

ORIGINAL

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

\_\_\_\_\_  
Appeal from Greenville County  
D. Garrison Hill, Circuit Court Judge  
\_\_\_\_\_

RECEIVED  
MAY 13 2013  
SC Court of Appeals

THE STATE,

RESPONDENT,

V.

ERICK E. HEWINS,

APPELLANT

Appellate Case No.2012-210306  
\_\_\_\_\_

INITIAL BRIEF OF APPELLANT  
\_\_\_\_\_

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**STATEMENT OF ISSUES ON APPEAL**

- I. The Trial Court erred in ruling that Appellant was collaterally estopped from challenging the search of his vehicle and seizure of the crack cocaine where Appellant was previously convicted of an open container charge in municipal court arising from the same search; where the State cannot establish that the legality of the search and seizure was actually litigated and directly determined in the open container action and that the legality of the search and seizure was necessary to support the open container conviction, Appellant is not precluded from seeking suppression of the crack cocaine due to an illegal search and seizure in his trial for drug possession.
  
- II. The doctrine of collateral estoppel does not prevent Appellant from challenging the validity of the search and seizure in his trial for drug possession even though he was previously convicted of an open container violation arising out of the same search where his prior conviction for open container was void because Appellant was denied his right to counsel in violation of the Sixth Amendment.

**STATEMENT OF THE CASE**

On May 4, 2010, Erick Eton Hewins was indicted by the Greenville County Grand Jury for unlawful possession of cocaine base or crack cocaine in violation of S.C. CODE ANN. § 44-53-0375. R. \*.

A trial was held before the Honorable D. Garrison Hill and a jury on March 12 and 13, 2012. Tr. 1. Hewins was represented by Randall L. Chambers, and the State was represented by Assistant Solicitor Joyce K. Monts. Id.

On March 13, 2012, the jury found Hewins guilty of possession of crack cocaine. Tr. 142, ll. 18-22. Judge Hill sentenced Hewins to one year imprisonment. Tr. 147.

Hewins timely served and filed his Notice of Appeal on March 21, 2012.

## STATEMENT OF FACTS

On September 15, 2009 at approximately 11:45 p.m., Officer Charles Cothran stopped Appellant Erick Hewins' vehicle after he made an illegal left turn from a non-turning lane in the city of Greenville. Tr. 54, ll. 8-20.

Officer Cothran approached Hewins' vehicle and requested his driver's license, insurance, and registration. Tr. 56, ll. 8-11. Hewins handed Officer Cothran his driver's license without any issue, but he could not locate his insurance or registration. Tr. 56, ll. 11-14.

Officer Cothran noticed that Hewins was "extremely nervous" and that his voice quivered and his breathing was deep and rapid. Tr. 56, ll. 15-21. Due to Hewins' nervousness, Officer Cothran called for another officer to come to the scene. Tr. 56, ll. 22-24, 87, ll. 11-13. Officer Michael Derrick Loftis arrived as a back-up unit. Tr. 58, ll. 15. Officer Loftis was a K-9 officer. Tr. 62, ll. 5-6.

When Officer Loftis arrived, Officer Cothran was in the process of issuing Hewins a warning citation. Tr. 59, ll. 17-19. Officer Cothran said Hewins stayed nervous even after Officer Cothran informed Hewins that he was only going to give him a warning. Tr. 59, l. 24 – 60, l. 7.

After Officer Loftis arrived and Officer Cothran had completed writing the warning, Officer Cothran walked up to the vehicle and asked Hewins to step out of the vehicle. Tr. 61, ll. 4-10. Officer Cothran testified that "since [Hewins] was so nervous," "I felt like, for my safety, I needed to have him step out of the car so I could see him better." Tr. 61, ll. 6-9.

Officer Cothran then conducted a pat-down of Hewins' outer clothing to make sure he did not have any guns or other type of instruments that could cause harm on him. Tr. 61, ll. 10-13.

Officer Cothran then asked Hewins for consent to search his vehicle, which Hewins refused. Tr. 63, ll. 2-6. Officer Cothran then asked Officer Loftis if he could get his K-9 out and walk the dog around Hewins' vehicle. Tr. 63, ll. 7-9, 88, ll. 10-11.

The dog walked around the vehicle and then Officer Loftis put the dog up and said the dog had alerted to the driver's side door of the vehicle. Tr. 63, ll. 10-14; 64, ll. 3-9, 89, ll. 13-24.

Since the dog had detected some sort of contraband, Officer Cothran then searched Hewins' vehicle where he found in the center armrest console a Smirnoff mini vodka bottle that was opened and partially consumed, as well as a small Tylenol bottle. Tr. 64, ll. 11-25.

Officer Cothran testified that since he knew a lot of times people hide contraband in those types of bottles, he popped the top of the Tylenol bottle, looked inside, and found two small rock-like white pebbles in the bottom of it. Officer Cothran said he immediately recognized it to be crack cocaine or cocaine base. Tr. 65, ll. 1-6.

Officer Cothran placed Hewins in custody and handcuffed him. Tr. 65, ll. 8-9. Officer Cothran then field tested the two pebbles which indicated the presence of cocaine. Tr. 65, ll. 13-19.

Officer Cothran testified that Hewins was subsequently convicted in municipal court of open container for the vodka mini bottle. Tr. 68, ll. 1-4.

Based upon his misunderstanding that Hewins had also already been convicted of possession of cocaine, Officer Cothran authorized the destruction of the drug evidence and it was destroyed. Tr. 68, ll. 1-16, 79, ll. 3-14.

Hewins was ultimately indicted and convicted of possession of 0.24 grams crack cocaine. R. \* [Indictment]; \* [State's Ex. 2]; Tr. 142, ll. 18-22.

## ARGUMENT

**I. The Trial Court erred in ruling that Appellant was collaterally estopped from challenging the search of his vehicle and seizure of the crack cocaine where Appellant was previously convicted of an open container charge in municipal court arising from the same search; where the State cannot establish that the legality of the search and seizure was actually litigated and directly determined in the open container action and that the legality of the search and seizure was necessary to support the open container conviction, Appellant is not precluded from seeking suppression of the crack cocaine due to an illegal search and seizure in his trial for drug possession.**

During pre-trial motions, Hewins moved to suppress the evidence seized during the traffic stop on the grounds that the search of the vehicle and subsequent seizure of the drugs were both unlawful. Tr. 21, l. 4 – 24, l. 25.

The State argued that pursuant to State v. Snowdon, 371 S.C. 331, 638 S.E.2d 91 (Ct. App. 2006), Hewins was precluded from challenging the search because he was already convicted of the open container charge in municipal court and therefore any challenge to the search is now waived. Tr. 25, ll. 3-18.

Based on the Snowdon case, the trial judge ruled he was constrained to find that Hewins was collaterally estopped from challenging the search. Tr. 31, ll. 19-21, 33, ll. 2-4.

In Snowdon, the police received a complaint of a disturbance at the defendant's home. When the officers arrived, the defendant was standing in his front yard grossly intoxicated and was arrested for breach of the peace. During a search incident to the arrest, the officer discovered a small quantity of marijuana in the defendant's wallet. The defendant was charged with breach of the peace and possession of marijuana. 371 S.C. at 332, 638 S.E.2d at 92.

The defendant in Snowdon pled guilty to breach of the peace in magistrate court. When he was later on trial in circuit court for the marijuana charge, the defendant sought to suppress the introduction of the marijuana, arguing that it was the fruit of a search following an illegal arrest made without probable cause. Id. at 332-33, 638 S.E.2d at 92.

The Court of Appeals recognized the principle that a “knowing and voluntary guilty plea waives all non-jurisdictional defects and defenses, including claims of constitutional violations.” Id. at 333, 638 S.E.2d at 92 (internal citations omitted). “A defendant who pleads guilty usually may not later raise independent claims of constitutional violations.” Id. (internal citations omitted). The Court of Appeals therefore held that having pled guilty to breach of the peace, the defendant waived any objection he may have had to the initial arrest and the legal consequences flowing therefrom. Id. at 333, 638 S.E.2d at 93.

The Court of Appeals also found that the defendant was “collaterally estopped from relitigating the issue of the validity of his arrest” where “[c]ollateral estoppel prevents a party from relitigating in a subsequent suit an issue actually and necessarily litigated and determined in a prior action.” Id. at 334, 638 S.E.2d at 93. “Because [the defendant] pled guilty to breach of the peace, the issue of whether there was probable cause to arrest him for that offense was necessarily determined in the magistrate court proceeding,” and “[c]onsequently, the doctrine of collateral estoppel prevent[ed] [defendant] from raising that issue again at his trial for possession of marijuana.” Id.

The Snowdon case does not prevent Hewins from challenging the search of his vehicle and seizure of the drugs.

First, the Uniform Traffic Ticket submitted by the State as evidence of Hewins’ conviction for open container indicates from its face that a trial was held in the municipal court on October 8, 2009 before Trial Officer Hawley and that the verdict of the trial was guilty. R.\*. While the records custodian for the City of Greenville Municipal Court testified that she looked up her computer records and found that Hewins pled guilty, that testimony completely contradicts the ticket’s

notation that there was a verdict of guilty after trial and Hewins' contention that he did not plead guilty. Tr. 25, ll. 20-22; 28, l. 24 – 29, l. 17.

The evidence is that Hewins was found guilty for an open container after a trial. The record does not indicate what issues were actually litigated at this trial.

The doctrine of collateral estoppel “prevents parties from relitigating an issue that has previously been conclusively determined.” Mfrs. & Merchants Mut. Ins. Co. v. Harvey, 330 S.C. 152, 166, 498 S.E.2d 222, 229 (Ct. App. 1998). “Under the doctrine of collateral estoppel, once a final judgment on the merits has been reached in a prior claim, the relitigation of those issues actually and necessarily litigated and determined in the first suit are precluded as to the parties and their privies in any subsequent action based upon a different claim. . . . The party asserting collateral estoppel “must show that the issue was actually litigated and directly determined in the prior action and that the matter or fact directly in issue was necessary to support the first judgment.” Carrigg v. Cannon, 347 S.C. 75, 79-80, 552 S.E.2d 767, 770 (Ct. App. 2001).

There is no indication that the legality of the search and seizure was actually litigated in Hewins' open container trial. That the search and seizure of the mini bottle had to be valid was not necessary to support a conviction for open container. The open container statute under which Hewins was convicted provides:

A person who is twenty-one years of age or older may transport lawfully acquired alcoholic liquors to and from a place where alcoholic liquors may be lawfully possessed or consumed. If the cap or seal on the container has been opened or broken, it is unlawful to transport the liquors in a motor vehicle, except in a trunk, luggage compartment, or cargo area that is separate and distinct from the driver's and passengers' compartments. . . . A person who violates this section is guilty of a misdemeanor and, upon conviction, must be fined not more than one hundred dollars or imprisoned for not more than thirty days. For purposes of this section, alcoholic liquors means all distilled spirits regardless of the percentage of alcohol by volume that they contain.

S.C. CODE ANN. § 64-6-4020.

A guilty verdict in an open container trial does not conclusively establish that the search and seizure of the container were valid where such is not a required element for obtaining a conviction under the open container statute. In some cases, a search and seizure may violate the Fourth Amendment, but the court may determine that the admission of the evidence seized by the search is harmless. See State v. Atchison, 268 S.C. 588, 592-93, 235 S.E.2d 294, 295-96 (1977). A conviction arising out of evidence seized during a search does not necessarily validate the search and seizure.

Where the State cannot establish that the legality of the search and seizure was actually litigated and directly determined in the open container action and that the legality of the search and seizure was necessary to support the open container conviction, Hewins is not precluded from seeking suppression of the crack cocaine due to an illegal search and seizure in his trial for drug possession. See Carrigg, 347 S.C. at 79-80, 552 S.E.2d at 770.

Even if this Court determines that Hewins pled guilty to the open container charge, the doctrine of collateral estoppel would still not be applicable here because of the requirement that the validity of the search and seizure had to have been necessarily determined in the municipal proceeding. Because validity of the search and seizure is not a necessary element of the open container charge to which Hewins may have pled guilty, the Trial Court erred in holding that Hewins' alleged guilty plea was a conclusive finding that the search of his vehicle and seizure of the mini bottle and drugs was legal. See Mfrs. & Merchants Mut. Ins. Co., 330 S.C. at 166-67, 498 S.E.2d at 229-30 (holding where a defendant pled guilty to a crime where intent was not an element, the trial court erred in ruling that the defendant's guilty plea was a conclusive finding that the

defendant acted intentionally; defendant was therefore not collaterally stopped from litigating the issue of intent in subsequent action).

The Trial Court erred as a matter of law in determining that Appellant was collaterally estopped from challenging the validity of the search and seizure. This case should be remanded to the Trial Court for a determination of whether the crack cocaine seized should have been suppressed as arising out of an unlawful search and seizure.

**II. The doctrine of collateral estoppel does not prevent Appellant from challenging the validity of the search and seizure in his trial for drug possession even though he was previously convicted of an open container violation arising out of the same search where his prior conviction for open container was void because Appellant was denied his right to counsel in violation of the Sixth Amendment.**

Neither the trial court record nor the Uniform Traffic Ticket indicates that Hewins was either found guilty or pled guilty to an open container violation with the benefit of counsel. R. \*. At the suppression hearing, defense counsel stated: “And I feel quite certain, and I haven’t heard anything to the contrary, that nobody at any point counseled my client that he would in any way be doing anything that would later collaterally estop him from raising any Constitutional issues he might have in this case.” Tr. 30, ll. 17-25.

In Argersinger v. Hamlin, the United States Supreme Court held “that absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial.” 407 U.S. 25, 37 (1972); see also Alabama v. Shelton, 535 U.S. 654, 658 (2002) (holding “a suspended sentence that may “end up in the actual deprivation of one’s liberty” may not be imposed unless the defendant was accorded ‘the guiding hand of counsel’ in the prosecution for the crime charged”); Scott v. Illinois, 440 U.S. 367, 373-74 (1979) (“We therefore hold that the Sixth and Fourteenth Amendments to the United States Constitution require only that no indigent criminal defendant be sentenced to a term of imprisonment unless the State has afforded him the right to assistance of appointed counsel in his defense’).

The United States Supreme Court has also stated that “to permit a conviction obtained in violation of [the Sixth Amendment] to be used against a person either to support guilt or enhance punishment for another offense . . . is to erode the principle [in Gideon v. Wainwright, 372 U.S. 335 (1963).]” Burgett v. Texas, 389 U.S. 109, 115 (1967). The Court went on further: “Worse yet,

since the defect in the prior conviction was denied of the right to counsel, the accused in effect suffers anew from the deprivation of that Sixth Amendment right.” Id.

In conformity with these principles, Hewins’ prior conviction for open container should not have collaterally estopped Hewins from challenging the search and seizure in his drug possession trial where his conviction for open container was obtained without him having the benefit of counsel. See Loper v. Beto, 405 U.S. 473 (1972) (holding that use for impeachment purposes of prior convictions which are void for failure to afford defendant his right to counsel deprives a criminal defendant of due process of law).

For this addition reason, Hewins requests that the case be remanded to the Trial Court for a ruling on his motion to suppress evidence of the crack cocaine.

**CONCLUSION**

For the reasons set forth herein, Appellant Erick Eton Hewins requests this Court to reverse the Trial Court's ruling that Hewins was collaterally estopped from challenging the legality of the search and seizure and remand for a ruling on Hewins' motion to suppress the evidence of the crack cocaine.

Respectfully submitted,



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Carmen V. Ganjehsani  
Appellate Defender

ATTORNEY FOR APPELLANT

This 13th day of May, 2013.

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**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, dated March 4, 2010;
- (2) Trial Transcript held March 12-13, 2012 (designated pages only): 1-5; 21-38; 52-94; 142, and 147;
- (3) State's Ex. 1 – Uniform Traffic Ticket; and
- (4) State's Ex. 2 – Drug Analysis Report.

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

May 13th, 2013.



Carmen V. Ganjehsani  
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CERTIFICATE OF SERVICE


The undersigned attorney hereby certifies that a true copy of the Initial Brief of Appellant and Designation of Matter in the above referenced case has been served upon Salley W. Elliott, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 13th day of May, 2013.



Carmen V. Ganjehsani  
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me  
this 13th day of May, 2013.

 (L.S.)  
Notary Public for South Carolina

My Commission Expires: October 2, 2013