

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM BERKLEY COUNTY
Court of Common Pleas

S.C. SUPREME COURT

Edgar W. Dickson, Circuit Judge

Case No. 2020-CP-08-00773
Appellate Case No. 2021-001173

Stephanie Michelle GardnerPetitioner,

vs.

Berkeley County Sheriff's Office and
Town of Moncks Corner, Respondents,

PETITION FOR CERTIORARI

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QUESTIONS PRESENTED

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II. Did the court below err in affirming summary judgement for the Defendants for deprivation because the Petitioner provided evidence that both the initial arrest and the warrant served on the Petition in jail were without probable cause again ignoring the precedents of the court regarding the evidence required to establish possession and that an arrest without probable cause is evidence of malice as an element of False Arrest or Malicious prosecution.7

III. Did the court below err in affirming the summary judgment on the defamation claim for truth and law enforcement privilege because the Facebook post was libelous as accusing Petitioner of Possession of Drugs because the Sheriff’s office has knowledge that the arrest was without probable cause and the libelous statement were published to persons not privileged to the and the publication did not serve a law enforcement purpose.7

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II. The court below erred in affirming summary judgement for the Defendants for deprivation of liberty, because the Petitioner provided evidence that both the initial arrest and the warrant served on the Petition in jail were without probable cause again ignoring the precedents of the court regarding the evidence required to establish possession and that an arrest without probable cause is evidence of malice as an element of False Arrest or Malicious prosecution.7

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IV. STATEMENT OF THE CASE

This action for False Arrest, Malicious Prosecution, Abuse of Process and Defamation was brought by Stephanie Michele Gardner (Gardner) against Town of Moncks Corner (TOMC and Berkeley County Sheriff's Office on March 20, 2020. TOMC filed an answer March 24, 2020 as a qualified general denial and defenses under the SC Tort Claims Act. BCSO filed an Answer on March 15, 2020 and an Amended Answer on November 19, 2020. The Answer is a qualified general denial and defenses under the SC Tort Claims Act. BCSO filed a motion for Summary Judgment on February 19, 2021. TOMC filed Summary Judgment Motion on March 1, 2021.

A hearing on the motion was held on April 5, 2021, before Judge Dickson. Judge Dickson granted Summary Judgment for both Defendants on April 27, 2021. Gardner filed a motion to Reconsider on May 6, 2021. The Motion to Reconsider was denied on September 13, 2021. Notice of Appeal was filed October 8, 2021. The Court of Appeals dismissed the Appeal by unpublished opinion on March 13, 2024. A Petition for Rehearing was filed on March 27, 2024. The Petition for Rehearing was denied on April 16, 2024.

STATEMENT OF THE FACTS

In the evening of April 27, 2018, the plaintiff below, appellant Gardner, a resident of Dillion County went to the residence of Samantha Easom in Monks Corner, S.C. Shortly after Gardner arrived, the Berkeley County Sheriff's Drug Enforcement Task Force came to the residence to serve a Family Court warrant on Michal Molyneaux. Bruce Barlow of the Town of Moncks Corner Police Department participated in the Task Force. While arresting Molyneaux law enforcement saw what they believe to be marijuana in the bedroom shared by Molyneaux and Easom. They asked Easom if they could search the house as Easom was the tenant. A Lt. Ham discovered small volumes of meth, cocaine and heroin in an envelope under a couch cushion near the cell phone of another visitor, Cory Gethers. Officer Barlow then told the persons still present that unless someone admitted possession, he would arrest them all. Barlow then on behalf of the Sheriff's Office arrested all six persons for possession with intent to distribute, including Gardner. Gardner was jailed for more than 40 days on a \$210,000 bond, and it was 180 days before the charges were dismissed. An arrest warrant was served on Gardner while she was jailed. The BCSO also published a Facebook post on the Drug and Warrant sweep listing Gardner's name and the charges. The warrants show no facts that would connect Gardner to the drugs and Barlow has testified that he arrested her because she was near where the hidden drugs were found. There is no evidence connecting Gardner with the drugs. The warrant described Gardner as a occupant of the location rather than a visitor.

ARGUMENT

Question I

- I. The court below erred in affirming the summary judgment dismissing Petitioners claim for deprivation of her liberty by Respondents on immunity under the S.C. Torts Claims act, by failing to follow the precedent of this Court in *Wortman v. Spartanburg*, 310 S.C. 1, 425 S.E.2d 18 (S.C. 1992) and its own precedents in *Gist v. Berkeley County Sheriff's Dept.*, 336 S.C. 611, 521 S.E.2d 163 (S.C. App. 1999). This Court has held that an arrest for violation of a statute not immunized in the law absent a showing that a law exists that prohibits the conduct that is the basis of the arrest.

In *State v. Stewart*, 858 S.E.2d 808 (S.C. 2021) the South Carolina Supreme Court set for the elements of proof for possession crimes. In *Stewart*, a confidential informant made a controlled buy of heroin from Stewart. The Laurens Sheriff obtained a search warrant for Stewart's home where the drug buy occurred. The home was shared with Stewart's girlfriend. 23.83 grams of heroin in a large bag in a plastic basket on top of the refrigerator, fifty-six oxycodone tablets in a tinfoil wrapper in the same plastic basket, a digital scale with a powdery residue on it, and \$2,730 in cash were found in the home. At trial the jury was charged, "Constructive possession means that the defendant had dominion and control or the right to exercise dominion and control over either the drugs itself or the property upon which the drugs were found." This was found to be error. The Court also charged "The defendant's knowledge and possession may be inferred when a substance is found on the property under the defendant's control" this was also found to be error. In setting for the elements of possession the Court stated:

State must prove two elements. First—as we originally stated—the State must prove the defendant had either actual physical custody of the drugs, or the right or power to exercise control over the drugs. See *State v. Hudson*, 277 S.C. 200, 202, 284 S.E.2d 773, 774-75 (1981) ("Actual possession" requires "actual physical custody" of the drugs and "constructive possession" requires "the right to exercise dominion and control" of the drugs); *Ellis*, 263 S.C. at 22, 207 S.E.2d at 413 (similar, but stating the first element as "the power ... to control its disposition or use"). Second—as we originally stated—the State must prove the defendant had "knowledge of [the] presence" of the drugs. *State v. Brown*, 267 S.C. 311, 315, 227 S.E.2d 674, 676 (1976); see also *Hudson*, 277 S.C. at 202, 284 S.E.2d at 774 (requiring proof of knowledge). In *State v. Lane*, 271 S.C. 68, 245 S.E.2d 114 (1978), discussing *Ellis* and *Brown*, we explained "knowledge" means "the accused must have an 'intent to control [the] disposition or use' " of the drugs. 271 S.C. at 73, 245 S.E.2d at 116. Under *Lane*, the second element is now stated as the defendant must have knowledge of the drugs and the intent to control their disposition or use. [emphasis added]

State v. Stewart 858 S.E.2d 818 at 810.

The Court also approved the statement: “that mere presence at the scene where the drugs were found is not enough to prove possession.” *State v. Stewart* 858 S.E.2d 818 at 812.

In *State v. Ballenger*, 454 S.E.2d 355, 317 S.C. 364 (S.C. App. 1995) this court stated “The State did not prove actual possession by Ballenger. The State produced evidence that police found a bag containing crack cocaine on the ground near where Ballenger was apprehended;...” 454 S.E.2d 355at 357

This is how the arresting officer Barlow described his determination of probable cause.

Q. Did you ever see any drugs in the possession of any of the people there?

A. Only in constructive possession, sir.

Q. I'm sorry?

A. Only in constructive possession.

Q. Okay. And who did you believe had constructive possession of these drugs? Everybody was in constructive possession.

Q. And how did you come to that conclusion?

A. Well, state law allows us to do that, *State vs. Muhammad*, if you have ability to have dominion and control over the substance.

And, I mean, they were only ten feet away.

I could easily argue that it could have been anybody in that house. Nobody claimed it.

Q. What were the facts that you relied on to determine that Stephanie Gardner had dominion or control of these drugs?

A. They were less than five — probably less than 12 feet away, I would say, from her. She could have easily had access to it, as well as everyone else in the That's all I needed, was probable cause, to make an

arrest.

Q. These drugs were not visible to somebody walking by this couch?

A. No, sir.

Q. They weren't open?

A. They were placed there. They were hidden there.

Q. And you asked Ms. Gardner if those were her drugs and she said they were not hers?

A. As everyone else said, too, yes, sir. Everyone said they were not their drugs and they didn't know whose drugs they were.

Q. Did Ms. Gardner ever indicate to you that she had knowledge of those drugs?

A. No, sir, she never indicated she had knowledge of them.

Q. In fact, nobody there indicated that they had knowledge of the drugs?

A. No, sir.

Q. And you had no indication of anything to suggest that Ms. Gardner did have knowledge of those drugs, did you?

A. No, sir, not at that time

Barlow Deposition Page 26 l. 19 to p. 28 l. 23 .

In his Deposition Barlow denied giving the Magistrate any additional information not included in the warrant. Barlow deposition P. 30 l. 21

In this case the investigating officer trained as a narcotics officer relied solely on the proximity of Gardner to the hidden drugs contrary to long established precedent of his Court . *Wortman v. Spartanburg*, 310 S.C. 1, 425 S.E.2d 18 (S.C. 1992) Neither the warrant nor the incident report show that Gardner had possession or control of the home where the drugs were found. Nor do the warrants or the incident report show any facts from which it could be inferred that Gardner had knowledge of the drugs or any intent to possess them. The small amounts marijuana found in Eason's bedroom were in Eason's admitted possession, so there is no evidence that Gardner had possession of the marijuana.

Since proximity is not a crime, the arrest and prosecution are without probable cause and Gardner was not charged with a crime. If the constitutional prohibition on unreasonable seizures is to mean anything this Court should find that the Plaintiff has made requisite showing to avoid summary judgment on the issue of probable cause. If there no probable cause for Petitioners arrest under the precedent of this Court in *Wortman*, supra the immunity of the Tort Claims Act would not apply and the Court of Appeals should be reversed.

Question II

II. The court below erred in affirming summary judgement for the Defendants for deprivation of liberty, because the Petitioner provided evidence that both the initial arrest and the warrant served on the Petition in jail were without probable cause again ignoring the precedents of the court regarding the evidence required to establish possession and that an arrest without probable cause is evidence of malice as an element of False Arrest or Malicious prosecution.

The requirements of probable cause for arrests in possession case in briefed in Question I. In ruling on lack of malice in the malicious prosecution claim the trial court cited *Pallares v. Seinar*, 407 S.C. 359, 756 S.E.2d 128 (S.C. 2014). That case approved the principle that malice may be inferred from lack of probable cause. As stated in Argument one, there was no probable cause for this arrest and prosecution. A jury may infer malice from lack of probable cause.

Question III

III. The court below erred in affirming the summary judgment on the defamation claim for truth and law enforcement privilege because the Facebook post was libelous as accusing Petitioner of Possession of Drugs because the Sheriff's office has knowledge that the arrest was without probable cause and the libelous statement were published to persons not privileged to the and the publication did not serve a law enforcement purpose.

The Sheriff's office published on Facebook that Gardner had been arrested by them for trafficking in drugs. The gist of this would be, to the public, a factual claim that Gardner was a drug trafficker and is defamatory.

The Defendant Sheriff's Office claims this is not libel because the statement that the Plaintiff had been arrested was true. The Sheriff's Office made the arrest and was not reporting on something a third party did. There is no fair reporting privilege for one's own statement. It is as if someone swore out a warrant against a neighbor then published to the other neighbors that the defamed party has been arrested for a crime. The neighbors would believe that the person bringing the warrant had special knowledge of the defamed party's guilt and a claim that it was true that the defamed party had been arrested would be unavailing as a defense. Here the public would rightly believe that the arrest was supported by probable cause, when it was not.

In *Richardson v. STATE-RECORD COMPANY, INC.*, 330 S.C. 562, 499 S.E.2d 822 (S.C. App. 1998), the State newspaper published a story about the death of a police officer a year after an automobile accident insinuating that Richardson killed the officer. Richardson claimed that the officer died of cancer unrelated to the accident. The State-Record went far beyond simply reporting the contents of the Traffic Collision Report. This Court held that for the defense of truth to apply the truth must be as broad as the defamatory imputation or 'sting' of the statement. The Facebook post on Gardner's arrest had the sting of implying that BCSO, had reason to

believe that Gardner was a drug trafficker, when in fact all they knew was that Gardner was in proximity to hidden drugs.

A claim for privilege does not survive unnecessary publication. *Kunst v. Loree*, 424 S.C. 24, 817 S.E.2d 295 (S.C. App. 2018)

In the deposition of BCSO its representative has asked if the publication had a law enforcement purpose:

Q. Okay. In this case, you -- the Berkeley County Sheriff's Office, published information that Stephanie Gardner was involved with trafficking narcotics?

A. That's what she was charged with.

Q. Okay. Did that have a law enforcement purpose?

A. Yes, sir. This is how we notify our citizens, and also for the media, what incidents occur.

Deposition of BCSO [Baker] p. 7 l. 3-12

That is not a law enforcement purpose and goes far beyond a publication to persons for which the conditional privilege would apply. A claim for privilege does not survive unnecessary publication. *Kunst v. Loree*, 424 S.C. 24, 817 S.E.2d 295 (S.C. App. 2018). In *Abofreka v. Alston Tobacco Co.*, 288 S.C. 122, 341 S.E.2d 622 (S.C. 1986) the Court stated that a privilege exists only when the publication has occurred in a proper manner and to proper parties only. In that case the statement was published widely to persons not directly involved in the dispute. A similar result occurred in *Davis v. Niederhof*, 143 S.E.2d 367, 246 S.C. 192 (S.C. 1965) due to excessive publication.

There exists a dispute as to whether the publication to the billion or so Facebook subscribers exceed the scope of the law enforcement privilege due to excessive publication and this Court should vacate the Court of Appeals decision.

Question IV

The Court below erred in affirming summary judgment based on the interagency agreement.

The plaintiff took a Rule 20(b) deposition of BCSO. It designated Chief Baker to represent the Defendant in that Deposition. Chief Baker admitted that Gardner was arrested by the BCSO. Deposition of BCSO Chief Baker representing BCSO. Page p. 7 l. 17 The incident report also shows that Barlow was doing the work of the Sheriff's Office at the time of the arrest as he was there as a team serving Family Court Warrants. The service of bench warrants is the responsibly of the Sheriff. Barlow was the affiant on the warrants, and he gave his address as 223 N Live Oak Dr, Moncks Corner. That is the address of the BCSO. The address for TOMC Police is 118 Carolina Ave. Moncks Corner, SC. The incident report shows the Agency as SC0080000 which is the number of BCSO. Barlow prepared the incident report, and it was approved by Hurshel Tanner of BCSO.

The interagency agreement is not something Gardner is a party to. Gardner has provided enough information to show that there is genuine issue of material facts sufficient to preclude summary Judgment.

CONCLUSION

Petitioner has established the court below disregarded binding precedents of this and questions of fact that should be resolved this court should vacate the Court of Appeals decision and remand this case to the Court of Common Pleas for trial.

Respectfully submitted,
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