

RECEIVED

May 01 2023

S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
In The Supreme Court

Appeal from Beaufort County
Court of General Sessions

The Honorable Brooks P. Goldsmith, Circuit Court Judge

Appellate Case No. 2018-002090

State of South Carolina,Respondent,

v.

Mary Ann German,Petitioner.

Opinion No. 28149 (S.C. S.Ct. filed April 5, 2023, re-filed April 19, 2023)

RETURN TO PETITION FOR REHEARING

Petitioner Mary German filed a petition for rehearing in response to this Court's April 19, 2023, opinion affirming her conviction for Felony DUI resulting in Death. This Court requested a return to the petition on April 20. The State respectfully submits that this Court properly applied the good faith exception to the warrantless collection of German's blood sample, and the petition for rehearing should be denied.

I.

This Court correctly refused to suppress German's blood-alcohol test results because the state trooper who ordered the collection of German's blood sample relied on a state statute explicitly authorizing him to do so. Evidence seized in accordance with a statutory provision should be suppressed “only if it can be said that the law enforcement officer had knowledge, or

may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment.” Illinois v. Krull, 480 U.S. 340, 348–49 (1987). “[T]he **sole** purpose of the exclusionary rule is to deter misconduct by law enforcement.” Hamrick v. State, 426 S.C. 638, 654, 828 S.E.2d 596, 604 (2019) (citing Davis v. United States, 564 U.S. 229, 238 (2011) (emphasis added)).

As the Krull court explained, “[u]nless a statute is **clearly unconstitutional**, an officer cannot be expected to question the judgment of the legislature that passed the law. If the statute is subsequently declared unconstitutional, excluding evidence obtained pursuant to it prior to such a judicial declaration will not deter future Fourth Amendment violations by an officer who has simply fulfilled his responsibility to enforce the statute as written.” Krull, 480 U.S. at 349 (emphasis added). Evidence seized pursuant to a statute authorizing the seizure should not be suppressed unless the statute's defects are “**so obvious** that an objectively reasonable police officer would have realized the statute was unconstitutional” Krull, 480 U.S. at 360 (emphasis added).

South Carolina's implied consent statute was not clearly unconstitutional when the trooper relied on it to order the collection German's blood sample. This Court had never passed on the constitutionality of the statute until its opinion in this case, despite many opportunities to do so. Even then, this Court only declared it unconstitutional as applied to German. This Court noted in its opinion that, with respect to the validity of the implied consent statute, “**clarity** of the law is needed.” State v. German, Op. No. 28149 (S.C. Sup. Ct. filed April 19, 2023) (Howard Adv. Sh. No. 15 at 19) (emphasis added).

German claims the officer could not have acted in good-faith reliance on this statute because the United State Supreme Court had, three weeks earlier, ruled that North Dakota's

implied consent statute authorizing blood draws in all DUI cases violated the Fourth Amendment. The Birchfield opinion did not address South Carolina's implied consent law, and did not render it "clearly unconstitutional." Even if the trooper could be fairly charged with knowledge of the Birchfield opinion, there are important differences between South Carolina's implied consent statute and the statute at play in Birchfield, the principal difference being that North Dakota's statute authorized blood draws in all DUI cases, whereas the statute at issue in this case applies only to felony DUI cases.

As the State argued in its brief and at oral argument, this is a major distinction because it fundamentally alters the balancing of State and individual interests at the core of the Fourth Amendment analysis. This Court rejected this argument for the first time in its opinion in this case. Because this Court had not previously found the statute violated the Fourth Amendment, the statute was not "clearly unconstitutional" when the trooper relied on it to collect German's blood sample. See State v. Prado, 397 Wis. 2d 719, 960 N.W.2d 869, 883 (Wis. 2021) ("Even accepting arguendo Prado's contention that court decisions had muddied the status of the incapacitated driver provision, what is clear is that no court had explicitly declared it to be unconstitutional until now. It would be unreasonable to expect a police officer to synthesize the relevant case law to divine that the statute was unconstitutional when no court had clearly said so."); State v. Weddle, 224 A.3d 1035, 1046–47 (Me. 2020) (explaining "the suppression of the results of the warrantless blood draw would not serve the purpose of the exclusionary rule. The officer who ordered Weddle's blood draw acted in good faith reliance on a statute blessed as constitutional as recently as 2007 Further, we note our own recent inability to reach a consensus on the handling of blood draws . . . and, as shown in the Concurring Opinion, the view that [Maine's implied consent statute] is constitutional still has some support").

The officer in this case candidly testified he sought a blood sample because of the statute explicitly authorizing him to do so. As a state trooper, he was trained to methodically follow the procedure outlined in this statute to the letter. This trooper did everything he had been taught to do, and relied on statutory language explicitly authorizing him to act exactly as he did. See Stewart v. State, 442 P.3d 158, 164 (Okla. 2019) (refusing to suppress blood-alcohol results where "trooper's reliance in this case on [Oklahoma's implied consent statute] as the basis for drawing Stewart's blood was objectively reasonable and unquestionably done in good faith"). Even the implied consent forms in this case quote directly from the statute authorizing this blood draw. There is nothing to support German's specious assertion that this officer did not "know or respect the law." The officer did exactly as he was trained to do, based on the words of the statute our legislature enacted. As in Hamrick, "[t]here is nothing in this record that in any way suggests the officers did not 'act with an objectively reasonable good-faith belief' that their conduct is lawful." Hamrick v. State, 426 S.C. 638, 654, 828 S.E.2d 596, 604 (2019).

"Police are charged to enforce laws until and unless they are declared unconstitutional. The enactment of a law forecloses speculation by enforcement officers concerning its constitutionality—with the possible exception of a law so grossly and flagrantly unconstitutional that any person of reasonable prudence would be bound to see its flaws. Society would be ill-served if its police officers took it upon themselves to determine which laws are and which are not constitutionally entitled to enforcement." Michigan v. DeFillippo, 443 U.S. 31, 38 (1979). "To deter police from enforcing a presumptively valid statute was never remotely in the contemplation of even the most zealous advocate of the exclusionary rule." DeFillippo, 443 U.S. 31, n.3. In accordance with the foregoing authority, this Court correctly applied the good faith exception in this case.

II.

German further argues that this Court should refuse to recognize a good faith exception to the exclusionary rule under the South Carolina Constitution. German cites the "controversial" 6-1-2 opinion in Davis v. United States, 564 U.S. 229 (2011), and asserts that police will abuse ambiguities in appellate court precedent to exploit advancements in technology to infringe the privacy of South Carolinians. German urges this Court not to adopt a "broad" good faith exception under the South Carolina Constitution.

German's argument has very little to do with the facts or law of this case, in which an officer, in good faith, relied on an unambiguous statute authoring a search, not an appellate court decision. See Krull. Contrary to German's arguments, the good faith exception does not allow police to willfully and systematically abuse citizens' privacy rights. The good faith exception is applied in the discretion of the appellate court, only when the court is convinced that suppression will not serve a deterrent purpose because officers acted in objective good faith. Like the exclusionary rule itself, it is not mechanical or compulsory. This Court should follow the extensive precedent of the United States Supreme Court and the majority of state courts and recognize that the exclusionary rule serves no purpose when applied blindly to police actions done in good faith.

The good faith exception, like the exclusionary rule itself, is a judicially-created rule which is not found in the text of the Federal Constitution. Likewise, the South Carolina Constitution does not contain a textual exclusionary rule or good faith exception. However, the rationales for the exclusionary rule and good faith exception apply equally to the Federal and South Carolina Constitutions.

The United States Supreme Court, and this Court, have repeatedly explained the rationale

for the exclusionary rule. The exclusionary rule is "designed to safeguard Fourth Amendment rights generally through its deterrent effect" United States v. Leon, 468 U.S. 897, 906 (1984). The Supreme Court has "repeatedly rejected the argument that exclusion is a necessary consequence of a Fourth Amendment violation." Herring v. United States, 555 U.S. 135, 141 (2009). Instead, it has "focused on the efficacy of the rule in deterring Fourth Amendment violations in the future." Id. The exclusionary rule is aimed at "flagrant," "intentional," and "deliberate" violations of rights. Id. at 144. "To trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system." Id. The rule serves no deterrent purpose when applied to innocent police conduct undertaken in objective good faith.

The Supreme Court has further explained that "the greatest deterrent to the enactment of unconstitutional statutes by a legislature is the power of the courts to invalidate such statutes. Invalidating a statute informs the legislature of its constitutional error, affects the admissibility of all evidence obtained subsequent to the constitutional ruling, and often results in the legislature's enacting a modified and constitutional version of the statute There is nothing to indicate that applying the exclusionary rule to evidence seized pursuant to the statute prior to the declaration of its invalidity will act as a significant, additional deterrent." Krull, 480 U.S. at 352. The United States Supreme Court has continued to expand the scope of the good faith exception, each time emphasizing that the exclusionary rule is not a blind mechanism indiscriminately excluding evidence regardless of police culpability. Rather, the only purpose of the exclusionary rule is to deter systematic or willful constitutional violations by police. Herring, 555 U.S. at 147 (noting the court's "repeated holdings that the deterrent effect of suppression must be substantial and outweigh any harm to the justice system").

This Court has not explicitly adopted the good faith exception in the context of the South Carolina Constitution. See State v. Austin, 306 S.C. 9, 19, 409 S.E.2d 811, 816–17 (Ct. App. 1991) (declining to address the issue where the argument was not preserved). However, there is no principled basis to depart from the United States Supreme Court's extensive, well-reasoned jurisprudence in this area. German argues this Court should reject the good faith exception because the South Carolina Constitution provides for "more expansive rights" than the Federal Constitution because it contains an express "right to privacy" clause. See State v. Forrester, 343 S.C. 637, 644, 541 S.E.2d 837, 841 (2001). But this enhanced "right to privacy" in no way negates the rationale behind the good faith exception, which addresses the **remedy** for a constitutional violation, not the extent of the underlying right. See State v. Lindquist, 869 N.W.2d 863, 872 (Minn. 2015) (distinguishing between the greater rights afforded by the Minnesota Constitution and the remedy for a violation of those rights, explaining "the appropriate remedy" for a constitutional violation is a "'separate, analytically distinct issue' from whether a constitutional violation occurred. . . . Thus, our jurisprudence regarding whether to afford greater protection under a provision in the Minnesota Constitution than is provided by its federal counterpart is not applicable" to whether the court would apply the good faith exception, which the court adopted under the Minnesota Constitution).

South Carolina should follow the United States Supreme Court and the majority of states and recognize that a good faith exception is implicit in our exclusionary rule. See Heien v. North Carolina, 574 U.S. 54, 75 and n.3 (2014) (Sotomayor, J., dissenting) (recognizing that most states have adopted a good faith exception under state law); People v. Goldston, 470 Mich. 523, 541, 682 N.W.2d 479, 489 n.10 (2004) (collecting cases where state courts adopted the good faith exception as a matter of state law). The rationale for the rule is sound, and there is no

principled reason why this Court should not recognize it, as the Court did in this case. See State v. Reynolds, 504 S.W.3d 283, 313 (Tenn. 2016) (recognizing a good faith exception and explaining "we discern no 'textual, historical, or other basis' on which to part company with the United States Supreme Court on this issue"); State v. Lindquist, 869 N.W.2d 863, 872 (Minn. 2015) ("We see no principled basis to [reject a good faith exception] when we have made clear that the exclusionary rule in Minnesota, like the federal exclusionary rule, does not require automatic suppression of evidence obtained by unlawful means.").

The good faith exception as defined by the United States Supreme Court strikes the appropriate balance between protection of individual rights and the public interest in maintaining a safe and orderly society. This Court can decline to apply the good faith exception in any case where exclusion would serve to deter unlawful police conduct. This is not such a case.

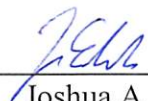
CONCLUSION

For all the foregoing reasons, German's petition for rehearing should be denied.

Respectfully submitted,

ALAN WILSON
Attorney General

JOSHUA A. EDWARDS
Assistant Attorney General

BY:  _____
Joshua A. Edwards
Bar # 101188

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

May 1, 2023