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STATEMENT OF ISSUE ON APPEAL

Did the South Carolina Court of Appeals err when it reversed Taylor's conviction when the officers lacked both reasonable suspicion to stop him based on an anonymous tip describing a black man "possibly selling dope," and probable cause to search the tennis ball in his possession when there was nothing inherently incriminating about the tennis ball and when an officer's *Terry* frisk removed any concern that weapons were present?

STATEMENT OF THE CASE

Syllester Taylor was indicted by the Florence County Grand Jury of Possession with Intent to Distribute Crack Cocaine (2007-GS-21-295). He was tried *in absentia* before the Honorable Thomas A. Russo and a jury April 17-20, 2007. Taylor was represented by Vick Meetze, Esquire. He was convicted of the charge on April 19, 2007. On April 20, 2007, the sentence was unsealed and Taylor was sentenced to 30 years imprisonment.

On May 13, 2010, the South Carolina Court of Appeals reversed respondent's conviction. State v. Taylor, Op. No. 4687. The state submitted a petition for rehearing and suggestion for rehearing *en banc* on May 28, 2010. Respondent filed a return on June 11, 2010. The state submitted a reply on June 15, 2010. On June 24, 2010, the Court of Appeals denied the State's request, and the State filed a petition for writ of certiorari on July 23, 2010. Respondent filed its return on August 24, 2010. This Court granted certiorari on April 20, 2011 and the state filed its brief of petitioner on June 20, 2011.

This respondent’s brief timely follows.

ARGUMENT

The South Carolina Court of Appeals did not err when it reversed Taylor's conviction because the officers lacked both reasonable suspicion to stop him based on an anonymous tip describing a black man "possibly selling dope," and probable cause to search the tennis ball in his possession when there was nothing inherently incriminating about the tennis ball and when an officer's *Terry* frisk removed any concern that weapons were present.

RELEVANT FACTS

Officers from the Florence County Sheriff's Office received an anonymous tip that there was a black male on a bicycle in the area who was "possibly selling dope." ROA 3, ll. 18-19. The area was a dirt road in Florence County where two roads intersect. ROA 3, ll. 9-16. Based on this, several officers descended on the area and spotted Syllester Taylor. They saw him speaking to another person "real close." ROA 4- 5. Based on this, Officer Bellamy concluded they were engaged in illegal activity. ROA 5, ll. 1-6. The officers approached the men, and Taylor, who had been straddling his bicycle, got on the bike and started heading in the direction of the officers. Bellamy told him to get off the bike, and when Taylor did not immediately comply, he used an arm-bar takedown to put him on the ground and so he could conduct his Terry[1] frisk. ROA 5, ll. 7-19. Once respondent was on the ground, Bellamy searched him and discovered a tennis ball containing crack cocaine.

The officers predicated their approach of Taylor on the anonymous phone call they received identifying a black male on a bicycle "possibly selling dope." No other information appears to have been furnished to the officers. Neither the officers nor dispatch

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

knew who made the call, and there is no copy of the 911 tape that recorded the call. ROA, 8, ll. 16-22; ROA 9, ll. 8-9. No testimony was provided regarding what time dispatch even received the phone call.

As they approached Taylor and the other gentleman, Officer Bryant testified that:

> "As they notice our presence, the other black male begin to walk away towards a wooded area. At the time, as we begin getting closer, Deputy Bellamy said he was going to go for the person on the bike. I would go for the other person walking away."

ROA, 11, ll. 18-20.

Bellamy testified that he was unable to tell if anything had passed between the two, but because of illegal activity in the area, he decided to approach. ROA, 24, ll. 14-18. The Lieutenant with the two officers did not see anything either. ROA 32, ll. 8-10.

I. The officers did not have reasonable suspicion to stop Taylor when they received an anonymous tip about a black man on a bicycle "possibly selling dope."

These factors articulated by the officers did not give rise to the level of reasonable suspicion necessary to justify the stop of Taylor. This case falls firmly within the ambit of State v. Green, 341 S.C. 214, 532 S.E.2d 896 (Ct. App. 2000). In that case, the South Carolina Court of Appeals held that information from an anonymous tipster did not rise to the requisite level of reasonable suspicion to justify the stop:

> In [Green], the anonymous caller provided police with Green's name, a description of the car he was driving, and the location he would be departing. These items are readily observable and do not supply sufficient indicia of reliability to establish reasonable suspicion to justify an investigatory stop. The officer made no personal

> observations and had no reason, aside from the anonymous tip, to suspect Green of illegal conduct.

Id. at 218.

In this case, there is even less of a showing. Here, the caller said it was a "black male" and "possibly selling dope." The tipster did not provide anything of predictive value with which to gauge the reliability of the tip. Merely speaking closely to another individual does not create an additional "personal observation" that supports the search in this case. "Reasonable suspicion requires a 'particularized and objective basis that would lead one to suspect another of criminal activity." State v. Rogers, 368 S.C. 529, 629 S.E.2d 679 (Ct. App. 2006). *See also* State v. Khingratsaiphon, 352 S.C. 62, 69, 572 S.E.2d 456, 459 (2002) *quoting* United States v. Cortez, 449 U.S. 411, 418, 101 S.Ct. 690, 66 L.Ed.2d 621 (1981); Florida v. J.L., 529 U.S. 266, 120 S.Ct. 1375, 146 L.E.2d 254 (2000). The officers were there precisely because they received the tip, and no further observations made on the scene suggested that anything illegal was afoot. "Reasonable suspicion is something more than an inchoate and unparticularized suspicion or hunch." Rogers at 534. *See also* State v. Butler, 343 S.C. 198, 202, 539 S.E.2d 414, 416 (Ct. App. 2000). Other than the mere facts of receiving an anonymous tip and seeing Taylor speaking to another gentleman, nothing observed by the officers legitimately gave them a reason to approach Taylor. Bellamy's "unparticularized suspicion" did not justify the arm-bar takedown that he performed on Taylor to conduct a Terry frisk. Indeed, Bellamy's "takedown" of Taylor was a "seizure" for purposes of Fourth Amendment analysis, requiring an even high showing of probable cause:

"A person has been "seized" within the meaning of the Fourth Amendment "whenever a police officer accosts [the] individual and restrains his freedom to walk away."

State v. Woodruff, 344 S.C. 537, 545 544 S.E.2d 290, 294 (2001). *See also* Terry v. Ohio, 392 U.S. 1, 16, 88 S.Ct. 1868, 1877, 20 L.Ed.2d 889, 903 (1968); Sikes v. State, 323 S.C. 28, 30, 448 S.E.2d 560, 562 (1994). "No right is held more sacred, or is more carefully guarded by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law." Woodruff at 294 (*quoting* Union Pacific Ry. Co. v. Botsford, 141 U.S. 250, 251, 11 S.Ct. 1000, 1001, 35 L.Ed.2d 734, 737 (1891)).

Bellamy did not have either reasonable suspicion to conduct an investigatory stop of Taylor, nor did he have probable cause to seize him. Because the stop in this case was illegal, the drugs that were located within the tennis ball were fruits of the poisonous tree. Wong Sun v. United States, 371 U.S. 471, 83 S.Ct.407, 9 L.Ed.2d. 441 (1963). The trial court erred by not granting Taylor's motion to suppress the drugs, the correct legal conclusion drawn by the South Carolina Court of Appeals.

Additionally, since the stop was illegal, Taylor had a right to resist the arrest. State v. LaCoste, 347 S.C. 153, 553 S.E.2d 464 (Ct. App. 2001) and State v. Poinsett, 250 S.C. 293, 157 S.E.2d 570 (1967). *See also* State v. McGowan, 347 S.C. 618, 557 S.E.2d 657 (2001)

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II. The officer did not have probable cause to search Taylor's tennis ball when there was nothing inherently incriminating about the tennis ball and when the officer's *Terry* frisk removed any concern that weapons were present, even though the initial encounter with Taylor was not justified by a finding of reasonable suspicion.

"Evidence seized in violation of the Fourth Amendment must be excluded from trial." State v. Weaver, 374 S.C. 313, 649 S.E.2d 479 (2007). *See also* State v. Freiburger, 366 S.C. 125, 620 S.E.2d 737 (2005), *cert. denied*, 547 U.S. 1147, 126 S.Ct. 2287, 164 L.Ed.2d 813 (2006). A warrantless search is *per se* unreasonable and violates the Fourth Amendment prohibition against unreasonable searches and seizures, but a warrantless search will withstand constitutional scrutiny where the search falls within one of several well-recognized exceptions to the warrant requirement. Weaver at 319. "The burden is upon the prosecution to establish probable cause and the existence of circumstances constituting an exception to the general prohibition against warrantless searches." Weaver at 319; State v. Freiburger, *supra*.

Here, the police officers did not even have reasonable suspicion to justify their stopping Taylor. Assuming *arguendo* that they did have cause to stop Taylor, they still did not have the legal right to intrude into his tennis ball. Once Taylor was wrestled onto the ground and perceived by Bellamy as trying to get away—again, assuming for the purpose of this example that the officers had reasonable suspicion to approach the men-- then the officer could have *properly* conducted a Terry frisk. However, after assuring himself that Taylor was not armed, the purpose of the Terry frisk was exhausted. No weapons were found. Without a further finding of probable cause then, the intrusion into the tennis ball was not justified. *See* State v. Abrams, 322 S.C. 286, 471 S.E.2d 716 (Ct. App. 1996), cert denied Nov. 20, 1996:

> [O]nce the officers determined [the defendant] was not armed, they could not carry the instrusiveness of their search further unless the incriminating character of the object discovered during the search was immediately apparent to the officer performing the pat-down.

Id. at 288.

Once the tennis ball was discovered, Bellamy knew that Taylor did not have a weapon in his pocket. The search should have ended at that point. Tennis balls are not inherently "incriminating." Citing the United States Supreme Court case Minnesota v. Dickerson, 508 U.S. 366, 113 S.Ct. 2130, 124 L.Ed.2d 334 (1993) in Woodruff:

> The purpose of this limited search is not to discover evidence of crime, but to allow the officer to pursue his investigation without fear of violence . . . Rather, a protective search—permitted without a warrant and on the basis of reasonable suspicion less than probable cause—must be *strictly* "limited to that which is necessary for the discovery of weapons which might be used to harm the officer of others nearby.

Id. at 549 (citations omitted) (emphasis added).

The onus during the suppression hearing was on the prosecution to show that probable cause existed at the time Bellamy squeezed open the tennis ball to get a look inside of it. They failed to do so. "The scope of a search authorized by Terry is limited." Id. at 547. Bellamy's intrusion into the tennis ball was a mere fishing expedition-- beyond the "strictly circumscribed" search justified under Terry—and it was improper.

The South Carolina Court of Appeals Decision

The Court of Appeals correctly concluded that the officers lacked reasonable suspicion to stop respondent in this situation. The Court of Appeals, in its exhaustive 20 page opinion, correctly analyzes the law on this issue. Both the state, and the dissent, appear to criticize the Court of Appeals' opinion on the issue of whether or not sufficient deference was given to the officers' purported experiences and intuition when they concluded that illegal activity must have been occurring. As the dissent notes, the trial judge placed great

emphasis on Bellamy's testimony that he observed respondent and his companion "huddled up." As the dissent notes:

> Thus, whereas in Sprinkle[2] the officers actually saw at close range and in bright light the absence of fruits or instruments of any crime, the officers in the present case could have been prevented by distance and lighting conditions from observing any suspicious activity, particularly if the subjects engaged in that activity were attempting to conceal it. Considering that the officers had less than optimal conditions to view the scene, I can fault neither Officer Bellamy for his decision to rely on his professional experience and training in determining that what he saw warranted further investigation nor the trial judge ruling that this reliance was reasonable.

Id. at 126.

The dissent suggests that it is appropriate to follow the reasoning set forth by the Fourth Circuit Court of Appeals in U.S. v. Lender, 985 F.2d 151 (4th Cir. 1993) and find that there was evidence presented during the suppression hearing to support a finding of reasonable suspicion. Id. at 127. With all due respect to the dissent, Lender does not compel a finding of reasonable suspicion in this case. In Lender, two policeman were patrolling an area known for heavy drug trafficking. These officers observed three or four men on a street corner huddled around Lender and looking down into his palm. Suspecting a drug deal, the police got out of the car and approached them. When they approached, Lender attempted to evade them by turning his back and walking away. Based on these facts, the court found that the police had reasonable suspicion to stop him. The Fourth Circuit Court of Appeals in Sprinkle, supra, notes that the fact that several men were looking into Lender's hand indicates that there was actually something in it. Additionally the Court, in Sprinkle, concluded that the lateness of the hour, 1:00 AM, contributed to the finding of reasonable suspicion. Here, the officers merely observed two men standing close together at

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[2] U.S. v. Sprinkle, 106 F.3d 613 (4th Cir. 1997).

nighttime. The police did not observe any money or drugs exchanging hands, nor could they articulate any other objective facts to support a reasonable belief that criminal activity was afoot. The dissent notes that lighting conditions "could have" prevented the observing of any suspicious activity "particularly if the subjects engaged in that activity were attempting to conceal it." Id. at 126. Respectfully, fidelity to 4th amendment analysis requires a particularized and objective basis for conducting an investigatory stop that was lacking in this case.

The Court of Appeals cites approvingly to Sprinkle in support of its finding that the officers lacked reasonable suspicion to stop respondent. In Sprinkle, the court rejected the government's arguments that the following five factors militated in favor of a finding of reasonable suspicion: (1) the officer knew that Sprinkle's companion had a criminal record and had recently been released from prison after serving time for narcotics violations, (2) the subjects were spotted in a high crime area, (3) Sprinkle and his associate were huddled together in a car with their hands close together, (4) Sprinkle's companion put his head down, and his hand to his face, to avoid recognition when an officer walked by, and (5) Sprinkle's companion drove away as soon as the officers walked by the car. Id. at 617. Regarding this factor of being huddled together, the court notes that it takes more than this impression to qualify as reasonable suspicion. Id. Likewise in this case, the mere fact that two men were standing close together at nighttime, despite the officer's characterization of their "huddling" together, did not amount to reasonable suspicion sufficient to justify an investigatory detention.

The Court of Appeals' decision in this case should stand because the officers did not have a reasonable suspicion to justify the detention of respondent in this case. The trial court

judge erred in finding otherwise because there is no evidence in the record to support a finding of reasonable suspicion in this case.

CONCLUSION

For the preceding reason, Taylor respectfully asks this Court to uphold the opinion of the South Carolina Court of Appeals.

Respectfully submitted,

_____
Elizabeth A. Franklin-Best
Appellate Defender

ATTORNEY FOR RESPONDENT.

This 20th day of July, 2011.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Florence County

Thomas A. Russo, Circuit Court Judge

Opinion No. 4687 (S.C. Ct. App. filed 5/13/2010)
07-GS-21-00295

THE STATE,

PETITIONER,

V.

SYLLESTER D. TAYLOR,

RESPONDENT

BRIEF OF RESPONDENT

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ATTORNEY FOR RESPONDENT.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Florence County
Thomas A. Russo, Circuit Court Judge

Opinion No. 4687 (S.C. Ct. App. filed 5/13/2010)
07-GS-21-00295

THE STATE,

PETITIONER,

V.

SYLLESTER D. TAYLOR,

RESPONDENT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Brief of Respondent in the above referenced case has been served upon Christina J. Catoe, Esquire, at Rembert Dennis Building, Room 519, 1000 Assembly Street, Columbia, South Carolina 29201, this 20th day of July, 2011.

_____
Elizabeth A. Franklin-Best
Appellate Defender

ATTORNEY FOR RESPONDENT.

SUBSCRIBED AND SWORN TO before me
this 20th day of July, 2011.

_____(L.S.)
Notary Public for South Carolina

My Commission Expires: May 16, 2021 .

SCCID
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Wanda H. Carter, Deputy Chief Appellate Defender

November 4, 2011

Christina J. Catoe
Assistant Attorney General
Office of the Attorney General
PO Box 11549
Columbia, SC 29211

Re: The State v. Syllester D. Taylor

Dear Christina

Enclosed please find two copies of the Brief of Respondent in the above entitled case, which I have filed today with the South Carolina Supreme Court.

Should you have any questions concerning this matter, please do not hesitate to contact me.

Sincerely,

Elizabeth A. Franklin-Best
Appellate Defender

EAF/eaf

cc: Court of Appeals

Enclosure

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Robert M. Dudek, Chief Appellate Defender
Wanda H. Carter, Deputy Chief Appellate Defender

November 4, 2011

Syllester D. Taylor #251960
McCormick Correctional Institution
386 Redemption Way
McCormick, SC 29899

Re: Your appeal

Dear Mr Taylor:

Enclosed please find a copy of the Brief of Respondent in your case, which I have filed with the South Carolina Supreme Court.

Should you have any questions concerning this matter, please do not hesitate to contact me.

Sincerely,

Elizabeth A. Franklin-Best
Appellate Defender

EAF/eaf

Enclosure