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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, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

TAVIS ANDRE COLSTON,

APPELLANT

APPELLATE CASE NO 2020-000257

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1. 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 plainview 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"?

2. 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?

STATEMENT OF THE CASE

During the December 2019 term, the York County Grand Jury indicted Appellant for possession of methamphetamine, second offense. R. 93. On February 12 – 13, Appellant proceeded to trial before the Honorable J. Mark Hayes, and a jury. R. 10. Jeffrey Baldwin Zuschke represented Appellant. Id. Austin Newman Smith and Maria Bender Hamilton represented the state. Id.

After the lower court denied Appellant's pretrial motion to suppress the drugs seized, Appellant was found guilty as indicted and sentenced to five years' imprisonment suspended upon twenty-four months of service and thirty-six months of probation. R. 84, ll. 7 – 15; R. 92, ll. 12 – 15.

This appeal follows.

STANDARD OF REVIEW

1. In Fourth Amendment search and seizure cases, the standard of review is limited to the following:

> The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion. An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support. When reviewing a Fourth Amendment search and seizure case, an appellate court must affirm if there is any evidence to support the ruling. The appellate court will reverse only when there is clear error.

State v. Wright, 391 S.C. 436, 442, 706 S.E.2d 324, 326 (2011) (citations and internal quotation marks omitted). This deference does not bar appellate courts from conducting their own review of the record to determine whether the trial judge's decision is supported by the evidence. State v. Tindall, 388 S.C. 518, 521, 698 S.E.2d 203, 205 (2010).

2. A motion for continuance is addressed to the sound discretion of the trial court and its ruling on such motion will not be reversed without a clear showing of abuse of discretion. State v. Browder, 277 S.C. 206, 284 S.E.2d 775 (1981). In South Carolina "[t]he grant or denial of a continuance is within the sound discretion of the trial judge and is reviewable on appeal only when an abuse of discretion appears from the record." Plyler v. Burns, 373 S.C. 637, 650, 647 S.E.2d 188, 195 (2007). Even if there was no evidentiary support, " '[i]n order for an error to warrant reversal, the error must result in prejudice to the appellant.' " Geer, 391 S.C. 179, 190, 705 S.E.2d 441, 447 (Ct. App. 2010) (quoting State v. Preslar, 364 S.C. 466, 473, 613 S.E.2d 381, 385 (Ct. App. 2005)).

ARGUMENT

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 plainview 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"

Relevant Facts

On August 31, 2019, Appellant went to his girlfriend's house to see their child. R. 33, l. 6 – 34, l. 1. Jeffrey Long, girlfriend's father, called the police to get Appellant to leave. Id.

Officer Gary Pence responded to the call and arrived at the scene. R. 41, l. 10 – 42, l. 23. Pence testified at Appellant's trial that as Appellant was leaving, he grabbed a jacket from his car and Pence saw "in plainview" a bag in Appellant's car that contained methamphetamine. R. 23, l. 15 – 24, l. 4; R. 44, l. 18 – 46, l. 5. Appellant was then arrested for possession of methamphetamine. Id.

Prior to trial, defense counsel made a motion to suppress the drug evidence because the search of Appellant's car was done without probable cause or a warrant. R. 16, l. 4 – 17, l. 18. Defense counsel also explained that the plainview exception to the warrant requirement did not apply because the criminal nature of contents of the bag that Pence saw in the car was not immediately apparent. Id. Pence claimed he saw a "white substance" in the bag, but after taking possession of the bag he saw it actually contained "blue and red pills." R. 24, ll. 14 – 24. Defense counsel argued that Pence "just saw a bag" the illegal nature of which was not apparent "short of [Pence] having preconceived notions about [Appellant]." R. 26, ll. 9 – 14.

The state argued that Pence thought the light blue pills "looked white" and made Pence believe they were narcotics. R. 22, l. 18 – 23, l. 5.

The court denied the motion to suppress because the state carried its burden of establishing that there was probable cause for the search. R. 26, ll. 15 – 19. As a result, the drugs were not suppressed, and Appellant was found guilty of possession of methamphetamine. R. 84, ll. 7 – 15.

Discussion

The trial court erred when it denied Appellant's motion to suppress the drugs seized without a warrant in this case because the criminal nature of the contents of the seized bag was not "immediately apparent" such that the plainview exception to the warrant requirement did not apply.

"Under the 'plainview' exception to the warrant requirement, objects falling within the plain view of a law enforcement officer who is rightfully in a position to view the objects are subject to seizure and may be introduced as evidence." State v. Wright, 391 S.C. 436, 443, 706 S.E.2d 324, 327 (2011) (quoting State v. Beckham, 334 S.C. 302, 317, 513 S.E.2d 606, 613 (1999). In Horton v. California, 110 S.Ct. 2301 (1990) the United States Supreme Court put forth a two-prong test for determining if a seizure is justified under the plainview exception. Horton, at 2308. The two prongs required for the plain view exception are: (1) the initial intrusion, that afforded the authorities the plain view was lawful and (2) the incriminating nature of the evidence was immediately apparent to the seizing authorities. State v. Wright, 391 S.C. 436, 443, 706 S.E.2d 324, 327 (2011).

In Arizona v. Hicks, 107 S.Ct. 1149 (1987), the United States Supreme Court held the plainview exception did not apply to the stereo equipment seized by police without a warrant.

Hicks, at 107 S.Ct. at 1153 – 54. In Hicks, a bullet was fired through the floor of Hick's apartment, striking and injuring a man in the apartment below. Hicks, at 1151 – 52. Police officers arrived and entered Hicks' apartment to search for the shooter, for other victims, and for weapons. Id. Officer Nelson noticed two sets of expensive stereo components, which seemed out of place in the "squalid" apartment. Hicks, 107 S. Ct. at 1152. Nelson suspected the stereos were stolen, so he moved them to read their serial numbers. Id. After he reported the serial numbers by phone to police headquarters, he discovered that the stereos were stolen and seized them. Id.

The Court held Officer Nelson's moving of the equipment did constitute a "search" separate and apart from the search for the shooter, victims, and weapons that was the lawful objective of his entry into the apartment. Id. at 1152 – 53. Merely inspecting those parts of the turntable that came into view during the authorized search would not have constituted a search, because it would have produced no additional invasion of respondent's privacy interest. Id.; See Illinois v. Andreas, 103 S.Ct. 3319, 3324 (1983). However, when Nelson moved the equipment to expose the serial numbers, the invasion of Hick's privacy was unjustified by the exigent circumstance that validated the entry. Hicks, 107 S. Ct. at 1152 – 53. Accordingly, since the criminal nature of the stereo equipment was not "immediately apparent" until Nelson moved the equipment the plainview exception was inapplicable and the evidence had to be suppressed at Hicks' trial.

Here, as in Hicks, the incriminating nature of the drugs found in Appellant's car was not immediately apparent. R. 26, ll. 9 – 14; Hicks, 107 S. Ct. at 1152 – 53. Officer Pence testified that he saw a "white substance" in the bag, when in reality the bag contained "blue and red pills." R. 24, ll. 14 – 24. In order to identify an object's incriminating nature, the officer must first

correctly identify the object itself. Law enforcement should not be permitted to see a mirage of an object with an incriminating nature to justify a seizure under the plainview exception.

Accordingly, the lower court erred when it denied Appellant's motion to suppress the drugs seized without a warrant by Officer Pence where the plainview exception was inapplicable because the incriminating nature of the bag seized was not immediately apparent.

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.

Relevant Facts

Prior to trial defense counsel moved for a continuance. R. 11, l. 19 – 15, l. 21. Defense counsel gave multiple reasons for why the continuance motion should be granted. Id. Defense counsel explained that Appellant had an older and more serious case that occurred almost a year prior to the charges in the current case, so that case should be tried first. Id. Furthermore, in the older case, Appellant's attorney Jeffrey Dunn filed a motion for a speedy trial. Id. Accordingly, defense counsel argued "in the interest of justice" the current case should have been tried after the older case because the state is using the current charge to enhance the older, more serious charge and Appellant would face up to twenty-five years' imprisonment after enhancement. Id.

Appellant's older, more serious charge was for trafficking methamphetamine. R. 90, l. 10 – 92, l. 10. Defense counsel called the state's enhancement of his older trafficking charge with the current possession charge "manifest injustice" and "cruel and unusual punishments." R. 12, l. 18 – 13, l. 3.

Defense counsel said that the request for a continuance was already made in front of an administrative judge. Defense counsel relayed Hall's decision that the continuance motion could be made again before the trial court. Defense counsel stated "Certainly, [Hall] did expect that [the motion for continuance] would be heard again by you." R. 13, l. 6 – 14, l. 2.

The state claimed that Judge Hall made a ruling that "the state can call the cases in any order, even if this one is newer," and that it was not improper for the state to use the newer charge to enhance the older one. R. 14, ll. 11 – 24. The state requested the trial court follow the administrative judge's ruling that "the state can try the cases in whichever order they deem fit." Id.

The trial court here ruled that since the administrative judge made a substantive ruling, "it would be inappropriate… to make a subsequent ruling that addresses those particular issues." R. 15, ll. 2 – 21. Appellant's motion for a continuance was denied.

Discussion

The trial court erred when it denied Appellant's motion for continuance because the earlier administrative judge's ruling the trial court relied on was an error. The control of the court's docket is vested in the judicial branch and the solicitor is part of the executive branch. See State v. Langford, 400 S.C. 421, 735 S.E.2d 471 (2012).[1] Thus, the trial court abused its discretion by failing to exercise its discretion and correct the administrative judge's ruling that "the solicitor could try the cases in whichever order they deemed fit" because that ruling wrongfully vested the control of the docket to the solicitor. R. 14, ll. 11 – 24.

In State v. Langford, our Supreme Court held that § 1-7-330 was an unconstitutional violation of the separation of powers. Langford, at 428, 735 S.E.2d at 475; § 1-7-330 S.C. Code Ann. The Court stated that the solicitor can determine the *manner* in which they prosecute a case but not the *order* of when they are tried. Id. at 453 n.6, 735 S.E.2d 485 n.6. The manner of a how a case is prosecuted includes decisions such as whether to consolidate or sever multiple charges,

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[1] The Solicitor's Association of South Carolina stated in its own amicus brief that "The Office of the Solicitor is part of the Executive branch of our state government." Langford, at 435, 735 S.E.2d at 478.

what charges to take to trial, and whether or not to make a guilty plea offer or take the case to trial. Id.

The Court in Langford, held that while the statute violated the separation of powers, Langford's convictions were affirmed because "to warrant reversal [a defendant] must demonstrate that he sustained prejudice as a result of the solicitor setting when his case was called for trial." Id. at 436, 735 S.E.2d at 479; see also State v. Hardin, 425 S.C. 1, 10 – 11, 819 S.E.2d 177, 182 (2018).

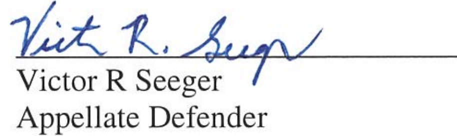
In State v. Page, 406 S.C. 472, 750 S.E.2d 623 (Ct. App. 2013), this Court held that the trial court did not err when it ruled that the solicitor had authority to determine the manner in which they proceed with a case's prosecution. Id. at 285 – 86; 750 S.E.2d at 630. This court explained that "while a solicitor can no longer determine the "order" in which cases are called, *Langford* makes clear that a solicitor's authority to determine how a solicitor "proceed[s]" with any particular case, *i.e.*, the manner, remains permissible." Id. at 286, 750 S.E.2d at 630.

In the present case, Appellant suffered prejudice from the denial of his motion for a continuance because the solicitor's improper control of the *order* of his trials subjected Appellant to much longer sentencing exposure on his older trafficking charge. R. 12, l. 18 – 13, l. 3. The solicitor's control over the docket here was not an exercise of their power to control the manner of how they prosecute the case but rather the order of when the cases were called.

The trial court should have corrected the administrative judge's erroneous ruling that the solicitor could control the *order* of the docket which abdicated the judiciary's responsibility to control the docket. Accordingly, the trial court's failure to use its discretion to rule on Appellant's motion for a continuance was an abuse of its discretion that prejudiced Appellant.

CONCLUSION

By reason of the foregoing arguments Appellant respectfully requests this Court vacate his convictions and remand his case back to the York County Court of General Sessions for a new trial.



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This 17th day of August, 2021.

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CERTIFICATE OF COUNSEL FOR APPELLANT

Counsel for appellant certifies that this Final Brief of Appellant complies to the best of my ability 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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This 17th day of August, 2021.