

RECEIVED
May 18 2023
SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Horry County

Honorable Letitia H. Verdin, Circuit Court Judge

Opinion No. 2023-UP-172

THE STATE,

RESPONDENT,

V.

GARY M. WIRTZ,

APPELLANT.

APPELLATE CASE NO. 2020-001388

PETITION FOR REHEARING

On May 3, 2023, this Court affirmed the trial court's denial of Appellant's pre-trial motion to suppress the contraband found during an inventory search holding that the State carried its burden to justify the warrantless search of Appellant's car. Wirtz v. State, Op. No. 2023-UP-172 (S.C. Ct. App. filed May 3, 2023). Pursuant to Rule 221(a), SCACR, Petitioner respectfully requests this Court rehear the matter considering the significant points overlooked and/or misapprehended by this Court discussed below.

circumstances. The entire purpose of the encounter and subsequent inventory was to ferret out crime.

Respectfully, the State did not carry its burden to justify the warrantless search of Appellant's car. The State relied solely on the existence of the written OCSD policies to justify the search. As Chief Justice Beatty opined in his dissent in State v. Miller, 423 S.C. 95, 113, 925 S.E.2d 166, 176 (2018) (Beatty, C.J. Dissenting) the mere existence of a written policy is not sufficient to justify a search or to remove an investigatory taint. See also People v. Spencer, 408 Ill. App. 3d 1, 8–9, 948 N.E.2d 196, 203 (2011) (“[T]he existence of a police regulation cannot be used as a predicate to determine the lawfulness or reasonableness of an inventory search of a vehicle.” To hold otherwise would grant the police an unlimited ability to evade the requirements of the fourth amendment by promulgating regulations that authorize the use of inventory searches following every arrest.).

The State offered no evidence of Pelfrey's subjective motivations in approaching and detaining Appellant or in seizing and searching Appellant's vehicle. However, in watching Court's Exhibit 3, it is apparent that Pelfrey's motivation for the encounter was that he believed there was contraband in the vehicle. Before he ever requested Appellant's license and registration, roughly five minutes into the encounter, he performed a frisk of Appellant's person and questioned Appellant as to what contraband is in the car. That Pelfrey may have eventually discovered some objectively reasonable basis to impound Appellant's vehicle did not remove the taint of the investigatory motive that led to the impoundment. The impound of Appellant's vehicle was not reasonable under these circumstances.

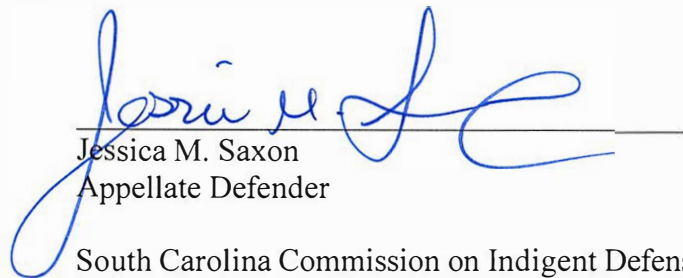
Reasonableness of the Search

This Court did not explicitly hold that the second factor in Miller had been met but referenced the portion of trial counsel's initial argument that the OCSD policies did not contain provisions regarding the opening of closed containers. However, during the suppression hearing, and in Appellant's brief, counsel conceded that the OCSD policies contained the relevant language based on updated documentation that had been provided by the State. What was argued was that Pelfrey did not act in accordance with the written policies and procedures in conducting an inventory search but instead "cart blanche tore apart the car" searching for evidence of a crime. Relevant to that argument were Pelfrey's words and actions, such as failing to properly fill out the inventory form or not allowing Appellant to contact the car's owner. These were not stand-alone grounds raised on appeal but part and parcel of the argument that Pelfrey, by his words and actions, acted with a clear investigatory motive in searching Appellant's vehicle. These actions showed that Pelfrey did *not* conduct the search according to the standard OCSD policies but instead rummaged through the car looking for evidence of a crime.

At no point did Pelfrey conduct an actual inventory of the vehicle and its contents. Instead, he looked underneath a cupholder, shook out the contents of a cigarette pack, attempted to forcibly remove the center console, and peeled back the lining of the trunk. Pelfrey was searching Appellant's vehicle, not inventorying it. That this was an investigatory search is further bolstered by the fact that when another officer on scene asked Pelfrey what to include in the inventory, he could not produce a list of items and said to simply say it was recorded on his body worn camera. The main purpose of the inventory exception is that police may "search a lawfully impounded vehicle *to compile an inventory list of the vehicle's contents* without violating the Fourth Amendment." United States v. Rowland, 341 F.3d 774, 779 (8th Cir. 2003) citing S. Dakota v.

Opperman, 428 U.S. 364 (1976); See Also United States v. Taylor, 636 F.3d 461 (8th Cir. 2011) (holding the search of Taylor’s truck was not justified by the inventory search exception to the warrant requirement because the officer’s description of “misc. tools” was insufficient to remove the inference that the search was investigatory.). An inventory list was not compiled in Appellant’s case because Pelfrey was not acting in his caretaker function but in his investigatory function. The search of Appellant’s vehicle was a “ruse for general rummaging in order to discover incriminating evidence” which is shown through Pelfrey’s words and actions during the hour-long encounter that led to Appellant’s arrest.

Appellant respectfully request that this Court reconsider its holding in this matter considering the points discussed above and find that the seizure and search of his car was unreasonable under both the United States and South Carolina State Constitutions.



Jessica M. Saxon
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589

ATTORNEY FOR APPELLANT

This 18th day of May, 2023.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED

May 18 2023

SC Court of Appeals

Appeal from Horry County

Honorable Letitia H. Verdin, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

GARY M. WIRTZ,

APPELLANT.

APPELLATE CASE NO. 2020-001388

CERTIFICATE OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies a true copy of the Petition for Rehearing in the above-referenced case has been served upon Mark Farthing, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS); and on Gary M. Wirtz, #226837, at Evans Correctional Institution, 610 Hwy. 9 West, Bennettsville, SC 29512, this 18th day of May, 2023.



Jessica M. Saxon
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589

ATTORNEY FOR APPELLANT