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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Anderson County

Honorable R. Lawton McIntosh, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

SAVAYEA ANTWAN GLENN,

APPELLANT.

APPELLATE CASE NO. 2024-000289

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Did the trial court err by denying Appellant's motion to suppress all evidence seized from Appellant's person and the subsequent search of his vehicle when law enforcement's act of lifting Appellant's shirt to look into his waistband violated the scope of a permissible Terry frisk in violation of Appellant's rights pursuant to the Fourth Amendment of the United States Constitution, and where law enforcement did not have probable cause to arrest Appellant for public disorderly conduct and thus conduct a search incident to arrest?

STATEMENT OF THE CASE

An Anderson County grand jury indicted Appellant on October 27, 2020, for trafficking in crack cocaine, twenty-eight grams or more, but less than one hundred grams. R. * (Indictment). His case was called to trial on February 5, 2024, before the Honorable R. Lawton McIntosh, and a jury. Tr. 1. Assistant Solicitors Danny Fulmer and Alexandra Navarre represented the state. Hadden Lucas and Elizabeth Chambers represented Appellant. Tr. 1.

On February 7, 2024, the jury found Appellant guilty as indicted. Tr. 257, l. 20 – 258, l. 5. He was sentenced to twenty-five years imprisonment and a fifty thousand dollar fine. Tr. 266, ll. 17-18.

This appeal follows.

STATEMENT OF FACTS

Appellant moved pretrial to suppress the crack cocaine found on his person. Appellant filed a written motion to suppress and a memorandum in support. R. * (Motion). A hearing was held on Appellant's motion after jury selection. Defense counsel conceded before the *in camera* testimony that law enforcement had reasonable suspicion to briefly detain Appellant and to perform a brief pat down search for weapons pursuant to Terry v. Ohio, 392 U.S. 1 (1968). However, he argued law enforcement exceeded the scope of a permissible Terry frisk in violation of the Fourth Amendment when an officer lifted Appellant's shirt without any exceptional circumstances that would permit the officer to bypass a pat down of Appellant's outer clothing. Tr. 52, l. 4 – 53, l. 7.

On May 24, 2020, dispatch received a call from an unknown individual at Eddie's Minute Mart, a convenience store in Anderson County. It is unclear from the record whether the caller was a customer of the store or an employee. The caller reported that a Black male wearing a dark blue shirt and red shoes was "intoxicated and causing a disturbance in the store, getting in a customer's personal space." The unknown caller further claimed the Black male "showed the clerk a firearm" in a "non-threatening manner" and was "making sexual comments to the clerk." Tr. 56, l. 1-21; Tr. 77, ll. 11-15.

Deputy Joshua Nesbitt with the Anderson County Sheriff's Office was the first officer to arrive on scene. When Nesbitt approached, Appellant was in the doorway of the store. Nesbitt began to question Appellant in an effort to determine if Appellant was the "subject" of the call. While talking to Appellant, Nesbitt smelled "the odor of alcohol." He claimed Appellant was being "loud and boisterous," which was "not in line with his normal nature." Nesbitt had previously been Appellant's probation officer and said Appellant was usually "quiet and

reserved." Nesbitt admitted Appellant was cooperative. Appellant did not try to walk away from Nesbitt, nor did he disobey any commands. Tr. 82, ll. 19-24.

About forty-five seconds after Nesbitt began questioning Appellant, Deputy Janessa Smith and a third officer arrived on scene. Deputy Smith listened to Nesbitt questioning Appellant. Nesbitt asked Appellant if he had been drinking. Appellant denied he had been drinking. Tr. 83, ll. 10-20. Nesbitt then asked Appellant for his identification. Appellant told Nesbitt his name and date of birth but did not produce an identification. State's Exhibit No. 5 (Body Camera Footage).

Deputy Smith testified that she also smelled a "strong odor" of alcohol on Appellant's breath and body and maintained Appellant's "speech was slurred and his eyes were glassy." Smith asserted that she "immediately" noticed a bulge in Appellant's "front right waistband area." She could see an "orange object . . . sticking out" of the waistband of Appellant's pants. Tr. 57, ll. 12-18. Smith claimed that when she saw the orange bag or fabric, she believed it was concealing a firearm based on the "surrounding circumstances" and the information provided by the unknown caller to dispatch (that the Black male showed the clerk a firearm in a nonthreatening manner). Tr. 58, ll. 18-25.

Smith stated during her *in camera* testimony that Appellant "was asked if he had a firearm" and denied he did. Tr. 57, ll. 19-21. However, a review of the body camera footage disproves Smith's testimony. Appellant was never asked if he had a gun. State's Exhibit No. 5 (Body Camera Footage).

Roughly thirty seconds after approaching Appellant, Deputy Smith asked Appellant, "What's this right here?" and simultaneously lifted Appellant's shirt. Appellant quickly pulled his shirt down. Smith then lifted Appellant's shirt a second time and asked, "Why you have that

right there?" State's Exhibit No. 5 (Body Camera Footage). Smith testified that when she lifted Appellant's shirt, she observed a clear plastic bag that contained a green leafy substance consistent with marijuana. Tr. 57, l. 19 – 58, l. 7. After observing the marijuana, Smith immediately placed Appellant under arrest and handcuffed him. State's Exhibit No. 5 (Body Camera Footage). Smith claimed during her *in camera* testimony that she arrested Appellant for public disorderly conduct because of his "gross intoxication." Tr. 59, ll. 1-7. However, the timing of Appellant's arrest strongly suggests he was arrested for possession of marijuana.

During his interaction with Smith and Nesbitt, Appellant was holding a green bag in his right hand and a pack of cigarettes in his left hand. Deputy Smith seized the green bag Appellant was holding, the orange bag tucked into his waistband, and the clear plastic bag containing the suspected marijuana. Smith searched the green bag and found an "unknown amount" of cash. In the orange bag, Smith found a "white, rocklike substance," that field tested positive for crack cocaine with a preliminary weight of 77.3 grams. Also in the orange bag, Smith found seven white tablets that she identified through "Pill Identifier" as hydrocodone, a schedule II controlled substance. Tr. 59, ll. 7-19.

When prompted by the assistant solicitor with a leading question, Deputy Smith maintained that she had decided upon approaching Appellant and determining him to be intoxicated to arrest him for public disorderly conduct. More specifically, she testified that she decided to arrest Appellant for public disorderly conduct because she smelled a strong odor of alcoholic beverages, he allegedly had "glassy eyes," and "his speech was slurred." When further prompted by the solicitor, Smith added that her decision to arrest Appellant for disorderly conduct was also based on the information dispatch received from the unknown caller stating

that Appellant was intoxicated, showed a firearm to the clerk, and was "getting in a customer's personal space." Tr. 59, l. 22 – 60, l. 13.

Deputy Smith conceded that she did nothing to corroborate the information relayed to her by dispatch from the unknown caller concerning Appellant's alleged behavior in the store. She also made no attempt to identify or speak to the caller. Tr. 64, l. 19 – 66, l. 5. She also admitted that both of Appellant's hands were visible throughout their brief encounter and that Appellant never threatened the officers nor disobeyed any orders. Tr. 68, l. 20 – 69, l. 20.

None of the officers asked Appellant if he had any weapons nor did they conduct a standard pat down search for weapons pursuant to Terry v. Ohio, 392 U.S. 1 (1968), before Smith lifted Appellant's shirt (which constituted a search). Tr. 84, ll. 10-18; Tr. 86, ll. 17-21.

Appellant testified *in camera* that he went to Eddie's Minute Mart to buy cigarettes and a cup of coffee. While he was paying, he dropped the cup of coffee near the counter, and it spilled. Appellant cleaned up the spilled coffee. While doing so, he blocked "the way" of other customers. In an effort to compensate the customers for blocking the way, Appellant offered to pay for their gas. Appellant denied that he was drunk. However, he admitted that he had been drinking hours earlier. Appellant also denied showing the clerk a gun or bothering other customers. Tr. 87, l. 15 – 90, l. 22.

Appellant explained that while speaking with the officers, his hands were full. He had a Crown Royal bag in one hand and a pack of cigarettes in the other hand. He stated that he never reached into his waistband, never threatened the officers, and never attempted to walk away or flee. He was cooperative. Appellant asserted that none of the officers frisked him for weapons. Instead, when Deputy Smith arrived on scene, she lifted Appellant's shirt, and after Appellant pulled his shirt back down, Smith lifted it a second time. Tr. 88, l. 15 – 89, l. 6.

At the conclusion of the *in camera* testimony, the assistant solicitor argued law enforcement had "two substantial legal reasons to search" Appellant. First, the solicitor argued Deputy Smith had probable cause to arrest Appellant for public disorderly conduct and thus was entitled to search Appellant incident to arrest. Second, the solicitor argued Smith had reasonable suspicion that Appellant may be armed based on the information she received from dispatch and the "bulge . . . she saw on his waistband" and thus, she was permitted to conduct "a Terry stop." The solicitor admitted there was no case law in South Carolina regarding whether a frisk for weapons pursuant to Terry v. Ohio, 392 U.S. 1 (1968), allows "a pull up of a shirt" or only permits a "pat down" of the outer clothing. Tr. 91, l. 1 – 93, l. 7.

Defense counsel argued the Terry frisk conducted by Deputy Smith was "unreasonable in scope" given that the officer lifted Appellant's shirt. He conceded that law enforcement was legally permitted to conduct a Terry frisk for weapons, which is "limited in scope to a pat down of the outer clothing," based on the information received from the 911 caller stating Appellant showed the store clerk a gun in a nonthreatening manner. Tr. 94, l. 9 – 95, l. 12.

Defense counsel also argued law enforcement did not have probable cause to arrest Appellant for public disorderly conduct. Citing to United States. v. Wilhelm, 80 F.3d 116 (4th Cir. 1996), counsel argued the tip (the information from the unknown caller) could not be relied upon to establish probable cause because law enforcement did nothing to confirm what the caller alleged. Accordingly, the police could only rely on what they observed to establish probable cause. Tr. 95, l. 13 – 96, l. 22.

The trial court asked defense counsel whether law enforcement had probable cause to arrest Appellant for public disorderly conduct based on the report that Appellant was drunk, was being loud inside the store, and showed the clerk a gun in a nonthreatening manner coupled with

the deputy's observations that Appellant was "very animated," smelled of alcohol, and his speech was slurred, and his eyes were red. Tr. 97, l. 21 – 98, l. 6. Counsel answered no because "public disorderly conduct requires the person be in a public place and . . . either be in a grossly intoxicated condition or . . . otherwise conduct himself in a disorderly or boisterous manner." Counsel asserted that the statute requires more than evidence of drinking alcohol or intoxication because, if that was the standard, law enforcement could go to any bar in town after midnight and arrest patrons leaving the establishment. He contended that while Appellant "may have had a little bit to drink that night," he was not "grossly intoxicated." Tr. 98, l. 15 – 99, l. 18. Grossly intoxicated is "falling down drunk" or "having buddies . . . carry you out of the bar." Counsel argued Appellant may have been "talking a little bit loudly" but he was not slurring his speech like the deputy claimed and he was not having trouble standing up. Tr. 100, ll. 4-15.

Expanding on his earlier argument that Deputy Smith exceeded the scope of a permissible Terry frisk, defense counsel asserted that "the degree of intrusion permitted by Terry . . . is a pat down frisk" for weapons. "So that means a pat down of the outer clothing." Citing to "LaFave's Treatise on the Fourth Amendment," which is also cited in Appellant's written motion to suppress and during Appellant's argument below, counsel contended that "sometimes the police are allowed to go straight in and grab a weapon" thereby bypassing a pat down, but only "if there are exceptional circumstances that would cause an immediate threat to the officer." Tr. 103, l. 5 – 104, l. 2; See R. * (Motion). He argued no such exceptional circumstance existed in this case.

The trial court succinctly summarized the issue as: "whether or not law enforcement, at that juncture [when Smith lifted Appellant's shirt], had sufficient probable cause to arrest him [Appellant] for public disorderly conduct. Next, . . . if they did not have sufficient probable

cause to arrest him for public disorderly conduct, whether or not the circumstances were such that his conduct gave them [law enforcement] the right to immediately avoid the pat down because of his actions." Tr. 107, ll. 9-18. At the conclusion of the *in camera* hearing, the court found law enforcement had probable cause to arrest Appellant for public disorderly conduct and thus were permitted to search Appellant incident to that arrest. Tr. 113, l. 11 – 114, l. 2. The court further found that the deputy's act of lifting Appellant's shirt did not violate Terry or the Fourth Amendment. Given the totality of the circumstances, the court found law enforcement was permitted to "skip the pat down and go to a more invasive type of search," which in this case, was lifting Appellant's shirt to expose his waistband. Tr. 114, ll. 3-24. However, the court admitted it did not believe after viewing the body camera footage that Appellant was "an immediate threat to their [law enforcement's] safety." Tr. 114, l. 25 – 115, l. 13.

In the court's written order, it again found law enforcement had probable cause to arrest Appellant for public disorderly conduct based on his "boisterous behavior." Consequently, the deputies were permitted to search Appellant incident to that arrest. R. * (Order). The court further found "based on the totality of the circumstances, [Appellant's] conduct was such as would allow the responding offers to bypass a pat down search in favor of the more intrusive search of lifting up [Appellant's] shirt." R. * (Order). The court again "acknowledged that [Appellant] was not acting in an immediately threatening manner when initially approached by law enforcement." However, the court still found police were permitted to bypass a pat down search given the circumstances. R. * (Order). Specifically, the court asserted, "Law enforcement should have not to wait until a suspect becomes an actual threat to their safety nor should law enforcement have to be clairvoyant to determine that a suspect will become an immediate threat to their safety before conducting more intrusive searches for their safety." R. * (Order).

Trial counsel repeatedly contemporaneously objected throughout the trial when the crack cocaine and other evidence was admitted before the jury. C.f. State v. Jones, 435 S.C. 138, 144-45, 866 S.E.2d 558, 561 (2021) (holding "where a court rules after a hearing on a constitutional issue . . . the ruling is final and, unless something changes during the trial that may reasonably cause the trial judge to alter the pretrial ruling, no further objection is required to preserve the issue for appellate review"). The court overruled or noted each of Appellant's contemporaneous objections.

STANDARD OF REVIEW

Appellate review of a motion to suppress based on the Fourth Amendment involves a two-step analysis. This Court reviews the trial court's factual findings for any evidentiary support. However, the ultimate legal conclusion is a question of law this Court reviews *de novo*. State v. Frasier, 437 S.C. 625, 633-34, 879 S.E.2d 762, 766 (2022).

ARGUMENT

The trial court erred by denying Appellant's motion to suppress all evidence seized from Appellant's person and the subsequent search of his vehicle when law enforcement's act of lifting Appellant's shirt to look into his waistband violated the scope of a permissible *Terry* frisk in violation of Appellant's rights pursuant to the Fourth Amendment of the United States Constitution, and where law enforcement did not have probable cause to arrest Appellant for public disorderly conduct and thus conduct a search incident to arrest.

"The Fourth Amendment to the United States Constitution prohibits unreasonable searches and seizures." State v. Khingratsaiphon, 352 S.C. 62, 69, 572 S.E.2d 456, 459 (2002). Warrantless searches and seizures are per se unreasonable under the Fourth Amendment, "subject to only a few specifically established and well delineated exceptions." State v. Woodruff, 344 S.C. 537, 545, 544 S.E.2d 290, 294 (Ct. App. 2001) (quoting Thompson v. Louisiana, 469 U.S. 17, 20 (1984)). "Evidence seized in violation of the Fourth Amendment must be excluded from trial." Khingratsaiphon, 352 S.C. at 69, 572 S.E.2d at 459 (citing Mapp v. Ohio, 367 U.S. 643 (1961)).

Violation of Scope of Permissible Terry Frisk for Weapons

"The Fourth Amendment 'applies to all seizures of the person, including seizures that involve only a brief detention short of traditional arrest.'" Id. (quoting United States v. Brignoni-Ponce, 422 U.S. 873, 878 (1975)). "A police officer may stop and briefly detain and question a person for investigative purposes, without treading upon his Fourth Amendment rights, when the officer has a reasonable suspicion supported by articulable facts, short of probable cause for arrest, that the person is involved in criminal activity." Id. (citing Terry v. Ohio, 392 U.S. 1 (1968)). "Reasonable suspicion requires a 'particularized and objective basis that would lead

one to suspect another of criminal activity.'" Id. (quoting United States v. Cortez, 449 U.S. 411, 418 (1981)). "In determining whether reasonable suspicion exists, 'the totality of the circumstances—the whole picture—' must be considered." Id. (quoting Cortez, 449 U.S. at 417).

During an investigative stop, a police officer may conduct a pat down search for weapons if the officer has a reasonable belief the suspect is armed and dangerous. State v. Woodruff, 344 SC. 537, 547, 544 S.E.2d at 295 (citing Pennsylvania v. Mimms, 434 U.S. 106, 111-12 (1977)); See State v. Spears, 429 S.C. 422, 444, 839 S.E.2d 450, 461 (2020); see also State v. Fowler, 322 S.C. 263, 267, 471 S.E.2d 706, 708 (Ct. App. 1996). "In other words, a reasonable person in the position of the officer must believe the frisk was necessary to preserve the officer's safety." Spears, 429 S.C. at 444, 839 S.E.2d at 461 (quoting Fowler, 322 S.C. at 267, 471 S.E.2d at 708). "In assessing whether a suspect is armed and dangerous, the officer need not be absolutely certain the individual is armed." Id. (quoting State v. Blassingame, 338 S.C. 240, 248-49, 525 S.E.2d 535, 540 (Ct. App. 1999)). "Terry dictates that even in the setting of a protective frisk, 'it is imperative that the facts be judged against an objective standard: would the facts available to the officer at the moment of the seizure or the search warrant a man of reasonable caution in the belief that the action taken was appropriate?'" Id. (quoting Terry, 392 U.S. at 21-22); See Carroll v. United States, 267 U.S. 132, 162 (1925)).

In Minnesota v. Dickerson, the United States Supreme Court emphasized that "the sole purpose of the Terry search is not to discover evidence, but to enable a police officer to pursue his or her investigation without fear of violence." State v. Abrams, 322 S.C. 286, 288, 471 S.E.2d 716, 717 (Ct. App. 1996) (citing Minnesota v. Dickerson, 508 U.S. 366, 373 (1993)). "If the protective search goes beyond what is necessary to determine if the suspect is armed, it is no longer valid under Terry and its fruits will be suppressed." Woodruff, 344 SC. 537, 549, 544

S.E.2d at 296 (citing Sibron v. New York, 392 U.S. 40, 65-66 (1968)). The state has the burden to "demonstrate that the seizure it seeks to justify on the basis of reasonable suspicion was sufficiently limited in scope and duration to satisfy the conditions of an investigative seizure." Id. at 551, 544 S.E.2d at 298-99 (quoting Florida v. Royer, 460 U.S. 491, 500 (1983).

"The scope of a search authorized by Terry is limited." Woodruff, 344 SC. 537, 548, 544 S.E.2d at 296 (citing Dickerson, 508 U.S. 366). "The courts of this state have recognized and applied the principle that law enforcement officers are not granted, under the purview of Terry, a general warrant to rummage and seize at will." Id. at 549, 544 S.E.2d at 296. No case in South Carolina has allowed a police officer to lift a suspect's shirt during a Terry stop instead of performing a frisk or a pat down search of the outer clothing. See 3 S.C. Jur. Arrest § 19; see also Stop and Frisk, Trial Handbook for South Carolina Lawyers § 30:10 (5th ed.). Rather, South Carolina courts have consistently stated that a "frisk" or a "pat down" is the degree of intrusion permitted during an investigative stop. See e.g. State v. Fowler, 322 S.C. 263, 267, 471 S.E.2d 706, 708 (Ct. App. 1996)("[B]efore the police may frisk a defendant, they must have a reasonable belief the defendant is armed and dangerous."); State v. Butler, 353 S.C. 383, 390, 577 S.E.2d 498, 502 (2003) ("The question before us, however, if whether Officer Cook had reasonable suspicion to conduct a pat-down or frisk of Butler."); State v. Smith, 329 S.C. 550, 557, 495 S.E.2d 798, 801-02 (Ct. App. 1998) (officer "had reasonable suspicion to perform the "patdown for weapons"); State v. Odom, 376 S.C. 330, 337-38, 656 S.E.2d 748, 752 (Ct. App. 2007) ("patdown" search did not exceed the bounds established under Terry); Milledge v. State, 422 S.C. 366, 811 S.E.2d 796 (2018) ("the deputies had reasonable suspicion Milledge was armed and danger sufficient to justify a frisk.").

In this case, the trial court erred by finding law enforcement did not violate the limited scope of a Terry frisk when Deputy Smith lifted Appellant's shirt rather than performing a pat down search of Appellant's outer clothing. In assessing the legality of Deputy Smith's conduct, respectfully, this Court should refer to the general rules delineated in LaFave's Search and Seizure: A Treatise on the Fourth Amendment for guidance. According to LaFave, the exceptions to Terry's pat down requirement are few, particularly being limited to situations where the suspect's actions made it impossible for law enforcement to safely conduct a pat down, the suspect ignored police commands, or the suspect made threatening movements. 4 Search & Seizure § 9.6(b) (Need for and extent of pat-down of person) (6th ed.) (March 2024 Update). Lafave distinguishes between cases where (1) the officer only has reasonable suspicion that the suspect may be armed (where the requirement of a pat down must be observed), and cases where (2) the suspect has engaged in conduct that would lead a police officer to reasonably believe that the suspect is armed and prepared, or threatening, to use the weapon to harm the officer (where the police may lawfully dispense with the requirement of a pat down). 4 Search & Seizure § 9.6(b) (Need for and extent of pat-down of person) (6th ed.) (March 2024 Update) (citing People v. Superior Ct., 15 Cal. App. 3d 806, 94 Cal. Rptr. 728 (Ct. App. 1971)). Significantly, if no "exceptional circumstances" exist "justifying a bypass of the pat down phase," the police are limited to a pat down search. 4 Search & Seizure § 9.6(b) (Need for and extent of pat-down of person) (6th ed.) (March 2024 Update).

LaFave provides examples of circumstances which justified law enforcement bypassing the pat down requirement, including United States v. Andrade, 551 F.3d 103 (1st Cir. 2008) (defendant refused order to stop, did not look at officer, and had his hands in his pockets); State v. Roach, 796 A.2d 214 (N.J. 2002) (defendant made sudden and repeated attempts to reach for a

bulge in his pants and refused to obey officer's order to lift his hands in the air); State v. Heitzmann, 632 N.W.2d 1 (N.D. 2001) (officer properly reached into pockets without further pat down where defendant "was attempting to frustrate the officer's pat down efforts" by his "quick, evasive movements"); and State v. Faulks, 633 N.W.2d 613 (S.D. 2001) (where defendant reached into his pocket for a third time, officer could, without pat down of pocket area, reach in and withdraw contents). 4 Search & Seizure § 9.6(b), n. 262 (Need for and extent of pat-down of person) (6th ed.) (March 2024 Update).

In this case, based on the totality of the circumstances, law enforcement could have safely performed the less invasive pat down search and thus violated Terry and the Fourth Amendment by conducting a more invasive search. The police stopped Appellant outside the convenience store after dispatch received a complaint that he was intoxicated, bothering customers, and showed the store clerk a firearm in a nonthreatening manner. Assuming this information created reasonable suspicion Appellant was armed, law enforcement could have lawfully frisked Appellant's outer clothing for weapons. However, Deputy Smith did not perform a frisk or pat down search. Instead, she lifted Appellant's shirt to look into his waistband, not once, but twice (apparently attempting to ascertain the contents of the orange bag).

Three officers were present during the encounter and surrounded Appellant. Appellant cooperated with law enforcement during the stop and did not attempt to walk away from the officers. Appellant did not put his hands in his pockets or reach into his waistband. He made no quick movements that could be construed as a threat to the police. In fact, Appellant's hands, which were full, were visible during the entire interaction. Appellant held a pack of cigarettes in his left hand and a green bag in his right hand. In short, Appellant took no action that posed any impediment to a pat down search. Deputy Smith could have safely and easily performed a pat

down search but simply chose not to. These circumstances are insufficient to justify the officer's decision to bypass the pat down requirement of Terry.

Moreover, the facts of this case could not be more different from Andrade, Roach, Heitzmann, or Faulks—that is, cases where police could lawfully dispense with a pat down. In those cases, the defendants were disobeying police commands, refusing to show their hands, reaching into their pockets repeatedly, and engaging in other threatening or unpredictable behavior that posed a potential threat to law enforcement. Appellant did none of these actions, and, in marked contrast, was very cooperative with the police as the officers admitted during their *in camera* testimony and as the trial court found in its order.

In State v. Privott, 999 A.2d 415 (N.J. 2010), law enforcement received an anonymous tip that a man had a gun at a specific intersection. Id. at 417. An officer approached Privott, who matched the description given by the anonymous tipster, and who the officer recognized from prior narcotic arrests and knew was associated with gang activity. Id. at 417-18. Privott appeared nervous, walked away from the officer, and moved one hand toward his waistband. Id. at 418. However, after the officer stopped Privott, Privott placed his hands against a fence as instructed by the officer and was cooperative. Id. During the stop, instead of patting Privott down for weapons, the officer lifted Privott's shirt to expose his stomach and, in doing so, observed a plastic bag with suspected drugs in the waistband of Privott's pants. The appellate court determined that these facts supported an investigatory stop and would have justified a frisk of the defendant.

The court then went on to "assess whether the scope of the search conducted by the officer was reasonable" emphasizing that the "investigative methods employed in a Terry stop should be the least intrusive means reasonably available to verify or dispel the officer's

suspicion" and "it is the State's burden to demonstrate that the seizure and frisk it seeks to justify on the basis of a reasonable suspicion was sufficiently limited in scope and duration to satisfy the conditions of an investigative seizure." Id. at 423-24 (quoting Florida v. Royer, 460 U.S. 491, 500 (1983) (internal quotation marks and alterations omitted). Noting that Privott was cooperative and complied with the officer's instructions to place his hands on the fence, the court concluded that "a reasonable search, as well as the least intrusive maneuver needed to protect the safety of the officer against a weapon, would have been the traditional pat-down search of the defendant's outer clothing." Id. at 424. Accordingly, the court held the officer's act of lifting Privott's shirt to expose his stomach "exceeded the scope of the pat-down search needed to protect the officer against the defendant having a weapon and was akin to a general cursory search of the defendant that is not condoned." Id. In balancing "the competing interests of an individual's right to privacy and the need to protect police from persons with weapons," the court decided "to strike the balance in favor or the traditional pat-down search." Id. at 424-25.

This Court should strike the same balance and hold it was unreasonable for Deputy Smith to bypass the pat down search in this case. Like the defendant in Privott, Appellant cooperated with the police. Indeed, the facts of this case are more favorable than the facts in Privott, since Appellant did not attempt to walk away from police, did not appear nervous, and did not reach toward his waistband.

Like in Privott, Deputy Smith had a lawful means to determine whether Appellant had a weapon: she could have performed a traditional pat down search. Instead, Smith engaged in the more intrusive act of lifting Appellant's search to look into his waistband at the orange bag. This Court should recognize this act for what is was: a general search, outside the scope of what Terry

and the Fourth Amendment permit, that was aimed at determining the contents of the small orange bag, not whether Appellant had a weapon.

Like the court in Privott, numerous other courts have reached the conclusion that a pat down frisk must come before an officer may raise a suspect's shirt or reach into a suspect's pocket. See e.g. Commonwealth v. Fleming, 925 N.E.2d. 39 (Mass. 2010) (holding police officer acted unreasonably in failing, prior to lifting the defendant's shirt and finding a revolver tucked into his waistband, to conduct an "exterior patfrisk" of the defendant's clothing to determine whether the suspicious bulge felt like a weapon); Epps v. State, 1 A.3d 488 (Md. 2010) (holding officer's order that the defendant lift his shirt exceeded permissible scope of Terry pat down frisk of the outer clothing for weapons); United States v. Casado, 303 F.3d 440 (2nd Cir. 2002) (holding officer's reach into defendant's pocket and removal of its contents exceeded the scope of a protective search for weapons under Terry); and United States v. Brown, 996 F.3d 998 (9th Cir. 2021) (holding while officer had ample justification to conduct a protective frisk, the officer's search of the defendant's pocket exceeded what was necessary to verify the defendant did not possess a weapon and violated Terry).

Accordingly, this Court should hold Deputy Smith's act of lifting Appellant's shirt, instead of performing the less invasive pat down of Appellant's outer clothing, was an unlawful search that exceeded the scope of a valid search permitted by Terry. Because all the evidence discovered on Appellant's person was a result of this unlawful search, this Court should hold the trial court erred by denying Appellant's motion to suppress.

Probable Cause to Arrest for Public Disorderly Conduct and Search Incident to Arrest

"Generally, a warrantless search is per se unreasonable and violates the Fourth Amendment prohibition against unreasonable searches and seizures." State v. Freiburger, 366

S.C. 125, 131, 620 S.E.2d 737, 740 (2005) (citing State v. Dupree, 319 S.C. 454, 456, 462 S.E.2d 279, 281 (1995)). "However, a warrantless search will withstand constitutional scrutiny where the search falls within one of several well recognized exceptions to the warrant requirement." Id. at 132, 620 S.E.2d at 740 (citing Dupree, 319 S.C. at 456, 462 S.E.2d at 281). "One such exception is in cases of a search incident to arrest." Id. (citing State v. Ferrell, 274 S.C. 401, 409, 266 S.E.2d 869, 873 (1980)). "The burden of establishing probable cause and the existence of circumstances constituting an exception to the general prohibition against warrantless searches is upon the prosecution." Id. (citing State v. Bultron, 318 S.C. 323, 332, 457 S.E.2d 616, 621 (Ct. App. 1995)).

"There are two historical rationales for the 'search incident to arrest' exception to the warrant requirement: (1) the need to disarm the suspect in order to take him into custody, and (2) the need to preserve evidence for later use at trial." Id. (citing Knowles v. Iowa, 525 U.S. 113, 116 (1998)). "A search may be conducted incident to an arrest only if it is substantially contemporaneous with the arrest and is confined to the immediate vicinity of the arrest." Id. (citing State v. Brown, 289 S.C. 581, 347 S.E.2d 882 (1986)). "A warrantless search which precedes a formal arrest is valid if the arrest quickly follows." Id. (citing State v. Moultrie, 316 S.C. 547, 551, 451 S.E.2d 34, 37 (Ct. App. 1994)). "The rationale for such a warrantless search is that it is permissible incident to a lawful arrest because of legitimate concerns for the safety of the officer and to prevent the destruction of evidence by the arrestee." Id. at 132-33, 620 S.E.2d at 740-741 (citing Chimel v. California, 395 U.S. 752 (1969) (when an arrest is made, it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape)).

In this case, the trial court found law enforcement had probable cause to arrest Appellant for public disorderly conduct and lawfully searched Appellant incident to that arrest. Public disorderly conduct is codified in S.C. Code Ann. § 16-17-530. This statute states in relevant part that one is guilty of a misdemeanor if the person is "found on any highway or at any public place or public gathering in a grossly intoxicated condition or otherwise conducts himself in a disorderly or boisterous manner." S.C. Code Ann. § 16-17-530(A)(1).

Unlike the trial court found, law enforcement did not have probable cause to arrest Appellant for public disorderly conduct and thus could not justify the search of Appellant's person as a search incident to arrest. While Appellant may have been drinking hours earlier and smelled of alcohol according to the officers, he was not in a "grossly intoxicated condition" nor was he conducting himself in "a disorderly or boisterous manner." See State's Exhibit No. 5 (Body Camera Footage). As defense counsel argued at trial, public disorderly conduct requires more than evidence of drinking alcohol or being intoxicated. As evidenced by the body camera footage, Appellant was not slurring his speech, despite what Deputy Smith claimed. The footage shows Appellant speaking clearly. Appellant also did not have difficulty standing and was not "falling down drunk." See Tr. 100, l. 9. He was fully cooperative with law enforcement and calmly answered Deputy Nesbitt's questions. While Appellant may have been talking loudly to Deputy Nesbitt and was a bit animated, he was not being "disorderly or boisterous" as the statute requires. He was not hollering or yelling or causing a disturbance. Accordingly, the police did not have probable cause to arrest Appellant for public disorderly conduct based on what the police observed.

Additionally, because law enforcement did nothing to corroborate the allegations made by the unknown caller to dispatch, the information provided by the caller could not be used as

evidence to arrest Appellant for public disorderly conduct. See United States v. Wilhelm, 80 F.3d 116 (4th Cir. 1996); see also Illinois v. Gates, 462 U.S. 213 (1983). The officers did not observe any of the conduct alleged by the caller nor did law enforcement conduct a follow up investigation to determine if the caller was reliable and the information relayed was accurate.

Respectfully, this Court should hold law enforcement did not have probable cause to arrest Appellant for public disorderly conduct and thus could not justify the search of Appellant's person as a lawful search incident to arrest. The trial court erred by denying Appellant's motion to suppress.

CONCLUSION

Based on the foregoing argument, Appellant respectfully requests this Court reverse his conviction and remand for a new trial.

Respectfully submitted,

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Senior Appellate Defender

ATTORNEY FOR APPELLANT

This 28th day of October, 2024.