STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

THE STATE,

RESPONDENT,

V.

RICKY MANIGO DAWSON,

APPELLANT

APPELLATE CASE NO. 2019-002107

Appeal from Berkeley County

Honorable G. Thomas Cooper, Jr., Circuit Court Judge

Opinion No. 2023-UP-348

PETITION FOR REHEARING

Pursuant to Rules 221 and 240, SCACR, counsel for appellant would petition for rehearing regarding this Court's upholding of the trial judge's denial of a pre-trial motion to suppress the fruit of an unlawful search and seizure on the grounds of consent and probable cause because the case was affirmed on the premise that probable cause existed without appellate review on the lack of consent issue raised on appeal, and because this Court might have overlooked the de novo standard of review in Fourth Amendment cases, which would have led to a no probable cause finding as matter of law, and ultimately a finding on the lack of consent question argued on appeal. In support of this petition, counsel would submit the following points.

A. APPELLANT'S RENEWED MOTION IN LIMINE PRESERVED THE LACK OF CONSENT ISSUE FOR APPEAL

Appellant's trial counsel's motion in limine raised prior to trial follows:

> "The sole issue before the Court is whether a police officer may search a backpack belonging to a passenger in an automobile after receiving the driver's consent to search the vehicle [only]" R. 210.

A motion in limine to exclude evidence at the beginning of the trial does not preserve an issue for appellate review because a motion in limine is not a final determination, which means the moving party must make a contemporaneous objection when the evidence is introduced at trial in order to preserve the issue for appellate reveiw. State v. Wood, 362 S.C. 520, 608 S.E.2d 435 (S.C. Ct. App. 2024). Here, trial counsel raised the lack of consent issue via objection at trial and the trial judge in effect denied the objection on the lack of consent issue by responding "all right," which preserved the lack of consent issue for appellate review. R 121, l. 11- p. 128, l. 17. A contemporaneous and specific objection is necessary to preserve an issue for appellate review. State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991). The objection based on the motion to suppress due to a lack of consent was made pre-trial, and at trial, whereinafter the trial judge ruled "all right" and admitted the illegal items seized into evidence. Thus the renewed motion to suppress due to lack of consent preserved the issue for appellate review.

B. NO PROBABLE CAUSE EXISTED AS A MATTER OF LAW IN THE CASE

This case emanated from a traffic stop due to a defective vehicle headlight. The stop occurred on the night of October 22, 2015, in Goose Creek, South Carolina. The vehicle driver was Sam Carr and appellant was a passenger sitting in the passenger seat. Officer Alexander Erickson, who stopped the vehicle testified that he noted a glass baggy in the

driver's lap (apparently the alleged glass baggy was empty because the driver was not arrested on any narcotics charges). Clearly, the presence of an empty glass baggy did not arise to the level of probable cause to conduct a warrantless search of the vehicle. The presence of a glass baggy in the driver's lap was not sufficient probable cause to search the vehicle issue case. All parties, including the pre-trial hearing judge, agreed that there was no merit to the probable cause issue in the case. Note proof of this is based on the following excerpts from the officer's pre-trial hearing testimony:

Q Okay. Now, you asked for consent [be]cause you did not have probable cause, correct? You agree with that?

A Absolutely.

Q All right. And you certainly didn't have a warrant at that point, right?

A Correct.

Q Okay. And, at that point, neither fellow was under arrest. So, this wasn't a search incident to arrest, correct?

A Correct

Q And the car had not been impounded. So, this was not a search—an inventory search of any sort, correct?

A Correct.

Q As this was a warrantless search based on the consent of Mr. Carr (driver) correct?
A Correct.

Q. You did not have probable cause?

A. Correct. R 39, lines 1-17; Tr. 61,lines 1-2.

The Court: The real issue in this case is not about the probable cause for the stop.

The Court: It's really not about the consent for the, for the

search of the car cause certainly Mr. Carr, can consent to his car being searched.

R. 47, l.22- p. 48, l. 4.

Defense Counsel: The consent of the driver could not extend to the closed bag [of appellant] South Carolina has not addressed this issue [consent] directly besides to accept the Fourth Amendment analysis of warrantless searches.....and the exception that's being relied on [here] is the consent.

R. 67 lines 18-24.

Solicitor: Well, the stop itself is fine. I do not contest the seizure of the car...we'll just jump right consent, your honor.
Hearing Tr. 70, l. 24 – p.71, l.3.

Court: But [your officer] says he didn't feel he had probable cause [to search the whole vehicle] so then comes your rub...because the next exception is consent...there is a void in our case law that deals with the scope of consent of a search by a third party by the owner of a vehicle.
R. 72, lines 8-13,Tr.78, lines20-22.

Counsel: I believe the question to be answered in this case is did the policeman need the consent of Mr. Dawson to go in the backpack or was the general consent given by the driver enough to go in the backpack.
R. 66, lines 13-16.

The officer's pretrial testimony follows:

Counsel: You asked for consent because you did not have probable cause?

Officer: Absolutely

Counsel: As this was a warrantless search based on consent

Officer: Correct. Hearing transcript
R. 39, lines 1-2 & lines 16-17.

Defense Counsel: Th[is was] consent because there's no probable cause.

Court: The real issue in the case is not about the probable cause R. 47, lines 22-24.

The instant case involved an impermissible Sikes v. State, 323 SC 28 448 S.E.2d 560 (1994) fishing expedition style search. In Sikes, the officer continued to detain a passenger without probable cause in order to buy time to extend to a search of the car. Similarly, there have been other cases where fishing expedition car searches were struck down by our Courts. See reversals in State v.Rodriguez, fishing expedition reversals in 323, S.C. 484, 476 S.E.2d 161 (S.C. Ct. App. (1996); State v. Woodruff, 344 S.C. 537, 544 S.E.2d 290 (2001); State v. Pichardo, 367 S.C. 84, 623 S.E.2d 840 (2007); State v. Williams, 351 S.C. 591, 571 S.E.2d 703 (2003). Clearly, there was no probable cause for a search of the vehicle in the case at bar.

C. THE APPELLATE STANDARD OF REVIEW REQUIREMENT INCLUDED A *DE NOVO* PROBE ON THE ISSUE OF PROBABLE CAUSE (WHICH DID NOT EXIST)

Had this Court conducted the required appellate review, then a finding of no probable cause would have been the result, and therefore, the merit in the remaining the lack of consent issue would have been addressed. In Fourth Amendment search and seizure cases, the standard of review follows:

> The South Carolina Supreme Court clarified its standard of review for cases involving an appeal from a motion to suppress based on Fourth Amendment grounds to the extent that appellate courts are no longer dependent on the trial court when the appellate court reviews the evidence, but instead there is a two-step analysis to review the trial court's factual findings although that the ultimate legal conclusion is a question of law subject to *de novo* review. State v. Frasier, 437 S.C. 625, 879 S.E.2d 762 (2022).
>
> The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion. An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual

conclusions, is without evidentiary support... the appellate court will reverse only when there is clear error.

State v. Wright, 391 S.C. 436, 442, 706 S.E.2d 324, 326 (2011) (citations and internal quotation marks omitted.) This deference does not bar appellate courts from conducting their own review of the record to determine whether the trial judge's decision is supported by the evidence. State v. Tindall, 388 S.C. 518, 521, 698 S.E.2d 203, 205 (2010).

In criminal cases, the appellate court sits to review errors of law only. State v. Wilson, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). On appeal from a suppression hearing, appellate courts are bound by the circuit court's factual findings if any evidence supports the findings. State v. Brockman, 339 S.C. 57, 66, 528 S.E.2d 661, 666 (2000). In an appeal from a motion to suppress evidence based on Fourth Amendment grounds, an appellate court may conduct its own review of the record to determine whether the evidence supports the circuit court's decision. See State v. Khingratsaiphon, 352 S.C. 62, 70, 572 S.E.2d 456, 460 (2002).

In criminal cases, an appellate court sits to review errors of law only. Therefore, an appellate court is bound by the trial court's factual findings unless they are clearly erroneous. State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). The same standard of review applies to preliminary factual findings in determining the admissibility of certain evidence in criminal cases. State v. Wilson, 345 S.C. 1, 5-6, 545 S.E.2d 827, 829 (2001). Appellate review in Fourth Amendment search and seizure cases is limited to determining whether any evidence supports the trial court's finding. State v. Butler, 353 S.C. 383, 388, 577 S.E.2d 498, 500-01 (Ct. App. 2003).

D. THE DRIVER'S CONSENT TO A VEHICLE SEARCH DID NOT EXTEND TO A SEARCH OF THE PASSENGER'S BACKPACK

A summary of the traffic stop interrogation follows:

Officer: I am not going to sit here and waste your time my time anybody else's time if that really was that little wrapper that's fine and what it looked like to me was a little baggie that the kind you put like marijuana in...

Driver: Sir.

Officer:...Cocaine, etc. and I just saw it sitting right there.

Driver: Sir I...I understand. I wouldn't...you got to understand I wouldn't.

Officer: Do you have any objection to me looking in that little front area of the vehicle?

Driver: What how (inaudible)...What are you talking about right where I was sitting at?

Officer: Yeah do you mind if I..

Driver: No, no right where I was…listen right where I was sitting at if you..No, listen you can check where I was sitting at I know…I am consenting to you, you asked to do a personal check of my area. My passenger like I am saying I am not going to put him in the situation like that is what I am saying.

Officer: Here's the thing man he's in the car, he…How well do you know him?

Driver: We Friends, like he cut my hair. Like I said he my barber. He cool. His car is in the shop. I was taking him…giving him a ride home.

Officer: Do you think that it would be good seeing that you're a truck driver, with a CDL…

Driver: No it's not good

Officer: That you rolling around with someone that might have something on them…so if…

Driver: No, I am not saying that. I am not even putting him…I don't even know…

Officer: Well that's ok. That's what I am saying if there is something that is on his side it's on his side…

Driver: No, No, there's nothing on his side. I know there's nothing on his side. I know there is nothing in my car. In my car I know there are no narcotics in my car.

Officer: So if I pull him out would you consent to having me look throughout the whole car?

Driver: Yes.

Officer: And then whatever is on him is on him.

Driver: No I've already (shakes head)

Officer: That's what the whole thing is.

Driver:…I am talking about my car. That's the only thing I can account for is my car.

Officer: Ok, that's fine. So I can have him get out and you're allowing me to go into your car right?

Driver: I guess man if this is going to speed up the process. If you're going to search my little area that's what I am referring to that little area…but…

Officer: Well I am asking you for the rest of the car...that's showing that you know...it's your choice.

Driver:...I really don't...I have no objections. I just want to speed up the process.

Officer: Ok as long as there is nothing else in the car and you are allowing me to do it. I will run through the car real quick and then send you on your way.

Driver: (Hands up then pointing both arms beckoning toward the vehicle) I promise...just the car right.

Officer: Yeap.

Driver: Ok...

The objection put forth by the defense was that driver's consent to search the car was limited and did not extend to the search of the backpack that belonged to appellant, who was the passenger and had an expectation of privacy in his backpack. Tr. 48, l.2-14. Tr. 51, l.17-p.52, l.16. Tr. 66, l.11-p.20, l.15, Tr. 72-80. The officer admitted to this based on his answer to a question regarding limited consent as follows:

> Defense Counsel: And he (driver) is telling you you're welcome to search for the car, but it is yours perceptions he is also telling you that he can't speak for [appellant]...maybe not those words, but that what he's implied.
>
> Officer Erickson: Yeah, I'll give you some on that, but, yeah, he's basically in my perception. Tr. 59, l.21-p. 60, l.2.

E.) ILLEGALITY OF SEARCH DUE TO LACK OF CONSENT TO SEARCH

LACK OF APPARENT AUTHORITY

In Illinois v. Rodriguez, 497 U.S. 177 (1990), the Supreme Court held that a third party can only give consent if the third party has common authority over the property or if the third party has apparent authority to consent to search the property. Here, the record was devoid of any evidence, i.e. that the driver had shared or common authority with appellant over the backpack,

and the record is devoid of any evidence that the driver had apparent authority to give police consent to search it. Appellant's backpack was on the floor on the passenger side of the car where appellant sat as a passenger. Appellant had dominion over that backpack that was within his space on the passenger floorboard where he sat in the passenger seat of the car. Also, the nature of a backpack in and of itself is such that it is individualized as belonging to one person in that person's possession. Therefore, there was no community or joint possession that the driver shared with appellant's backpack. Moreover, driver Carr gave permission for a search of the car only, rather than specific items inside the vehicle. Additionally, note that the backpack was not found in a common area of the car such as the console or backseat or trunk. Rather, the backpack was at the feet of the passenger (appellant) on the passenger side at appellant's feet and within his dominion and control.

Under these facts and circumstances, not only did driver Carr not have any apparent authority or common shared authority over the backpack to give consent to a search of the same, but also under the reasonableness test per the totality of the circumstances, the police officer, himself surely had no grounds to believe that driver Carr possessed any apparent authority to consent to the search of appellant's backpack. In other words, it was unreasonable for the officer to have believed that driver Carr could consent to a search of appellant's backpack. It was unreasonable for the officer to have believed that driver Carr had any common interest in a backpack that belonged to a passenger that sat at the passenger side that clearly was under the dominion and control of the passenger.

LIMITED CONSENT

Finally, since the consent given in this case was not a general consent, then the holding in Florida v. Jimeno, 500 U.S. 252 (1991), did not apply in the case. In Jimeno, the Court held that

a general consent to search the car included consent to search containers in the car. However, the facts of this case did not line up with Jimeno because driver Carr did not give a general consent. Rather, the driver's search was limited to the car itself and not containers therein. The context of the dialogue between the Officer and Carr established this as driver Carr stated that "I'm consenting to you...in my area...I'm not going to put [my passenger] in a situation," i.e. no consent was given to search appellant's belongings.

An example of this limited consent was highlighted in State v. Forrester, 343 S.C. 637, 541, S.E.2d 837 (2001). In Forrester, the defendant only opened her purse just a little for the officer to peek inside, but the officer grabbed the purse and reached inside the purse after opening it fully and found crack cocaine inside. The Forrester Court held that the Fourth Amendment[1] was violated because the defendant in Forrester merely offered the police officer a visual inspection of the purse under a restricted manner, and thus limited the scope of the consent to search rather than surrendering the purse per a full consent to search of the entire purse. Note that the South Carolina State Constitution under article 1, 10 provides an express protection of the right to privacy.[2]

Similarly, in the case at bar, the driver gave a limited search of his car only and not a general search to include appellant's backpack as a passenger in the car. Again, driver Carr's comments confirmed this limited consent as follows:

> Carr: No, listen you can check where I was sitting...I am consenting to you, you asked to do a personal checks of my area...my passenger like I am saying I am not going to put him in a situation like that is what I'm saying

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[1] The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable search and seizures shall not be violated.

[2] The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures and against unreasonable invasions of privacy shall not be violated.

> Officer: So if I pull [appellant] out would consent to having me looking throughout the whole car?
> Carr: Yes
>
> Officer: And whatever is on [appellant] in on [appellant].
>
> Carr: No, I've already...
>
> Carr: I am talking about my car. That's the only thing I can account for is my car. See page 9 of Order Denying Motion to Suppress.

Clearly, Carr's consent to search the vehicle was not a general search to include passenger appellant's belongings in the car, but rather a limited search of the car and what belonged to him.

OTHER JURISDICTIONS

People v. James, 16 3 Ill.2d 302 645 N.E. 2d 101 (1994), and United States v. Welch, F.3 761 (9th Cir. 1993), were cases where the Courts noted how untenable it was to reasonably believe that a driver could consent to the search of a woman's purse. In Brown v. State, 789 So. 2d 1021 (Fla Dist. Ct. App. 2001), the Court held that a driver could not consent to the search of a passenger's fanny pack where the passenger who was sitting in the car had the fanny pack on her lap. In United States v. Infante-Ruiz, 13 F. 3d 498 (1st Cir. 1994), the Court held that a driver could not consent to search a passenger's brief case in the trunk of the car. In United States v. Minnoz, 590 F.3d 916118th Cir. 2010), the Court held that a driver could not consent to the search of the passenger's backpack without determining who owned the backpack (that being the driver or the passenger).

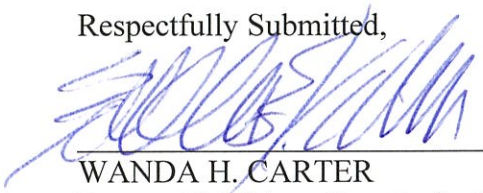
Here, the trial judge erred in denying appellant's motion to suppress the drugs found per the search and seizure of appellant's backpack in violation of the Fourth Amendment and Article 1, section 10 of the South Carolina State Constitution. The trial judge denied the motion to

suppress by ruling that driver Carr authorized a general consent to search his vehicle. However, the ruling was in error because this was a limited consent to search similar to the limited search found in State v. Forrester, 343 S.C. 637, 541 S.E.2d 837 (2001), and also because driver had no apparent authority to consent to a search of appellant's backpack and no common authority with appellant over the backpack.

CONCLUSION

WHEREFORE, based on the following points indicating that no probable cause to search existed as a matter of law in the case, counsel for appellant would request a rehearing on the Fourth Amendment lack of consent to search issue raised on appeal.

Respectfully Submitted,



WANDA H. CARTER
Deputy Chief Appellate Defender

This 3rd day of November, 2023

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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Berkeley County

Honorable G. Thomas Cooper, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

V.

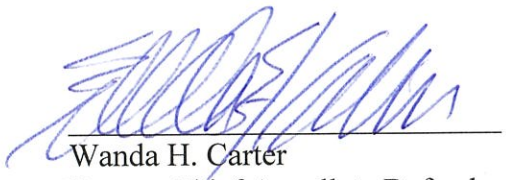
RICKY MANIGO DAWSON,

APPELLANT

APPELLATE CASE NO. 2019-002107

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a copy of the Petition for Rehearing in the above-entitled case has been served upon Mark R. Farthing, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS), and on Ricky Manigo Dawson, #381886, at Ridgeland Correctional Institution, PO Box 2039, Ridgeland, SC 29936, this 3rd day of November, 2023.



Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR APPELLANT

From: Leverett, Scott
To: SC - FARTHING MARK
Cc: Grace Sommer; Carter, Wanda
Subject: Ricky Manigo Dawson - Petition for Rehearing - Appellate Case No. 2019-002107
Date: Friday, November 3, 2023 2:51:00 PM
Attachments: Ricky Manigo Dawson - Petition for Rehearing - Appellate Case No. 2019-002107.pdf

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Dear Mr. Farthing,

Attached please find a copy of the Petition for Rehearing in the above referenced case that is being filed today, November 3, 2023, with the Court of Appeals.

-Scott Leverett
Admin. Asst. for Wanda Carter
Appellate Defense