

**IN THE SUPREME COURT OF MISSISSIPPI
COURT OF APPEALS OF THE STATE OF MISSISSIPPI**

STATE OF MISSISSIPPI

APPELLEE

-VS-

**APPEAL NO. 2007-CA-00414-COA
Prentiss County Case #CV-06-251G**

TERRY BURNS

APPELLANT

**APPEAL OF DENIAL OF MOTION FOR POST CONVICTION RELIEF
FROM THE CIRCUIT COURT OF PRENTISS COUNTY, MISSISSIPPI**

BRIEF OF APPELLANT

ORAL ARGUMENT IS NOT REQUESTED

RESPECTFULLY SUBMITTED,



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STATEMENT REGARDING ORAL ARGUMENT

Oral Argument is not requested.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

TERRY BURNS, the Appellant below, identifies the following issues for review by

this Court:

ISSUE I: WHETHER THE TRIAL COURT ERRED BY DISMISSING THE
 APPELLANT'S PETITION FOR POST CONVICTION RELIEF.

STATEMENT OF THE CASE

A. The nature of the Case.

This is an appeal of the denial of a post conviction motion challenging the plea and sentence originating from Circuit Court of Prentiss County, Mississippi. The trial court had exclusive jurisdiction over the persons and the subject matter pursuant to Miss. Code Ann. Section 99-39-1 et seq. and Miss. Code Ann. Section 99-39-5 et seq. and further because the petitioner was indicted by the Prentiss County, Mississippi Grand Jury on January 27, 2005, entered a guilty plea to the indictment, and the Court sentenced the Defendant to a term of twenty (20) years in the custody of the Mississippi Department of Corrections, eight years of sentence suspended, leaving twelve (12) years to serve. This sentence ran concurrent with the sentence imposed in Prentiss County CR04-033 and followed by five (5) years of post-release supervision. On January 30, 2007, the trial court dismissed the petition for post conviction relief. It is from said conviction and sentence and the denial of relief from his petition for post conviction relief that TERRY BURNS now presents this appeal.

B. The Course of the Proceedings

Petitioner Terry Burns was charged by criminal indictment with unlawfully, wilfully, and feloniously selling and transferring a quantity of Hydromorphone (Dilaudid), a Schedule II Controlled Substance, in violation of Mississippi Code, Annotated, Section 41-29-139.

Subsequently, the Court sentenced the Defendant to a term of twenty (20) years in the custody of the Mississippi Department of Corrections, eight years of sentence suspended, leaving twelve (12) years to serve. After filing a timely petition for post conviction relief, the appellant was denied relief in the Circuit Court of Prentiss County on January 30, 2007.

C. Disposition in the Court Below

The sentencing order was filed by the Circuit Court of Prentiss County, Mississippi, on February 2, 2005, in which the Defendant was sentenced for the crime of Sale of Hydromorphone. Subsequently, it was Ordered that the Defendant be sentenced to serve a term of twenty (20) years in the Mississippi Department of Corrections, eight years (8) suspended, leaving twelve (12) years to serve. Also the Defendant was to be placed on Five (5) years of Post Release Supervision after release from confinement.

Statement of Facts Relevant to the Issues Presented for Review.

Appellant maintains that his fourth amendment right protecting him from unreasonable searches and seizures was violated by the unconstitutional search of his vehicle and his home.

SUMMARY OF THE ARGUMENT

Appellant Terry Burns maintains that an illegal search was conducted on his vehicle thereby violating his Fourth Amendment right. Furthermore, Burns believes that the fruit obtained through the illegal search of his vehicle and home should be suppressed

ARGUMENT

ISSUE I. WHETHER THE TRIAL COURT ERRED BY DISMISSING THE APPELLANT'S PETITION FOR POST CONVICTION RELIEF.

Petitioner Burn's right to be free from unreasonable search and seizures as described in the Fourth Amendment to the United States Constitution was violated when arresting officers conducted an illegal, warrantless search of his vehicle, while said vehicle was parked in his driveway. Subsequently, agents, after arresting Burns, obtained a warrant to search his residence. However, Burns maintains that since the initial search of his vehicle was illegal, the evidence

obtained from his vehicle and later from the search of his residence should be suppressed. The Fourth Amendment to the United States Constitution governs all searches and seizures conducted by government agents. As such, the Fourth Amendment to the Constitution of the United States provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Defendant Terry Burns' Fourth Amendment rights have been violated by the illegal search of his vehicle, and subsequently by the search of his home. All evidence produced by the aforementioned illegal conduct should be suppressed. Illegal authorization was obtained to search his residence from the Court and such unlawful acts constitute violations of defendant's Fourth Amendment right to be free from unreasonable searches. Furthermore, the defendant claims pursuant to Simmons v. United States, 390 U.S. 377 (1968) and 18 U.S.C. Section 3504(a), that he is "aggrieved" by the "unlawful acts" and that evidence which has been offered in trials, hearings, and other proceedings before the Grand Jury, the Court and other authorities of the United States is inadmissible because it is the primary product of an "unlawful act" and/or because it was obtained by the exploitation of or otherwise derived from an "unlawful act."

The Warrantless Search

On January 6, 2004, Investigator Michael Ramey and Investigator Rhonda Brock, approached Terry Burns as he exited his vehicle after parking in his driveway. Officers stated that they had been suspecting Burns of driving on suspended license. This interaction with Burns was

made after his vehicle was in the private driveway to his residence, 207 Robertson Circle, Booneville, Mississippi 38829 at approximately 11:30 a.m. Burns exited his vehicle, closed the door to the vehicle and was approached by both officers. Terry Burns was asked whether he would consent to his vehicle being searched to which he refused to consent to said search. In contravention to his refusal, agents nonetheless began effectuating a search of the vehicle which ultimately yielded twenty-one Hydromorphone (dilaudid) tablets under the seat of the vehicle. Burns was arrested at his residence and thereafter agents submitted an affidavit for a search warrant for Burns' home. A search was executed on the residence that yielded additional amounts of controlled substances, notebooks, phone bills, checks, vehicles, and miscellaneous items. The agents conducting the searches in this case, conducted searches that were outside the judicial process, and without prior approval by a judge or magistrate. "It is a first principle of Fourth Amendment jurisprudence that the police may not conduct a search unless they first convince a neutral magistrate that there is a probable cause to do so." New York v. Belton, 453 U.S. 454, 457 (1981). The rule is that a warrantless search is per se unreasonable, subject only to a few specifically established and well-delineated exceptions. Katz v. United States, 389 U.S. 347, 357 (1967); Coolidge v. New Hampshire, 403 U.S. 443, 454-55 (1971).

Therefore, the burden rests upon the government to make a showing of facts, if it can, to justify its departure from the warrant requirement. Coolidge v. New Hampshire,

403 U.S. 443, 454-55 (1971); McDonald v. Jeffers, 342 U.S. 48, 51 (1951). The government bears both the burden of persuasion by a preponderance of the evidence, United States v. McGrath, 459 F. Supp. 1258, 1265 (S.D.N.Y. 1978); see Lego v. Twomey, 404 U.S. 477 (1972), and the burden at the hearing of going forward with its proof. United States v. Tussell, 441 F.

Supp. 1092, 1097 (M.D. Pa. 1977). However, the Defendant is entitled to attack the government's proof and to present his own evidence.

Clearly the government cannot meet its burden of proving the existence of an exception to the warrant requirement. The searches and ultimately the seizures were conducted without probable cause, exigent circumstances, or lawful consent.

As the Fourth Amendment indicates, the ultimate measure of the constitutionality of a governmental search is "reasonableness." Vernonia School District 47 v. Acton, 515 U.S. 646, 115 S. Ct. 2386 (1995). Whether a particular search meets the reasonableness standard is judged by balancing its intrusion against its promotion of legitimate governmental interests. The individual's legitimate expectations of privacy and personal security are placed on one side of the balance while the government's need for effective methods to deal with breaches of public order are placed on the other. Without question there was not present in the case at bar the urgency that allowed the waiving of the request for searching the petitioner's vehicle. Burns was outside the vehicle, posed no threat to the safety of himself or others, and there was not any chance of the evidence being destroyed. The defendant's expectation of privacy heavily outweighed any alleged breach of public order that the government may propose. The Defendant furthermore believes that he is entitled to this Fourth Amendment protection because his expectation of privacy is one that society is "prepared to recognize as legitimate." Katz v. United States, 389 U.S. 347, 360 (1967); Hudson v. Palmer, 468 U.S. 517 (1984). In Katz the court reversed a District Court judgment because petitioner was entitled to the protection of United States Constitutional Amendment IV when he occupied a telephone booth, shut the door, and made a call; and the government agents ignored the requirement that they obtain authorization from a

magistrate upon a showing of probable cause. Like Katz, defendant Burns should not have been subjected to a search without prior court approval.

Title 18 U.S.C. Section 3504(a)(1) provides: [Upon] a claim by a party aggrieved that evidence is inadmissible because it is the primary product of an unlawful act or because it was obtained by the exploitation of an unlawful act, the opponent of the claim shall affirm or deny the occurrence of the alleged unlawful act. Defendant Burns requests that this Court order such affirmation or denial of the occurrence of an unlawful act.

In making this argument, the defendant turns the Courts attention to certain statements contained in United States v. Torres, 751 F.2d 875 (7th Cir. 1984). The Torres court wrote:

“The usual way in which judges interpreting the Fourth Amendment take account of the fact that searches vary in the degree to which they invade personal privacy is by requiring a higher degree of probable cause (to believe that the search will yield incriminating evidence), and by being more insistent that a warrant be obtained if at all feasible, the more intrusive the search is.

The Fifth Circuit’s ruling in United States v. Holmes, 521 F.2d 859 (5th Cir. 1975) supports defendant Burns’s position. Here the trial judge made an alternate finding, ruling that agent Vipperman’s peering into the shed was an illegal search conducted without probable cause and lacking the authorization of a warrant. He ordered all evidence seized from the Moody property suppressed. The contents in defendant Burns’s vehicle were not in “plain view”, and the evidence seized based upon the illegal search (looking under the seat of Burn’s vehicle) and seizure should be suppressed as “fruit”. In Brock v. United States, 223 F.2d 681 (5th Cir. 1955) the Fifth Circuit Court of Appeals dealt with an intrusion similar to that involved in the instant

case. Federal agents observed the operation of an illicit still for two days and raided it without first obtaining a warrant. They then proceeded to a house one-quarter of a mile away because they thought that the people arrested in the raid had come from there. Knowing they could not obtain a warrant on the basis of information available to them, they decided to obtain the evidence they needed to support a search by going onto the premises and peering into a bedroom window. The Fifth Circuit held that this was an illegal search and ordered suppression.

Likewise, the agents in the instant case knew that they could not obtain a warrant with the information they possessed and decided to search the defendant's vehicle while it was parked in his driveway without court authorization or consent. This search was done only to secure evidence of an alleged crime which would support a warrant for a later and thorough search of the premises and the agents did so with no basis except speculation for believing any illegal activity was there occurring. The action that was condemned in Brock fares no better here.

In articulating additional case law that supports the defendant's position, an individual with a present possessory interest in the premises searched may have standing to challenge that search even though he was not present when the search was made. Accordingly, if the defendant has a possessory interest in the vehicle and house (and the contents therein), he can challenge the illegal search of the vehicle even while he was not present. See Chapman v. United States, 365 U.S. 610 (1961) (search of rented premises without warrant and in absence of tenant but with consent of landlord was unlawful and evidence seized was inadmissible). See United States v. Angulo-Fernandez, 53 F.3d 1177 (10th Cir. 1995) (although registered owner of car denied ownership, such evidence is not determinative of defendant's right to possess car and, absent contrary evidence, these facts were sufficient to meet defendant burden of standing).

Reasonable Expectation Of Privacy

The defendant avers that he possessed a legitimate expectation of privacy. Because the defendant did own the vehicle that he was parked in his driveway, he maintained a reasonable expectation of privacy to refuse search of said vehicle. See Katz v. United States, 389 U.S. 347 (1967). As owner of the vehicle, Defendant Burns's expectation of privacy was reasonable inasmuch as it had "a source outside of the Fourth Amendment... by reference to [both] concepts of real property... law" and "understandings that are recognized and permitted by society." United States v. Vega, 221 F.3d 789 (5th Cir. 2000) (the convictions and sentence of Vega, who as renter of the premises had an expectation of privacy, were vacated, and the district's court's denial of his motion to suppress evidence seized, including statements obtained, were reversed and remanded).

Three principles guide the inquiry of whether one has a legitimate expectation of privacy: First, the Fourth Amendment protects people, not places. Therefore the emphasis should not surround whether the vehicle was at a place which is private but whether the defendant has a reasonable expectation of privacy therein. If the government, however, believes this to be true, then the defendant may assert that he possessed a legitimate expectation of privacy.

Secondly, a privacy interest, in the constitutional sense, consists of a reasonable expectation that uninvited and unauthorized persons will not intrude into a particular area. The owner could shut the door of his vehicle without being subjected to illegal entrance by anyone.

Third, an expectation of privacy, strictly speaking, consists of a belief that uninvited people, (in the instant case the investigating agents), will not intrude in a particular way. The defendant's reference to the legitimate expectations of privacy regarding his vehicle and home is the

expectation that the contents in either place would be safe from exposure to the public. See United States v. Shelton, Rexius, Harshfield, and Tilton, 742 F. Supp. 1491 (1990).

Exclusionary Rule

Under the Exclusionary Rule, evidence obtained in violation of the Fourth Amendment cannot be used in a criminal proceeding against the victim of the illegal search and/or seizure. Mapp v. Ohio, 367 U.S. 643 (1961). This includes the “fruit” of such illegal conduct. Wong Sun v. United States, 371 U.S. 471 (1963). Based upon these Supreme Court rulings, because investigating agents did not receive authorization or consent to search Burns’ vehicle, it rendered the search illegal and unlawful. Accordingly, the fruits from the unlawful acts, (i.e. the supporting facts contained within the affidavit for search warrant to search Burns’ residence), and all evidence derived from the search of the vehicle and residence, cannot be used in a criminal proceeding against the defendant. The Exclusionary Rule is a judicially created remedy designed to deter law enforcement misconduct. Therefore, the application of the rule must be applied to cases where its remedial objectives are thought to be best served. Due to the violations cited thus far, and the sufficient specificity which enables the Court to conclude that relief must be granted for the defendant based upon the egregious violations of his Fourth Amendment rights.

Traffic Stops and the Fourth Amendment

The Fourth Amendment protects individuals from unreasonable searches and seizures. U.S. v. Grant, 349 F.3d 192, 196 (5th Cir. 2003). Traffic stops are considered to be seizures within the meaning of the Fourth Amendment. Because a traffic stop more closely resembles an investigative detention than a formal arrest, this Court analyzes a traffic stop for Fourth Amendment purposes under the standard articulated in Terry v. Ohio, 392 U.S. 1 (1968). Also

see Couldery v. State, 1890 So.2d 959, 962) (Miss. Ct. App. 2004). Under Terry, a detention is lawful if the officer "can 'point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant [the search and seizure].'" U.S. v. Santiago, 310 F.3d 336, 340 (5th Cir. 2002). Terry requires "a two-tiered reasonable suspicion inquiry: 1) whether the officer's action was justified at its inception, and 2) whether the search or seizure was reasonably related in scope to the circumstances that justified the stop in the first place." In determining the existence of "reasonable suspicion, grounded in specific and articulable facts,' the court must consider whether, taking into account the totality of the circumstances, the detaining officers had a 'particularized and objective basis for suspecting the particular person stopped of criminal activity.'" Adams v. City of Booneville, 910 So.2d 720, 722 (Miss. Ct. App. 2005) (quoting U.S. v. Cortez, 449 U.S. 411, 417-18 (1981)).

Although the trial court determined that the detention of Burns was legal, the officers at the scene of the arrest stated that they witnessed Burns driving on a suspended license and therefore approached his vehicle after it was parked in his driveway. However, the officers did not suspect Burns of driving under the influence of a drug or intoxicant. Burns did not exhibit any suspicious behavior nor were suspicious circumstances present that may have alerted officers to open the door of his vehicle and execute a search. Additionally, the arresting agents did not articulate specific facts that undergirded any suspicion that the vehicle contained controlled substances. Burns contends that, at the time the controlled substances were found in his vehicle, officers were not executing a protective search but were undertaking an exploratory search of his vehicle for contraband.

"Fourth Amendment rights are personal rights which, like some other constitutional rights, may not be vicariously asserted." Alderman v. United States, 394 U.S. 165, 174, 89 S. Ct. 961, 966-67, 22 L. Ed. 2d 176 (1969). In Walker v. State, 913 So. 2d 198, 225 (Miss. 2005), this Court said only persons whose Fourth Amendment rights have been violated can benefit from the protections of the exclusionary rule." Here, Burns was the owner of the vehicle that was searched and therefore is entitled to benefit from the protections of the exclusionary rule because he has standing to assert that the controlled substances found was the product of a illegal search, and his fourth assignment of error has merit. The officers were not required to ignore contraband discovered in the course of a *Terry* search although such was not the point nor could it have validly been of his search in the first place. When such chance discovery is made, evidence thus discovered does not require suppression. However, in the case at bar, the circumstances surrounding the search of Burns' vehicle demand suppression of the evidence. The discovery of the controlled substances was not by chance, nor was the contraband in plain view. Officers obtained the controlled substances by exceeding the scope of the permissible search of Burns' car. The meaning of the Fourth Amendment has been greatly refined and expanded upon in the two centuries since its passage. One of the more notable examples of this jurisprudence concerns the automobile exception to the warrant requirement. This rule is well summarized in Barry v. State, 406 So.2d 45, (Miss.1981): "A warrantless search of an automobile has long been recognized as an exception to the warrant requirement provided probable cause and exigent circumstances exist. This exception is founded on the basic premise that for Fourth Amendment purposes there is a fundamental difference between houses and cars. The practical effect of this exception is that evidence seized without a warrant from an automobile is admissible if there is

probable cause and an exigency. The exigency prong is addressed in the Mississippi Federal case of Henry v. Williams, 299 F.Supp. 36 (N.D.Miss.1969):

[T]he exceptional circumstances excusing the issuance of a warrant are: 1) when the vehicle searched is in motion; 2) when the officers have probable cause to believe the vehicle contains contraband subject to search; and 3) when it is impracticable to secure a warrant because the vehicle can and may be removed from the jurisdiction. Id. at 45.

Applying these criteria, the vehicle was not in motion when the agents stopped it, in fact, it was parked in the defendant's driveway. Although the officers were investigating the possible role of the defendant in sale of controlled substances, they did not have probable cause to believe that the vehicle contained contraband, and finally, because the vehicle was apprehended at the defendant's residence, it was highly unlikely that it would have been removed from the jurisdiction. The exigency requirement excusing the issuance of a warrant was not satisfied by the facts of the case three times.

INVENTORY SEARCH

Often officers, after arresting a suspect execute a specific type of search of the suspect's vehicle. This search is properly classified as an "inventory search." In the case at bar, the search was not an inventory search in any form because Burns' car was not being impounded at the time the search occurred, and was parked safely in his driveway. There was no potential liability by the Sheriff's Department or police of a temporarily abandoned vehicle, nor was there any need to remove anything of value and place those items with Burns' belongings at the jail, in an effort to avoid harm to police from unknown items in the car if it is impounded, to avoid false claims of theft, and to prevent

vandalism of property. South Dakota v. Opperman, 428 U.S. 364, 369, 96 S.Ct. 3092, 49 L.Ed.2d 1000 (1976). The reasonableness of any search, without a warrant, is measured from the standpoint of the conduct of the searchers. If their conduct is in some way reprehensible, or if they precipitated in a search and are motivated therein solely by a desire to "hunt" for incriminating evidence; or if they do so without any plausible explanation or justification, the invasion is an unreasonable one, violating the Fourth Amendment. Such is the case here. Robinson v. State, 418 So.2d 749, 752 (Miss.1982) (quoting Godbee v. State, 224 So.2d 441, 443 (Fla.App.1969)).

CONCLUSION

Defendant Burns maintains that in order for the tenants of due process to be fully adhered to this court must allow him to withdraw his plea thereby vacating his sentence and ordering a new trial.

WHEREFORE, PREMISES CONSIDERED, and to insure that the fundamental tenants of due process and the Fourth Amendment protections against illegal search and seizure Defendant Burns requests that this Honorable Court vacate the imposed sentence and remand this case for a new trial and any additional relief that the court may deem as just and appropriate.

Respectfully Submitted, on this the 12 day of June,
2007.

By: _____

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CERTIFICATE OF SERVICE

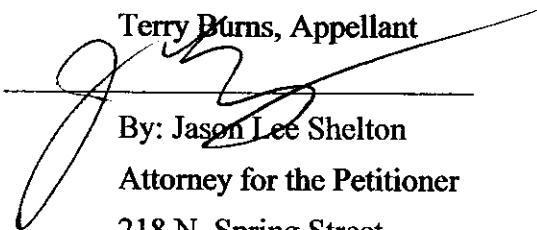
THIS IS TO CERTIFY THAT I, JASON LEE SHELTON, have this day served
a true and correct copy of the above and foregoing APPEAL OF DENIAL OF MOTION
FOR POST CONVICTION RELIEF FROM THE CIRCUIT COURT OF PRENTISS
COUNTY, MISSISSIPPI, postage prepaid, first class mail, addressed as follows on this
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