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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from York County
Honorable J. Mark Hayes, II, Circuit Court Judge

THE STATE OF SOUTH CAROLINA,

Respondent,

vs.

TAVIS ANDRE COLSTON,

Appellant.

Appellate Case No. 2020-000257

FINAL BRIEF OF RESPONDENT

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APPELLANT'S STATEMENT OF ISSUES ON APPEAL

I. Whether the lower court erred when it denied Appellant's motion to suppress the bag of drugs found in this case where the drugs were seized from appellant's car without a warrant and the plain view exception did not apply because the criminal nature of the drugs was not immediately apparent to Officer Pence as he initially saw the bag's contents as a "white substance," but after he entered Appellant's car he discovered contents of the bag were actually "blue and red pills"?

II. Whether the lower court erred when it denied Appellant's motion for a continuance where the lower court abused its discretion by failing to exercise its discretion because it did not want to disturb the earlier denial of Appellant's motion for continuance by the administrative judge where the administrative judge wrongfully vested the inherently judicial power of control of the order of the docket to the solicitor?

RESPONDENT'S STATEMENT OF ISSUES ON APPEAL

I. Regardless of the color of the pills, their illegality was immediately apparent and met the plain view exception, but nonetheless in Court's Exhibit 1, the narcotics placed on the hood of the police vehicle appear to be white, and not blue or red, and the officer told Appellant he saw "white stuff." The search and seizure was also lawful under the automobile exception to the search warrant requirement.

II. The trial court did not err in denying the continuance motion because both parties were prepared to try the charge. The administrative judge was not provided a sufficient basis by the public defender to continue the case that was set for trial. Further, the issue is moot.

STATEMENT OF THE CASE

Appellant Tavis Colston was tried for possession of methamphetamine, second offense, on February 12-13, 2020, and convicted by a jury as charged. The day of trial, Appellant moved for a continuance and also moved to suppress the seized narcotics. Those motions were denied by the Honorable J. Mark Hayes, II. Appellant was sentenced to five years' imprisonment, suspended to twenty-four months' imprisonment and thirty-six months' probation.

At a previous hearing held on January 31, 2020, Appellant made a motion for continuance which was denied by the Honorable Daniel Dewitt Hall. The basis of the continuance motion made to both Judge Hayes as the trial judge, and to Judge Hall in his role as the Chief Administrative Judge for the Sixteenth Judicial Circuit, was to postpone trial of his methamphetamine possession charge until charges incurred earlier for trafficking cocaine and trafficking methamphetamine, alleged to have been committed on or about September 18, 2018, were tried first (2018-GS-46-7478 and 7479). Appellant wanted to avoid those trafficking charges being enhanced to third offense trafficking by use of the conviction for possession of methamphetamine in the present case. Since Appellant submitted his brief, Appellant pled guilty on April 21, 2021, to both of those trafficking charges as second offenses, and was sentenced to ten years' imprisonment for both charges to be served concurrently.

ARGUMENT

I.

Regardless of the color of the pills, their illegality was immediately apparent and met the plain view exception, but nonetheless in Court's Exhibit 1, the narcotics placed on the hood of the police vehicle appear to be white, and not blue or red, and the officer told Appellant he saw "white stuff." The search and seizure was also lawful under the automobile exception to the search warrant requirement.

Appellant claims the trial court erred in denying Appellant's motion to suppress the narcotics seized because the narcotics were blue and the deputy said they were white. In the video, the pills were white. Further, their illegality was readily apparent regardless of their color. Moreover, under the automobile exception to the search warrant requirement, law enforcement was permitted to search the vehicle and determine if the bag contained narcotics.

Motion to Suppress

Prior to trial, Appellant moved to suppress the seized methamphetamine pills, arguing the plain view exception should not apply because the deputy was mistaken about what he saw, and therefore, according to Appellant, the illegality of the substance was not readily apparent.

The deputy, Deputy Gary Pence, testified he responded to a Saluda Road address in Rock Hill following a report of a disturbance. When he arrived, Appellant was standing in the driveway. Deputy Pence testified as follows:

> I got out and immediately talked with Mr. Colston, just trying to figure out what was going on. . . . I asked him for his ID and he told me that it was in his vehicle. He started to walk towards his vehicle. I asked him if he'd mind – or if there were any weapons or anything inside of the vehicle, which he said there were not [sic]. I then asked him if he was okay with me retrieving his ID from the vehicle, in which he did say that it was okay. I reached inside, and in the front

> passenger seat, grabbed a wallet that had his ID card in it. While looking at his ID card, Mr. Colston was standing beside me, which we were right beside his vehicle. He was continually looking into the vehicle, and then grabbed a white T-shirt that was on the front of the vehicle and threw it inside of the vehicle through the open front passenger window. When he did that, I looked into the vehicle. The shirt landed in the – on the center console. And I noticed before it landed, there was a small bag that appeared to have a white substance – you know, it was a plastic bag. It was tied into a knot. It appeared to be narcotics to me.

R. p. 20, line 16 – p. 21, line 11. The incident was captured on Deputy Pence's body-cam. R. p. 21.

The trial court noted it watched the video and listened to the officer's testimony, then ruled that the State met its burden of establishing probable cause for the search. R. p. 26, lines 15-19.

Court's Exhibit 1

During the motion to suppress, the body-cam footage was admitted as Court's Exhibit 1. It depicts the event described by Deputy Pence as testified to by Deputy Pence. When Deputy Pence places the substance seized on the hood of his patrol vehicle, the bag appears to hold **a white substance**. Court's Exhibit 1 (freeze at approx. 5:45). He summarized what occurred succinctly to a fellow officer at the end of the video. Court's Exhibit 1 (7:30 to completion). Respondent has designated this exhibit for the record.

Trial Testimony

The first witness at trial was Jeffrey Long, who testified Appellant is the father of Long's daughter's son. Appellant came to their residence and banged on the door demanding to see his son and "causing problems." On cross-examination, Long explained Appellant threatened to pull a gun on him. Long took Appellant's keys so Appellant could not leave before police arrived. R. p. 35.

Deputy Pence testified similarly to his pre-trial testimony. Deputy Pence further explained,

"[W]hile I was getting his ID out of his wallet, [Appellant] was continually trying to get around me. I noticed a little – his – began to change – he seemed a little nervous to me." R. p. 42, lines 11-14. That was when Appellant threw the T-shirt into the vehicle, which caused Deputy Pence to notice the plastic bag tied in a knot "that appeared to have narcotics in it, so I placed Mr. Colston in custody and took him back to the front of my vehicle." R. p. 42, lines 14-23. Deputy Pence later testified that when Deputy Pence started towards the vehicle, Appellant seemed to want to get there before Deputy Pence. R. p. 44, line 24 – p. 74, line 3. Deputy Pence gave the drugs to Deputy Mulder once he retrieved them. R. p. 45.

Appellant told Deputy Pence the pills were not drugs, but some sort of supplement. R. p. 60. However, the forensic chemist testified she tested each pill and determined each one contained methamphetamine. R. p. 66. The chemist further testified the pills or tablets did not have any clear markings or appear to be similar to prescription pills. R. p. 67.

Standard of Review

"South Carolina appellate courts review Fourth Amendment determinations under a clear error standard." State v. Provet, 405 S.C. 101, 107, 747 S.E.2d 453, 456 (2013). "When reviewing a Fourth Amendment search and seizure case, an appellate court must affirm if there is any evidence to support the ruling." State v. Wright, 391 S.C. 436, 442, 706 S.E.2d 324, 326 (2011).

Plain View Exception to the Search Warrant Requirement

"[O]bjects falling within the plain view of a law enforcement officer who is rightfully in position to view these objects are subject to seizure and may be introduced in evidence." State v. Brown, 289 S.C. 581, 588, 347 S.E.2d 882, 886 (1986). "[T]he two elements needed to satisfy the plain view exception are: (1) the initial intrusion which afforded the authorities the plain view was

lawful and (2) the incriminating nature of the evidence was immediately apparent to the seizing authorities." Wright, 391 S.C. at 443, 706 S.E.2d at 327.

The initial view of the contraband occurred while Deputy Pence stood outside Appellant's vehicle. The "search" was lawful. So was the "seizure" of the pills. The United States Supreme Court has made it clear that one does not have a legitimate interest in contraband. The Court held:

> Official conduct that does not "compromise any legitimate interest in privacy" is not a search subject to the Fourth Amendment. Jacobsen, 466 U.S., at 123, 104 S.Ct. 1652. We have held that any interest in possessing contraband cannot be deemed "legitimate," and thus, governmental conduct that only reveals the possession of contraband "compromises no legitimate privacy interest." Ibid. This is because the expectation "that certain facts will not come to the attention of the authorities" is not the same as an interest in "privacy that society is prepared to consider reasonable." Id. at 122, 104 S.Ct. 1652 (punctuation omitted).

Illinois v. Caballes, 543 U.S. 405, 408-409 (2005).

In Texas v. Brown, 460 U.S. 730 (1983), the United States Supreme Court examined the plain view exception in detail. In that case, an officer stopped Brown's vehicle at a driver's license checkpoint. The Officer shined a light into Brown's vehicle and observed Brown holding an opaque green party balloon he furtively placed by the car seat beside his leg while reaching for the glove compartment. The officer was aware narcotics were frequently packaged in balloons like the one in Brown's possession. The officer observed quantities of loose white powder and a bag of balloons when Brown opened the glove compartment. The officer instructed Brown to exit the vehicle and before following him, the officer picked up the green balloon which seemed to have a powdery substance inside later found to be heroin. Id. at 733-35. The Supreme Court reviewed the Texas Court of Criminal Appeals' holding that the plain view exception did not apply because the

"immediately apparent" requirement of the plain view exception was not met since the officer only saw a green balloon and did not know "incriminating evidence was before him." Id. at 736.

Reflecting on its own case law regarding the plain view exception, the Supreme Court observed, "[O]ur decisions have come to reflect the rule that if, while lawfully engaged in an activity in a particular place, police officers perceive a suspicious object, they may seize it immediately." Id. at 739. "This rule merely reflects an application of the Fourth Amendment's central requirement of reasonableness to the law governing seizures of property." Id. The Court explained, "'Plain view' is perhaps better understood, therefore, not as an independent 'exception' to the warrant clause, but simply as an extension of whatever the prior justification for an officer's 'access to an object' may be." Id. at 738-39.

Examining the "immediately apparent" requirement, the Supreme Court found the state court misinterpreted "immediately apparent" to mean "the officer must be possessed of near certainty as to the seizable nature of the items. Decisions by this Court . . . indicate that the use of the phrase 'immediately apparent' was very likely an unhappy choice of words, since it can be taken to imply that an unduly high degree of certainty as to the incriminatory character of evidence is necessary for an application of the 'plain view' doctrine." Id. at 741. The Supreme Court advised: "Plainly, the Court did not view the 'immediately apparent' language . . . as establishing any requirement that a police officer 'know' that certain items are contraband or evidence of a crime." Id. at 741. Noting "probable cause is a flexible, common sense standard" that "merely requires that the facts available to the officer would 'warrant a man of reasonable caution in the belief,'" the Court held that "[a] 'practical, nontechnical' probability that incriminating evidence is involved is all that is required." Id. at 742. The Supreme Court noted the fact the officer could not see through the fabric of the

balloon to see its contents was irrelevant, "the character of the balloon itself spoke volumes as to its contents – particularly to the trained eye of the officer." Id. at 743.

In State v. Knowles, 438 So.2d 648 (La. Ct. App. 1983), the defendant complained the plain view exception should not apply because the marijuana seized was not plainly visible. The officer observed a hand rolled cigarette stuck to the defendant's pants when the defendant got out of his vehicle. The officer "seized" the cigarette and discovered it contained marijuana. The defendant argued that the contraband was concealed within in the cigarette paper and the cigarette could as just as well have held tobacco. Reviewing Brown, the Louisiana Court noted "officers could have had a reasonable suspicion that the partially burned cigarette paper in plain view on the defendant's trousers when he stepped from his automobile contained the contraband substance marijuana." Id. at 651-652.

In the present case, Deputy Pence was responding to a 911 call for a domestic disturbance and was appropriately requesting identification from Colston who stood outside Long's residence. "Assuming a lawful stop, an officer is entitled to some chance to gain his bearings and to acquire a fair understanding of the surrounding scene. Just as the officer may ask for the identification of the driver of a lawfully stopped vehicle . . . so he may request identification of the passengers also lawfully stopped. No separate showing is required." United States v. Soriano-Jarquin, 492 F.3d 495, 500 (4th Cir. 2007). Colston informed Deputy Pence the identification was in Colston's vehicle and Colston consented to Deputy Pence retrieving the identification. Colston does not challenge whether Deputy Pence was in a lawful position to observe the contraband when he was standing outside Colston's vehicle. This is when Deputy Pence observed what he described as a white substance in a bag tied up in a knot that appeared to him to be drugs. Thus, Deputy Pence articulated probable

cause to seize the narcotics.

Colston focuses on the details of the description: the drugs were blue, not white, he contends. This argument is undermined by the fact that the substance appears to be white in the video. See Court's Exhibit 1. However, regardless of the color of the contraband, the critical information is the packaging of the materials and also the physical appearance, rather than the color, of the substance that led Deputy Pence to believe he was viewing narcotics. Colston is effectively relying on an argument like the one rejected in Brown by suggesting Deputy Pence needed to be certain of the illegality of the substance he observed, or at least its color. However, as the Brown court noted, probable cause deals in probabilities and not certainty, and definitely not certainty of color (although the bag appears white). Deputy Pence articulated a proper basis to find probable cause to seize the narcotics from the vehicle.

Perhaps more directly applicable is the automobile exception. State v. Bailey, 276 S.C. 32, 36, 274 S.E.2d 913, 915 (1981); see State v. Morris, 395 S.C. 600, 609, 720 S.E.2d 468, 472 (Ct. App. 2011) ("[T]he ready mobility of and the lessened expectation of privacy in automobiles endorse an exception to that rule based upon probable cause."). Pursuant to the automobile exception, law enforcement officers may conduct a warrantless search of an automobile based on probable cause alone. State v. Bultron, 318 S.C. 323, 332, 457 S.E.2d 616, 621 (Ct. App. 1995). 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." Id. Significantly, "[i]f 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." State v. Weaver, 374 S.C. 313, 320, 649 S.E.2d 479, 482 (2007).

In Colorado v. Bannister, 449 U.S. 1 (1980), the officer approached a vehicle at a gas station that the officer just observed speeding on the highway and standing on the side of the automobile saw items recently stolen nearby and the occupants matched the description of the suspects. The Supreme Court held, "these circumstances provided not only probable cause to arrest, but also [under the automobile exception] probable cause to seize the incriminating items without a warrant." Id. at 4 (internal citations omitted). Red, white, or blue, Deputy Pence, based on his experience, recognized from the pills' appearance and packaging that he had probable cause to believe he was looking at illegal narcotics; and therefore, he could seize the bag of pills from the automobile without a warrant under the automobile exception to the warrant requirement.

In conclusion, the bag in the video appears to hold white substance, just like Deputy Pence described. Furthermore, the narcotics were in Deputy Pence's plain view and its illegality was immediately apparent. Therefore he could seize the bag of white substance without a warrant. And additionally, Deputy Pence properly seized the narcotics under the automobile exception to the warrant requirement. Therefore, evidence supports the trial court's denial of the suppression motion and the conviction and sentence should be affirmed.

II.

The trial court did not err in denying the continuance motion because both parties were prepared to try the charge. The administrative judge was not provided a sufficient basis by the public defender to continue the case that was set for trial. Further, the issue is moot.

Appellant argues the trial court erred in denying his motion for a continuance. Appellant's request for a continuance was not based on his preparedness for trial but his wish to limit his sentence exposure for two separate trafficking charges by preventing a potential conviction for the instant possession charge being used to enhance the two trafficking charges to third offenses. Since Appellant's public defender was prepared for trial, the trial court did not err in denying the motion for a continuance. After filing his initial brief, Appellant pled guilty to the trafficking charges as second offenses and without the instant possession conviction enhancing the trafficking charges. Therefore the issue is moot.

On January 31, 2020, in a hearing before Judge Hall in his role as administrative judge for General Sessions, Appellant's public defender asked for a continuance for a trial on the instant possession charge that was scheduled in two weeks. The basis of the motion was Appellant wanted the prosecution to first proceed on trafficking charges that were a year older to avoid the risk that a conviction for the instant possession charge would enhance the trafficking charges to a third offense and a minimum twenty-five years' imprisonment. The public defender did not represent Appellant on the trafficking charges; instead, Appellant was represented by private counsel. The public defender, while moving for a continuance in the instant case, stated Appellant's private counsel moved for a speedy trial on the trafficking charge. The prosecution noted the instant possession case was expected to be a one-day trial. R. pp. 4-5.

Judge Hall ruled as follows:

> I am going to deny the continuance. Here is the thing, Mr. Colston. The Court can't assess cases, the strengths and weaknesses of cases, the evidence in the cases. In our system, that is the State's responsibility. It's their privilege and their right. Listen to me.
>
> When they make that – when they assess those cases, in determining which cases to try, they have various reasons for those. Again, that is their right. That is their responsibility.
>
> The Court doesn't have any authority to order them to try a particular case at a particular time, unless they have already told me that they are ready for trial and the defense is ready for trial and everybody has agreed on it.
>
> Where we are today is that they have agreed that possession is the trial. They are ready for trial. It has been scheduled for trial.
>
> So I will deny your continuance. I am not going to order the State, because I don't believe I have any judicial authority to order them which case to call at what time.

R. p. 7, line 6 - p. 8, line 2.

At the beginning of trial, the public defender asked Judge Hayes for a continuance. The public defender argued the trafficking charge Appellant was facing occurred almost a year before the commission of the present charge. R. pp. 4-5. The public defender argued:

> And, lastly, in the interest of justice, the same reason that we don't want it to be scheduled prior to the other one, and we want it to be continued until after that one's trial date is the same reason they want to do it, which is they plan to enhance that prior in time charge to a third offense, which would carry a mandatory minimum of 25 years. And we think it's a manifest injustice for him and would, in effect, be cruel and unusual punishment for him to be getting a mandatory minimum on a charge for something that happened a whole year earlier in time based on a conviction of something that happened a year later.

R. p. 5, line 18 – p. 6, line 3.

The State noted Judge Hall ruled on the motion, finding the State could try the cases in the order it saw fit. The State advised: "We agree with Judge Hall that we can try this case before the

other one, even though it is newer. And the conviction from this case could also enhance an earlier arrest." R. p. 7, lines 17-22. Judge Hayes declined to overturn the ruling made by Judge Hall but advised the trial court would entertain a continuance request based on anything occurring since Judge Hall's decision or on a basis that Judge Hall did not rule upon. R. p. 8, lines 14-21. However, the public defender did not offer any further reason to continue the trial.

A trial court's denial of a motion for continuance is left to the sound discretion of the trial court and will not be disturbed absent an abuse of that discretion resulting in prejudice to the defendant. State v. Williams, 321 S.C. 455, 469 S.E.2d 49 (1996). Reversals from the denial of a defendant's motion for continuance are as "rare as the proverbial hens' teeth." State v. Mansfield, 343 S.C. 66, 538 S.E.2d 257 (Ct. App. 2000).

The basis of Appellant's motion was his desire to dispose of his trafficking charges before he was convicted of the present charge so as to limit his exposure for the trafficking charge. "Litigants have no vested right in the order in which cases are assigned for trial." Levine v. United States, 182 F.2d 556, 559 (8th Cir. 1950) (quoted favorably by State v. Harrison, 432 S.C. 448, 854 S.E.2d 468, 486 (2021) (Hearn, concurring)).

By order dated June 28, 2019 (Re: Duties of Circuit Court Judges for Administrative Purposes), the South Carolina Supreme Court ordered the circuit court judge designated as a chief administrative judge in a judicial circuit is granted the authority to under paragraph 1, call meetings "of the County Bar Association for the purpose of preparing civil and criminal rosters . . ." and under paragraph 4, "[t]o manage the criminal docket after consultation with the Circuit Solicitor, Circuit Public Defender, and Clerk of Court."

As quoted earlier, Judge Hall observed that ordinarily he does not have the ability to call a

case until both parties indicate they are ready to proceed. Absent from the record is any indication that the prosecutor or private counsel indicated to Judge Hall they were ready to try the trafficking charge or that private counsel was present at any meeting or consultation regarding the scheduling of the trial of the trafficking charges. Indeed, the record fails to reflect private counsel appeared at the January 31 hearing before Judge Hall. Without private counsel present, it would be inappropriate for Judge Hall to take any action on the trafficking charges and in derogation of the June 28 order requiring consultation with counsel for both parties to the trafficking charge before setting it for trial. Additionally, Judge Hall did not have a basis to grant a continuance request for a charge both parties admitted being prepared to try.

Moreover, Appellant's prejudice would arise only if the prosecutor, after successfully attaining a conviction for the instant possession charge, proceeded on the trafficking charges, the case went to trial, and the jury convicted him of trafficking (and not a lesser offense). If that scenario were to play out, Appellant would be able to bring any meritorious challenge to the use of the present conviction to enhance his trafficking offense at the time of sentencing. For Judge Hall, the alleged controversy was not ripe, since the prosecution did not have the ability to enhance the trafficking charge without a conviction for possession, assuming the prosecution went forward on the trafficking charge at all. Waters v. South Carolina Land Resources Conservation Comm'n, 321 S.C. 219, 227, 467 S.E.2d 913, 917-18 (1996) ("A justiciable controversy is a real and substantial controversy which is ripe and appropriate for judicial determination, as distinguished from a contingent, hypothetical or abstract dispute."). Judge Hayes, as a trial judge, did not have a basis to grant a continuance request either, as both parties were prepared for a trial set by Judge Hall.

Instead, Appellant pled guilty to the trafficking charges as second offenses on April 21, 2021,

before the Honorable William J. McKinnon pursuant to a negotiated sentence. See Sentencing sheets (R. p. 98, p.101). Therefore, the risk that these charges would be used to enhance Appellant's trafficking charges to a third offense has passed. Accordingly, the issue is now moot. "Where there is no actual controversy, this Court will not decide moot or academic questions." South Carolina Retirement System Investment Comm'n v. Loftis, 402 S.C. 382, 384, 741 S.E.2d 757, 758 (2013).

The trial court did not err in declining to disturb the administrative law judge's determination that a continuance was not warranted because both parties were prepared for trial. Further, the issue was rendered moot by Appellant's plea to the trafficking charges without use of the conviction in the present case for enhancement.

CONCLUSION

For all of the foregoing reasons, the judgment and conviction of the lower court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent 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."

Respectfully submitted,

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