STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Berkeley County

Honorable G. Thomas Cooper, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

V.

RICKY MANIGO DAWSON,

APPELLANT

APPELLATE CASE NO 2019-002107

FINAL REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

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[1] Counsel: You asked for consent because you did not have probable cause?
Officer: Absolutely
Counsel: As this was a warrantless search based on consent
Officer: Correct. Hearing transcript R. p. 39, lines 1-2 & lines 16-17.
Defense Counsel: Th[is was] consent because there's no probable cause.
Court: The real issue in the case is not about the probable cause...R. p 47, l.22-24.

[2] State v. Adams, 354 S.C. 361, 580 S.E.2d 285 (2003).

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

STATEMENT OF THE CASE

Appellant Ricky Manigo Dawson was found guilty of trafficking in cocaine, third offense, possession with intent to distribute crack cocaine, third offense, and possession of a weapon during the commission of a violent crime per bench trial held at the December 2019 term of the Berkeley County General Sessions Court before Judge G. Thomas Cooper, who sentenced appellant to an aggregate twenty-five year prison term. A pretrial suppression hearing was held on March 14, 2018, before Judge Deadra L. Jefferson at the Berkeley County General Sessions Court in the case. James W. Smiley represented appellant at the trial and pre-trial hearing; and Assistant Solicitors Bart Jackson Stegall and Tyler Jenkins appeared on behalf of the state at trial. Assistant Solicitor Stegall appeared at the pre-trial suppression hearing held in the case.

Appellant appealed his convictions and sentences, and filed a Brief of Appellant on October 26, 2020. The respondent filed a Brief of Respondent on April 12, 2021. This Reply Brief of Appellant follows.

ARGUMENT IN REPLY

The trial judge erred in denying appellant's motion to suppress the search of his bag while he was a passenger in a vehicle when there was no legally valid consent for the search; and the trial judge's error in denying the suppression motion cannot be upheld per the respondent's argument that the issue of probable cause discussed in the lower court's order, but not raised on appeal, was an independent ground to affirm as the law of the case where all parties agreed at the hearing, including the trial judge, that probable cause for the warrantless search was not an issue in the case,[3] and where probable cause was not listed as an exception for a warrantless search, and because appellant was procedurally barred from raising one issue in the lower court (consent to search) and another on appeal (probable cause to search),[4] and finally because probable cause cannot become the law of the case where the trial judge erred as a matter of law in including probable case as an exception to the warrantless search in the order.

This case involved a warrantless search per a traffic stop. A warrantless search violates the Fourth Amendment unless an exception applies, and the exceptions to a warrantless search as outlined in State v. Bailey, 276 SC 32, 274, S.E.2d 913 (1981), follow:

1.) Search incident to arrest
2.) Hot pursuit
3.) Stop and frisk
4.) Automobile
5.) Plain view
6.) Consent
7.) Abandonment
8.) Exigent circumstances

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[3] Counsel: You asked for consent because you did not have probable cause?
Officer: Absolutely.
Counsel: As this was a warrantless search based on consent?
Officer: Correct. Hearing transcript R. p. 39, lines 1-2 & lines 16-17.
Defense Counsel: Th[is was] consent because there's no probable cause.
Court: The real issue in the case is not about the probable cause...R. p 47, l.22-24

[4] State v. Adams, 354 S.C. 361, 580 S.E.2d 285 (2003).

Nowhere on the list is there an exception for probable cause. At the hearing and on appeal, the sole issue in the case was whether consent was given for the warrantless search of appellant's bag where appellant was a passenger in the car since the driver, who gave limited consent to search the vehicle, did not give consent for a search of appellant's bag, and where the driver had no possessory interest in appellant's bag or authority over appellant's bag in which to give legally valid consent to search it. The driver's consent did not include a consent to search appellant's property. The consent issue was discussed at length at the hearing and in the brief of appellant filed in this case.

Again, this was not a probable cause to search issue case. This was a consent to search issue case. All parties, including the lower court judge, were in agreement that this case revolved around the issue of whether consent to search existed only and that probable cause to search was not an issue in the case. The following excerpts from the officer at the scene establish this:

> Q Okay. Now, you asked for consent [be]cause you did not have probable cause, correct? You agree with that?
>
> A Absolutely.
>
> Q All right. And you certainly didn't have a warrant at that point, right?
>
> A Correct.
>
> Q Okay. And, at that point, neither fellow was under arrest. So, this wasn't a search incident to arrest, correct?
>
> A Correct
>
> Q And the car had not been impounded. So, this was not a search—an inventory search of any sort, correct?
>
> A Correct.
>
> Q As this was a warrantless search based on the consent of Mr. Carr (driver) correct?

A Correct.

Q. You did not have probable cause?

A. Correct. R. 39, lines 1-17; R. 61,lines 1-2.

Defense counsel: The consent cause there's no probable cause.

The Court: The real issue in this case is not about the probable cause for the stop.

The Court: It's really not about the consent for the, for the search of the car cause certainly Mr. Carr, can consent to his car being searched.

R. p. 47, l.22- p. 48, l. 4.

Defense Counsel: The consent of the driver could not extend to the closed bag [of appellant] South Carolina has not addressed this issue [consent] directly besides to accept the Fourth Amendment analysis of warrantless searches.....and the exception that's being relied on [here] is the consent.
R. 67 lines 18-24.

Solicitor: Well, the stop itself is fine. I do not contest the seizure of the car...we'll just jump right consent, your honor.
R. 70, l. 24 – p.71, l.3.

Court: But [your officer] says he didn't feel he had probable cause [to search the whole vehicle] so then comes your rub...because the next exception is consent...there is a void in our case law that deals with the scope of consent of a search by a third party by the owner of a vehicle.
R. 72, lines 8-13, R.78, lines 20-22.

Near the close of the hearing, defense counsel stated the following:

> I believe the question to be answered in this case is, did the policeman need the consent of Mr. Dawson to go in the backpack or was the general consent given by the driver enough to go into the backpack. R. 66, lines 13-16.

The respondent erroneously argued in the state's brief that consent was validly given, but more importantly that probable cause supported the search in question and that since the lower court addressed probable cause to search, in addition to the validity of consent to search, in the Order denying the motion to suppress, then the trial judge's finding of probable cause to search became the law of the case since the same was not addressed on appeal by appellant. The respondent's argument follows:

> Pursuant to the law-of-the-case doctrine, Appellant's challenge to the propriety of the ruling denying his suppression motion cannot be successful on appeal as a matter of law because Appellant has only raised a challenge to one of the multiple stand-alone grounds upon which the ruling was based, which means the unchallenged ground has now become the law of the case regardless of whether it was right or wrong. Furthermore, notwithstanding the applicability of the law-of-the-case doctrine under the circumstances involved, Appellant's suppression motion was properly denied because the officer who conducted the search possessed a probable cause basis to believe narcotics were likely present in the vehicle and, therefore, could validly conduct a search of the vehicle—along with the backpack inside of it—pursuant to the automobile exception to the warrant requirement.

The trial judge denied appellant's motion after ruling that consent was proper and valid, and that there was probable cause to search. However, the issue of the improper consent was the only issue in the case and had been clarified as such at the hearing. Thus, the consent issue was raised on appeal. Note the procedural bar against raising one issue below and another on appeal. In addition, note further that the respondent's claim that there was probable cause to excuse the warrantless search and that since probable cause was ruled on by the lower court, but not discussed on appeal by appellant, then the lower court's finding that probable cause existed for the search would mean that the denial of the motion to suppress should be affirmed cannot stand legally because the reliance on the law of the case doctrine is misplaced. The reason being that as

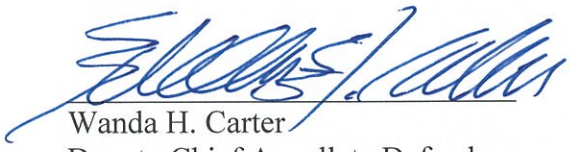
a matter of law, none of the eight exceptions to excuse a warrantless search included a probable cause to search. Thus, the trial judge's ruling regarding probable cause as an exception to the warrantless search in denying the motion to suppress was error as a matter of law, which means the reliance on the law of the case doctrine cannot stand. Again, the warrantless search exceptions are search incident to arrest, hot pursuit, stop and frisk, automobile, plain view, consent, abandonment, and exigent circumstances. Nowhere on that list is probable cause contained as a separate exception. The only issue in the case, which was addressed below and on appeal was the question of whether consent existed to support the warrantless search.

Additionally, the automobile exception is of no consequence because the instant search involved appellant's bag in the automobile itself and the question of the owner's limited third-party consent therein. In closing, note that the cases where probable case had been found to justify an automobile search were cases where the actual automobile itself was searched and the automobile belonged to the owner and items inside belonged to the vehicle's owner rather than incidents where the articles inside belonged to a passenger's individual bag from the automobile. Thus, neither probable cause nor the automobile exception would fit into this case. Again, the instant case is distinguishable from the probable cause cases cited by the respondent where the vehicle and vehicle compartments were searched because the issue there revolved around the vehicle owner's contents and not bags belonging to third parties inside the vehicles. State v. Bailey, 276 S.C. 32, 274 S.E.2d 913 (search of truck) State v. Cox, 290 S.C. 489, 351, S.E.2d 570 (1986)(vehicle trunk). Here, there was a bag belonging to a passenger, i.e., appellant inside a car where consent was requested from the driver and thereafter the question became whether the driver could issue a third-party consent to search of passenger appellant's bag. No such consent was legally valid. See Brief of Appellant.

Finally, in the event a probable cause issue would arise in the case, appellant would argue on appeal that the officer's view of a plastic baggy in the driver's lap raised probable cause only with respect to the driver, and that there was no such similar sighting about appellant's personal space inside the car to raise any probable cause to search appellant's bag in the case.

CONCLUSION

Based on the foregoing argument, counsel would request that this Court reverse the lower court's denial of appellant's suppression motion and vacate his convictions and sentences.



Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR APPELLANT

This 1st day off June, 2021.