STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Jasper County

Carmen T. Mullen, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

KAREEM STEVENSON,

APPELLANT.

APPELLATE CASE NO. 2021-000417

INITIAL BRIEF OF APPELLANT

SARAH E. SHIPE
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

1. The court erred in admitting drug evidence found on appellant and in the vehicle where the officer did not have reasonable suspicion to conduct a traffic stop and the subsequent seizure and search was a violation of appellant's constitutional rights 4

   Standard of Review 4
   Relevant Facts 4
   Discussion 6

2. The trial court erred in allowing police officers, who were not qualified as experts in this case, to testify that the substance found in appellant's pocket was heroin and that the substances found in the vehicle were cocaine base and marijuana. 8

   Standard of Review 8
   Relevant Facts 8
   Discussion 10

3. The trial court erred in admitting suspected marijuana in appellant's trial where he was not charged in connection with the suspected marijuana 13

   Standard of Review 13
   Relevant Facts 13
   Discussion 14

CONCLUSION 16

TABLE OF AUTHORITIES

Cases

Berkemer v. McCarty, 468 U.S. 420 (1984) 6, 7

Reid v. Georgia, 448 U.S. 438 (1980) 6

State v. Abdullah, 357 S.C. 344, 592 S.E.2d 344 (Ct. App. 2004) 4

State v. Baccus, 367 S.C. 41, 625 S.E.2d 216 (2006) 8

State v. Brockman, 339 S.C. 57, 528 S.E.2d 661 (2000) 4

State v. Brockmeyer, 406 S.C. 324, 751 S.E.2d 645 (2013) 13

State v. Douglas, 380 S.C. 499, 671 S.E.2d 606 (2009) 10

State v. Fripp, 396 S.C. 434, 721 S.E.2d 465 (Ct. App. 2012) 10

State v. Green, 341 S.C. 214, 532 S.E.2d 896 (Ct. App. 2000) 4

State v. Hatcher, 392 S.C. 86, 708 S.E.2d 750 (2011) 13

State v. Pagan, 369 S.C. 201, 631 S.E.2d 262 (2006) 13

State v. Pipkin, 359 S.C. 322, 597 S.E.2d 831 (Ct.App.2004) 15

State v. Westmoreland, 421 S.C. 410, 807 S.E.2d 701 (Ct. App. 2017) 11

State v. Wilson, 345 S.C. 1, 545 S.E.2d 827 (2001) 4

State v. Woodruff, 344 S.C. 537, 544 S.E.2d 290 (Ct.App.2001) 6

Terry v. Ohio, 392 U.S. 1 (1968) 6

United States v. Arvizu, 534 U.S. 266 (2002) 6

United States v. Mendenhall, 446 U.S. 544 (1980) 6

United States v. Sprinkle, 106 F.3d 613 (4th Cir.1997) 6

Watson v. Ford Motor Co., 389 S.C. 434, 699 S.E.2d 169 (2010) 10

Whren v. United States, 517 U.S. 806 (1996) 7

Statutes

S.C. Code Ann. § 56-5-2120 ..... 5, 7

S.C. Code Ann. § 56-5-2120(A) 5

Rules

Rule 401, SCRE 14

Rule 402, SCRE 14

Rule 403, SCRE 15

Rule 701, SCRE 11

Rule 704, SCRE 11

Constitutional Provisions

U.S. Const. amend IV 4, 6

S.C. Const. art. I, § 10 4

STATEMENT OF ISSUES ON APPEAL

1.

Whether the court erred in admitting drug evidence found on appellant and in the vehicle where police did not have a reasonable suspicion to conduct a traffic stop and the subsequent seizure and search was a violation of appellant's constitutional rights?

2.

Whether trial court erred in allowing two police officers, who were not qualified as experts in this case, to testify that the substance found in appellant's pocket was heroin and the substances found in the vehicle were cocaine base and marijuana?

3.

Whether the trial court abused its discretion by admitting suspected drugs found during the search that appellant was not charged with and that were never tested?

STATEMENT OF THE CASE

Procedural History

On March 4, 2019, a Jasper County grand jury indicted appellant for trafficking heroin, four grams or more, but less than fourteen grams, trafficking cocaine base, ten grams or more but less than twenty-eight grams, possession with intent to distribute cocaine, and possession of methamphetamine. R*. Appellant was tried April 12, 2021, before the Honorable Carmen T. Mullen and a jury. Tr. 1. Dustin Whetsel and Carolyn Carmody represented appellant. Lynorr Musser, assistant solicitor, and Samantha Molina, assistant solicitor, represented the state. Tr. 1.

The jury found appellant guilty of trafficking heroin, trafficking cocaine base, and possession of cocaine. Tr. 264. However, the jury acquitted appellant for possession of methamphetamine. Tr. 264. Judge Mullen sentenced appellant to concurrent terms of ten years' imprisonment for trafficking heroin, ten years' imprisonment for trafficking cocaine base, and three years' imprisonment for possession of cocaine. Tr. 278.

This appeal follows.

Facts

On June 11, 2018, Officer Hallie Godley, of the Jasper County Sheriff's Office, conducted a traffic stop on a gray BMW. The driver of the vehicle was Dimario Garrett and the passenger was appellant. According to Godley's testimony, the reason for the traffic stop was "an improper turn," because after the vehicle, made a right hand turn on to a highway it immediately entered the interior lane. Tr. 44, l. 15-45, l. 6; 45, l. 22-46, l. 2.

Godley initiated her blue lights and the car pulled over to the shoulder. Godley approached the vehicle and requested license, registration, and insurance information. Tr. 4-46, l. 14. She informed Garrett and appellant that she smelled marijuana and asked if marijuana was

present in the vehicle. They admitted they smoked earlier but denied that there was marijuana in the car. Tr. 46, l. 15-47, l. 8. Godley advised them that once her partner arrived, she would ask them to exit the vehicle and the car would be searched. Appellant tried to get out of the vehicle and Godley stopped him. Tr. 47, l. 15-48, l. 3. When two other officers arrived, it appeared appellant was trying to exit the car through the window and Officer Raymond Davis pulled him to the ground and handcuffed him. Tr. 48, l. 20-22; 66, ll. 5-20.

During the search the officers found suspected heroin in appellant's pocket. They also found suspected marijuana, three pills, suspected cocaine base, and suspected cocaine in the vehicle. Tr. 48, l. 25-49, l. 6; 67, ll. 3-4. Appellant was charged with all the suspected drugs and Garrett was released with a warning citation.

ARGUMENT

1.

The court erred in admitting drug evidence found on appellant and in the vehicle where the officer did not have reasonable suspicion to conduct a traffic stop and the subsequent seizure and search was a violation of appellant's constitutional rights

Standard of review

In criminal cases, the appellate court sits to review errors of law only and is bound by the factual findings of the trial court unless clearly erroneous. *State v. Wilson,* 345 S.C. 1, 5–6, 545 S.E.2d 827, 829 (2001). The trial court's factual findings on whether evidence should be suppressed due to a Fourth Amendment violation are reviewed only for clear error. *State v. Brockman,* 339 S.C. 57, 66, 528 S.E.2d 661, 666 (2000). "On appeal from a suppression hearing, this court is bound by the circuit court's factual findings if any evidence supports the findings." *State v. Abdullah,* 357 S.C. 344, 349, 592 S.E.2d 344, 347 (Ct. App. 2004). Appellate review in Fourth Amendment search and seizure cases is "limited to determining whether any evidence supports the trial court's finding." *State v. Green,* 341 S.C. 214, 219 n. 3, 532 S.E.2d 896, 898 n. 3 (Ct. App. 2000).

Relevant facts

Pretrial, defense counsel filed a motion to suppress all drug evidence found on appellant and in the vehicle arguing that Officer Hallie Godley did not have reasonable suspicion to conduct a traffic stop and the subsequent seizure and search was a violation of appellant's rights under the Fourth Amendment of the United States Constitution and of Article I Section 10 of the South Carolina Constitution. Motion; Tr. 29, ll. 22-23. Counsel asserted the conduct observed by Godley and captured on the dash camera of her vehicle was not a violation of the traffic laws

of South Carolina. Tr. 33-36. Counsel contended the alleged violation of S.C. Code Ann. § 56-5-2120(A),[1] did not apply because the vehicle can be seen, in the dash camera video, turning close to the curve into the exterior lane before entering the interior lane. Tr. 34, ll. 5-20. Counsel also asserted that the stop was unreasonable and therefore the underlying seizure of appellant and of the car was unlawful and the fruits of the search should be suppressed. Tr. 35, l. 18-36, l. 5.

The prosecutor contended the vehicle failed to maintain a lane, alleging that the vehicle drove diagonally across the exterior lane into the interior lane and did not signal when changing lanes. Tr. 36, ll. 9-20. The state contended that, even if the court were to find there was not probable cause for the traffic stop, appellant's failure to comply with Godley's instruction to stay in the car should be considered an intervening act of criminal conduct that would cause the results of the search to cease to be fruit of the poisonous tree. Tr. 37, ll. 5-25.

Defense counsel responded that this situation was distinct because there was no intervening act that would justify allowing the evidence found to be admissible. Counsel maintained that the conduct of the vehicle did not violate any traffic laws and therefore this was not a valid traffic stop and anything recovered as a result should be suppressed. Tr. 38, ll. 4-17.

The court denied defense counsel's motion to suppress the evidence found on appellant and in the vehicle. The court found that S.C. Code Ann. § 56-5-2120(A) was violated and that there was reasonable suspicion by Godley of a traffic violation and therefore the stop was constitutionally valid. Tr. 38, l. 21-39, l. 5.

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[1] The driver of a vehicle intending to turn shall do so as follows: (a) Right turns. Both the approach for a right turn and a right turn shall be made as close as practicable to the right-hand curb or edge of the roadway. S.C. Code Ann. § 56-5-2120.

Discussion

In this case, Godley's traffic stop was unreasonable under the circumstances and therefore any evidence found as a result of the search of appellant and the vehicle should have been suppressed.

The Fourth Amendment guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend IV; *see State v. Woodruff,* 344 S.C. 537, 544 S.E.2d 290 (Ct.App.2001). Thus, the Fourth Amendment protects against unreasonable searches and seizures, including seizures that involve only a brief detention. *United States v. Mendenhall,* 446 U.S. 544 (1980). An officer is permitted to make an investigative detention or stop only if supported "by a reasonable and articulable suspicion that the person seized is engaged in criminal activity." *Reid v. Georgia*, 448 U.S. 438 (1980). "And in justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." *Terry v. Ohio*, 392 U.S. 1 (1968). Thus, a court must look to the totality of the circumstances in determining whether the officer had a particularized and objective basis for suspecting criminal activity. *United States v. Arvizu*, 534 U.S. 266 (2002). "While such a detention does not require probable cause, it does require something more than an 'inchoate and unparticularized suspicion or hunch.'" *United States v. Sprinkle*, 106 F.3d 613, 617 (4th Cir.1997) (quoting *Terry*, 392 U.S. at 27 (1968)).

A traffic stop is a limited seizure more like an investigative detention than a custodial arrest. *See Berkemer v. McCarty*, 468 U.S. 420 (1984). Thus, in analyzing such investigative detentions, courts employ the standard articulated by the United States Supreme Court in *Terry v. Ohio*, 392 U.S. 1 (1968). Under this standard, "a policeman who lacks probable cause but whose

observations lead him reasonably to suspect that a particular person has committed, is committing, or is about to commit a crime, may detain that person briefly in order to investigate the circumstances that provoke that suspicion." *Berkemer*, 468 U.S. at 439.

An automobile stop is subject to the constitutional imperative that it not be "unreasonable" under the circumstances. *Whren v. United States*, 517 U.S. 806 (1996). As a general matter, the decision to stop an automobile is reasonable where police have probable cause to believe that a traffic violation has occurred. *Id.*

Officer Godley did not have probable cause to believe a traffic violation occurred in this case. The conduct shown in the dash camera video was not in violation of S.C. Code Ann. § 56-5-2120 or any other traffic law. In the dash camera video, court's exhibit 5, it is clear that the vehicle makes a complete stop at the stop sign, signals a right-hand turn, turns in to the exterior lane, and then enters the interior lane.[2] Additionally no other traffic violation occurred which would warrant the traffic stop made by officer Godley. Thus, all the evidence found during the search should have been suppressed.

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[2] Court's exhibit 5, Godley's dash camera video is on file with this court.

ARGUMENT

2.

The trial court erred in allowing police officers, who were not qualified as experts in this case, to testify that the substance found in appellant's pocket was heroin and that the substances found in the vehicle were cocaine base and marijuana.

Standard of review

"In criminal cases, the appellate court sits to review errors of law only." *State v. Baccus,* 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). Thus, an appellate court is bound by the trial court's factual findings unless they are clearly erroneous. *Id.*

Relevant facts

During Officer Raymond Davis testimony the following exchange occurred:

> **Q**: Once you have [appellant] in front of the patrol car, what do you do?
>
> **A**: I searched him.
> ...
>
> **Q**: What, if anything, did you find?
>
> **A**: I found a bag of heroin in his left front pocket.
> ...
>
> **Defense**: Your Honor, objection to the characterization of heroin from Detective Davis.
>
> **Court**: Overruled.
>
> **Q**: So, let me ask that again. Based on your training and experience, the item that you pulled out of his pocket, what did you recognize it to be?
>
> **A**: Heroin
>
> **Q**: At that point do you communicate that you found heroin to Detective Kellermeyer and Detective Godley?

A: Yes, ma'am. I said I got heroin. And then I put it on the hood of her patrol car.

Q: Now, in your presence, did Detective Godley also find anything?

A: Yeah. Detective Godley [] found some crack.

Defense: Objection, speculation, and personal knowledge.

Court: Okay. Overruled.

...

Q: What was in the cigarette pack?

A: Crack.

Q: Okay. Based on your training and experience, do certain drugs have slang or street names.

A: Yes, ma'am.

Q: What is the street name for heroin?

A: Dog food.

Defense: Objection, your honor.

...

Defense: Based on 702, as far as not having an adequate foundation.

...

Court: No. Go ahead. You can ask that question.

Tr. 120, l. 23-123, l. 20. Throughout Davis' testimony he and the prosecutor continued to refer to the suspected drugs as heroin. Tr. 124, ll. 8-15; 125, l. 17; 129, ll. 5-7; 131, l. 17; 132, 14-16; 133, l. 1; 135, ll. 21-25; 143, l. 9. When the baggy of suspected heroin was offered in to evidence defense counsel objected again stating, "I will object until the chemist actually admits it." Tr. 131, l. 20-132, l. 3.

Likewise, throughout Hallie Godley's testimony she, and the prosecutor, referred to the suspected drugs found during the search as heroin, crack, and weed. Tr. 159, ll. 2-21; 162, l. 6; 172, ll. 18-20; 175, ll. 16-19; 193, l.3-8. Also, during Godley's testimony, over defense counsel's objection, the court allowed her to testify regarding what "factors" she considered to determine whether suspected drugs were for personal use or to sell. Tr. 146, l. 25-148, l. 6.

Discussion

Godley and Davis were fact witness for the state they were not offered, and were not qualified, as experts in forensic chemistry or forensic analysis. While they both testified that in the course of their employment, they had the opportunity to become familiar with certain drugs that was not sufficient to allow them to give expert opinion testimony regarding what the drugs were.

"Expert testimony differs from lay testimony in that an expert witness is permitted to state an opinion based on facts not within his firsthand knowledge." *Watson v. Ford Motor Co.*, 389 S.C. 434, 445–46, 699 S.E.2d 169, 175 (2010). "On the other hand, a lay witness may only testify as to matters within his personal knowledge and may not offer opinion testimony which requires special knowledge, skill, experience, or training." *Id.* at 446, 699 S.E.2d at 175; *see also State v. Douglas*, 380 S.C. 499, 502, 671 S.E.2d 606, 608 (2009) ("Lay witnesses are permitted to offer testimony in the form of opinions or inferences if the opinions or inferences are rationally based on the witness'[s] perception, and will aid the jury in understanding testimony, and do not require special knowledge."). "Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." *State v. Fripp*, 396 S.C. 434, 439, 721 S.E.2d 465, 467 (Ct. App. 2012) (quoting

Rule 704, SCRE). *State v. Westmoreland*, 421 S.C. 410, 419, 807 S.E.2d 701, 706 (Ct. App. 2017)

If the witness is not testifying as an expert, the witness'[s] testimony in the form of opinions or inferences is limited to those opinions or inferences which (a) are rationally based on the perception of the witness, (b) are helpful to a clear understanding of the witness'[s] testimony or the determination of a fact in issue, and (c) do not require special knowledge, skill, experience or training. Rule 701, SCRE.

The officers could not perceive what type of drug any of the substances were each substance had to be sent for chemical analysis. It follows that this was not "rationally based on the perception of the witness." *Id.* The officers may have known that the drugs appeared to be heroin or appeared to be cocaine base but that was not a determination that could have been made simply by looking at the substance. Also, their testimony, regarding what the suspected drugs were, was not necessary to have "a clear understanding of the witness testimony." Both officers' testimonies were regarding the sequence of event leading to the discovery of the suspected drugs. *Id.*

Moreover, the identification of drugs requires specialized knowledge, skill, experience, or training. An expert is required to give testimony regarding what the drugs were and in fact the state later presented testimony through Willie Smith, a forensic chemist for the South Carolina Law Enforcement Division. Treating both officers as if they were experts, when they were not, lent more credence to their testimonies in in the minds of the jurors.

The nature of the drugs was an element of each of the offenses appellant was charged with. By the time Smith took the stand the jury had already heard numerous times what the officers believed the drugs were. Neither Officer Godley or Officer Davis were qualified as

experts, and they should not have been allowed to give their opinion as to what the suspected drugs were.

ARGUMENT

3.

The trial court erred in admitting suspected marijuana in appellant's trial where he was not charged in connection with the suspected marijuana

Standard of review

The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion." *State v. Hatcher,* 392 S.C. 86, 91, 708 S.E.2d 750, 753 (2011) ("quoting *State v. Pagan,* 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006)). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." *Id.*; *see also State v. Brockmeyer*, 406 S.C. 324, 340, 751 S.E.2d 645, 653 (2013).

Relevant facts

During Officer Hallie Godley's testimony the following exchange occurred:

Q: With respect to State's number 7, what is that?

A: Marijuana located in the vehicle.

Q: Who gave that to you? Who found it?

A: Kellermeyer

...

Q: There is no charge for that here today, correct?

A: Correct.

Q: That is in magistrate court?

A: Correct a different court

> **Defense**: Your Honor, I would object as to relevance, who may adjudicate a charge. Marijuana is not something we are concerned with today, as far as the charges.
>
> ...
>
> **Defense**: A marijuana charge is irrelevant because that is not something that's before the court today.
>
> **Court**: Overruled. I think she can answer that just to explain why it's not here.

Tr. 174, l. 3-175, l. 4.

Later the state offered the suspected marijuana in evidence and defense again objected arguing the substance had not been tested and was not charged in this case. The court overruled the objection stating simply, "I think it can come into evidence." Tr. 178, ll. 17-25

Discussion

The trial court abused its discretion by admitting suspected drugs in evidence in appellant's trial where there were no charges related to the suspected drugs and they had not been tested. The suspected marijuana was not relevant to this case, where the state admittedly was not charging appellant in connection to this case. See Rule 401, SCRE ("Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.)

"All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, the Constitution of the State of South Carolina, statutes, [the rules of evidence], or by other rules promulgated by the Supreme Court of South Carolina." Rule 402, SCRE. "Evidence which is not relevant is not admissible." *Id.*

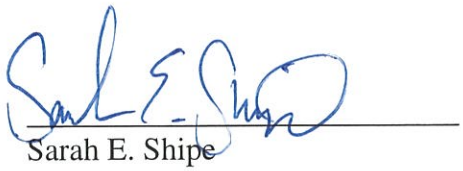
"Although relevant, evidence may be excluded if its probative value is substantially

outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Rule 403, SCRE.

Any probative value the suspected drug evidence may have had was substantially outweighed by the danger of unfair prejudice. *See State v. Pipkin*, 359 S.C. 322, 326, 597 S.E.2d 831, 833 (Ct.App.2004); *see also* Rule 403, SCRE (Evidence is incompetent if it could create dangers such as prejudice, undue delay, confusion of the issues, tendency to mislead the jury, waste of time, or cumulative presentation). The state chose not to charge appellant with the suspected drugs and therefore the only reason to present this evidence to the jury was to induce a decision on an improper basis.

CONCLUSION

By reason of the forgoing arguments, appellant requests this Court reverse his convictions and remand his case for a new trial.



Sarah E. Shipe
Appellate Defender

ATTORNEY FOR APPELLANT

This 28th day of March, 2022.

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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Jasper County

Carmen T. Mullen, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

KAREEM STEVENSON,

APPELLANT.

APPELLATE CASE NO. 2021-000417

DESIGNATION OF MATTER TO BE INCLUDED IN RECORD ON APPEAL

Appellant proposes the following be included in the Record on Appeal:

(1) True-billed indictment(s) and sentence sheet(s);
(2) Trial transcript dated April 12, 2021, pages 27-39; 91-102; 106-179; 182-201; 211-223; 226-264; 269-270; 275-276; 278-279;
(3) Motion to Suppress; and
(4) Court's Exhibit #5 (Godley's dash camera).

I certify that this designation contains no matter which is irrelevant to this appeal.

Sarah E. Shipe
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

This 28th day of March, 2022.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Jasper County

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THE STATE,

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APPELLANT.

APPELLATE CASE NO. 2021-000417

CERTIFICATE OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies a true copy of the Initial Brief of Appellant and Designation of Matter in the above-referenced case has been served upon William M. Blitch, Jr., Esquire, at the primary e-mail address listed in the Attorney Information System (AIS); and on Kareem Stevenson, #385260, at Kershaw Correctional Institution, 4848 Gold Mine Highway, Kershaw, SC, 29067, this 28th day of March, 2022.

Sarah E. Shipe
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