STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

ORIGINAL

Appeal from Richland County

Honorable Alison Renee Lee, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

SOLEIMAN HATTAR,

APPELLANT

APPELLATE CASE NO 2016-002246

RECEIVED
MAY 29 2018
SC Court of Appeals

FINAL BRIEF OF APPELLANT

ROBERT M. PACHAK
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

STATEMENT OF ISSUE ON APPEAL 1

STATEMENT OF THE CASE 2

ARGUMENT

The trial court erred in upholding the search of the front passenger side of the truck where appellant was sitting when there was no reasonable articulable suspicion for the search and public safety was not involved. 3

CONCLUSION 6

TABLE OF AUTHORITIES

Cases

Arizona v. Gant, 556 U.S. 332, 129 S.Ct. 1710 (2009) 4

Henry v. United States, 361 U.S. 98, 80 S.Ct. 168, 4 L.Ed.2d 134 (1959) 4

Jackson v. Denno, 378 U.S. 368 (1964) 3

Johnson v. United States, 333 U.S. 10, 68 S.Ct. 367, 92 L.Ed. 436 (1948) 4

New York v. Quarles, 467 U.S. 649, 104 S.Ct. 262 (1984) 4

Rawlings v. Kentucky, 448 U.S. 98, 100 S.Ct. 2556, n. 6, 65 L.Ed.2d 633 (1980) 4

Sibron v. New York, 392 U.S. 40, 88 S.Ct. 1889, 20 L.Ed.2d 917 (1968) 4

Smith v. Ohio, 494 U.S. 541, 110 S.Ct. 1288 (1990) 4

State v. Brown, 267 S.C. 311. 227 S.E.2d 674 (1976) 5

State v. Pichardo, 367 S.C. 84, 623 S.E.2d 840 (2005) 5

State v. Tindall, 388 S.C. 518, 698 S.E.2d 203 (2010) 5

Constitutional Provisions

U.S. Const. amend. IV 4

STATEMENT OF ISSUE ON APPEAL

Whether the trial court erred in upholding the search of the passenger side of the truck where appellant was sitting when there was no reasonable articulable suspicion for the search and public safety was not involved?

STATEMENT OF THE CASE

Appellant was convicted of the following charges along with their respective sealed sentences:

Manufacturing meth	20 years
Possession with intent to distribute heroin	10 years
Possession of oxycodone	5 years
Possession of meth	5 years
Possession of narcotics	1 year

Trial was held before the Honorable Alison R. Lee in Richland County on October 24-26, 2016. The sentences were read by the Honorable Howard P. King on October 31, 2016. Appellant was represented by C. Lawrence Simmons, Esq. The state was represented by R. Cathcart, Esq. and J. Benny, Esq., Assistant Solicitors.

This appeal follows.

ARGUMENT

The trial court erred in upholding the search of the front passenger side of the truck where appellant was sitting when there was no reasonable articulable suspicion for the search and public safety was not involved.

At the Jackson v. Denno, 378 U.S. 368 (1964) hearing Officer Kaderly testified that on November of 2014 around 11:00 PM he was driving a patrol car and his training officer, Sgt. Dale, was in the front passenger seat. Officer Kaderly initiated a traffic stop on a blue truck for failing to yield the right of way. Appellant was sitting in the front passenger seat. Kaderly approached the driver and told him the reason for the stop. (R. 6, line 2 – p. 8, line 24.) Sgt. Dale approached the passenger side of the vehicle. Kaderly said he arrested the driver of the vehicle for driving under suspension and was detained. (R. 9, lines 1-25). Kaderly said Sgt. Dale noticed something was under appellant's feet. He said, "we didn't know what that was at the time we had to ask questions to figure out exactly what it was." (R. 11, line 8 – p. 12, line 2).

Sgt. Dale testified that he approached the passenger side of the truck where appellant was sitting – He said both appellant and the driver were sweating profusely even though it was less than 32 degrees outside.[1]

They were both extremely nervous – He noticed a towel covering up an item on the floorboard in the passenger side of the truck. (R. 29, line 9 – p. 30, line 1). He said he asked appellant twice what was under his legs. (R. 30, lines 2-18). Sgt. Dale testified that he decided to handcuff appellant while he was still sitting in the truck. He then lifted up the towel and found a two liter bottle with fluid in it that appeared to be boiling. (R. 31, lines 1-8).

---

[1] An EMS technician later testified that appellant's skin was warm and dry and he did not seem to be sweating profusely. (R. 117, line 21 – p. 118, line 1).

The assistant solicitor tried to argue that this case was a "public safety" exception to Miranda under New York v. Quarles, 467 U.S. 649, 104 S.Ct. 262 (1984). (R. 46, line 16 – p. 47, line 18). But the real question was Sgt. Dale's right to handcuff appellant as a passenger and then search and seize what was under the towel. Under the assistant solicitor's interpretation of the law, the police would be able to search anywhere at any time. The Fourth Amendment, however, does not allow the "unbridled discretion to rummage at will…" Arizona v. Gant, 556 U.S. 332, 345, 129 S.Ct. 1710, 1720 (2009). Instead, an officer has to have "reasonable suspicion" to search a passenger and there has to be "probable cause" to believe a vehicle contains evidence of criminal activity. Arizona v. Gant, 556 U.S. at 346-348, 129 S.Ct. at 1721.

As the Court noted in Smith v. Ohio, 494 U.S. 541, 543, 110 S.Ct. 1288, 1290 (1990), "that reasoning however, 'justify[ing] the arrest by the search and at the same time…the search by the arrest,' just 'will not do.' Johnson v. United States, 333 U.S. 10, 16-17, 68 S.Ct. 367, 370, 92 L.Ed. 436 (1948). As we have had occasion in the past to observe, '[i]t is axiomatic that an incident search may not precede an arrest and serve as part of its justification.' Sibron v. New York, 392 U.S. 40, 63, 88 S.Ct. 1889, 1902, 20 L.Ed.2d 917 (1968); see also Henry v. United States, 361 U.S. 98, 102, 80 S.Ct. 168, 171, 4 L.Ed.2d 134 (1959); Rawlings v. Kentucky, 448 U.S. 98, 111, n.6, 100 S.Ct. 2556, 2564, n. 6, 65 L.Ed.2d 633 (1980). The exception for searches incident to arrest permits to police to search a lawfully arrested person and areas within his immediate control. Contrary to the Ohio Supreme Court's reasoning, it does not permit the police to search any citizen without a warrant or probable cause so long as an arrest immediately follows."

It should also be noted that being a nervous passenger or driver does not justify a seizure and a search. State v. Pichardo, 367 S.C. 84, 105, 623 S.E.2d 840, 851 (2005); State v. Tindall,

388 S.C. 518, 523, 698 S.E.2d 203, 206 (2010); State v. Brown, 267 S.C. 311. 227 S.E.2d 674 (1976).

CONCLUSION

Appellant's convictions should be reversed as the drugs seized were the fruit of the poisonous tree from an illegal search and seizure of appellant.

Robert M. Pachak
Appellate Defender

ATTORNEY FOR APPELLANT

This 29th day of May, 2018.

CERTIFICATE OF COUNSEL FOR APPELLANT

The undersigned certifies that to the best of my ability this 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."

May 29, 2018

Robert M. Pachak

Robert M. Pachak
Appellate Defender

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

ATTORNEY FOR APPELLANT

RECEIVED
MAY 29 2018
SC Court of Appeals