

orig.

THE STATE OF SOUTH CAROLINA

In The Supreme Court

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JUL 25 2013

**S.C. Supreme Court**

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Appeal from Spartanburg County

Roger L. Couch, Circuit Court Judge

THE STATE,

Respondent,

vs.

JAMES D. TINSLEY, II,

Petitioner.

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Appellate Case No: 2010-179266

Docket No: 2013-000536

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**PETITIONER'S REPLY BRIEF TO RESPONDENTS  
RETURN IN OPPOSITION TO CERTIORARI REVIEW**

\_\_\_\_\_  
James Douglas Tinsley, II, #171943,  
Livesay Work Center, N4-5A,  
P.O. Box 580  
Una, South Carolina 29378

Petitioner Pro se

This is Petitioner's reply brief to the Respondents return in opposition to certiorari review. The Respondents stress that the trial judge was correct and that the Court of Appeals did not err in upholding Petitioner's conviction under the Fourth Amendment challenge, because: (1) the officers seizure of the camper was lawful under the plain view doctrine;<sup>1</sup> and (2) the subsequent search and testimony concerning the V.I.N. was conducted by a private party.

#### FACTS

Petitioner Tinsley purchased a camper from Bill Dotson, an acquaintance Petitioner had met through the Iwana sales paper. Petitioner locked the camper, put a hitch-lock on it and parked it at his Grandmothers home which is next door to his father's home. Petitioner purchased the camper to use in the go-kart racing industry and put go-kart graphics on its outside. Petitioner also had a similar enclosed race trailer with the same identical graphics which he had been using previously.

On December 13, 2006, Detectives Wight and Beck went to Petitioner's fathers home to seize the camper. They attempted to have Petitioner's father consent to a search of the camper. Petitioner's father told detectives that he was not sure he was authorized to consent to a search because it was not on his property and he had no key to the camper.

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<sup>1</sup> The Respondents also stress that the camper could have been seized under the automobile exception. Petitioner has previously demonstrated why the automobile exception does not apply to this case in his writ of certiorari at page 9, FN 3.

The detectives assured Petitioner's father that he did have the authority to consent to its search and had him sign a consent form. The detectives called Greenville pop-a-lock to come break into the camper. Detectives entered the camper, conducted a search and discovered the V.I.N. make and model information on an interior cabinet door. This information was compared to the camper stolen from Holiday Kamper and was found to match. Detectives seized the camper and returned it to a Holiday Kamper mechanic. The mechanic was shown the V.I.N. and compared it to the V.I.N. listed on the police report filed by Holiday Kamper.

At trial, the Petitioner sought the suppression of the camper and its V.I.N. because it was searched and seized in violation of the Fourth Amendment. Following a suppression hearing the trial judge ruled that the search was unlawful and that any reference to the V.I.N. would be prohibited. However, the trial judge ruled that the seizure of the camper would still be lawful because it was conducted on a different premise. Presumably, that it could be seized based upon the plain-view doctrine.

Petitioner objected arguing that the evidence during the suppression hearing demonstrated that there was no probable cause to seize the camper because its stolen character was not immediately apparent.

The State then called Paul Thomas, a representative of Holiday Kamper, and sought to have him identify the camper and

its V.I.N. based upon a subsequent inspection and search of the camper he had conducted following its return.

The trial judge allowed the testimony over Petitioners objection because he reasoned that if he were correct in holding that the seizure were lawful, the subsequent search by Holiday Kamper representatives would constitute a private party search that would not be prohibited by the Fourth Amendment.

On review, the South Carolina Court of Appeals upheld the conviction, presumably, because they believed the record supported a finding that the camper was seized under the plain-view doctrine, although they could point to no facts in the record to support that belief. In connection, they believed that the subsequent search by Holiday Kamper representatives constituted a private party search even though the search was only conducted "after" a prior unlawful search and seizure by the Government.

The Petitioner sought a writ of certiorari to review these decisions. The Respondents filed a return opposing the Petition and basically made the same arguments stressed on appeal.

Petitioner will address each of these issues in turn.

#### I. PLAIN-VIEW DOCTRINE

During the suppression hearing, the detectives repeatedly testified that they were not sure whether they were looking at the stolen camper or whether they were looking at Petitioner's "other" race trailer purchased in North Carolina.

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Q. Why didn't you just open it with a key?

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A. Because at the time we had called--we were just trying to determine the true identity of the camper. (App. pg. 22, lines 6-8).

Q. Did you know my enclosed race trailer had those identical stickers on it?

A. Yes. (App. pg. 23, lines 18-20).

Q. So, if something matches a description and theres more than one of them, how can you say for certain that the one your looking at is stolen?

A. That's why we went in to determine the V.I.N. number to, to--show who it belonged to. (App. pg. 24, lines 14-17).

Q. You said the only way you could do that was by going inside and looking at the V.I.N. number?

A. Well, that did--it did show it belonged to Holiday Camper. We didn't know whether it was a North Carolina camper<sup>2</sup> or the Holiday camper. (App. pg. 25, lines 4-8).

Under these conditions it is unlikely that the campers stolen character was immediately apparent to them. There was nothing unique about the camper to distinguish it from Petitioner's other race trailer. Both were white. Both had rear ramp doors. Both had identical graphics and both were bumper pull trailers. While detectives did possess the make, model and V.I.N. of the stolen camper, they did not testify that the make, model or other identifying marks were displayed on the campers exterior so as to cause them to immediately recognize the camper as evidence.

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<sup>2</sup> Petitioner's enclosed race trailer which contained identical decals was purchased at TNT trailer sales in Lincolnton, North Carolina. (App. pg. 220, lines 18-23; pg. 223, line 16-pg. 224, line 5). Detective Wights testimony demonstrates that the camper was not in plain view, because he could not distinguish it from Petitioner's other known race trailer. If police could have seized the camper based upon its immediate apparent stolen character, they would have done so and would not have went to great lengths to trick Petitioners father into signing a "bogus" consent form.

For the plain-view doctrine to apply, an objects stolen character must be immediately apparent to police. Horton v. California, 496 U.S. 128, 136-37 (1990); Arizona v. Hicks, 480 U.S. 321, 328 (1987). Although the camper was obviously in plain view, its probative value remained uncertain until "after its interior was swept and examined". Horton, at 137. The detectives "suspicion" about the camper does not rise to the level of probable cause. Hicks, at 326.

Assuming arguendo, that sufficient knowledge concerning the make, model and decals rose to the level of probable cause, the campers seizure would nevertheless require a prior warrant because there were no exigent circumstances that prevented police from obtaining a warrant. Carroll v. United States, 267 U.S. 132, 156 (1925)(whenever the securing of a warrant is reasonably practical, it must be used). Police had the camper surrounded and one officer could have remained with the camper while the other left to obtain a warrant. Arkansas v. Sanders, 442 U.S. 753, 758 (1979).

Finally, since the trial judge held that the initial search were unlawful, it should invalidate everything which occurred thereafter. There are no distinctions between search and seizure protections. Neither is of inferior worth or necessarily require lesser protections. Hicks, at 328. To authorize the seizure of the camper after it had already been unlawfully searched would provide a greater protection for seizures than for unlawful searches.

## II. PRIVATE PARTY SEARCH

The Respondents seem to believe that Petitioner only objected to a Bill of Sale being published which had been prepared after the camper had been returned in order to sell it.

Petitioner in fact, objected to the testimony of Paul Thomas concerning the identification of the camper, its V.I.N. and any other information, including the Bill of Sale, which was directly or indirectly linked to the Governments previous illegal search and seizure of the camper.

In other words, the State exploited the previous search and seizure that allowed Thomas to testify and identify the camper. This knowledge and testimony was directly or indirectly derived from the previous search and seizure which could not have otherwise occurred. This previous Governmental search and seizure is sufficient to demonstrate the Governments involvement in the private citizens conduct, because the private citizen could not have been involved in the subsequent private party search if police had not already violated the Fourth Amendment in obtaining and returning the camper to the private party.

Although the Fourth Amendment does not apply to a search or seizure, even an arbitrary one, effected by a private party on his own initiative, the Amendment protects against such intrusions if the private party acted as an instrument or agent of the Government. United States v. Jacobsen, 466 U.S. 109, 113-14 (1984). Whether a private party should be deemed an agent or instrument of the Government for Fourth Amendment pur-

poses necessarily turns on the degree of the Governments participation in the private party's activities. Skinner v. Railway Labor Executives' Association, 489 U.S. 602, 614 (1989). That question can only be resolved "in light of all the circumstances". Coolidge v. New Hampshire, 403 U.S. 443, 487 (1971). It is important to recognize, that "the fact that the Government has not compelled a private party to perform a search does not, by itself, establish that the search is a private one". Skinner, at 615.

In Jacobsen, Coolidge, and State v. Cohen, 409 S.E.2d 383 (1991)(the authority relied upon by the Respondents and the Court of Appeals), there was nothing wrongful about the Government's acquisition of the packages or its examination of their contents to the extent that they had "already been examined" by third parties. In other words, the private party search took place "prior too" any Government involvement.

This is highly relevant here because the Governments participation resulted in allowing the subsequent search by Holiday Kamper representatives to take place, which otherwise would never have occurred.

For example: In Walter v. United States, 447 U.S. 649, 100 S.Ct. 2395, 65 L.Ed.2d (1980), the court found that the private parties reading of the film labels would only have allowed them to draw inferences about what was on the films, and this might have made them suspicious of what was on the films, but that the private party had not actually viewed the films prior to the Governments screening of the films. Id. at 657.

In other words, the Government had already searched the films "prior too" any private party search and thus the private parties acts did not constitute a private party search.

If the Court of Appeals and the Respondents version of the law were correct, police could overcome any "prior" unconstitutional search or seizure by returning the property to its owner or by selling the property to any third party who could then be called to the stand to testify and identify the object that they recieved and inspected after the police seizure takes place.

Here, police knew they had conducted an unlawful search and seizure and the prosecution believed that a further search and inspection was necessary in order to obtain evidence which they believed might be used at trial. To circumvent the Fourth Amendment violation, the State attempted to argue that the search and inspection of the camper following its return constituted a private party search. The Petitioner cannot conceive of, and the Respondents have failed to suggest how, the subsequent search could have occurred without the Governemts prior involvement, so as to demonstrate the lack of Government involvement in the private parties conduct.

The law has always excused private party searches that take place "prior too" any Governmental involvement and has authorized the use of evidence obtained by police following a prior private search by a non-governmental party. The law has never authorized the use of evidence obtained by a private party following a prior unlawful Government search or seizure

in order to overcome the prior unlawful actions. The reason being is, that the prior unlawful Governmental search and seizure also transforms the private parties search into a Government search. It is clear that without police involvement the evidence and testimony used to convict Petitioner would not have come to light.

The doctrine of the fruit of a poisonous tree prohibits the use of evidence obtained "directly" or "indirectly" through and unlawful search or seizure. Wong Sun v. United States, 371 U.S. 471, 484 (1963). Here, the opportunity to discover evidence and give testimony was directly or indirectly created by a prior unlawful Governmental search and seizure which otherwise would not have been available. Accordingly, this court should find that Petitioner was convicted based upon evidence that was the product of an illegal Governmental search. The fact that the Government did not compel Holiday Kamper to perform the search does not render the search a private one. The Government provided the private party with the opportunity to conduct the search, gather evidence and knowledge for testifying which it otherwise would not have had.

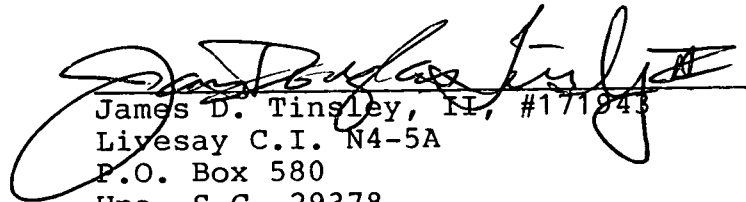
Here, the search should be deemed to have had Governmental involvement so as to exclude it from being a private party search.

#### CONCLUSION

For all of the foregoing reasons, the petition for writ of certiorari should be granted and Petitioners conviction should be reversed.

Respectfully submitted,


July 20, 2003

  
James D. Tinsley, Sr., #171843  
Livesay C.I. N4-5A  
P.O. Box 580  
Una, S.C. 29378

CERTIFICATE OF SERVICE

I, James Douglas Tinsley, Sr., hereby certify that I did cause the foregoing Reply Brief to be served upon opposing counsel this 23<sup>rd</sup> day of July, 2013, by placing a true and correct copy in the U.S. mail, with proper postage affixed thereto, and addressed as follows:

DAVID SPENCER  
Assistant Deputy Attorney General  
P.O. Box 11549  
Columbia, S.C. 29211

  
James Douglas Tinsley, Sr.