APR 09 2015

SC Court of Appeals

THE STATE,

RESPONDENT,

V.

ANDRE DECOSTA,

APPELLANT.

APPELLATE CASE NO. 2011-196666

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

The Trial Court erred in refusing to suppress the evidence obtained as a result of law enforcement's unlawful stop of the vehicle in which Appellant was a passenger where law enforcement did not have either probable cause or reasonable suspicion of criminal activity to justify stopping the vehicle; the driver of the vehicle had not violated any traffic laws and the only reason the officer stopped the vehicle was because (1) the vehicle, which was not the only moving vehicle in the area at that time, was spotted 0.7 miles away from a burglary that had been committed minutes earlier during the early morning hours of November 29, 2010; and (2) the vehicle was slowly approaching a stop sign on a side street to turn right onto a major thoroughfare.

STATEMENT OF THE CASE

On January 27, 2011, Appellant Andre DeCosta was indicted by the Beaufort County Grand Jury for (1) second degree burglary; (2) grand larceny in the amount of \$10,000 or more; and (3) third degree arson.

On July 25-27, 2011, Appellant proceeded to trial before the Honorable G. Thomas Cooper, Jr. R. p. 63.¹ Appellant elected to proceed with a bench trial. R. pp. 70, l. 20 – 73, l. 5. Appellant was represented by Matthew L. Walker, and the State was represented by Assistant Solicitors Casey N. Rankin and Sean P. Thornton. R. p. 63.

On July 27, 2011, Judge Cooper found Appellant guilty as charged. R. p. 249, ll. 19-24. He sentenced Appellant to (1) fifteen years for second degree burglary; (2) ten years for grand larceny in the amount of \$10,000 or more; and (3) fifteen years for third degree arson. R. p. 258, ll. 6-17; R. 270 (Sentence Sheets). Judge Cooper ordered the sentences to run concurrently. R. p. 258; 18-19; R. 270 (Sentence Sheets).

On July 28, 2011, Appellant made a motion for new trial which Judge Cooper denied. July 28 Hearing R. p. 260-266.

Appellant timely filed and served his Notice of Appeal.

¹ The court reporter originally prepared the transcript of the trial for the days of July 25-27, 2011 but indicated in the transcript that she was unable to transcribe the entire proceedings of the afternoon of July 25, 2011. Appellant will refer to this transcript as Tr. II in the initial brief. After the parties moved forward to reconstruct the missing portions of the trial, the court reporter located the disks containing the July 25, 2011 proceedings and prepared a separate transcript with separate pages numbers for this day. Appellant will refer to this transcript as Tr. I. in the initial brief.

ARGUMENT

The Trial Court erred in refusing to suppress the evidence obtained as a result of law enforcement's unlawful stop of the vehicle in which Appellant was a passenger where law enforcement did not have either probable cause or reasonable suspicion of criminal activity to justify stopping the vehicle; the driver of the vehicle had not violated any traffic laws and the only reason the officer stopped the vehicle was because (1) the vehicle, which was not the only moving vehicle in the area at that time, was spotted 0.7 miles away from a burglary that had been committed minutes earlier during the early morning hours of November 29, 2010; and (2) the vehicle was slowly approaching a stop sign on a side street to turn right onto a major thoroughfare.

Relevant facts of suppression hearing

Appellant moved to suppress the evidence taken from the stop of the vehicle in which Appellant was riding as well as any statements or confessions following from such stop where there was no probable cause or reasonable suspicion for law enforcement to stop the vehicle. The Trial Court heard evidence on the motion during a pre-trial suppression hearing. R. p. 5, ll. 2-21.

Officer Christopher Gonzales of the Bluffton Police Department testified that during the early morning hours of November 29, 2010, he responded to two separate locations. The first location was Dan's Fan City. The second location was Ligato's Jewelry Store. R. p. 6, ll. 5-19. He first received a call at 2:39 a.m. to respond to a fire at Dan's Fan City. Dan's Fan City was located in a shopping center on Highway 278 called Plantation Park. He responded to the fire at Dan's Fan City. R. pp. 6, l. 24 – 7, l. 16.

Officer Gonzales then received another call shortly after that to respond to an alarm at Ligato's Jewelry Store located in the Bluffton Commons at 80 Baylor Drive in Bluffton. Officer Gonzales believed that the fire at Dan's Fan City was set as a diversion for the break-in at the jewelry store. Officer Gonzales left Dan's Fan City and arrived at the scene of the jewelry store where approximately ten units had already responded. R. pp. 7, l. 17 –

8, l. 23. The dispatch call from the burglary at the jewelry store came in at about 2:48 a.m. R. p. 33, ll. 7-16. Officer Gonzales believed he arrived at the jewelry store around 2:50 a.m. R. p. 34, ll. 16-22.

Dan's Fan City was approximately a mile away from Ligato's Jewelry Store. R p. 11, ll. 1 -3. When Officer Gonzales arrived at the jewelry store, he instructed an officer to determine if someone had gotten inside from the front glass and he drove to the back of the building to see if he could catch somebody on the inside. As he was riding to the back of the building, he was advised that someone had gotten inside the store and taken some items so Officer Gonzales immediately responded back out onto Buck Island Road to see if he could locate a vehicle. He said the time was approximately 2:50 a.m. R. pp. 11, l. 18 – 12, l. 12.

Officer Gonzales testified that after he left the jewelry store, he saw a vehicle on Westbury Park Drive at the intersection of Highway 278. R. pp. 12, l. 13 – 13, l. 1. He said that the vehicle was located between the two incident locations, and he further claimed during his direct examination by the solicitor that there was not a lot of other traffic on the road at that time. R. pp. 13, ll. 2-8.

Officer Gonzales admitted though that he had seen another vehicle driving near the area prior to his arrival at Ligato's Jewelry Store, but that when he left the store and drove back out to Highway 278, that vehicle was gone. He testified that is when he saw the vehicle in question coming out of Westbury Park Drive. R. p. 13, ll. 19-25. He stated he saw this vehicle, the one in which Appellant would subsequently be found, approximately four minutes after the burglary. R. p. 38, ll. 7-10.

Officer Gonzales also claimed the vehicle he saw as he pulled up to the intersection of Westbury Park Drive and Highway 278 was driving at “a real slow speed.” The vehicle then turned right onto Highway 278 at Buck Island Road and Officer Gonzales tried to catch up with it. R. p. 14, ll. 1 – 13.

Officer Gonzales caught up with the vehicle and notified dispatch to run the tag. He then activated his patrol lights to conduct a stop. The vehicle pulled into a Walgreens parking lot. After he stopped the vehicle, Officer Gonzales was advised that the tag was suspended. He reiterated that he did not learn that the tag was suspended until after he stopped the vehicle. R. pp. 14, l. 14 – 15, l. 2.

Officer Gonzales approached the vehicle from the passenger side and walked up to the back window. He looked down and noticed a subject lying down in the backseat. This subject was later determined to be Appellant. Officer Gonzales advised Appellant to sit up and put his hands where he could see them. He noticed that Appellant and the driver were dressed in all black. R. p. 15, ll. 8-21.

The driver, Mr. Hamilton, consented to a search of his vehicle. Officer Gonzales found jewelry and watches that appeared to have come from the jewelry store just burglarized. Officer Gonzales also saw an ax on the floor. R. pp. 16, l. 9 – 17, l. 8.

On cross-examination, Officer Gonzales acknowledged that while he was driving from Dan’s Fan City to Ligato’s Jewelry Store, he did not see the vehicle he would later stop – the vehicle in which Appellant was riding. R. p. 21, ll. 8-11. He did confirm that he had seen another vehicle while driving to the jewelry store. R. pp. 21, l. 19 – 22, l. 4. That was the vehicle Officer Gonzales was looking for when he left the jewelry store, and he testified that had he seen that first vehicle, he would have stopped it. R. p. 22, ll. 5 – 18.

Officer Gonzales admitted on cross-examination that when he left the jewelry store, he had no information about who had committed the burglary. He did not know if it had been committed by someone on foot, bicycle, or vehicle. R. p. 24, ll. 13-23.

Officer Gonzales also admitted that the vehicle he stopped was turning onto Highway 278 from a private road and that it would have been improper for someone to have been driving down a private road at a high rate of speed. R. pp. 24, l. 24 – 25, l. 12. He also acknowledged that he was not actually behind this vehicle when he first saw it and instead saw it turning right. Officer Gonzales only saw the vehicle driving for a short distance before it turned right. He also acknowledged there was a stop sign there. R. p. 40, ll. 5-23. Therefore, there would have been nothing unusual or wrong about someone driving a vehicle slowly on a private road right before stopping and turning at a stop sign.

Officer Gonzales further testified that he saw the vehicle 0.7 miles from the jewelry store location. R. pp. 25, l. 16 – 26, l. 8; 32, ll. 4-8. When he caught up with the vehicle, the driver of the vehicle did not try to flee or do anything of the sort. R. pp. 26, l. 20 – 27, l. 1. The vehicle responded immediately and pulled over once Officer Gonzales activated his blue lights. R. p. 27, ll. 5-8. Officer Gonzales reconfirmed that he did not receive any information about the vehicle's tag until after he stopped the vehicle. R. pp. 27, l. 9 – 28, l. 1.

Officer Gonzales' patrol vehicle was equipped with an in-car video which recorded the stop in the early morning hours of November 29, 2010. R. p. 28, ll. 2-21; State's Ex. 3 (in-car video). During cross-examination of Officer Gonzales, defense counsel for Appellant played the video. Officer Gonzales conceded seeing several other vehicles besides the one Appellant was riding in on the road at this time of night, including another

vehicle stopped at a stoplight right where Officer Gonzales was pulling over the vehicle in question. Defense counsel continued to point out to Officer Gonzales even more vehicles on the road that could be seen driving on the highway in the background of the in-car video. In all, approximately eighteen other vehicles, either parked at the Walgreens or driving on the highway in the background, could be seen on the dash cam video during the first minutes of the stop. R. p. 29, ll. 1 – 11; State’s Ex. 3 (in-car video).

When Officer Gonzales decided to pull the vehicle in which Appellant was located, he did not see anything suspicious about the vehicle and just saw a person driving it. He did not notice Appellant lying down in the back until after he stopped the vehicle. He did not see what the driver was wearing until after he stopped the vehicle. R. pp. 31, l. 13 – 32, l. 3.

At the conclusion of the suppression hearing, defense counsel for Appellant argued there was no probable cause for Officer Gonzales to have stopped the vehicle for a traffic violation and also no reasonable suspicion of criminal activity to have stopped the vehicle. There was no description of a subject or vehicle being sought after the burglary at the jewelry store. The only reasons Officer Gonzales pulled the vehicle was because it was driving slowly approaching a stop sign to turn onto a major highway and because the vehicle was seen 0.7 miles from the burglary location. Defense counsel for Appellant asserted that these two factors were not enough to justify Officer Gonzales’ stop of the vehicle, especially where there was a good bit of traffic in this particular light industrial area at that time of night. R. pp. 41, l. 10 – 43, l. 3.

The Trial Court recognized being located in the vicinity of a crime would not be sufficient to give rise to a stop because it would mean that anyone who happened to “chance along that way would be subject to a stop for no reason at all.” R. p. 43, ll. 4-14. The Trial

Court, however, was concerned with the lateness of the hour and the fact that the vehicle originally was on a less traveled road before it pulled onto a well traveled and busy highway. R. pp. 43, l. 15 – 44, l. 7.

Defense counsel argued that a vehicle being on a side street in the vicinity of the crime should not warrant a different level of scrutiny and pointed out that for all anyone knew, the vehicle could have missed its turn and turned around. R. p. 44, ll. 9-16. Defense counsel also emphasized that other than the lateness of the hour, there was absolutely nothing else or any kind of evasive conduct observed by Office Gonzales with respect to the vehicle. R. pp. 45, l. 3 – 47, l. 2. Defense counsel stressed the officer's hunch was not enough to stop the vehicle under the requirements of the Fourth Amendment. R. p. 47, ll. 2-5.

Defense counsel further argued to the Trial Court that seven-tenths of a mile away from the location of the burglary was also not in the vicinity of the crime. He pointed out to the Trial Court that it was not as if the officer saw the vehicle pulling out of the parking lot of the jewelry store shopping center. R. pp. 48, ll. 19 – 49, l. 23. There was nothing about this particular vehicle that gave the officer reasonable suspicion that the occupants of the vehicle had been involved in criminal activity; the officer was just merely randomly stopping vehicles. R. p. 56, ll. 1-13.

The Trial Court denied the motion to suppress, ruling the officer's observance of the vehicle close in time and place of the burglary, along with the lateness of the hour and the limited traffic on the road at that hour, constituted a totality of circumstances in which reasonable suspicion justifiably existed for the officer to have stopped the vehicle. The

Trial Court noted on the record that Appellant's objection was preserved for appellate review. R. pp. 58, l. 5 – 61, l. 13.

Prior to the start of trial testimony, Appellant again made a continuing objection to any evidence that was obtained as a result of the stop, including any evidence taken from the vehicle and any statements made by Appellant that would not have been obtained but for the stop of the vehicle. The Trial Court noted Appellant's continuing objection and stated that Appellant did not need to continue to object to such evidence throughout the trial. R. pp. 74, l. 5 – 75, l. 6.

During his trial testimony, Officer Gonzales acknowledged that there were always cars traveling on Highway 278 where the vehicle in question was pulled and that the Walgreens where the vehicle pulled over was open for business even at 2:30 in the morning. Officer Gonzales also acknowledged that there was a large subdivision and golf course nearby. R. pp. 105, l. 4 – 106, l. 24. He further testified that the speed of the vehicle in question caught his attention, but admitted that if the vehicle had been traveling at a faster rate of speed, he probably would not have ignored the vehicle and would have still stopped it. R. p. 104, ll. 7-19.

At the conclusion of the trial testimony, Appellant again argued for the suppression of the evidence based on the unlawful stop of the vehicle. Appellant asserted to the Trial Court that the clear inference from Officer Gonzales' trial testimony was that even though the vehicle in question was not the only car he saw, he was going to stop the vehicle regardless and regardless of what speed it was traveling. Appellant also reiterated to the Trial Court that Officer Gonzales' trial testimony confirmed the existence of traffic in the area even during the early morning hours, especially where there was large residential area

nearby as well as a nighttime pharmacy. The Trial Court once again denied the motion to suppress. R. pp. 236, l. 12 – 240, l. 19.

Discussion

The stop of the vehicle in question was not supported by either probable cause or reasonable suspicion. The Fourth 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. The stopping of a vehicle and the detention of its occupants constitute a seizure and implicates the Fourth Amendment's prohibition against unreasonable searches and seizures. State v. Butler, 353 S.C. 383, 389, 577 S.E.2d 498, 501 (Ct. App. 2003) (citing Delaware v. Prouse, 440 U.S. 648, 653–54, (1979)).

“As a general matter, the decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred.” State v. Butler, 343 S.C. 198, 201, 539 S.E.2d 414, 415 (Ct. App. 2000). Our courts have held that in South Carolina, however, an officer may stop and briefly detain the occupants of a car without treading on Fourth Amendment rights, even without probable cause to arrest, if he has a reasonable suspicion that the occupants are involved in criminal activity. Id.; Sikes v. State, 323 S.C. 28, 30–31, 448 S.E.2d 560, 562 (1994); Knight v. State, 284 S.C. 138, 141, 325 S.E.2d 535, 537 (1985). “ ‘[A] policeman who lacks probable cause but whose observations lead him reasonably to suspect that a particular person has committed, is committing, or is about to commit a crime, may detain that person briefly in order to investigate the circumstances that provoke that suspicion.’ ” State v. Nelson, 336 S.C. 186, 192, 519 S.E.2d 786, 789 (1999) (quoting Berkemer v. McCarty, 468 U.S. 420, 439 (1984)).

“‘Reasonable suspicion’ requires a ‘particularized and objective basis that would lead one to suspect another of criminal activity.’ ” State v. Khingratsaiphon, 352 S.C. 62, 69, 572 S.E.2d 456, 459 (2002) (quoting United States v. Cortez, 449 U.S. 411, 418 (1981)). “In determining whether reasonable suspicion exists, ‘the totality of the circumstances—the whole picture—’ must be considered.” Id. (quoting Cortez, 449 U.S. at 417); see also State v. Woodruff, 344 S.C. 537, 546, 544 S.E.2d 290, 295 (Ct. App. 2001) (“The term ‘reasonable suspicion’ requires a particularized and objective basis that would lead one to suspect another of criminal activity. In determining whether reasonable suspicion exists, the whole picture must be considered.”) Reasonable suspicion is something more than an inchoate and unparticularized suspicion or hunch. Butler, 343 S.C. at 202, 539 S.E.2d at 416. However, it is less than the level required for probable cause. Id.

Here, it was undisputed that Officer Gonzales did not have probable cause to stop the vehicle in question where the State presented no evidence that the vehicle had violated any traffic laws. Officer Gonzales admitted he did not learn that the tag was suspended until after he had already stopped the vehicle. Tr. I. pp. 14, l. 14 – 15, l. 2; 27, l. 9 – 28, l. 1. Therefore, for the stop of the vehicle to have been lawful, Officer Gonzales must have had reasonable suspicion that the occupants of the vehicle were engaged in criminal activity. The State was required to have shown a particularized and objective basis that would have led Officer Gonzales to suspect that the occupants of the vehicle he stopped were engaged in criminal activity.

The only facts known by Officer Gonzales when he stopped the vehicle in question were that (1) the vehicle was spotted 0.7 miles away from a burglary that had been committed minutes earlier during the early morning hours of November 29, 2010; and (2)

the vehicle was slowly approaching a stop sign on a side street to turn right onto a major thoroughfare. R. pp. 14, ll. 1-13; 25, l. 16 – 26, l. 8; 32, ll. 4-8; 38, ll. 7-10; 40, ll. 5-23.

The factors not known by Officer Gonzales or otherwise not observed by him were the following:

1. Officer Gonzales had no information about how the burglary at the jewelry store was committed, whether it was by someone on foot, bicycle, or vehicle. R. p. 24, ll. 13-23;
2. Officer Gonzales did not have any description of the possible suspects of the burglary. R. p. 24, ll. 13-23;
3. Officer Gonzales did not see multiple occupants in the vehicle until after he stopped the vehicle and could only see the driver when he decided to stop the vehicle. R. pp. 31, l. 13 – 32, l. 3;
4. Officer Gonzales did not observe the vehicle or its occupants driving evasively or otherwise engaging in any evasive conduct. R. pp. 31, l. 13 – 32, l. 3;
5. Office Gonzales testified that the driver of the vehicle did not attempt to flee when Officer Gonzales activated his blue lights to pull the vehicle over. R. pp. 26, l. 20-27, l. 1; and
6. Officer Gonzales did not observe what type of clothing the occupants were wearing until after he stopped the vehicle. R. pp. 31, l. 13 – 32, l. 3.

Officer Gonzales also acknowledged that he did not see this particular vehicle in question when he was driving from Dan's Fan City to the jewelry store and had actually seen a another vehicle when he was on his way to the burglary scene. That was the vehicle he was looking for when he left the jewelry store. If he had seen that vehicle, he would have stopped it instead. R. pp. 13, ll. 19-25; 21, ll. 8-11; 21, l. 19-22, l. 4; 22, ll. 5-18. His plan was really just to stop any vehicle he observed.

Officer Gonzales also conceded during the suppression hearing that the vehicle in which Appellant was riding was not in fact the only vehicle on the road in the area of the

burglary. R. p. 29, ll. 1-11. In fact, the in-car video showed another vehicle stopped right at a stoplight when Officer Gonzales pulled over the vehicle in question. Once the vehicle pulled over at the Walgreens, the in-car video showed at least eighteen other vehicles either in the Walgreens parking lot or driving on the highway in the background during just the first few minutes of the stop. See State's Ex. 3 (in-car video). The vehicle that Officer Gonzales stopped was by no means the lone vehicle on the road in an area 0.7 miles away from the scene of the burglary during a late hour at night.

Considering the totality of the circumstances, the mere fact that the vehicle in question was observed 0.7 miles away from the burglary during the early morning hours of November 29, 2010 and was on a side street slowly approaching a stop sign to turn right onto a major thoroughfare did not establish the required particularized and objective basis that would lead one to suspect another of criminal activity. First, a defendant's general proximity to the crime scene, in a vehicle, cannot support reasonable suspicion. See United States v. Moore, 983 F. Supp.2d 1030, 1034 (E.D. Wis. 2013); see also United States v. Baskin, 401 F.3d 788, 791 (7th Cir. 2005) (stating that "a defendant's mere presence in an area of expected criminal activity does not in and of itself justify an investigatory stop").

That the vehicle in which Appellant was riding was slowly approaching a stop sign on a side street to turn onto a major thoroughfare is also not an indication of criminal activity. In fact, Officer Gonzales admitted that it would have been improper for someone to have been driving down a private road at a high rate of speed. R. pp. 24, l. 24 – 25, l. 12; 40, ll. 5-23. Officer Gonzales also admitted during trial that he likely would have pulled the vehicle even if it had been traveling at a faster rate of speed. R. p. 104, ll. 7-19.

The lateness of the hour, without anything more, is also not sufficient to support reasonable suspicion of criminal activity to justify Officer Gonzales' stop of the vehicle. Cf. United States v. Lender, 985 F.2d 151, 154 (4th Cir. 1993) (observing that while "lateness of the hour is another fact that may raise the level of suspicion," additional factors justified the detention of the defendant in that case where officers observed the defendant engaged in behavior that looked like a drug transaction). In addition, the in-care video confirmed that the vehicle in question was not the only vehicle on the road at this late hour. See State's Ex. 3 (in-car video).

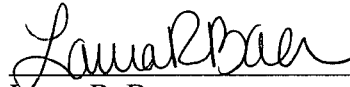
The factors cited by the Trial Court gain little, if any, strength when put together. Together, they did not give Officer Gonzales the necessary, reasonable, articulable suspicion of criminal activity. Officer Gonzales may have relied on a hunch that the vehicle he stopped had been involved in the burglary, but "inarticulate hunches" do not support detentions. Delaware v. Prouse, 440 U.S. 648, 661 (1979); Terry v. Ohio, 392 U.S. 1, 22 (1968). The search was not constitutional simply because the fruits justified the arrests. Smith v. Ohio, 494 U.S. 541 (1990).

The stop of the vehicle in which Appellant was riding was not justified. Accordingly, Appellant's motion to suppress all evidence deriving from the stop, including any resulting alleged statements or confessions, should have been granted. Because such evidence was inadmissible as fruit of the poisonous tree, Appellant's convictions for second degree burglary, grand larceny, and third degree arson should be reversed. See Wong Sun v. United States, 371 U.S. 471 (1963); Sikes v. State, 323 S.C. 28, 448 S.E.2d 560 (1994).

CONCLUSION

For the reasons set forth herein, Appellant Andre DeCosta respectfully requests this Court to suppress the evidence obtained as a result of the unlawful stop of the vehicle and reverse his convictions for second degree burglary, grand larceny, and third degree arson.

Respectfully submitted,

A handwritten signature in cursive script, reading "Laura R. Baer", written over a horizontal line.

Laura R. Baer
Appellate Defender

ATTORNEY FOR APPELLANT

This 9th day of April, 2015.

CERTIFICATE OF COUNSEL FOR APPELLANT

The undersigned certifies that to the best of my ability the Final Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

April 9, 2015

A handwritten signature in cursive script that reads "Laura R. Baer". The signature is written in black ink and is positioned above a horizontal line.

Laura R. Baer
Appellate Defender

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