STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Anderson County

Honorable R. Scott Sprouse, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JAMEY CHRISTOPHER GILLIAM,

APPELLANT

APPELLATE CASE NO. 2020-000877

FINAL BRIEF OF APPELLANT

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Whether the trial judge erred in allowing the state to introduce drugs into evidence which were seized from a closed container and from Appellant's car, where the container was opened by a police officer without a warrant and the search was not a search incident to arrest, since the fruit of the warrantless search formed the basis for Appellant's arrest; further, whether the search of the car was a fruit of the illegal search of the container?

2.

Whether the trial judge erred in allowing the state to introduce Appellant's statement that "all the drugs were his" where this statement was a direct result of the police officer's illegal search of the closed container and Appellant's car, and therefore was the fruit of an illegal search?

STATEMENT OF THE CASE

Appellant was indicted by the Anderson County Grand Jury for possession of cocaine and possession of methamphetamine. R. 246-249. Appellant's trial was held before the Honorable R. Scott Sprouse and a jury from February 24 – 25, 2020. R. 1. Appellant was represented by Hadden Lucas and Victoria Gurney. R. 1. The state was represented by Lauren Price. R. 1.

The jury found Appellant guilty as charged. R. 223, l. 16 – 224, l. 9. The judge sentenced Appellant to three years imprisonment, suspended to the service of one-year imprisonment, followed by five years of probation on both charges. R. 232, ll. 12 – 21.

This appeal follows.

STANDARD OF REVIEW

An appeal of a trial court's ruling on a motion to suppress evidence based on Fourth Amendment grounds is reviewed for clear error only. State v. Tindall, 388 S.C. 518, 521, 698 S.E.2d 203, 205 (2010). The appellate courts must affirm if there is any evidence to support the decision of the trial judge. State v. Provet, 405 S.C. 101, 107, 747 S.E.2d 453, 456 (2013). "However, this deference does not bar this Court from conducting its own review of the record to determine whether the trial judge's decision is supported by the evidence." Tindall, 388 S.C. at 521, 698 S.E.2d at 205 citing State v. Khingratsaiphon, 352 S.C. 62, 70, 572 S.E.2d 456, 459 (2002).

STATEMENT OF THE FACTS

On May 1, 2018, Jonathan Velez, with the Anderson County Sheriff's Office, saw a gold SUV parked near the site of a former Ingles Grocery Store. R. 101, l. 3 – 104, l. 12. Velez recalled that the Ingles had been closed for "quite some time" and the "building was in ruins." Velez also said that there were problems with people stealing metal in the building and homeless people living in the building. Because of these problems, Ingles tore down the building. R. 102, ll. 12 – 25.

Velez recalled that the SUV caught his attention because of the prior problems with people trespassing on the property, which was common, and that he typically would "make contact with these individuals and then run them off." R. 104, ll. 4 – 20. Velez approached the passenger side of the vehicle and could hear what sounded like a female screaming. Appellant was sitting in the front passenger seat and a female was sitting in the driver's seat. R. 105, l. 5 – 107, l. 10.

According to Velez, he asked what they were doing and "neither one of them could really advise [him]" so he asked Appellant to step out of the car. R. 107, ll. 12 – 22. As Appellant stepped out of the car, Velez observed an open container of alcohol in the car and a glass pipe fell to the ground and shattered.[1] R. 107, l. 23 – 108, l. 2. Velez detained Appellant by placing him in handcuffs. R. 108, ll. 19 – 21. While Velez was putting handcuffs on Appellant, he observed Appellant clutching something in his hand and Appellant would not say what the item was. Velez took the item from Appellant and saw that it was a "metal pill container." Velez stated: "It's commonly used or sold for people to put their prescription medication to carry with them whenever they're out and about." R. 108, l. 22 – 109, l. 9.

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[1] Velez claimed that the pipe was one that was commonly used to smoke methamphetamine. R. 108, ll. 4 – 14.

Velez admitted that he opened the metal container and saw a "clear plastic baggy" inside which had a powdery substance that Velez believed to be cocaine. He also observed another plastic bag which had a "crystal-like substance" in it, which Velez believed was methamphetamine. R. 109, l. 18 – 110, l. 7. Velez then stated that he placed Appellant under arrest "for the substances that [he] found in that container." R. 110, ll. 13 – 16. After Velez arrested Appellant, he searched Appellant's person and found a loose powdery substance in Appellant's pocket. Velez also searched Appellant's car and found a clear plastic bag containing what Velez believed to be methamphetamine. R. 110, l. 17 – 112, l. 24.

Meredith Lanford, with the Anderson/Oconee Regional Forensic Laboratory, was qualified as an expert in the "chemical analysis of drugs." R. 167, l. 7 – 169, l. 8. Lanford testified that the substances she was given to test in Appellant's case were confirmed to be cocaine and methamphetamine. R. 175, l. 15 – 176, l. 13. Lanford stated that the total weights were .53 grams of methamphetamine and .38 grams of cocaine. R. 178, ll. 9 – 19.

ARGUMENT

1.

The trial judge erred in allowing the state to introduce drugs into evidence which were seized from a closed container and from Appellant's car, because the container was opened by a police officer without a warrant and the search was not a search incident to arrest, since the fruit of the warrantless search formed the basis for Appellant's arrest; further, the search of the car was a fruit of the illegal search of the container.

Relevant Facts

Defense counsel filed a pretrial motion to suppress the drugs that were found in the container and Appellant's car as having been the fruits of an illegal warrantless search. R. 5, l. 10 – 6, l. 4; R. 233. The state called Velez to testify as to the circumstances of his search and subsequent arrest of Appellant.

Velez testified, *in camera*, that he detained Appellant when he saw the glass pipe shatter on the ground as Appellant was getting out of the car. R. 16, l. 3 – 17, l. 6. Velez further testified that he took the container out of Appellant's hand and opened it. R. 17, ll. 11 – 25. Velez claimed that he saw two bags inside the container, one containing cocaine and the other containing methamphetamine. Velez admitted: "And I advised [Appellant] that . . . *due to the items I just retrieved from his hand*, that he was under arrest." R. 18, ll. 2 – 19 (emphasis added).

On cross-examination, Velez admitted that the container was closed when he took it from Appellant's hand, and he could not see through it. R. 21, l. 15 – 22, l. 11. Velez further admitted that he did not ask for Appellant's consent to open the container. R. 22, ll. 12 – 17.

Defense counsel argued that the warrantless search of the closed container in Appellant's hand did not fall within any recognized exception to the warrant requirement of the Fourth

Amendment. R. 39, ll. 6 – 22. Counsel specifically maintained that the search was not a search incident to arrest because Appellant was not arrested until after the items inside the container were discovered. R. 39, l. 23 – 40, l. 14.

The state argued that the search of Appellant was a search incident to arrest and relied on State v. Moultrie, 316 S.C. 547, 451 S.E.2d 34 (Ct. App. 1994) for the proposition that if an officer has probable cause to arrest, the officer is permitted to search the person prior to actually making the arrest. R. 49, l. 3 – 50, l. 10. The state maintained that the search of the container in Appellant's hand was contemporaneous with his arrest and therefore was a search incident to arrest. R. 51, ll. 4 – 24.

Defense counsel correctly responded that Moultrie does not allow for the fruits of a warrantless search that is conducted contemporaneously with arrest to be used to justify that arrest. Counsel pointed out that, here, *Appellant was arrested for the drugs found in the closed container which was searched by Velez without a warrant.* Because the fruits of the warrantless search were in fact the basis of Appellant's arrest, the search was not a search incident to arrest, but instead was necessarily a search prior to arrest and without probable cause. R. 55, l. 5 – 56, l. 8.

The trial judge ruled that the evidence was admissible as a search incident to arrest. R. 56, l. 19 – 58, l. 3. The drugs found in the closed container and Appellant's car were introduced over counsel's renewed objection at trial. R. 171, l. 11 – 172, l. 19; R. 173, l. 22 – 174, l. 7.

Discussion

The trial judge erred in denying Appellant's motion to suppress the drugs found in the closed container in Appellant's hand, and Appellant's car, because the search of the container

was warrantless and in violation of the Fourth Amendment to the United States Constitution and Article I, Section 10 of the South Carolina Constitution. The search of the car that followed was a fruit of the initial illegal search of the container. The search was not a search incident to arrest, nor was it supported by probable cause, and therefore the drugs should have been suppressed.

"The Fourth Amendment to the United States Constitution prohibits unreasonable searches and seizures." State v. Forrester, 343 S.C. 637, 643, 541 S.E.2d 837, 840 (2001). When evidence against a criminal defendant is obtained in violation of the Fourth Amendment it cannot be used against him in court. Weeks v. United States, 232 U.S. 383 (1914). The Supreme Court of the United States made this exclusionary rule applicable to the States in Mapp v. Ohio, 367 U.S. 643 (1961). "Therefore, all citizens enjoy this federal constitutional protection in every criminal proceeding." Forrester, 343 S.C. at 643, 541 S.E.2d at 840.

The South Carolina Constitution also contains a provision protecting people from unreasonable searches and seizures. S.C. Const. art. I, § 10. However, our State Constitution goes further than the United States Constitution by including an express right of the people against "unreasonable invasions of privacy." Id. "Thus, this Court can interpret the state protection against unreasonable searches and seizures in such a way as to provide greater protection than the federal Constitution." Forrester, 343 S.C. at 644, 541 S.E.2d at 840.

"Generally, a warrantless search is *per se* unreasonable and violates the Fourth Amendment prohibition against unreasonable searches and seizures." State v. Weaver, 374 S.C. 313, 319, 649 S.E.2d 479, 482 (2007). "However, a warrantless search will withstand constitutional scrutiny where the search falls within one of several well-recognized exceptions to the warrant requirement." Id. The burden is on the state to prove that the warrantless search was

supported by probable cause and fell within one of the exceptions to the warrant requirement. Id. at 319–20, 649 S.E.2d at 482.

One exception to the warrant requirement of the Fourth Amendment is that when police lawfully arrest a person, they may search the person arrested and "the area within his immediate control." Chimel v. California, 395 U.S. 752, 762–63 (1969). However, the Supreme Court has also noted that "[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 (1968). "The exception for searches incident to arrest permits the police to search a lawfully arrested person and areas within his immediate control . . . [I]t does not permit the police to search any citizen without a warrant or probable cause so long as an arrest immediately follows." Smith v. Ohio, 494 U.S. 541, 543 (1990).

Here, the trial judge erred in finding that the search of the closed container in Appellant's hand was a search incident to arrest because *it was the contents of the closed container that formed the basis of Appellant's arrest.* As Velez testified: "I advised [Appellant] that . . . *due to the items I just retrieved from his hand,* that he was under arrest." R. 18, ll. 2 – 19 (emphasis added). Velez admitted this after having searched the closed container without a warrant or articulating how the search was permissible based on any exception to the warrant requirement.

In State v. Moultrie, 316 S.C. 547, 451 S.E.2d 34 (Ct. Appl 1994), this Court found that an officer's "pat-down" search of a suspect, prior to arrest but after probable cause to arrest the suspect existed, was permissible as a search incident to arrest. In Moultrie, an informant gave police detailed information about drug sales happening at Moultrie's house. When police went to Moultrie's house to investigate, they observed Moultrie standing outside with a plastic bag of marijuana at his feet. The police also found a brown paper bag with crack, cocaine and more

marijuana nearby which was consistent with the information they received from their informant. Id. at 549-50, 451 S.E.2d at 36.

An officer conducted a "pat-down" search of Moultrie which revealed a large sum of cash. Id. This Court found that the "pat-down" search which revealed the cash constituted a search incident to arrest even though the search preceded the formal arrest. Id. at 551-52, 451 S.E.2d at 37. This was because probable cause to arrest Moultrie already existed and his subsequent arrest was not based on the cash found in his pocket. Id. at 553, 451 S.E.2d at 38. The Court noted that the bag of marijuana seen at Moultrie's feet along with the bag of other drugs found nearby justified Moultrie's arrest and therefore the "pat-down" which revealed the cash qualified as a search incident to arrest. Id.

The facts here are substantially different from those in Moultrie. Here, Velez did not have probable cause to arrest Appellant until *after* he conducted the warrantless search. Furthermore, Appellant's arrest was based solely on the evidence found during the warrantless and illegal search of the closed container in Appellant's hand. As the Moultrie Court acknowledged: "The fruits of [a warrantless search that precedes a formal arrest] cannot be used to justify the arrest." Id. at 551, 451 S.E.2d at 37.

The facts of Appellant's case are much more like those in Smith v. Ohio, 494 U.S. 541 (1990). In Smith, the defendant, while carrying a brown paper grocery bag, was approached by two plainclothes officers who asked him to "come here a minute." The defendant ignored the officers and continued walking. When one of the officers identified himself as a police officer, the defendant threw the bag on the hood of his car. The officer asked the defendant what was in the bag and the defendant did not respond. The officer then opened the bag, discovered drug paraphernalia, and arrested the defendant. Id. at 541-42.

The Smith Court observed that "justifying the arrest by the search and at the same time the search by the arrest, just will not do." Id. at 543 (cleaned up). In other words, while a search incident to arrest may precede a formal arrest, it cannot precede the existence of probable cause to arrest. Furthermore, the arrest itself cannot be based on fruits of a warrantless search made prior to a finding of probable cause to arrest. Here, the trial judge erred in finding that Velez searched Appellant incident to a lawful arrest because by Velez's own admission the arrest was based on the drugs he found in the warrantless search. Appellant's convictions should be reversed. See Smith v. Ohio, 494 U.S. 541 (1990).

2.

The trial judge erred in allowing the state to introduce Appellant's statement that "all the drugs were his" because this statement was a direct result of the police officer's illegal search of the closed container and Appellant's car, and therefore was the fruit of an illegal search.

Relevant Facts

Defense counsel moved to suppress an alleged statement made by Appellant after his arrest as being the fruit of an illegal warrantless search. R. 6, l. 13 – 7, l. 4. Velez recalled in his *in camera* testimony that after Appellant was arrested, Velez put Appellant in the back of his patrol car and questioned Appellant. R. 58, ll. 8 – 25. Velez claimed that after he advised Appellant of his Miranda[2] Rights, Appellant said "all the drugs were his." R. 61, l. 13 – 63, l. 20. The judge ruled that this alleged statement by Appellant was admissible. R. 67, l. 22 – 68, l. 13.

When Velez testified in front of the jury that Appellant claimed ownership of the drugs that were found, defense counsel objected. Counsel argued that "[Appellant's] statement is derivative of the illegal search and seizure." R. 114, ll. 11 – 25. Counsel specified that her objection was based on the Fourth Amendment to the United States Constitution as well as Article 1, Section 10 of the South Carolina Constitution. R. 115, ll. 8 – 14.

The judge overruled defense counsel's objection. R. 115, ll. 15 – 24. Velez then testified that when he spoke with Appellant after Appellant was arrested, Appellant stated that "the drugs were his." R. 27, l. 21 – 120, l. 4.

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2 Miranda v. Arizona, 384 U.S. 436 (1966).

Discussion

Physical evidence, along with verbal statements and "testimony as to matters observed during an unlawful invasion" must be excluded from evidence where it is immediately derived from "an unlawful entry [or] an unauthorized arrest." Wong Sun v. U.S. 371 U.S. 471, 485 (1963). This doctrine, commonly known as "fruit of the poisonous tree," holds that "evidence must be excluded if it would not have come to light but for the illegal actions of the police, and the evidence has been obtained by the exploitation of that illegality." State v. Copeland, 321 S.C. 318, 323, 468 S.E.2d 620, 624 (1996).

"However, not all evidence conceivably derived from an illegal search need be suppressed if it is somehow attenuated enough from the violation to dissipate the taint." State v. Adams, 409 S.C. 641, 648, 763 S.E.2d 341, 345 (2014) quoting United States v. Najjar, 300 F.3d 466, 477 (4th Cir. 2002). The Adams Court identified several factors that may be considered in determining whether the "derivative evidence has been purged of the taint of the unlawful search," including: "(1) the amount of time between the illegal action and the acquisition of the evidence; (2) the presence of intervening circumstances; and (3) the purpose and flagrancy of the official misconduct." Id.

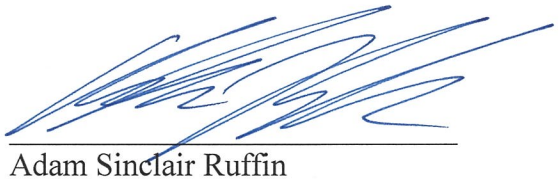
As argued above in Issue 1, Velez's search of the container in Appellant's hand was unlawful. The fruit of this unlawful search was the drugs in the container and the drugs that were subsequently found inside the car. However, the "fruit of the poisonous tree" doctrine does not only apply to the physical evidence found. Appellant's alleged statement claiming ownership of the drugs was also obtained as a direct result of Velez's illegal action and therefore should have also been suppressed. See State v. Boswell, 391 S.C. 592, 605-06, 707 S.E.2d 265, 272 (2011) (holding that defendant's confession was not admissible because it was fruit of the

poisonous tree where defendant was illegally arrested by officers prior to his confession); State v. Tindall, 388 S.C. 518, 523-24, 698 S.E.2d 203, 206 (2010) (holding that defendant's statements should have been suppressed because they were obtained while defendant was unlawfully detained by police).

The trial judge erred in allowing the admission of Appellant's alleged confession to ownership of the drugs found in the container and in the car because the alleged confession was the direct result of the illegal search of the container. There were no intervening circumstances to dissipate the initial taint of the illegal search. Had the officer not illegally opened the container in Appellant's hand, no drugs would have ever been discovered and Appellant would have never been questioned about the ownership of the drugs. Therefore, Appellant's alleged confession was the fruit of an illegal search. Appellant's convictions should be reversed. See Wong Sun v. U.S. 371 U.S. 471 (1963); State v. Boswell, 391 S.C. 592, 707 S.E.2d 265 (2011); State v. Tindall, 388 S.C. 518, 698 S.E.2d 203 (2010).

CONCLUSION

By reason of the foregoing argument, Appellant's convictions should be reversed, and this case remanded to the Anderson County Court of General Sessions for a new trial.



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This 20th day of September, 2021.

CERTIFICATE OF COUNSEL

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."

September 20, 2021

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