STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Lexington County

Honorable Debra R. McCaslin, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JUSTIN TYLER ELLAREE HOPKINS,

APPELLANT

APPELLATE CASE NO. 2022-001567

INITIAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE

Appellant Justin Tyler Hopkins was indicted for one count of burglary in the first degree and three counts of murder by a Lexington County grand jury on August 8, 2022. R. p. *. He was tried before the Honorable Debra R. McCaslin and a jury on October 24-28, 2022. Tr. 1. At trial, appellant was represented by David Mauldin and Sarah Mauldin. Samuel Hubbard, Suzanne Mayes, and Bruce Norton represented the state.

On October 28, 2022, the jury convicted appellant of all four charges. Judge McCaslin sentenced appellant to life imprisonment for each of the murder counts and eighteen years imprisonment for burglary, concurrent. Tr. 913, ll. 17 – 21.

This appeal followed.

STATEMENT OF FACTS

On December 17, 2019, unknown perpetrators entered an apartment in the Woodland Village apartment complex in Lexington County, shooting and killing two occupants and fatally wounding a third. Tr. 208, l. 19 – 212, l. 15. The only witness to the event, Donnovin Haynes, lived in the apartment. He was asleep when the shooting started and hid inside a bathroom closet upon waking to the gunshots. Tr. 260, ll. 1 – 12. Haynes did not see the assailants, but believed he heard at least two unknown individuals inside the apartment. Tr. 265, l 5 – 266, l. 10.

After police arrived on scene, they found two deceased individuals. Tr. 216, l. 3 – 217, l. 15. A third individual was treated on scene and transported by EMS to the hospital, but he died shortly after. Tr. 214, l. 13 – 215, l. 24.

The police focused on appellant within a few days of the crime. An informant came forward with claims appellant was attempting to sell a handgun of the caliber used in the crime. R. * Search Warrant of Landmark dated 12/21/2019. Police obtained a photograph of appellant, and at least one witness picked appellant out of a photographic lineup as being in the area of the shooting when it happened.[1] R. * Search Warrant of Landmark dated 12/21/2019.

The police secured a search warrant for apartment 27A at the Landmark Apartment complex rented to Maxie Jacobs, who was not connected in any way with the investigation. Tr. 585, ll. 12 – 16. Various officers were in place in the vicinity of the apartment complex before the search warrant was signed so they could execute the search. Tr. 84, ll. 8 - 22. While waiting on the signed search warrant, a vehicle of interest in the investigation, a white duly pickup truck, was observed dropping off an individual who went into apartment 27A. Tr. 104, l. 14 – 105, l. 13.

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[1] This witness was not called at trial, but the photographic identification was used to help secure several search warrants, including those at issue in this appeal.

Since the pickup truck was a vehicle of interest in the investigation, the police elected to "find a reason" to stop the vehicle. Tr. 105, ll. 1 - 5. At the time the white pickup truck was stopped, it was being driven by Jeremy Cornish, who was later charged with the same crimes as a co-defendant. Tr. 461, ll. 6 - 9.

After the white pickup left the apartment complex, another car arrived and a person matching the vague physical description of appellant left the apartment that was the subject of the search warrant and got into the rear passenger compartment of another car. Tr. 78, l. 5 – 79, l. 9. The police decided to stop the car as soon as it left the parking lot of the apartment without even the justification of a minor traffic infraction. Tr. 84, ll. 20-25. During the stop that followed, at least a mile from the place to be searched, two bags were seized and searched, discovering some shell casings and ammunition as well as clothing, including a white T-shirt.[2] Tr. 110, l. 8 – 114, l. 24.

Co-defendant Cornish was tried just before appellant and the evidence and witnesses at both trials closely matched. Tr. 90, ll. 9 – 21; tr. 136, ll. 14 – 22; tr. 146, ll. 8 – 14; tr. 152, ll. 11 – 15; tr. 381, ll. 11 – 15. Judge McCaslin also presided over the Cornish trial and made reference to her prior rulings in deciding some of the issues raised at appellant's trial. Tr. 65, l. 10 – 66, l. 12; tr. 151, ll. 2 -23; tr. 162, ll. 18 - 25

As discussed *infra*, appellant moved to suppress the t-shirt and other evidence seized during the traffic stop as a violation of his rights protected by the Fourth Amendment of the United States Constitution and his rights under the South Carolina Constitution. Appellant also moved to suppress his DNA profile since the state obtained it in the mere hope it would match DNA from

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[2] No firearm used in the crime was recovered. Two handguns seized from the bags during the traffic stop were not connected to the crime or introduced at trial. Tr. 110, l. 8 – 114, l. 24.

the crime scene. Appellant asserted the search of apartment 27A at the Landmark Apartment complex was defective since the affidavit failed to allege he resided in apartment 27A. The trial judge denied the suppression motions.

ARGUMENT

1. Law enforcement may not use the authority of a search warrant of a residence to seize a car a mile from the location to be searched simply because a person vaguely fitting the description of a person of interest in their investigation leaves the residence before the search warrant was executed.

A. Standard of Review.

"[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." State v. Frasier, 437 S.C. 625, 633–34, 879 S.E.2d 762, 766 (2022). A warrantless search is unreasonable *per se*, unless it falls within a recognized exception to the warrant requirement. Riley v. California, 573 U.S. 373, 382 (2014); *see also* State v. Weaver, 374 S.C. 313, 319, 649 S.E.2d 479, 482 (2007) (noting a warrantless search is per se unreasonable).

B. The evidence wrongly seized during the traffic stop was central to the case against appellant.

On December 21, 2019, police stopped, in absence of any traffic violation, a car and seized two bags belonging to appellant from the rear passenger area. Tr. 110, l. 10 – 113. l. 16. A key piece of evidence against appellant from one of the seized bags was a white t-shirt that contained a single spot of blood that tested positive for the DNA of victim Duwan Williams who was killed inside the apartment. Tr. 755, ll. 3 - 22. In addition, a firearms expert, James Green with SLED identified two different handgun types being used during the crime and that rounds consistent with both types of weapons were found within the seized bags. Tr. 698, ll. 16 – 24, tr. 703, ll. 19 – 24.

At the time of the stop, this car was not of interest to law enforcement and the driver was unknown to them.[3] At most, law enforcement believed someone matching the vague description of appellant had entered the backseat of the car with two bags of some unknown type after leaving the apartment they were preparing to search. Tr. 78, l. 5 – 79, l. 9. There was no reason given by law enforcement for the stop and the order was simply given by officer Johnathan Brock to stop the car as it left the parking lot. Tr. 84, ll. 20-25.

C. The trial court's ruling.

Defense counsel moved to suppress the introduction of any evidence seized from the two bags on the basis that the search warrant did not permit the stop of the car a mile away from the premises to be searched and the stop was a violation of appellant's Fourth Amendment rights under the United States Constitution and his rights under Article 1, Section 10 of the South Carolina Constitution. Tr. 122, l. 17 – 123, l. 19. Following a suppression hearing, the trial court ruled that the stop of the car was justified because of the search warrant and as an investigative stop under Terry v. Ohio, 392 U.S. 1 (1968). Tr. 126, l. 9 – 127, l. 7.

Defense counsel renewed his pre-trial motion to suppress this evidence as illegally seized during the unlawful traffic stop as it was introduced at trial, and the objection was noted and treated as a continuing objection by the trial court. Tr. 486, ll. 7 – 16; tr. 513, 7 – 10; tr. 684, ll. 4 – 23; tr. 723, l. 20 – 724, l. 21.

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[3] The only vehicle of interest at this stage was a white pickup truck they stopped a short time before as it left the area to be searched using a minor traffic violation as justification. Tr. 102, l. 23 – 103, l. 5; tr. 104, l. 14 – 105, l. 5.

D. The trial court's legal conclusion that the search warrant for the apartment complex allowed the police to stop an unrelated car a mile away from the apartment was an error at law.

The police had no authority to stop the car and the evidence seized should have been suppressed as fruit of the poisonous tree from the unlawful stop, detention, and search. Tr. 71, l. 11 – 73, l. 11. Specifically, defense counsel asserted that the police action permitted at the time of the stop was a search of appellant's alleged residence under the terms of a search warrant and that the "geographical boundary" and the stop and seizure occurred too far from the area to be searched to justify the stop and detention under Bailey v. United States, 568 U.S. 186, 201 (2013). Since the authority was derived from the search warrant for a specific apartment, and the stop of the unrelated car occurred over a mile away from that location, it was outside the geographic dimension which would have authorized law enforcement to forcibly stop the car, seize appellant, and seize his property.

The facts of the present case are similar to the facts in Bailey. In Bailey, an individual fitting the description of the suspect was observed leaving the residence to be searched shortly before the execution of a search warrant and leaving the scene in a vehicle.[4] Police on scene waiting to execute the search then followed the vehicle away from the scene and pulled them over about a mile from the location to be searched, less than five minutes after they left the scene to be searched. Bailey, 568 U.S. at 190. While acknowledging the justification for detentions of individuals in connection with the execution of a search warrant close to the scene, under the facts presented the United States Supreme Court found the suspect "was detained at a point beyond any reasonable understanding of the immediate vicinity of the premises in question" and that a stop

[4] The physical descriptions in the present case and in Bailey are also similar ("a heavy set black male with short hair" and a heavy set black male with light skin).

and detention one mile away from the scene to be searched and within five minutes of the suspect's leaving the scene to be searched was not permissible under the authority of a search warrant. Id. at 201.

The Supreme Court held that if "officers elect to defer the detention until the suspect or departing occupant leaves the immediate vicinity, the lawfulness of detention is controlled by other standards, including, of course, a brief stop for questioning based on reasonable suspicion under Terry or an arrest based on probable cause." Id. at 202.

The state in the present case offered several justifications for delaying stopping the car, including the desire to have a marked patrol car complete the stop due to officer safety concerns. Tr. 121, l. 18 – 122, l. 8. The trial court was particularly swayed by the concept of officer safety and the need to avoid destruction of evidence. As the trial court noted:

> I understand the argument that it appears from the testimony that the search warrant was going to be executed because it had been signed. This guy comes up, he's there ten minutes, he walks in with no bag and he's carrying bags out. So, you know, I can easily see destruction of evidence and anything else that crosses their mind and I also understand the safety issue of being in an unmarked car and it being late at night and – and they possibly could be armed and dangerous on three counts of murder. Perfectly reasonable to me. And then it says something about *Terry*, but the Courts seem to leave it open and it didn't say *Terry's* like your only aspect. In fact, the case that they sent it back to remand on they found that while they did a pretty good *Terry* stop, they kind of overreached their boundaries on arresting him.

Tr. 118, l. 1-16.

While the "added safety" of using a marked patrol car to execute the stop was compelling to the trial court may be a consideration when in close vicinity to the place to be searched, it may not serve as an excuse to detain those individuals not in the immediate vicinity of the physical location to be searched. The Supreme Court recognized that in closer cases (when immediately

vicinity is a closer question) courts may "consider a number of factors to determine whether an occupant was detained within the immediate vicinity of the premises to be searched, including the lawful limits of the premises, *whether the occupant was within the line of sight of his dwelling*, the ease of reentry from the occupant's location, *and other relevant factors*. Bailey at 201 (emphasis added). As the stop here was almost identical to the Bailey stop in terms of geographic distance, the authority of the search warrant as a basis for the stop was improper and the trial court's reliance on the "other factors" of destruction of evidence and officer safety impermissibly extended the geographic reach of the search warrant to allow a seizure well beyond the "immediate vicinity." In effect, the trial court allowed the police to transform their search warrant into an arrest warrant to be executed well away from the premises to be searched in violation of Bailey. This was an error of law.

E. A *Terry* stop was not justified of a car that was in no way connected to the criminal investigation.

The trial court made reference to the traffic stop being supported by reasonable suspicion and valid under Terry v. Ohio, 392 U.S. 1 (1968). However, at this point in the investigation, the police had limited information that connected appellant to the crimes of December 17, 2019. The affidavit supporting the search warrant mentioned an unnamed "CI" overhead a conversation with someone who heard a statement about a "hot" gun for sale with "3 bodies" on it. R. * Search Warrant of Landmark dated 12/21/2019. This same "CI" was credited with relaying details of the crime that were not public, such as a gun being taken from the scene of the crime. R. * Search Warrant of Landmark dated 12/21/2019. Police then listened in during a conversation about a gun sale between the "CI" and appellant, although the details of the "hot" nature of the gun or the "3 bodies" on it were not repeated in this conversation. R. * Search Warrant of Landmark dated

12/21/2019. An unnamed witness saw someone matching appellant's appearance running away from area close in time to the shootings. This same unnamed witness picked appellant out of a photographic lineup. R. * Search Warrant of Landmark dated 12/21/2019. Appellant arguably fit the generic physical description of someone "in the area" of the shooting – a "short, heavy set, light skinned black male with a beard." R. * Search Warrant of Landmark dated 12/21/2019.

However, when the traffic stop occurred on December 21, 2019, the police had no reasonable suspicion that any crime was involved *that evening* and made the decision to stop the car regardless of the lack of any ongoing or suspected criminal activity by the occupants of the car. "[W]hile reasonable suspicion is not a high bar and 'is a less demanding standard than probable cause and requires a showing considerably less than preponderance of the evidence, the Fourth Amendment requires at least a minimal level of objective justification for making the stop.' This inquiry involves the totality of the circumstances, and '[c]ourts must give due weight to common sense judgments reached by officers in light of their experience and training.'" State v. Frasier, 437 S.C. 625, 635, 879 S.E.2d 762, 767 (2022).

Prior to the stop, officer Johnathan Brock observed someone of the "proper" height (short) and "weight" (heavy) leave the apartment and get into the unrelated car's rear compartment. Tr. 77, l. 12 – 78, l. 22. While Brock was aware a search warrant had been issued, it was not ready for execution at the time he observed this individual. Tr. 79, ll. 10-21. Brock also admitted the lighting was poor, and he was unable to properly see the individual beyond generic height and weight:

> [H]e went past the front headlights and so I was able to see more of a descriptive of that person's height and weight and that he was carrying two bags, one in each hand, and then he went around to the -- I'm sorry, I've got to think in my head. It's backwards. So he went around to the far side as he crossed it, which would be the driver's side, and then got into the passenger -- the back passenger right-- the back passenger seat.

> Q. So let me back you up. This individual, do you remember what he was wearing?
>
> A. I remember that he was wearing a red hoodie. Again, you can't see a whole lot with the lights, but I could see him as he passed, the hint of red.
>
> Q. Could you tell if the individual that walked across those -- in front of those headlights if -- if he bore any resemblance at all to the -- Justin Hopkins, that – the description you had for Justin Hopkins?
>
> A. Yes, sir, he did. His *height and weight* were pretty discernable.
>
> Q. And you mentioned two bags. Let me ask you this. When you first saw an individual get out of the car to go into 27A, did you see anybody carrying anything?
>
> A. I didn't. He didn't have anything that I could see.
>
> Q. Okay. But coming out of 27A, you say -- what could you see?
>
> A. I could just see that -- again, *because of the light from the headlights, all I can see is kind of like bags. I can't tell what they are, what color they are, anything about them because of the way the light's in my eyes, but I could definitely tell he had something in his hands.*

Tr. 78, l. 5 – 79, l. 9 (emphasis added).

Brock made the decision to stop the car regardless of any lack of criminal activity based solely upon the search warrant awaiting execution.

> And as soon as they started to leave and he got in the car, I was already requesting a marked vehicle to stop that car.
>
> Q. Okay. That request was made while you were over there at Landmark?
>
> A. Yes. I was still in my car and parked.

Tr. 84, ll. 20-25. Thus, the police did not have a reasonable suspicion of criminal activity surrounding the car, but elected to stop and seize the car solely because someone who may have been appellant was seen leaving the location to be searched and getting in the back seat of the car

carrying "*kind of like bags.*" This should be contrasted to their approach to stopping the vehicle of interest that same night driven by co-defendant Cornish, as they used a minor traffic violation to justify the initial stop of that vehicle. Tr. 460, ll. 19 – 25. Absent a similar pretext, the stop here was conducted based solely upon the existence of the search warrant.

"An exception to the Fourth Amendment rule prohibiting detention absent probable cause must not diverge from its purpose and rationale." Bailey, 568 U.S. at 194. "The South Carolina Constitution, with an express right to privacy provision included in the article prohibiting unreasonable searches and seizures, favors an interpretation offering a higher level of privacy protection than the Fourth Amendment." State v. Forrester, 343 S.C. 637, 645, 541 S.E.2d 837, 841 (2001). "[T]he federal Constitution sets the floor for individual rights while the state constitution establishes the ceiling." Id. at 647, 541 S.E.2d at 842. Thus, "[t]he focus in the state constitution is on whether the invasion of privacy is reasonable, regardless of the person's expectation of privacy" in the place searched. State v. Weaver, 374 S.C. 313, 322, 649 S.E.2d 479, 483 (2007). "By articulating a specific prohibition against 'unreasonable invasions of privacy,' the people of South Carolina have indicated that searches and seizures that do not offend the federal Constitution may still offend the South Carolina Constitution." Id.

Here, the action of law enforcement in ignoring the geographic restrictions of their search warrant to stop a car was a violation of appellant's rights protected under the United States Constitution and South Carolina's Constitution. The state may not cure this violation through a reliance upon reasonable suspicion of criminal activity as the stop in question was not based upon any concern or threat of ongoing criminal activity by the occupants of the vehicle, but a suspicion of involvement by an occupant of the car to an earlier, completed crime. The action here can be contrasted with the action approved following remand in Bailey. There, the Second Circuit Court

of Appeals reviewed the alternative basis for the stop under Terry. The court noted three factors creating a reasonable suspicion of criminal activity justifying the stop including that the location to be searched was suspected of *ongoing* drug trafficking, that the suspect left the apartment where criminal activity was conducted, and the suspect fit the description of the person engaged in such *ongoing* criminal activity. United States v. Bailey, 743 F.3d 322, 333 (2d Cir. 2014)(hereinafter Bailey II)(holding that when detectives "had an articulable basis to conduct an investigatory Terry stop to ascertain the men's identities and their reason for being at a premises where there was probable cause to think criminal conduct was occurring and a gun was located" and who fit the description of the person engaged in such ongoing criminal activity.). Thus, the court in Bailey II focused on the ongoing nature of the criminal activity (drugs actively being sold from the location), not solely the relation of the place to be searched and the person stopped. The Second Circuit noted "ownership or occupancy of searched premises" was not enough to provide the reasonable suspicion necessary for a valid Terry stop, but could be considered as a factor, along with the other factors it noted, in supplying reasonable suspicion. Bailey II, 743 F.3d at 334-35.

In the present case, there was no active, ongoing criminal activity in the location to be searched.[5] In fact, there was no clear indication provided in the search warrant that appellant even resided in the place to be searched, as discussed *infra*. The basis for the stop in the present case, appellant leaving the place to be searched and vaguely matching a description of a suspect, did not justify the stop of the vehicle under Terry. Police could have followed the vehicle and conducted an investigatory stop over an observed traffic violation, as they did do in connection with the white

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[5] The search warrant for apartment 27A only alleged the search was needed "to preserve and collect any potential evidence related to this incident which may establish the facts of the shooting . . ." R. * Search Warrant Landmark Apartments dated 12/21/2019. No allegation of *ongoing criminal activity within the apartment* was contained in the search warrant affidavit.

truck that was of interest in the investigation. Instead, relying solely upon the search warrant, a car of no interest to the investigation was seized in violation of both the Fourth Amendment under the United States Constitution and under Article 1, Section 10 of the South Carolina Constitution. The evidence seized during the unlawful stop should have been suppressed and appellant should be granted a new trial.

F. The odor of marijuana did not justify the initial stop and search of the car.

In a last attempt to justify the seizure and later search of the bags, the state relied upon the odor of marijuana and inevitable discovery. 125, l. 22 – p. 126, l. 8. While Brock testified he smelled the odor of marijuana, he did so only after forcibly opening the door of the car.

> Q. When you-all stopped this vehicle, this silver car with Mr. Hopkins in it, what, if anything, did you notice as far as an odor when the doors were opened?
>
> A. So as soon as I opened the door, obviously not my primary concern, but there was the odor of marijuana coming from that vehicle.

Tr. 101, ll. 3 – 8.

While the smell of marijuana may have arguably allowed a search of the car *following a valid stop*, it was not the basis for the initial stop itself. *See* State v. Morris, 411 S.C. 571, 581, 769 S.E.2d 854, 859 (2015) (allowing the search of a vehicle following a routine traffic violation stop due to reasonable suspicion that contraband would be found within the vehicle based in part on unrolled and hollowed cigars in the console and smell of marijuana).

Since the initial stop and seizure here was unlawful under Bailey v. United States, 568 U.S. 186 (2013) and was not properly conducted as an investigatory stop under Terry v. Ohio, 392 U.S. 1 (1968), the subsequent search and seizure of the two bags was unlawful and may not be cured

by the end result. Simply put, "[i]n law, the ends do not justify the means." State v. Frasier, 437 S.C. 625, 637, 879 S.E.2d 762, 768 (2022) (quoting State v. Adams, 409 S.C. 641, 763 S.E.2d 341 (2014)). The evidence seized from the two bags, including the ammunition, casings, and white t-shirt, should have been suppressed and appellant is entitled to a new trial.

2. Law enforcement may not seize someone's DNA under a search warrant on a mere suspicion it may be useful later if a suspect's DNA is ever obtained.

A. Standard of Review.

"In determining whether a search warrant is supported by probable cause, the crucial element is not whether the target of the search is suspected of a crime, but whether it is reasonable to believe that the items to be seized will be found in the place to be searched." State v. Thompson, 419 S.C. 250, 256, 797 S.E.2d 716, 719 (2017). "The Fourth Amendment protects against intrusions into the human body for the taking of evidence absent a warrant unless there are exigent circumstances, such as the imminent destruction of evidence." State v. Baccus, 367 S.C. 41, 53, 625 S.E.2d 216, 222 (2006). "[T]he State must then show (1) a clear indication that material evidence relevant to the question of the suspect's guilt will be found, and (2) that the method used to secure this evidence is safe and reliable." State v. Register, 308 S.C. 534, 537–38, 419 S.E.2d 771, 773 (1992).

B. The Hopkins DNA evidence and the motion to suppress.

Defense counsel moved to suppress the DNA evidence connected to appellant's DNA profile and that of his co-defendant, Cornish, since the state lacked a profile of a suspect to compare with the seized DNA profiles. Tr. 140, l. 9 – 141, l. 15. The state used the improperly collected DNA profile of appellant at trial to assist in establishing appellant's ownership of a white t-shirt with a small blood stain from one of the victims (appellant's DNA was present on the shirt indicating he had worn the shirt) and ownership of the boots allegedly used to kick on a door of a closet at the crime scene (appellant's DNA was inside the boot indicating he had worn the boots). Tr. 753, ll. 2 – 14; tr. 757, ll. 4 – 21. In addition, the state presented evidence of touch DNA from

the co-defendant Cornish on the interior deadbolt of the crime scene entry door. Tr. 750, l. 1 – 7501, l. 19.

The issue raised by defense counsel centered on defects in the search warrants regarding the existence of a suspect's DNA from the crime scene. The state seized the DNA of both appellant and Cornish assuming it would be useful in the case rather than based upon the existence of DNA evidence. The crime occurred on December 17, 2019. The scene was secured, and crime scene technicians swabbed areas for "touch DNA" and obtained other biological samples over a period of three days. Tr. p. 292, l. 16 – 293, l. 24; tr. 329, l 8 – 330, l. 21. By affidavit of Detective Livingston of the Lexington County Sherriff's Office dated December 22, 2019, the state secured a warrant for the seizure of a buccal swab of appellant's saliva for the purpose of obtaining his DNA. R. * Warrant for DNA Hopkins dated 12/22/2019. The affidavit supporting the warrant requested appellant's DNA "as a known standard to compare against DNA swabs for touch DNA and swabs of blood taken from the crime scene, which is reasonably believed will further tie [appellant] to this incident." R. * Warrant for DNA Hopkins dated 12/22/2019. Omitted from the affidavit was any information as to a suspect's DNA being obtained from the crime scene, or in fact any DNA being obtained and tested connecting appellant to the crime. In an attempt to cure the defects in its original warrant, the state secured a second warrant for appellant's DNA shortly before trial. R. * Warrant for Hopkins DNA dated 9/23/2022. This affidavit suffers from the same defect, failing to provide the court with any guidance that a suspect's DNA profile had been generated to justify the conclusory statement that appellant's DNA profile would reasonably lead to relevant evidence. There was no indication in the affidavit that a suspect's DNA profile had been retrieved from the crime scene to compare. This "new" affidavit was also factually inaccurate, as the testing results for any touch DNA from the crime scene had already been processed, and the

state was well aware that appellant's DNA was not present at the crime scene.[6] R. * Warrant for Hopkins DNA dated 9/23/2022; Tr. 750, l. 5 – 751, l. 11.

Appellant objected to the use of his DNA profile on the basis that the state did not have a suspect's profile against which to compare his DNA. Tr. 140, l. 11 – 141, l. 15. The state assumed his DNA would be present, so obtained a search warrant shortly after arrest for appellant's DNA so they could conduct a compare *if they happened to discover s suspect's DNA was located inside the crime scene.* The trial court ruled that the state did have items to compare appellant's DNA, mentioning the white T-shirt obtained from the unlawful traffic stop in particular. Tr. 144, ll. 3 – 13.

In the present case, appellant's DNA was seized assuming an unknown suspect's DNA would be found at the crime scene. The original affidavit mentions only swabs of blood and touch DNA taken from the crime scene without indication that a suspect's DNA profile was obtained from the swabs. R. * Warrant for DNA Hopkins dated 12/22/2019. The subsequent "corrected" warrant suffered from the same issues, simply alleging once again that "touch DNA *swabs* from areas in the apartment that suspects *may have had contact with*" had been obtained. Again, what is omitted is any reference to an "unknown suspects" DNA being obtained from any of those swabs for trace evidence.

The affidavits supporting the search warrants in this case do not contain any indication as to whether the police had DNA evidence to compare to Hopkins' or Cornish's DNA profile. In reviewing a claim for seizure of DNA evidence, the judge is entitled to know that there is

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[6] The state had found co-defendant Cornish's DNA on the interior deadbolt of the entry door to the crime scene. Tr. 750, l. 5 – 751, l. 11. This was the only DNA evidence from inside the apartment connecting appellant or Cornish to the crime scene.

"unknown" DNA present and the circumstances indicating such DNA may belong to a suspect in the case before ruling on probable cause. Absent such a showing, there was no "clear indication" that this identification evidence would be found justifying its seizure from a suspect. Our courts have noted the need for a suspect's DNA to be available for comparison before obtaining evidence of this type. *See* State v. Chisholm, 395 S.C. 259, 266–68, 717 S.E.2d 614, 617–18 (Ct.App.2011) (affirming an order requiring defendant to provide a DNA sample where the State presented evidence to the magistrate that the victim's clothing contained the DNA of an unidentified male); State v. Jenkins, 398 S.C. 215, 224–25, 727 S.E.2d 761, 766 (Ct. App. 2012), rev'd on other grounds, 412 S.C. 643, 773 S.E.2d 906 (2015) ("Accordingly, to show that a suspect's DNA is relevant under the second element of *Baccus*, the State must show there is other DNA evidence in the case to which it can be compared, or in some other manner clearly indicate the relevance of the DNA sought.").

In this case, the assumption that a suspect's DNA was present on the various swabs obtained from a violent crime scene does not support a finding of probable cause for identification evidence obtained appellant's body under Baccus and Register. The late effort by the state to cure this issue by obtaining another search warrant, despite knowing that appellant's DNA was not found at the crime scene, was ineffective to cure the violation. Evidence related to appellant's DNA profile should have been suppressed.

C. The Cornish DNA evidence should have been suppressed under the same grounds.

This same argument, and result, would apply to the DNA samples taken from Cornish and introduced during appellant's trial. As the Cornish touch DNA on the inside of the door was used against appellant as a "hand of one hand of all" argument,[7] appellant had standing under S.C. Code Ann. § 17-13-140 (1976 *as amended*) to object to the defective warrant seizing Cornish's DNA profile. *See* State v. McKnight, 291 S.C. 110, 115, 352 S.E.2d 471, 474 (1987) (holding a person "contesting the legality of a search because of a defect under Section 17–13–140 need only show that the State is attempting to introduce the evidence against him.") *see also* State v. Freeman, 319 S.C. 110, 459 S.E.2d 867 (Ct. App. 1995) (holding ruling on defective warrant applied to all charged defendants).

For Cornish, by the time the state attempts to cure its collection problem with the September 23, 2022, warrant, the crime scene DNA tests results were already available and known. The affidavit supporting the search warrant is deliberately misleading in an attempt to mirror information known to the state without reference to Cornish's DNA already having been seized and compared to the results from the crime scene.[8] In attempting to cure the unlawful seizure issue, the state's supporting affidavit for Cornish mirrors the claims from the Hopkins warrant. Neither allege that an "unknown" suspect's DNA has been obtained as a comparison basis. Both simply allege swabs *looking for* DNA have been obtained, but with no indication such swabs *actually contained* DNA evidence, much less that the DNA obtained is that of an unknown suspect justifying the seizure of DNA from either appellant or Cornish.

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[7] The state argued it did not matter who shot the victims since the hand of one was the hand of all. Tr. 837, 6 – 838, l. 16.

[8] That comparison resulted in a single DNA match, finding Cornish's touch DNA on the deadbolt lock on the inside of the door to the apartment. Tr. 750, l. 5 – 751, l. 11.

The search warrants to obtain DNA profiles for both appellant and Cornish were insufficient to establish a "clear indication" that this identification evidence would be found at the crime scene. Due to the defect in failing to allege that DNA evidence existed of a suspect, the evidence related to the DNA results should have been excluded and a remand for a new trial is warranted.

3. A search warrant for the residence of a suspect in a criminal investigation requires some probable cause information that the suspect actually resides in the place to be searched.

"In determining whether a search warrant is supported by probable cause, the crucial element is not whether the target of the search is suspected of a crime, but whether it is reasonable to believe that the items to be seized will be found in the place to be searched." Thompson, 419 S.C. at 256, 797 S.E.2d at 719. "The duty of the reviewing court is to ensure the issuing judge had a substantial basis for concluding probable cause existed. Although great deference must be given to an issuing judge's conclusions, the judge may only issue a search warrant upon a finding of probable cause." Id. at 257, 797 S.E.2d at 719 (internal citations omitted).

The search warrant for apartment 27A of the Landmark Apartment complex was defective in that it failed to establish probable cause that appellant resided in apartment 27A. The warrant clearly identifies apartment 27A of the Landmark Apartment complex as the location to be searched. R. * Search Warrant Landmark dated 12/21/2019. The probable cause portion of the warrant establishes the basis for suspicion of appellant being involved in the crime, with some reference to his phone number being listed with Landmark Apartments. At the time the warrant was issued, Apartment 27A was leased by one Maxie Jacobs. Tr. 585, ll. 12 – 16. While appellant had discussed leasing the apartment after the Jacobs leased expired close in time to the search warrant, he was not on the lease at the time of the search and his conversations with the Landmark were not mentioned in the affidavit. Tr. 588, l. 1 – 589; l. 6; R. * Search Warrant Landmark dated 12/21/2019. The search warrant, despite acknowledging being in touch with the Landmark Apartment complex to confirm the phone number was consistent with appellant's cellular phone, did not inform the magistrate of who leased apartment 27A (Jacobs) or what connection, if any, appellant had with apartment 27A. The trial court ruled the affidavit established probable cause:

> Well, when I read it, that's what I thought. Just a plain simple reading it of. I'm gonna allow it. It is clear in the description to be searched with the judge's signature. It referenced in the affidavit itself Landmark Apartment records, what all they did to identify Justin Hopkins and where he lived. And, again, it's in the description of the property that has also been initialled by the judge. So the apartment search I find is sufficient and that's my ruling.

Tr. 130, ll. 3 – 10.

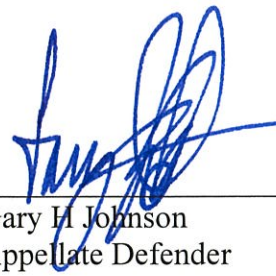
The trial court's factual finding, that the state identified where appellant lived, was not supported by the affidavit. The affidavit would support a factual finding the appellant lived somewhere in the Landmark Apartment complex, but not in apartment 27A. This case is controlled by the South Carolina Supreme Court's decision in State v. Thompson, 419 S.C. 250, 797 S.E.2d 716 (2017). There, the affidavit to search the parents' home of a suspect was "insufficiently specific to provide a fair probability the evidence sought by the search warrant would be located there." Id. at 258, 797 S.E.2d at 720. Much like in Thompson, the affidavit here indicated a connection between appellant and the apartment complex, but not the specific apartment leased to Mr. Jacobs, apartment 27A. In Thomspon, the issue surrounding the warrant was not the absence of allegations of criminal activity justifying the search, but of remoteness. With the lack of specific and relevant information regarding the timing of the alleged criminal activity, our Supreme Court noted that the allegations did not "independently or together" demonstrate "a sufficiently specific indication that the drugs Thompson was selling were being accessed at that address on or near" the time of the search. Id. at 258, 797 S.E.2d at 720. While Thompson had a connection with the location to be searched, it was owned by a third party (his parents). In the present case, the affidavit fails to properly connect appellant with residing in apartment 27A, a glaring error particularly in light of the fact that the apartment was leased by Jacobs. Allegations of a connection to the

Landmark Apartment complex alone, rather than specifically to apartment 27A, were not sufficient to establish probable cause.

The trial court should have suppressed the evidence seized from the search of apartment 27A due to the defective affidavit. This would have included the work boots that the state used to place appellant inside the crime scene due to photographs of a smeared shoe print on an interior door that was consistent with the size and tread pattern of a pair of appellant's work boots. Tr. 652, l. 8 – 654, l. 8. Appellant is entitled to a new trial with suppression of the material seized from apartment 27A.

CONCLUSION

By reasons of the foregoing arguments, appellant's convictions should be reversed, and the case remanded to the Lexington County Court of General Sessions for a new trial.



Gary H Johnson
Appellate Defender

ATTORNEY FOR APPELLANT

This 19th day of September, 2023.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

RECEIVED
Sep 19 2023
SC Court of Appeals

Appeal from Lexington County

Honorable Debra R. McCaslin, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JUSTIN TYLER ELLAREE HOPKINS,

APPELLANT

APPELLATE CASE NO. 2022-001567

DESIGNATION OF MATTER TO BE INCLUDED IN RECORD ON APPEAL

Appellant proposes the following be included in the Record on Appeal:

(1) True-billed indictment(s) and sentence sheets;
(2) Trial transcript dated October 24-28, 2022 pages (Tr.): 1-16, 59-864, 886-887, 911-913;
(3) Search Warrant for Apt. 27A dated 12/21/2019;
(4) Search Warrant for Hopkins' DNA dated 12/21/2019;
(5) Search Warrant for Hopkins' DNA dated 9/23/2022;
(6) Search Warrant for Cornish DNA dated 9/23/2022.

I certify that this designation contains no matter which is irrelevant to this appeal.

Gary H Johnson
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR APPELLANT

This 19th day of September, 2023

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STATE OF SOUTH CAROLINA

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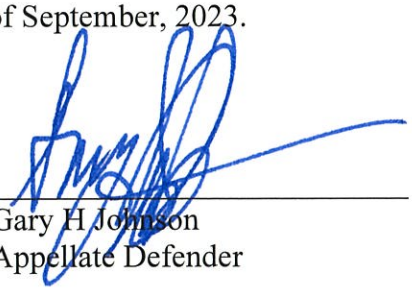
APPELLATE CASE NO. 2022-001567

CERTIFICATE OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies a true copy of the Initial Brief of Appellant and Designation of Matter in the above-referenced case has been served upon Melody J. Brown, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS), this 19th day of September, 2023.



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