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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to the Court of Appeals
Appeal from Richland County
Honorable J. Derham Cole, Circuit Court Judge

Opinion No. 2022-UP-380 (S.C. Ct. App. Filed October 12, 2022)
Withdrawn, Substituted and Refiled November 16, 2022

ADONIS WILLIAMS,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2023-000168

REPLY TO RETURN TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

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INDEX

QUESTION PRESENTED

1. Did the Court of Appeals err in finding that Petitioner abandoned his cell phone and as a result the trial judge properly refused to exclude text messages obtained by a warrantless search of the cell phone?

ARGUMENTS IN REPLY

1. **The Court of Appeals erred in finding that Petitioner abandoned his cell phone and as a result the trial judge properly refused to exclude text messages obtained by a warrantless search of the cell phone.**

This case involves a challenge to the warrantless search of a cell phone in violation of Petitioner's Fourth Amendment rights pursuant to the State and Federal Constitutions. The trial judge erred in admitting prejudicial text messages found as a result of the unconstitutional search. The Court of Appeals applied the correct standard of review but erred in the legal conclusion that the cell phone was abandoned. The cell phone was not abandoned. The Court of Appeals wrote:

> On direct appeal, Petitioner argues the trial court erred in denying his motion to suppress information from his cell phone and finding the phone was abandoned. We hold Petitioner abandoned his phone. See State v. Frasier, Op. No. 28117 (S.C. Sup. Ct. filed Sept. 28, 2022) (Howard Adv. Sh. No. 35 at 12, 17) ("[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 ... is a question of law subject to de novo review.").

Williams v. State, No. 2018-001688, 2022 WL 17164515, at *1 (S.C. Ct. App. Nov. 16, 2022). The legal conclusion that the cell phone was abandoned is subject to de novo review by this Court pursuant to State v. Frasier, 437 S.C. 625, 879 S.E.2d 762 (2022). As fully discussed in the petition for writ of certiorari, the cell phone was not abandoned.

The error in admitting the text messages was not harmless. The investigator was allowed to testify as to the content of text messages found on the cell phone stating, "The police is looking for you. They came back one of a kind." (App. p. 497, lines 7-8). The investigator then testified about another text message stating, "'Are you gonna let me get that weed, my N-I-G-G-A?' There's a question mark. And, 'I'm about to go into hiding.' Then, 'Black power.'" (App.

p. 497, lines 19-22). Photographs of the text messages were also admitted in evidence as State's Exhibits #66, #67. (App. p. 496, line 8). As the trial judge cautioned, "Well, sometimes you have too much, and that's generally what gets solicitors in trouble because they have too much and they don't need everything that they put in." (App. p. 88, lines 20-23). The text messages were too much. The portions of the text messages that included a racial slur, a reference to Black power, and a reference to weed were not cumulative to the other evidence of flight presented by the State. The evidence presented by the State was not overwhelming. The error in admitting the text messages requires reversal.

In State v. Reyes, 432 S.C. 394, 406, 853 S.E.2d 334, 340 (2020), this Court wrote:

> In determining whether error is harmless beyond a reasonable doubt, we often look to whether the "defendant's guilt has been conclusively proven ... such that no other rational conclusion can be reached." State v. Collins, 409 S.C. 524, 538, 763 S.E.2d 22, 29-30 (2014) (quoting State v. Bryant, 369 S.C. 511, 518, 633 S.E.2d 152, 156 (2006)). Thus, "overwhelming evidence" of a defendant's guilt is a relevant consideration in the harmless error analysis. See State v. Kromah, 401 S.C. 340, 361-62, 737 S.E.2d 490, 501 (2013).

The State's evidence linking Petitioner to the burglary and armed robbery was not overwhelming. This was the second trial after the first jury was unable to reach a verdict. A mixture of DNA evidence was found on a cigarette butt that was found on the grassy area near a driveway on Patricia Drive where the witness testified the suspect got out of her truck. (App. pp. 305-307). The DNA expert testified that neither the witness, nor Petitioner could be eliminated as contributors to the mixture of DNA found on the cigarette butt. (App. p. 386, lines 3-19). Petitioner's DNA was not found inside the truck or the house that was burglarized. The fingerprint evidence was found on the outside of the house on a telephone box where the wires had been cut. (App. p. 173, lines 14-23). Petitioner's fingerprints were not found inside the house or the truck. Although the witness described the suspect as having a chickenpox scar near

his left eye, (App. p. 195, line 24 – p. 196, line 1), and Petitioner admitted having a mark on his temple, (App. p. 652, lines 13-18), the witness did not identify Petitioner. The State's evidence was not overwhelming. The error was not harmless.

Respondent argues that the text messages were evidence of flight and cumulative to other testimony and evidence in the record. (Return to Petition for Writ of Certiorari p. 13). The text messages went beyond evidence of flight. The portions of the text messages that included a racial slur, a reference to Black power, and a reference to weed were not cumulative to the other evidence of flight presented by the State. The admission of the text messages that included racially charged words was prejudicial and not harmless when the State's evidence was not overwhelming.

The State additionally argues that, "The minimal evidence of flight from the text messages was so insignificant to the State's presentation that it was never mentioned by the State during closing argument." (Return to Petition for Writ of Certiorari p. 14). While the State sanitized the text messages by omitting the racially charged words, the State mentioned the text messages in closing arguing to the jury, "Afterwards, he's sending text messages: 'Are you going to get me that weed? I'm about to go into hiding.' Which is exactly what he did." (App. p. 692, lines 14-16). The trial judge erred in admitting prejudicial text messages found as a result of an unconstitutional search of a cell phone that had not been abandoned. The error was not harmless.

CONCLUSION

Based on the above arguments, this Court should grant the petition for writ of certiorari to allow further briefing on the issues.

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ATTORNEY FOR PETITIONER

This 3rd day of July, 2023.