STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM OCONEE COUNTY
Court of General Sessions

J. Cordell Maddox, Jr., Circuit Court Judge

Case No. 2004-GS-37-1055
379 S.C. 304, 665 S.E.2d 188 (Ct. App. 2008)

The State ..... Respondent,

v.

Terry T. Tindall, ...Petitioner.

REPLY BRIEF OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

ARGUMENTS

I. Petitioner Preserved the Issue Regarding Evidence Seized During the Illegal Stop

The State initially contends that Petitioner failed to make a contemporaneous objection to the admission of the cocaine and therefore any such issue is not preserved for

appeal. (Respondent's Brief, pp. 3-4). This assertion is incorrect.

In ruling on the Petitioner's pre-trial motion to suppress, the trial court stated that, although "it is close," the court felt the stop was not extraordinarily long and the officer explained his reasonable suspicion of criminal activity. (Tr. pp. 63-64). This ruling followed a lengthy hearing where the trial court took testimony *in camera*. Immediately following the ruling, the parties gave opening statements and then the State presented the very evidence that was the subject of the motion to suppress.

It was clear that the trial court's ruling was, in fact, a final ruling on the evidence, and even if there had been no further objection, this issue was preserved since such objection would have been a futile act. Under these circumstances, where there is nothing new presented that would have changed the trial court's mind, our appellate courts have held the pre-trial motion to suppress is sufficient to preserve the issue for appeal. *See e.g.*, *State v. Wood*, 362 S.C. 520, 608 S.E.2d 435 (Ct. App. 2004), *cert. denied* Aug. 15, 2006 (in most cases, making a motion *in limine* to exclude evidence at the beginning of trial does not preserve an issue for review because a motion *in limine* is not a final determination; however, when a judge makes a ruling on the admission of evidence on the record immediately prior to the introduction of the evidence in question, the aggrieved party does not need to renew the objection); *State v. Tufts*, 355 S.C. 493, 585 S.E.2d 523 (Ct. App. 2003), *cert. denied* June 24, 2004 (although a ruling on an *in limine* motion is usually not final and the losing party must renew his or her objection when the evidence is presented, where the motion is ruled upon immediately prior to the introduction of the evidence in question, no further objection is necessary; the trial

judge's decision, reached after *in camera* testimony, lengthy discussion with counsel, and an overnight recess, was a final ruling, and immediately after the trial court ruled, the State called the sponsoring detective to the stand and he testified in front of the jury, and the Court held the issue was preserved). Hence, Petitioner's objection after the *in camera* testimony in this case, and immediately before the State presented the evidence, sufficiently preserved the issue for appellate review.

Furthermore, despite the State's brief argument to the contrary, Petitioner in fact objected to the evidence at trial based upon the witness assuming facts not in evidence, and identifying the contraband without expert evidence of such. (Tr. p. 145, lines 16-19). The trial court later noted that Petitioner was "fully protected" on the record regarding this issue and the very arguments made on appeal. (Tr. p. 292, line 18 - p. 294, line 23). The trial court repeated this admonition at the close of all the evidence, when Petitioner specifically renewed the motion to suppress and to dismiss. (R. p. 369, lines 11-19).

Petitioner respectfully submits that this issue is properly preserved for this Court's review, and the Court should reject the State's brief argument to the contrary.

II. Petitioner Was Unquestionably "Seized" Prior to his Arrest and Did Not Voluntarily Consent to the Search

In its Return, the State next takes the incredible position that the encounter between Petitioner and Officer Colegrove was a consensual encounter, and that Petitioner was not "seized" within the meaning of the Fourth Amendment at the time Officer

Colegrove continued the interrogation that led to the discovery of the contraband underneath the Jeep. (Respondent's Brief, pp. 4-6). The Court should reject this position.

The State cites *United States v. Sullivan*, 138 F.3d 126 (4th Cir. 1998), to support its position that Petitioner was not "seized" when Colegrove asked if he could search the Jeep, and that the encounter was consensual. In *Sullivan*, the Fourth Circuit held that once the traffic stop is over and its purpose is served, mere questioning by officers, *without some indicated restraint*, does not amount to a seizure under the Fourth Amendment. The Court noted that once the officer in that case had given Sullivan his license back and affording him "the right to depart." 138 F.3d at 133. In this case, however, there is no question that Petitioner never was afforded "the right to depart" before the purported consensual encounter took place. In *Sullivan*, the encounter lasted about one minute (the officer asked Sullivan if he had something in the car, and after the third time, Sullivan admitted he had a gun under the seat). *Sullivan* is simply inapposite to this case.

The test for determining whether an individual is "seized" within the meaning of the Fourth Amendment is whether a reasonable person in Petitioner's position would have felt free to decline the officer's request and to "go about his business." *California v. Hodari D.*, 499 U.S. 621 (1991). <u>See</u> <u>also</u> *Michigan v. Chesternut*, 486 U.S. 567 (1988) (test for determining if a particular encounter constitutes a seizure within the meaning of Fourth Amendment is whether in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave). So long as the person to whom questions are put remains free to disregard the questions and walk away, there has been no intrusion upon that person's liberty or privacy as would under the

Constitution require some particularized and objective justification. *United States v. Mendenhall,* 446 U.S. 544 (1980).

The *only* evidence in this record is that Petitioner was **not** free to disregard Officer Colegrove's continued interrogation and go about his business following completion of the traffic stop. Petitioner was not free to walk away or leave, nor did he believe he was free to leave. Petitioner stated that he did not feel as if he could just leave, and Officer Colegrove never told him he could leave. (Tr. p. 13, lines 10-16; p. 15, lines 4-8; p. 16, lines 2-12). There was a dog in the patrol car's back seat, and Petitioner stated, "There were two officers standing beside my door, and Officer Colegrove was still talking to me. So I didn't feel as if I was free to leave." (Tr. p. 16, lines 10-12). At the suppression hearing, Petitioner testified that after about 20 minutes Sergeant Colegrove gave Petitioner his license and information back along with a warning ticket. (Tr. p. 13, lines 2-6). Petitioner added, "I never thought the stop was over." (Tr. p. 12, line 25).

In camera, Sergeant Colegrove stated that it would normally take about 2 to 3 minutes to write a warning ticket. (Tr. p. 49, lines 5-10). Sergeant Colegrove gave Petitioner the warning ticket and all of the paperwork, but did not state Petitioner could go. (Tr. p. 49, lines 16-24). Sergeant Colegrove did not tell Petitioner he was free to leave, or that Petitioner did not have to consent to a search of the vehicle. (Tr. p. 50, lines 3-5; p. 53, lines 12-16). Sergeant Colegrove never told Petitioner he was a suspect of a crime. (Tr. p. 52, lines 8-9; p. 53, lines 17-18). Had Petitioner tried to leave Sergeant Colegrove would have brought the drug dog out. (Tr. p. 50, lines 10-12).

At trial, Sergeant Colegrove stated that had Petitioner refused to permit the

search, Sergeant Colegrove would **not** have let him leave, and would have brought the drug dog out. (Tr. p. 215, lines 11-17). Sergeant Colegrove had no intention of permitting Petitioner to get out of the patrol car. (Tr. p. 215, lines 18-20). Petitioner did not know he could leave. (Tr. p. 216, lines 19-21). At the time, Petitioner was still confined in the patrol car with Sergeant Colegrove and the drug dog, and there were two other officers outside the car. (Tr. p. 219, line 17 - p. 220, line 1).

As Chief Judge Hearn stated recently, "[u]ndoubtedly, a law enforcement officer may request permission to search at any time. However, when an officer asks for consent to search after an unconstitutional detention, the consent procured is *per se* invalid unless it is both voluntary and not an exploitation of the unlawful detention." *State v. Adams*, 377 S.C. 334, 339, 659 S.E.2d 272, 275 (Ct. App. 2008). Accord *State v. Willard*, 374 S.C. 129, 647 S.E.2d 252 (Ct. App. 2007); *State v. Pichardo*, 367 S.C. 84, 623 S.E.2d 840 (Ct. App. 2005). See also *State v. Robinson*, 306 S.C. 399, 412 S.E.2d 411 (1991) (a consent to search procured during an unlawful stop is invalid unless such consent is both voluntary and not an exploitation of the unlawful stop).

In this case, Officer Colgrove never stopped questioning Petitioner after giving him the warning ticket, and escalated the stop into a second detention without probable cause, much less articulable suspicion, that a crime was "afoot." Any purported "consent" at that point was necessarily void because the encounter was not consensual, and the prolonged stop was unlawful. There is simply no question that Petitioner was detained from the moment Officer Colegrove pulled him over. He was never free to leave. The State is simply wrong to imply otherwise, and to imply that the behavior during the

encounter gave rise to suspicions that other illegal activity was afoot.

Accordingly, the Court should reject the State's attempt to paint this matter into one of consent so as to obviate the need to comply with the Fourth Amendment.

III. The Trial Court Should Have Suppressed the Cocaine

Regarding the merits of the issue, Petitioner stands on the arguments he made in his Brief of Petitioner. Petitioner would like to comment, however, on the State's conclusory argument that "the officer identified a plethora of facts and circumstances supporting his suspicion." (Respondent's Brief, p. 6).

In camera, Sergeant Colegrove stated the Defendant exited the vehicle and did a "felony stretch," raising his hands in kind of a stress relief action. (Tr. p. 27, lines 12-14). This "felony stretch" led Sergeant Colegrove to believe that "a crime was afoot." (Tr. p. 27, lines 10-11). On cross-examination regarding the "felony stretch," Sergeant Colegrove agreed that it was his belief that if someone is under stress, they let out the tension by flexing their arms. (Tr. p. 32, lines 17-21). During the trial, Sergeant Colegrove stated Defendant got out of the car and stretched, which indicated to Sergeant Colegrove a "fight or flight" syndrome. (Tr. p. 174, lines 8 - 15, line; p. 175, lines 13-23).

Officer Colegrove also testified "it was his behavior of him while I was asking those questions. It wasn't specifically that. I try to get people to feel comfortable, to de-escalate. Your client was continuously extremely nervous, erratic pulse, fidgety with his hands and with his feet the whole time." (Tr. p. 48, lines 6-11). Officer Colgrove agreed that he wrote a report following the arrest, and did **not** mention Petitioner was nervous,

did **not** say Petitioner was "fidgety," and did **not** mention the heartbeat or pulse rate in that report. (Tr. p. 30, line 17 - p. 32, line 11). Officer Colegrove also identified Atlanta, Georgia and Durham, North Carolina as "drug hubs," but of course he also viewed every other location as a "drug hub" as well. As argued in the Brief of Petitioner, this adds nothing to the probable cause, or even articulable suspicion, inquiry.

There was simply no evidence to indicate Petitioner was engaged in any illegal activity beyond his mere presence in the vehicle where the drugs were found hidden behind the bumper. Compare *State v. Hernandez*, Op. No. 26654 (S.C. Sup. Ct. filed May 26, 2009) (Shearouse Adv. Sh. No. 22 at 13) (this Court reversed convictions and sentences where the State's evidence only proved mere presence without providing substantial circumstantial evidence of defendant's knowledge of the illegal activity, rather, the evidence raised a mere suspicion insufficient to support a verdict).

This Court should review the record and hold that, pursuant to *Illinois v. Caballes*, 543 U.S. 405 (2005), *State v. Williams*, 351 S.C. 591, 571 S.E.2d 703 (Ct. App. 2002) and *State v. Jones*, 364 S.C. 51, 610 S.E.2d 846 (Ct. App. 2005), the evidence in this case should have been suppressed. The Court should reverse Petitioner's conviction and remand the matter with instructions for the trial court to suppress the evidence.

IV. The Court of Appeals Should Have Reversed the Trial Court's Failure to Suppress the Statement

Petitioner stands on the arguments he made in his Brief of Petitioner, but would address certain statements the State made in its Respondent's Brief.

The State continues to describe the search in this case as a "consensual search."

(Respondent's Brief, p. 8). As argued above, there was no valid consent: Officer Colegrove's continued detention of Petitioner was illegal, so that any consent given was not valid. Furthermore, because the continued detention without probable cause, or even articulable suspicion, was illegal, it mattered not whether Officer Colegrove gave Petitioner any warning pursuant to *Miranda v. Arizona*, 384 U.S. 436 (1966), because any evidence, including statements obtained by continued questioning, would be fruit of the poisonous tree and inadmissible.

The State also remarks that Petitioner failed to argue this issue in his Brief. (Respondent's Brief p. 7). Petitioner would point this Court to pages 48 through 50 of his Brief of Petitioner as well as pages 41 through 42 of his Brief of Appellant in the Appendix.

Accordingly, this Court should reject the State's argument, and implication, that this issue as argued was not preserved for this Court's review.

CONCLUSION

For the reasons stated the Court should find that the issues Petitioner raised are preserved for this Court's review. The Court should reverse Petitioner's conviction, and remand the matter with instructions to the trial court to suppress the evidence seized as the result of the violation of Petitioner's Fourth Amendment rights as well as *Miranda v. Arizona*, 384 U.S. 436 (1966).

Respectfully submitted,

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