STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal From Oconee County
Honorable J. Cordell Maddox, Jr., Circuit Court Judge

State v. Tindall, 379 S.C. 304, 665 S.E.2d 188 (Ct. App. 2008)

THE STATE,

Respondent,

vs.

TERRY T. TINDALL,

Petitoner.

BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

The Grand Jurors of Oconee County charged (2004-GS-37-1055) Terry Tyrod Tindall with trafficking 400 grams or more of cocaine in violation of S.C. Code § 44-53-370(e)(2)(e). The defendant and his counsel came to trial on July 25, 2005 before the Honorable J. Cordell Maddox, Jr., Judge, and a jury. The jury found the defendant guilty, and the court sentenced him to 25 years imprisonment and a fine of $250,000. The defendant served a timely notice of appeal. The Court of Appeals of South Carolina affirmed the judgment, State v. Tindall, 379 S.C. 304, 665 S.E.2d 188 (2008), and, by Order dated April 10, 2009, the Supreme Court of South Carolina granted review of the decision.

ARGUMENTI. **The court of appeals soundly affirmed the denial of the motion to suppress contraband.**

The defendant claims that he contemporaneously objected to the introduction of the cocaine. (Brief of Petitioner p. 11). An examination of the defendant's citations (Brief of Petitioner p. 11, citing R. p. 145, lines 16-19; p. 292, line 18-p. 294, line 23) shows no contemporaneous objection to the introduction of the cocaine: The defendant objected - on the ground of a want of expert testimony on chemical analysis - to a police officer's identifying State's Exhibits 2-A, 2-B, and 2-C to be kilos of cocaine. Then, the defendant had no objection to the exhibits based upon the Rule for Chemical Analysis and Chain of Custody, Rule 6, SCRCrimP. State's Exhibits 2-A, 2-B, and 2-C were admitted without objection. The lab report, also without objection, identified the drugs to be 901.1 grams of cocaine, 482.8 grams of cocaine, and 996.9 grams of cocaine. (Tr. p. 4; p. 145, line 8 - p. 148, line 5). After the close of the state's case (R. p. 267, lines 2-3; p. 295, lines 8-10), the defendant moved for a directed verdict and asked the court to revisit the motion to suppress his statements [on grounds of untimely Miranda warnings]. (R. pp. 292-294).

Further, the court expressly found that the cocaine was admitted "[w]ithout objection." (R. p. 145, line 8-p. 146, line 9). Similarly, when the court admitted the Drug Analysis Report, defendant's counsel stated that there was "[n]o objection," and the court found it was admitted "[w]ithout objection." (R. p. 147, line 4-p. 148, line 5). A motion in limine to exclude evidence at the beginning of trial preserves no issue for review because a motion in limine is not a final determination. The moving party must make a contemporaneous objection when the evidence is introduced. State v. Forrester, 343 S.C. 637, 541 S.E.2d 837 (2001); State v. Floyd, 295 S.C. 518, 369 S.E.2d 842

(1988)(Chandler, J., observing peril of treating an in limine ruling as final); State v. King, 349 S.C. 142, 561 S.E.2d 640 (Ct.App. 2002)(in limine motion to suppress drugs must be renewed at the time the drugs are admitted into evidence). The want of a contemporaneous trial objection to the contraband left no issue for appellate review. (FBOR, Argument I, pp. 3, 5-6). The Court of appeals did not err by affirming the denial of the motion to suppress the contraband.

Assume for argument that the appellate court may review the trial court's in limine ruling. The substance of the defendant's position was that the officer had no reasonable suspicion to continue to detain the defendant beyond the traffic stop. (R. p. 55 - p. 59, line 6).

First, the officer did not detain the defendant beyond the traffic stop. The officer's normal time for a traffic stop was ten to fifteen minutes. (R. p. 44). The officer stopped the defendant at about 7:05, and the defendant was in the patrol car at about 7:09. (R. p. 44). The defendant lived out-of-state and did not have a current driver's license in his possession (R. p. 17), and he was driving a rental vehicle. (R. p. 6). The officer called and checked on the defendant's license (R. p. 37), wrote the defendant a warning ticket and returned all of the defendant's paperwork (R. p. 49).[1]

[1] In the officer's experience, when he returned things, a lot of people would "open the door and walk out and get in their car and drive off." (R. p. 217, lines 2-5).

After issuing the warning ticket and returning the driver's license, the officer requested the defendant's consent to search the vehicle. The defendant consented. (R. p. 13; p. 22; also see, e.g., R. p. 332). For his safety, the officer did not like to search alone and had made an anticipatory, coded request for support. (R. p. 45). An officer and a trainee came in the same vehicle. (R. p. 52). The consensual search of the defendant's vehicle began about 7:20. (R. p. 53). In sum, the officer handled a detailed traffic stop, completed a warning ticket, returned the defendant's paper work, obtained the defendant's free consent to search the vehicle, obtained safety support, and began the consensual search – all within the time period of an ordinary traffic stop.[2] The officer's traffic stop was based upon probable cause, and the officer did not detain the defendant beyond the traffic stop. The trial judge's declining to suppress the cocaine could have been affirmed on the ground that the defendant was not detained beyond the traffic stop.

[2] Additionally, the defendant acknowledged time consuming casual conversation with the officer about the officer's dog and his dog: "You know, just casual conversation." (R. p. 335).

Next, the complaint at the in limine hearing that there was no reasonable suspicion to continue to detain the defendant beyond the traffic stop overlooks the obvious - the defendant consented to the search of his vehicle, and the search was pursuant to his consent. A person is not seized when he consents to a search of his vehicle and then watches the very search to which he consented. See United States v. Sullivan, 138 F.3d 126, 131 (4th Cir. 1998)(lengthening a traffic stop by mere questioning without some indicated restraint does not amount either to custody for Miranda purposes or a seizure under the Fourth Amendment). Assuming for argument that reasonable suspicion was required for any hypothetical time between completing the traffic stop and obtaining the defendant's consent, the officer identified a plethora of facts and circumstances supporting his suspicion. State v. Tindall, 379 S.C. 304, 665 S.E.2d 188 (Ct. App. 2008)(listing specific facts and circumstances officer identified to form reasonable suspicion). See United States v. Sokolow, 490 U.S. 1, 109 S.Ct. 1581, 104 L.Ed.2d 1 (1989)(existence of "reasonable suspicion" requires officer to articulate factors leading to that conclusion).

II. **The court of appeals soundly affirmed the denial of the motion to suppress a statement.** Unlike the defendant's first issue, the present issue was raised at trial and preserved for appellate review: The defendant contended in limine that the officer conducted a drug investigation after getting him into the car and should have given Miranda warnings earlier. (R. p. 110, line 19 - p. 111, line 15). The court found that the statement was admissible. (R. p. 112, line 20 - p. 113, line 13). At trial, the defendant noted the requirement for a contemporaneous objection to preserve an issue for appeal and renewed his objection to the state's testimony on the same grounds. The court affirmed its previous ruling. (R. p. 153, line 13 - p. 155, line 2; pp. 292-294).

The court of appeals found that while the defendant's argument referenced Miranda, the appellate argument solely concerned the legality of the search. Since the court found no illegality in the search, the court affirmed. State v. Tindall, 379 S.C. 304, 665 S.E.2d 188 (Ct. App. 2008). On discretionary review, the defendant assigns error to the appellate court. There was no error. An issue that is not argued in the appellant's brief is deemed abandoned and should not be considered on appeal. Rule 208(b)(1)(D), SCACR; e.g., Jones v. Leagan, Op. No. 4551 (S. C. Ct. App. filed May 27, 2009).

Assume for argument that the issue the defendant raised at trial is now considered. The defense at trial was that the defendant was merely driving the vehicle and had no knowledge of the cocaine in the bumper of the vehicle. The defendant wanted to suppress officers' testimony that the defendant claimed that he was paid $1500 for driving the vehicle from Atlanta to Durham.[3] (R. p. 156 - p. 157, line 8; p. 240, lines 15-22).

[3] At trial the defendant said that the $1500 was not for driving the car. Rather, it was just money from a close friend. (R. pp. 354-355). However, he allowed that when he saw the officer pull out the cocaine, he wondered if that were the reason for the money. (R. p. 361).

The trial court was entirely correct. The officer saw a maroon Jeep traveling 73 miles per hour in a 65 speed zone. After following and seeing improper lane travel and tailgating, he stopped the vehicle at about 7:05 (R. p. 25; p. 44), observed the defendant's remarkable discomfort and other suspicious circumstances (R. pp. 27-29), wrote the defendant a warning ticket and returned all of the defendant's paperwork (R. p. 49), and obtained the defendant's consent to search the vehicle (R. p. 22). The consensual search began about 7:20 (R. p. 53) and ended about 7:29 (See R. p. 64, lines 8-22). After finding the cocaine, the officer arrested the defendant, handcuffed him, and gave him Miranda warnings. He thought that the defendant understood his rights. His answers to questions after receiving his rights were rational and responsive. The defendant was not threatened and not promised anything. He neither changed his mind nor withdrew from talking. He did not say that he wanted an attorney. The officer thought the defendant gave his statement freely and voluntarily. (R. p. 107, line 20 - p. 108; p. 109, line 25 - p. 110, line 6). The court found that the statement was admissible. (R. p. 112, line 20 - p. 113, line 13). The instant case is a routine traffic stop followed by a consensual vehicle search. During a routine traffic stop, the motorist is "detained and not free to leave," but the motorist is not 'in custody' for Miranda purposes.

United States v. Sullivan, 138 F.3d 126, 131 (4th Cir. 1998). The defendant was neither detained nor in custody during the consensual search, and there was no reason to give the defendant Miranda rights until the officer found the suspicious article.

CONCLUSION The judgment of the trial court should be affirmed.

Respectfully submitted,

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June 10, 2009

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THE STATE,

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PROOF OF SERVICE

I, Harold M. Coombs, Jr., certify that I have served the within Brief of Respondent on Petitioner by depositing three copies of the same in the United States mail, postage prepaid, addressed to his attorney of record, John S. Nichols, Esquire, Post Office Box 7965, Columbia, South Carolina 29202.

I further certify that all parties required by Rule to be served have been served.

This10th day of June, 2009.

HAROLD M. COOMBS, JR.

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ATTORNEY
FOR RESPONDENT

June 10, 2009

The Honorable Daniel E. Shearouse
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RE: State v. Terry T. Tindall

Dear Mr. Shearouse:

Enclosed please find the original and 14 copies of the Brief of Respondent in the above referenced case

Sincerely,

Harold M. Coombs, Jr.
Senior Assistant Attorney General

kws
Enclosures
cc: John S. Nichols, Esquire
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