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Nov 28 2022
S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

ON CERTIORARI TO THE COURT OF APPEALS

APPEAL FROM CHARLESTON COUNTY
In the Court of General Sessions

Thomas L. Hughston, Jr., Circuit Court Judge

Appellate Case No. 2021-001043

The State .....Respondent,

v.

General T. Little.....Petitioner.

REPLY BRIEF OF PETITIONER

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ARGUMENT

Petitioner General T. Little (Dr. Little) submits this reply brief to respond to the State's arguments in response. The Court should reject those arguments—and reverse and remand for a new trial—for at least five reasons.

First, the State misrepresents the factual record in several material respects. Although the State seeks to recycle its arguments that the driveway had "plenty of room" for Dr. Little to park wholly within it, Resp. Br. at 3; his car was "parked oddly," *id.* at 10; and it was "halfway on the mulch," *id.* at 13; the pictures in the record plainly tell a different story.[1] *See* (R. pp. 1265, 1286–87 & 553). Because the vehicle on the left was hugging the middle of the driveway, Dr. Little parked his vehicle farther to the right, and only his right rear tire rested in the mulch beside the driveway. *See id.* Objectively speaking, nothing is "odd" about that.

And Dr. Little was *not* the one who "contacted law enforcement the night of the murder informing them that he would go to the crime scene." Resp. Br. at 10. In fact, officers asked Dr. Little's daughter, Kimberly, to contact him. (R. p. 454:5–7) (K. Little: "A lady – I thought it was a cop, but I'm learning later she's a detective. She asked me to call him to come to the house."). Kimberly was unable to recall if that was the last time she spoke with her father that evening. *Id.* Officers, however, made no effort to call Dr. Little or to orchestrate another phone call through Kimberly. Instead of simply calling to ask if he was still coming to the crime scene, officers were so "worried" when Dr. Little did not show up to the scene of his ex-wife's murder after barely an hour had passed that they went to his house and searched his vehicles without a warrant.

[1] Also, while the search warrant affidavits indicate Deputy Colburn observed the passenger window rolled down during his sweep, (R. pp. 1257, 1262), he testified at trial he could see the window down from the street as he pulled up to the home, (R. p. 516). Deputy Colburn arrived after 11:00 P.M. that evening. (*Id.*) No overhead lights were on inside the car, (R. p. 549), and he needed the aid of his flashlight to search the vehicles.

Last, contrary to the State's misrepresentation, Deputy Colburn *did* "know that the car that was parked oddly belonged to the Petitioner." Resp. Br. 12. Kimberly told Deputy Colburn as much. (R. p. 57:12–14) (Colburn: "Only other thing that was provided to me was from Kimberly, was that Mr. Little usually drives a silver Toyota SUV"). When asked why he documented the type of vehicle Dr. Little drove, Deputy Colburn said, "The only reason was to notate that that was the vehicle he drove. And if I was to go to his residence, if that vehicle was there, obviously, he potentially was home." (R. p. 57:22–24); *see also* (R. p. 178:6–7) (stating that, when he got to Dr. Little's house, Deputy Colburn "[n]oticed a silver Toyota SUV that [he] was told Mr. Little usually drives").

These points matter, too, because these are key historical facts that preceded the unlawful search of the vehicles parked within the curtilage of Dr. Little's home. *See Florida v. Jardines*, 569 U.S. 1, 10 (2013); *State v. Abdullah*, 357 S.C. 344, 351, 592 S.E.2d 344, 348 (Ct. App. 2004). The State's failure to accurately set the stage only further demonstrates its justifications for Deputy Colburn's "need" to conduct an illegal search are a mere pretext.

Second, in addition to failing to acknowledge the proper standard of review in Fourth Amendment cases,[2] the State did not even address the fatal flaws in its arguments before the circuit court and the court of appeals. The State still has not articulated in a single brief (1) why officers did not have time to secure a warrant or (2) what justified Detective Muirhead's second illegal search of the vehicles.

[2] *See State v. Frasier*, Op. No. 28117 (Howard Adv. Sh. No. 35 at 17) (S.C. Sup. Ct. filed Sept. 28, 2022) ("[A]ppellate review of a motion to suppress based on the Fourth Amendment involves a two-step analysis. This dual inquiry means we review the trial court's factual findings for any evidentiary support, but the ultimate legal conclusion—in this case whether reasonable suspicion exists—is a question of law subject to de novo review.").

Turning to the exceptions to the warrant requirement, the State's arguments are incurably inconsistent. Since the pretrial suppression hearing, the State's defense of the illegal search has been a moving target. On the one hand, the State curiously shifts focus on certiorari, hitting hard on the argument that officers were conducting a welfare check. Respectfully, the State's argument does not pass the smell test. For starters, officers did not even testify about that exception during the suppression hearing or at trial. Instead, Deputy Colburn merely said he was instructed to go to Dr. Little's residence "to make contact with him to see if he would talk to detectives." (R. p. 61:7). Detective Muirhead confirmed that, "as part of his duty before [Deputy Colburn] was going to knock on the door, he wanted to clear the vehicles to make sure that he was safe." (R. p. 90:19–21). In the pretrial hearing, the assistant solicitor mentioned "welfare check" only in passing as a potential justification for why Deputy Colburn was sent there. But that's not what Deputy Colburn said. He was there "to make contact" with Dr. Little, not check on his well-being. Yet on the other hand, the State argues that Dr. Little "avoided law enforcement for over an hour." Resp. Br. at 19. That argument, in turn, is inconsistent with officers' testimony that Dr. Little was not a suspect at the time. Which one is it? The State still cannot get its story straight on appeal.

In *Jardines*, "the question" was "precisely *whether* the officer's conduct was an objectively reasonable search." 569 U.S. at 10. As the Court recognized, "that depends upon whether the officers had an implied license to enter the porch, which in turn depends upon the purpose for which they entered." *Id.* And "their behavior objectively reveal[ed] a purpose to conduct a search, which is not what anyone would think he had license to do." *Id.* A review of Deputy Colburn's actions—making multiple laps around Dr. Little's vehicle with a flashlight for over 90 seconds and paying such close attention to the interior that he was able to notice a smudge on the inside of a door and towels in the floorboard—demonstrates he was not clearing the vehicles to eliminate

potential danger. Instead, he was plainly conducting a search for evidence. And that violates the Fourth Amendment because "the circumstances, viewed objectively," did not "justify [the] action." *State v. Herring*, 387 S.C. 201, 210, 692 S.E.2d 490, 494 (2009) (quoting *Scott v. United States*, 436 U.S. 128, 138 (1978)).

With all due respect, no ordinarily prudent and cautious person, under these circumstances, would believe an invasive 90-second search in the curtilage of one's home was justified to protect the safety of officers or others. After all, Deputy Colburn testified that Dr. Little was not a suspect, he did not believe Dr. Little was hiding, and he did not believe Dr. Little was armed and dangerous. At most, the State had a hunch that something was off that evening. But an "inchoate and unparticularized suspicion or hunch" will not do. *Maryland v. Buie*, 494 U.S. 325, 332 (1990) (quoting *Terry v. Ohio*, 392 U.S. 1, 27 (1968)). That is not tantamount to probable cause.

Put simply, the State's post-hoc justifications for exigent circumstances do not pass muster. Deputy Colburn was not concerned with Dr. Little's welfare. And the scope and duration of his search reveal he was not concerned with officer safety. He was looking for evidence. That does not satisfy the Fourth Amendment's touchstone of reasonableness. Consequently, all evidence obtained from the unlawful searches should have been suppressed.

Third, while the State apparently decided to abandon its preservation argument about the state constitutional issue, it still did not wrestle with the argument in any meaningful way. The State, for instance, did not address the effect of *Collins v. Virginia*[3] on the continued viability or applicability of *State v. Weaver*[4] in this case. Nor does the State address the appropriate standard for considering the state constitutional issue. Instead, the State merely argues—in conclusory

[3] 138 S. Ct. 1663 (2018).

[4] 374 S.C. 313, 649 S.E.2d 479 (2007).

fashion without any citation to authority—that any reasonable officer would have done exactly what Deputy Colburn did here because Dr. Little did not show up to his ex-wife's murder scene an hour after *one* phone call with his daughter at officers' urging. What the State ignores, however, is Deputy Colburn's testimony that (1) Dr. Little was not a suspect, (R. p. 56–57); (2) he did not believe Dr. Little was hiding, (R. p. 550); (3) he did not think Dr. Little was armed and dangerous, (R. p. 59); and (4) he had backup on the scene, (R. p. 62). Deputy Colburn therefore lacked probable cause, and his unlawful search of the vehicles parked within the curtilage of Dr. Little's home violated article I, section 10 of the South Carolina Constitution.

Fourth, the State's wafer-thin defense of the assistant solicitor's improper conduct during closing argument is unpersuasive. As an initial matter, the State once again misleadingly omits the flippant question marks used on the PowerPoint slide to emphasize the absence of a ring. Unfortunately, the slide was not similarly scrubbed for the jury. (R. pp. 1161, 1306) ("no jewelry (no ring???)"). Further, the State continues to argue that "[o]ne can reasonably draw the inference that Petitioner removed his ring while cleaning up after the murder." Resp. Br. at 18. That's the whole problem here: the jury likely *did* make that inference after the State brought up evidence suppressed prior to trial due to the unconstitutional means by which it was obtained. Doubling down on the constitutional violation cannot be harmless error. Reversal is thus "dictated by . . . the ends of public justice." *State v. Prince*, 279 S.C. 30, 33, 301 S.E.2d 471, 472 (1983).

Fifth, the State still has made no effort to demonstrate the admissibility of outsole footwear impressions testimony. For one, the State—like the court of appeals—did not apply all the *Council*/*Daubert*[5] factors. Indeed, the State did not articulate any of them or explain what showing

[5] *State v. Council*, 335 S.C. 1, 515 S.E.2d 508 (1999); *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993).

it made below, or even on appeal, to bring this testimony across the expert finish line. Rather, the State contends "this technique is considered reliable all over the nation" and cites four cases. Yet none of those cases were presented to the circuit court, they are not binding on this Court, and they do not and cannot give the State a pass on proving admissibility. *See State v. Ellis*, 345 S.C. 175, 178, 547 S.E.2d 490, 491 (2001) (holding reversal is required when a solicitor exploits "the [circuit] court's imprimatur of [an officer] as an 'expert' . . . to the prejudice of the defendant" because a police "officer's improper opinion [that] goes to the heart of the case is not harmless").

CONCLUSION

In sum, the State's brief did not seriously address the fundamental errors that tainted the investigation and trial of this matter. Because the State's arguments are without merit and do not cure the circuit court's and court of appeals' errors, the Court should reverse and remand to the court of general sessions for a new trial with instructions to exclude the unlawfully obtained and otherwise inadmissible evidence at issue on appeal.

(Signature page to follow)

Respectfully submitted,

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