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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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Appeal from Newberry County
Honorable William P. Keesley Circuit Court Judge
Honorable Frank Addy, Jr., Circuit Court Judge
Appellate Case No. 2023-000274

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THE STATE,

Appellant,

vs.

JONATHAN C. DAWKINS,

Respondent.

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# FINAL BRIEF OF APPELLANT

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## STATEMENT OF ISSUE ON APPEAL

**The trial judge reversibly erred by granting Dawkins' motion to suppress illegal drugs recovered on Dawkins' person when the search was proper as a search incident to arrest.**

## STATEMENT OF THE CASE

In October of 2021, Respondent Jonathan Dawkins was arrested after illegal drugs were found in a search of his clothing. In November of 2022, the Newberry County Grand Jury indicted Dawkins for possession with intent to distribute fentanyl. On December 5, 2022, Dawkins' case was called for trial in the Newberry County Court of General Sessions with the Honorable William P. Keesley circuit court judge, presiding. Dawkins was represented by Tristan M. Shaffer, Esquire. At the outset of the trial proceedings, Dawkins' counsel moved for the illegal drugs to be suppressed, and the trial judge conducted a suppression hearing on the matter. At the conclusion of the hearing, defense counsel indicated that two more videos had surfaced. The trial judge continued the case until December 6, 2022, to give Dawkins and his counsel time to review the other videos. On December 6, 2022, defense asked for a continuance to give Dawkins time to review the footage because only defense counsel had done so at that point. The trial judge continued the case and stated that he was not going to rule on the suppression motion at that time. On February 21, 2023, the suppression motion was heard again in front of the Honorable Frank Addy, Jr., circuit court judge. The trial judge granted the suppression motion, and the trial was aborted prior to the jury being sworn. The State then timely filed a notice of appeal.[1]

[1] Because the trial judge's suppression of the drugs substantially impairs the State's ability to prosecute Dawkins for the indicted drug-related offenses, the State can properly appeal the trial judge's suppression ruling. See State v. McKnight, 287 S.C. 167, 168, 337 S.E.2d 208, 209 (1985) ("A pre-trial order granting the suppression of evidence which significantly impairs the prosecution of a criminal case is directly appealable[.]").

## STATEMENT OF FACTS

On October 29, 2021, officers were dispatched to Wise St. in Newberry County in reference to Jonathan Dawkins making threats to "Shoot up a house, a car, several subjects." (R. 13). Officers arrived just after midnight and located Dawkins. (R. 14). Officers made contact with Dawkins and placed him in investigative detention. (R. 17). During the search of Dawkins, an open liquor container, a small baggy of a green leafy substance, and a pill bottle that contained four bags of pills were located on his person. (R. 24; 40). Dawkins was arrested and charged with possession with intent to distribute fentanyl.

A suppression hearing for the drugs found on Dawkins was held on December 5, 2022. Officer Daniel Coulombe testified that he was familiar with Dawkins from previous interactions and so when he arrived on scene, he exited his vehicle, called Dawkins' name, and began to approach him. (R. 14). Coulombe testified that Dawkins began to create distance and Coulombe was concerned that Dawkins might have a weapon based on his actions and the nature of the call. (R. 15-16). Once officers were in a position where Dawkins could not flee, he was placed in investigative detention. (R. 17). Coulombe testified that he intended to arrest Dawkins for public intoxication based on his odor and behavior and considered the threats Dawkins had been reported to have made. (R. 20-21). Coulombe and another officer conducted a pat down of Dawkins after being placed in investigative detention. (Court's Exhibit 4; R. 20). Coulombe testified that he felt a hard object in Dawkins upper left pocket that he could not exclude from being a weapon. (R. 22-23). Coulombe looked inside the upper left pocket of Dawkins jacket and found a green pill bottle commonly used to carry prescription drugs as well as a small baggy of marijuana. (R. 23-24). The pill bottle contained four packages of pills. (R. 24). Coulombe

testified that the reason for the pat down was that he believed he had a weapon on him and that it was a Terry frisk. (R. 25).

On cross examination, Coulombe testified that he thought the pill bottle could have been the barrel of a gun. (R. 27). Coulombe admitted that he had not decided to arrest Dawkins at the time of the search because he was trying to get more information but was leaning towards arresting him for public intoxication. (R. 29-30). Defense counsel also questioned Coulombe about how he repeatedly told Dawkins he was not trying to "hem him up." (R. 29-31). Coulombe testified that he did not tell Dawkins of the plan to arrest him because he had run in a previous encounter. (R. 33). He further testified that he smelled alcohol on him at the first contact, so he was thinking in that direction; however, Dawkins was not in arms reach so he did not communicate that to him. (R. 33).

Officer Kristin Avey, with Newberry Police Department was also on scene and testified at the suppression hearing. Avey testified that she suspected Dawkins was under the influence when she first approached him because Dawkins was slurring his speech, behaving erratically, and smelled of alcohol. (R. 40). Avey testified and her body camera shows that an open liquor bottle was found in Dawkins' back pocket of his jeans prior to the pat down of Dawkins' jacket that led to the discovery of the drugs. (R. 40; Court's Exhibit 7).

After the witnesses testified, defense counsel argued that the evidence presented established officers not planning on arresting Dawkins prior to finding the drugs and that the testimony about the pill bottle being a gun barrel was not credible. (R. 47). Defense counsel further asserted that the method of search was not consistent with a frisk search and that neither the Terry frisk nor the search incident to arrest were valid arguments. (R. 48-49). The State argued that it was a valid Terry frisk due to the report of threats provided reasonable suspicion to

believe Dawkins was armed and dangerous as well as the search was valid incident to arrest because Dawkins was publicly intoxicated. (R. 49-50).

Defense counsel then indicated to the court that an additional recording had surfaced, and therefore, the case was continued to the next day. (R. 56-59). Defense counsel had the opportunity to review the other videos; however, Dawkins did not. Judge Keesley stated that he would not rule on the suppression motion and continued the case to give the defense time to review the footage. (R. 61-71).

The case proceeded in front of the Honorable Frank Addy, Jr., on February 21, 2023. Judge Addy indicated that he had read both previous transcripts and reviewed all the footage, including the compilation made by defense counsel. (R. 75; Court's Exhibit 3, Defense Exhibit 1). Defense counsel again asserted that the Terry frisk was improper because the recording showed officers immediately search the pocket inside the jacket and manipulate the jacket. (R. 77-78). The State argued that the recording showed Officer Coloumbe touch the outer left pocket of jacket before reaching inside and seizing the fentanyl and that a proper Terry frisk occurred. (R. 79-81). The State further argued that the search was a proper search incident to arrest because probable cause existed to arrest Dawkins due to his intoxication and possession of an open container of alcohol. (R. 82).

In analyzing the testimony the trial judge states:

> If the testimony in December had been yeah, he was definitely under arrest, he was under arrest, I made up my mind to arrest him, I was gonna cuff him and take him down and book him, then it's game over. You've got a search incident to arrest, and the pill bottle is fair game regardless of where it was located, regardless of how the pat down played out. But you've got the search incident to arrest issue all muddled in and mixed in with the investigative detention testimony and this entire discussion of plain feel. I mean, if the State wants it to be both, then **it can't be both because we're using different legal standards to judge the reasonableness and the legality of the underlying search.**

(R. 84-85) (emphasis added). The State argued that the Terry frisk and search incident to arrest were contemporaneous. (R. 86-87). The trial judge further stated:

> The Court's problem again is that the rationale for the search is factually and legally inherently contradictory and a lot of what was testified to, in my opinion, contradicted by the video that only became apparent--or only became--or that the defense only became aware of at trial...**If this was a straight search incident to arrest, then it would be game over**, but the characterization of this as an investigative detention and I don't even know why you're going--or why that phrase was used.

(R. 94-95) (emphasis added). The trial judge further stated that because of the contradiction in testimony he had to suppress the drugs. The trial judge stated that despite that officers "had the right to arrest" Dawkins and "could have arrested" Dawkins at the time of the search, the testimony seems that Dawkins was in investigative detention and the search did not "meet constitutional muster" for a Terry frisk. (R. 95). In his conclusion, he states that if it was search incident to arrest there was no need to elicit testimony about Terry frisk; therefore, he was suppressing the drugs. (R. 96-97).

## STANDARD OF REVIEW

In criminal cases, appellate courts sit to review errors of law only. State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). "Historically, we have repeatedly noted that appellate courts review and appeal from a motion to suppress based on a violation of the Fourth Amendment under the deferential "any evidence" standard." State v. Frasier, 437 S.C. 625, 632, 879 S.E.2d 762, 765 (2022). "Pursuant to this standard, our appellate courts 'will not reverse a trial court's finding of fact simply because it would have decided the case differently.'" Id. "Appellate 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 evidentiary support, but the ultimate legal conclusion... is a question of law subject to de novo review." Id. at 633-634, 879 S.E.2d at 766.

## ARGUMENT

**The trial judge reversibly erred by granting Dawkins' motion to suppress illegal drugs recovered on Dawkins' person when the search was proper as a search incident to arrest.**

Following an in limine suppression hearing, the trial judge ruled the illegal drugs recovered in Dawkins' case should be excluded from trial after finding that, because of the contradictory positions advanced, the search of Dawkins was improper. Contrary to the trial judge's ruling, the evidence and testimony presented during the suppression hearing established that the search was proper under search incident to arrest. Despite there being testimony about a Terry frisk, there was probable cause to arrest Dawkins, and, therefore, the search was proper as a valid search incident to arrest. Under such circumstances, the officers actions were entirely reasonable and did not constitute an unreasonable invasion of Dawkins' right to privacy, and the trial judge's conclusions to the contrary were clearly erroneous as a matter of law. The trial judge's suppression ruling should be reversed, and Dawkins's case should be remanded for trial.

The Fourth Amendment of the United States Constitution protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. In addition to those protections, the South Carolina Constitution provides its own protections to the state's citizens against unreasonable searches and seizures. State v. Forrester, 343 S.C. 637, 643, 541 S.E.2d 837, 840 (2001); see S.C. Const. art. I, § 10 ("The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures and unreasonable invasions of privacy shall not be violated[.]"). Furthermore, primarily in order to guard against invasive technological advancements, the South Carolina Constitution also expressly protects our citizens from "unreasonable invasions of privacy." S.C. Const. art. I, § 10; see Forrester, 343 S.C. at 647, 541

S.E.2d at 842 ("[T]he drafters of our state constitution's right to privacy provision were principally concerned with the emergence of new electronic technologies that increased the government's ability to conduct searches.").

Through the additional provision regarding 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." State v. Weaver, 374 S.C. 313, 322, 649 S.E.2d 479, 483 (2007). Thus, "the South Carolina Constitution favors an interpretation offering a higher level of privacy protection than the Fourth Amendment." Id. However, the South Carolina Constitution by its express language only forbids searches, seizures, and invasions of privacy that are *unreasonable*. S.C. Const. art. I, § 10; see State v. Foster, 269 S.C. 373, 378, 237 S.E.2d 589, 591 (1977) ("It is only unreasonable searches and seizures that are prohibited."); see also Maryland v. Buie, 494 U.S. 325, 331 (1990) ("It goes without saying that the Fourth Amendment bars only unreasonable searches and seizures[.]"). Accordingly, just like the search and seizure protections offered by the federal constitution, the touchstone of our state constitution's search and seizure protections is reasonableness. See Florida v. Jimeno, 500 U.S. 248, 250 (1991) ("The touchstone of the Fourth Amendment is reasonableness."); see also Heien v. North Carolina, 574 U.S. 54, 60-61 (2014) ("To be reasonable is not to be perfect, and so the Fourth Amendment allows for some mistakes on the part of government officials, giving them 'fair leeway for enforcing the law in the community's protection.'" (citation omitted)).

"A warrantless search is unreasonable per se, unless it falls within a recognized exception to the warrant requirement." State v. German, 439 S.C. 449, 461, 887 S.E.2d 912, 918 (2023). "The recognized exceptions to the warrant requirement are search incident to lawful arrest, hot pursuit, stop and frisk, the automobile exception, the plain view doctrine, consent and

abandonment." Id. "The prosecution bears the burden of establishing probable cause as well as the existence of circumstances constituting an exception to the general prohibition against unreasonable search and seizures." State v. Gamble, 405 S.C. 409, 416, 747 S.E.2d 784, 787 (2013). "Probable cause is defined as a good faith belief that a person is guilty of a crime when this belief rests upon such grounds as would induce and ordinarily prudent and cautious person, under the circumstances, to believe likewise." Id.

"A search may be conducted incident to arrest only if it is substantially contemporaneous with the arrest and is confined to the immediate vicinity of the arrest." State v. Freiburger, 366 S.C. 125, 132, 620 S.E.2d 737, 740 (2005). "There are situations in a warrantless search which immediately precedes an arrest is held lawful, in cases where the police officer is held to have probable cause from the outset." Id. "The fact that an arresting officer improperly based a search of an individual on a Terry stop rationale does not prevent the State from otherwise justifying the search by proving probable cause to make a warrantless arrest of the individual existed prior to the search." State v. Moultrie, 316 S.C. 547, 551, 451 S.E.2d 34, 37 (Ct. App. 1994). A search may precede a formal arrest if the officer has probable cause to arrest at the time of the search and the fruits of the search were not necessary to support probable cause to arrest. Rawlings v. Kentucky, 448 U.S. 98, 111, 100 S.Ct. 2556, 2564 (1980). In State v. Freiburger, a taxi driver was murdered by a passenger in his cab with a gun shot wound to the head. Freiburger, 366 S.C. 125, 620 S.E.2d 737 (2005). About a month later Freiburger was stopped by a Tennessee Highway Patrolman for hitch hiking. Id. The Patrolman questioned him and then patted him down, discovering a gun. Id. The gun was confiscated and Freiburger was ultimately arrested for carrying arms. Id. Our South Carolina Supreme Court held that "the fact that Freiburger was not ultimately arrested for hitchhiking is not dispositive. As recently stated by the United State

Supreme Court, an officer's 'subjective reason for making the arrest need not be the criminal offense as to which the known facts provide probable cause...the fact that the officer did not have state of mind which is hypothecated by the reasons which provide the legal justification for the officer's actions does not invalidate the action taken as long as the circumstances, **viewed objectively**, justify that action.'" Id. at 133, 620 S.E.2d at 741 (emphasis added).

In this case, there was testimony that Dawkins, who had just threatened two people who non anonymously and immediately reported these threats, was intoxicated when first approached. (R. 40). He was slurring his speech, behaving erratically, and smelled of alcohol. (R. 40). Coulombe testified that he did not tell Dawkins he planned to arrest him for public intoxication because he was afraid he would flee if he did; however, he testified that he was "in the direction" of arresting Dawkins for public intoxication. However, because drugs were quickly found in the ensuing search of Dawkins, he ended up being arrested for something other than the public intoxication due to the more serious crime uncovered. Similar to Freiburger, while Dawkins was not arrested for the initial crime that he could have been arrested for there was probable cause for the arrest making the search valid. The trial judge erred in suppressing the drugs simply because of the contradictory testimony from the officers and his view that the State could not assert contradictory points. See Florida v. Royer, 460 U.S. 491, 103 S. Ct. 1319 (1983) (holding the fact the officers did not believe there was probable cause and proceeded on a consensual Terry stop rationale would not foreclose the State from justifying the defendant's custody by proving probable cause). As held in Freiburger, the subjective intent of the officer does not matter. Objectively, the officers here had probable cause to arrest Dawkins for public intoxication. Therefore, the search was valid as a legitimate search incident to arrest, and the drugs should not have been suppressed.

## CONCLUSION

For all the foregoing reasons, it is respectfully submitted the ruling of the circuit court judge should be reversed and the case should be remanded for trial.

Respectfully submitted,

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**CERTIFICATE OF COUNSEL**

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The undersigned certifies this Final Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 2014, order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

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