STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Apr 19 2023

S.C. SUPREME COURT

Appeal from Beaufort County

Honorable Brooks P. Goldsmith, Circuit Court Judge

Opinion No. 28149

THE STATE,

RESPONDENT,

V.

MARY ANN GERMAN,

APPELLANT.

APPELLATE CASE NO. 2018-002090

PETITION FOR REHEARING

Pursuant to Rule 221(a), SCACR, Mary Ann German requests that this Court grant rehearing on the decision (substituted April 19, 2023) because: (1) the good faith exception to the Fourth Amendment does not apply to this case; (2) this Court should not adopt the controversial, broad federal interpretation of the good-faith exception for the South Carolina Constitution. Any good faith exception under the state constitution should err on the side of protecting citizens' privacy if a grey area in the law exists.

1. Davis Good-Faith Does Not Apply

The good faith analysis adopted by this Court will prove unworkable in future cases and violates the federal constitution. It gives the police a grace period to violate the law after appellate decisions. The correct approach is a bright-line rule using the date of an appellate decision as the cut-off for good faith. Citizens are charged with knowing the law even as it constantly evolves. The police need to be held to this same standard—if not a higher one.

Davis v. United States, 564 U.S. 229 (2011) created a new exception to the exclusionary rule for police who rely on incorrect "binding appellate precedent" when they violate a citizen's Fourth Amendment rights. 564 U.S. at 249-50. Such reliance must be "objectively reasonable." Davis, 564 U.S. at 241. The Supreme Court traced the officers' reliance in Davis to a specific, easily understood rule in an Eleventh Circuit decision. Id. at 239-40. The Court stated, "The police acted in strict compliance with binding precedent, and their behavior was not wrongful." Id. at 240.

The two cases at play in Davis were decided in 1981 and in 2009. New York v. Belton, 453 U.S. 454 (1981); Arizona v. Gant, 556 U.S. 332 (2009). The search by the officers in Davis happened between the two decisions—in 2007. Davis, 564 U.S. at 235. The officers' search was legal under the old rule of Belton as interpreted in the Eleventh Circuit, but not under Gant. Id. at 240. At no point in Davis did the Court entertain giving the police a grace period after an appellate decision changes the law. The Court's analysis simply compared the dates of the decisions to the date of the search.

When discussing the application of the exclusionary rule, the Court stressed that its purpose was to deter police misconduct. Id. at 246. The Court reasoned that excluding the evidence seized would only deter "conscientious police work." Id. at 241. "Responsible law

enforcement officers will take care to learn what is required of them under Fourth Amendment precedent and will conform their conduct to those rules." Id. (internal quotation omitted). The Court stressed that binding appellate precedent "specifically *authorized*" the police's search. Id. (emphasis in original).

This Court erred in not applying this straightforward analysis to the timeline of events. The officer forcibly, and without consent, drew Mary German's blood on July 10, 2016. The relevant precedent is Missouri v. McNeely, which was decided three years earlier, in 2013. Missouri v. McNeely, 569 U.S. 141 (2013). McNeely was further confirmed by Birchfield v. North Dakota, 579 U.S. 438 (2016), decided three weeks before the illegal seizure of German's blood. Unlike Davis, the decisions making the officers' conduct illegal were issued before the conduct.

This Court's Opinion erroneously begins with the date of state law decisions interpreting McNeely. Opinion at 32. The decisions of the United States Supreme Court are binding on and control the actions of police officers. Davis good faith does not begin from the time a state court addresses a United States Supreme Court decision. It begins with the date of that decision. The "responsible law enforcement officer" envisioned in Davis must know the law as the United States Supreme Court pronounces it.

It was obvious after McNeely that section 56-5-2846's head was on the chopping block. Categorical reliance on the statute was ended by McNeely. The McNeely Court said, "[w]hether a warrantless blood test of a drunk driving suspect is reasonable must be determined case by case based on the totality of the circumstances." McNeely, 569 U.S. at 156. The Court rejected Missouri's argument that "so long as the officer has probable cause and the blood test is conducted in a reasonable manner, it is categorically reasonable for law enforcement to obtain

the blood sample without a warrant." Id. The Court ultimately held, "In those drunk-driving investigations where police officers can reasonably obtain a warrant before a blood sample can be drawn without significantly undermining the efficacy of the search, the Fourth Amendment mandates that they do so." Id. at 152. If the Fourth Amendment mandates using a warrant if practicable, then no officer could objectively rely on section 56-5-2946's categorical approach.

The axe unquestionably came down for section 56-5-2946 with Birchfield. The Birchfield Court held that neither the search incident to arrest doctrine nor state implied consent statutes would uphold categorical warrantless blood tests. Birchfield, 136 S.Ct. at 2184-87. The Court concluded that "motorists cannot be deemed to have consented to a blood test on pain of committing a criminal offense." Id. at 2186. The State knew at the time of the suppression hearing in German's case that neither exigent circumstances nor the search incident to arrest exceptions for a warrantless blood draw survived McNeely and Birchfield because it expressly waived any reliance on them. R. 71, l. 16 – 73, l. 8.

The officer who ordered German's blood drawn candidly admitted that it would have been possible to get a warrant. R. 41, ll. 10 – 14. Because it was practicable to get a warrant, McNeely mandated the police obtain one. This mandate existed three years before German's blood was drawn. Unlike in Davis, the officer here was simply ignorant of United States Supreme Court precedent. The police were not "conscientious" or "responsible." They just did not know or respect the law.

The exclusionary rule's purpose of deterring police misconduct applies to ignoring developments in the law. The good faith analysis used here deters police from keeping up with the law. It invites the mischief of willful blindness. Giving police three weeks of a grace period

after Birchfield will prove unworkable. It turns an objective analysis into a subjective one. It invites the question of what grace period is reasonable—a question that must now be litigated.

Defense attorneys will have to subpoena police training manuals and emails, communications from the Attorney General, and other entities that advise law enforcement in order to make a record and argue against the application of good faith. Defendants will have to prove that an officer knew or should have known about a relevant development in the law. Defendants will have to engage in discovery and litigate issues related to willful blindness of developments in the law.

This Court should not open that door. It should keep the law focused on the objective, simple application of the date of an appellate decision instead of a sideshow about what an officer knew about the law and when. Unless an appellate court says differently, its decision becomes the law immediately upon release. That rule certainly applies to citizens. If it does not apply to the police, then a two-tiered system related to Fourth Amendment law will exist. Citizens will be faced with the maxim, which serves us well, that "ignorance of the law is no excuse." But under this Court's interpretation of Davis good faith, the police's ignorance of the law becomes an excuse. The United States Supreme Court provided no grace period and this Court's interpretation of Davis contravenes its holding.

2. This Court Should Reject an Expansive Davis Good Faith Exception under the South Carolina Constitution

The Court assumes without deciding that a broad federal Davis good faith exception is the same under the South Carolina Constitution's privacy guarantee. This step should not be taken lightly. Even if this Court's interpretation of Davis is correct, our right of privacy's greater

protections than the Fourth Amendment are better served by rejecting the broad scope of the controversial Davis decision.

Davis was a 6-1-2 decision, with Justice Sotomayor concurring and Justices Breyer and Ginsburg dissenting. Justice Sotomayor's concurrence concisely explains why South Carolina should reject Davis. She agreed with the majority that the near-uniform interpretation of Belton to allow the police conduct in Davis meant that exclusion served no useful purpose for deterrence. Davis, 564 U.S. at 250-52.

She wrote separately to warn of what would happen if Davis were interpreted too broadly. Id. She was concerned primarily with what incentives were created for police when the law was unsettled. Id. She quoted the accurate prediction of United States v. Johnson, 457 U.S. 537, 561 (1982) that "in close cases, law enforcement officials would have little incentive to err on the side of constitutional behavior." Id.

South Carolina's constitutional right of privacy was adopted because of fear of technological surveillance and police action. "The genesis of the privacy provision related solely to modern technology and the ever-increasing volume and acquisition of data and personal information." Planned Parenthood South Atlantic v. State, 438 S.C. 188, 310, 882 S.E.2d 770, 835 (2023) (Kittredge, J., dissenting). These concerns were sufficient to pass this constitutional provision in 1967.

The erosion of privacy by technology has gotten exponentially worse since 1967. The members of the West Committee would be shocked and horrified at law enforcement's ability to penetrate the private lives of South Carolinians through a device that everyone carries in their pockets—the smartphone. Cameras are on street corners and doorbells. License plate readers log and store forever the comings-and goings of citizens on our highways.

The rate of technological advance far outstrips the ability of the law to keep pace. Under the Davis regime, the police have every incentive to use technology to invade citizens' privacy until an appellate court forbids it. The gap between the use of a new technology and an appellate decision restricting its use will be years.

During these gap years, the privacy rights of South Carolinians will be worthless under a Davis good faith regime. In the long run, the law may push back against technological invasion, but as the legendary economist John Maynard Keynes famously said, "In the long run we are all dead." John Maynard Keynes, The Tract on Monetary Reform (1923).

Our state constitution should protect South Carolinians from warrantless searches and technology run amok. Interpreting good faith narrowly would only allow the police to avoid application of the exclusionary rule when they rely on clear, specific appellate decisions. If the law is unsettled and the police choose to push the boundaries of what the constitution allows, the police should bear the risk of exclusion, not the citizenry.

The current litigation over cell phone searches illustrates this problem. See Zachary C. Bolitho, Specifically Authorized by Binding Precedent Does Not Mean Suggested by Persuasive Precedent: Applying the Good-Faith Exception After Davis v. United States, 118 W. Va. L. Rev. 643, 671–72 (2015). Likening cell phones to cigarette boxes, the police used the search incident to arrest exception to rummage through every arrestee's phone without a warrant. Id. The practice began to end with the Supreme Court's decision in Riley v. California, 573 U.S. 373 (2014), but the Davis decision extended the life of warrantless searches and denied relief to defendants' whose constitutional rights were violated. Id.

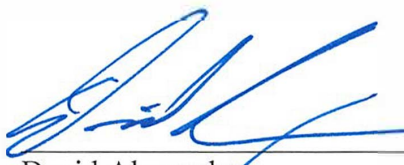
The lesson learned by police is that they can run wild with new technology because of a broad interpretation of Davis. If South Carolina were instead to adopt a more restrictive rule that

good faith cannot apply where the law is unsettled, the police incentives would change. They would become more cautious about using technology. Instead of adopting Silicon Valley's mantra of "go fast and break things," the police would be forced to use a more conservative approach. A conservative approach is certainly more in line with the values of South Carolinians. A healthy fear of government power counsels rejecting a broad good faith exception in South Carolina.

While German's case involves an old technology—a syringe—this Court's adoption of a broad Davis good faith interpretation has large ramifications for new technology. While appellant rejects the notion that the law was unsettled and arguably allowed the police action in this case, that was this Court's judgment. But even if that view is adopted, it does not follow that this Court should automatically apply a broad good faith interpretation under the state constitution without considering its implications beyond this case. This Court should grant rehearing to consider and restrict the scope of a good faith exception under state law. The federal government has shown little interest in protecting Americans from the erosion of their privacy rights. South Carolina can do better.

Conclusion

Davis good faith does not apply because the illegal police conduct occurred after the United States Supreme Court's decisions. Under the South Carolina Constitution, the incentives for police should be to err on the side of caution when invading citizens' privacy. This Court should grant rehearing and reverse German's conviction because of the search that four members of this Court determined was illegal.



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This 19th day of April, 2023.