STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal From Horry County
Hon. Benjamin H. Culbertson, Circuit Court Judge
Appellate Case No. 2011-192246

The State,

Respondent,

v.

Ervin Gamble

Petitioner.

PETITION FOR REHEARING

On August 28, 2013, the majority of this Court reversed the Court of Appeals' Opinion which affirmed the trial court's denial of Petitioner's motion to suppress drugs. The majority of this Court misapprehended or overlooked the facts of the case as well as applicable law, most notably the fact any error was merely cumulative and harmless. Accordingly, pursuant to Rule 221(a), SCACR, the Court should grant the petition for rehearing, find the Court of Appeals properly affirmed the decision of the trial court, and affirm Petitioner's conviction and sentence.

Preservation

The majority of this Court found the issue presented to be properly preserved for review on appeal. The Court ruled: "While defense counsel could have articulated his objection more clearly, his objection adequately preserved the issue for this Court's review." The Court appears to only rule on the substance of the motion which the State

submitted was based on an argument regarding the "foundation" for admitting the drugs. The Court overlooks several additional arguments raised by the State to demonstrate the issue was not preserved, including one of the main bases relied on by the Court of Appeals in ruling the issue not properly preserved.

The issue was not preserved for several reasons. First, he specifically waived a suppression hearing when requested by the State so he cannot now complain of the State's inability to provide sufficient evidence to the trial court to submit admission of the drugs. Second, Petitioner waived his right to contest the admission of the drugs by not raising a contemporaneous objection. Finally, at the directed verdict stage when Petitioner actually raised allegations regarding the arrest, the State offered to provide the evidence in camera but Petitioner refused arguing the evidence could only be admitted in front of the jury which is inaccurate and therefore he waived any issue.

Prior to trial, the trial court and counsel engage in a discussion regarding the charges Petitioner faced. The State notes it will not be pursuing the attempt to distribute case. The solicitor specifically states the State will go forward on the trafficking charge, which resulted after Petitioner "drives up into the driveway" and "[t]hey arrest him . . . based on . . . the information they had." (R.50; App.52). The solicitor then notes "And the CI, as you know Your Honor, is deceased." (App.52). The following colloquy then occurs:

> Counsel for State: Your Honor, I guess I do need to get on the record . . . whether . . . [counsel for Petitioner] is specifically waiving that suppression hearing?
> We've discussed having that . . . previously.

And I guess if we - - if he's going to do that, we need to do that on the record as well.

The Court: Do you have a motion to suppress at this time?

Counsel for Petitioner: Your Honor, I don't have a motion - - motion to suppress at this time.

(R.58; App.60). The State clearly anticipated and obviously discussed Petitioner's desire to challenge the admission of the evidence and specifically inquired into the need for a hearing regarding the admissibility. The court questioned Petitioner's counsel and he specifically waived his right to challenge the evidence by not going forward with the suppression hearing.

As the dissent notes, Petitioner should not be entitled to benefit from his own decision not to allow an in camera pretrial hearing to take place. This is especially true when the State sought such a hearing based on the understanding counsel would challenge the admissibility but was then told by counsel he did not seek a hearing in that regard.

This Court has long held to the requirement an objection must be contemporaneous and at the first opportunity. State v. Sheppard, 391 S.C. 415, 420-421, 706 S.E.2d 16, 19 (2011) ("Our law is clear that a party must make a contemporaneous objection that is ruled upon by the trial judge to preserve an issue for appellate review."); State v. Johnson, 363 S.C. 53, 58, 609 S.E.2d 520, 523 (2005) ("To preserve an issue for review there must be a contemporaneous objection that is ruled upon by the trial court."); State v. Pauling, 322 S.C. 95, 100, 470 S.E.2d 106, 109 (1996) (stating that "[h]aving denied the trial judge an opportunity to cure any alleged error by failing to contemporaneously object ..., Appellant is procedurally barred from raising these issues

for the first time on appeal"); State v. Williams, 303 S.C. 410, 401 S.E.2d 168 (1991) (defendant must object at first opportunity to preserve issue for appellate review; alleged error must be raised to and ruled on by trial judge); Clyde v. Southern Public Utilities Co., 96 S.E. 116, 118 (1918) ("Besides defendants' objection came too late. To avail either party, such an objection must be made at the first opportunity, or it will be deemed to have been waived").

In this case, Agent Mullinax testified extensively regarding the investigation, the detention of Petitioner, the arrest of Petitioner, the search of Petitioner and his vehicle, the discovery of drugs, the drugs testing positive for heroin, and the fact the best evidence kit was maintained in his possession and it contained all of the drugs found. This evidence was shown to the officer, and identified by the officer as containing the heroin he took off Petitioner and Petitioner's vehicle. (App.82-83; 88-94). All of the above testimony occurred without any objection by Petitioner. The majority's opinion details most of the testimony by Agent Mullinax that was admitted without objection. Petitioner, in order to preserve an issue related to an illegal arrest and search incident to that arrest, should have raised the issue when Agent Mullinax began discussing the detention, arrest, and search of Petitioner. He could have raised the objection when Agent Mullinax detailed the results of the search incident to arrest indicating the items found tested positive for heroin. All of this testimony was presented to the jury without objection by Petitioner and as a result, he failed to raise the proper objection at the earliest opportunity. The Court of Appeals, therefore, correctly determined the issue was not properly preserved for review on appeal.

It should also be noted when he did object, the State was not offered the opportunity to present any argument to the court or to conduct an *in camera* hearing to present evidence to support the admissibility of the drugs. The State sought to do this prior to trial by seeking to determine if Petitioner sought to suppress the drugs. When Petitioner specifically waived the right to a suppression hearing, he prevented the State from effectively entering testimony or evidence to support the arrest and search resulting in the discovery of heroin.

Finally, when Petitioner again raised the issue of suppressing the drugs as part of his directed verdict motion and raised, for the first time, the argument the arrest was illegal, the State offered to conduct an *in camera* hearing to provide all the evidence for the record regarding the admissibility of the drugs. (App.121-122). Instead of allowing the State to present its evidence in front of the court in an *in camera* hearing, Petitioner maintained it was incumbent on the State to present sufficient evidence supporting the admission of the evidence to the jury. (App.123-128). Again, as the dissent properly notes, Petitioner's own conduct presented the State from properly demonstrating all evidence and testimony it had in its possession regarding the attempt to distribute crime which served as the initial basis for the arrest. See State v. Stroman, 281 S.C. 508, 316 S.E.2d 395 (1985) ("a party cannot complain of an error which his own conduct has induced.").

The colloquy during this discussion is also quite informative. After Petitioner raises his issue regarding the suppression of the drugs, the trial court immediately explains: "All right; I noticed at the . . .outset that there was . . . that you did instruct that there was no . . . motion to suppress." (App.119). The trial court's comment clearly

indicated his belief Petitioner waived the issue. Further, the State's initial position is that Petitioner waived the issue by waiving a suppression hearing when it was discussed prior to trial.

In any event, the State offered to present the evidence for the court to make a ruling. Finally, the State correctly argued it should not be required to present the evidence in front of the jury because different rules apply compared to presenting the evidence to the court to make the determination, State v. Pressley, 288 S.C. 128, 341 S.E.2d 626 (1986). The State correctly maintained the determination is one solely for the court on the admissibility of the evidence, and not one for the jury. Watson v. Ford Motor Co., 389 S.C. 434, 445, 699 S.E.2d 169, 174 (2010).

The court and counsel for Petitioner then engage in a discussion regarding the State's burden and how it must present the evidence to demonstrate their was a proper arrest and a proper search incident to arrest. Throughout this colloquy it is clear both counsel for Petitioner and the court are aware of the underlying charge of attempt to distribute heroin, the fact the charge was developed through information obtained from a confidential informant who is not present to testify, and the attempt to distribute lead to the arrest that resulted in the search and the evidence of heroin on the trafficking charge. (App.123-130).

As a result, this Court should find the issue is clearly not preserved for review on appeal or in the alternative Petitioner waived his right to contest the issue. Further, Petitioner's own conduct of preventing an *in camera* hearing induced any error on the part of the court in admitting the evidence of the drugs.

Merits

On the merits, the State presented the trial court sufficient evidence to demonstrate the arrest was legal and the search incident to that arrest was proper. The record discloses the court's knowledge of the circumstances leading up to Petitioner's arrest. When that information is coupled with Agent Mullinax's extensive testimony without objection, the trial court had ample evidence to support the admission of the drugs.

First, it is important to note that the determination of admissibility is one for the trial judge to make in their function as gatekeeper. Admissibility of the drugs is not for the jury and the evidence supporting the drugs admission need not all be presented to the jury. The majority appears to overlook the facts known to the trial court and overlooks the barriers the State faced to presenting its evidence appropriately to the trial court.

"The admission or exclusion of evidence is a matter within the trial court's sound discretion, and an appellate court may only disturb a ruling admitting or excluding evidence upon a showing of a 'manifest abuse of discretion accompanied by probable prejudice.'" State v. Commander, 396 S.C. 254, 262-263, 721 S.E.2d 413, 417 (2011) (quoting State v. Douglas, 369 S.C. 424, 429, 632 S.E.2d 845, 847–48 (2006)). Further, the determination of admissibility is for the trial court and not the jury as this Court has repeatedly explained:

> When the issue of the admissibility of the pistol came before the court a determination had to be made by the judge after the two interested parties were permitted to present evidence to their own satisfaction in the absence of the jury. In effect there came into being a little trial within a big trial. The judge had to try the issue: 'Is the pistol admissible in evidence?' Incident to his determination he was also required to determine if the pistol was procured by

> coercion or other improper methods, and if it was given to the police officers by consent. In order to make the determination he was required to evaluate all of the evidence and give to each witness' testimony such meaning and credibility as it should have. In weighing the testimony he had the benefit of gazing upon the countenances of the witnesses and was entitled to consider, among other things, the interest of the wife in testifying as she did. It is argued that the overall circumstances prove beyond question that the action of the wife was not voluntary. Such circumstances were paraded before the trial judge and were matters for him to consider in making his final ruling.

State v. Richburg, 253 S.C. 458, 462-463, 171 S.E.2d 592, 593-594 (1969).[1] Further, this Court explained:

> The jury and the trial court each have distinct roles and separate responsibilities that they must execute during a trial. The jury serves as the fact finder and is charged with the duty of weighing the evidence admitted at trial and reaching a verdict. The trial court, on the other hand, is charged with the duty of determining issues of law. As a part of this duty, the trial court serves as the gatekeeper and must decide whether the evidence submitted by a party is admissible pursuant to the Rules of Evidence as a matter of law. Once the trial court makes a ruling that the particular evidence is admissible, then it is exclusively within the jury's province to decide how much weight the evidence deserves.

Watson, 389 S.C. at 445, 699 S.E.2d at 174-175.

The issue is whether the evidence was seized pursuant to a search incident to a lawful arrest and that determination as clearly for the trial court based on all the evidence before the trial court, not based on evidence presented solely to the jury. Generally, a warrantless search is *per se* unreasonable and violates the Fourth Amendment prohibition against unreasonable searches and seizures. State v. Weaver, 374 S.C. 313, 319, 649

[1] As noted above, it is the "little trial" within the main trial that Petitioner's conduct and argument precluded in this case. He waived the suppression hearing and prevented the State from proffering its evidence in an in camera hearing; instead arguing, against the settled law of South Carolina, the issue of the drug's admissibility had to be developed before the jury.

S.E.2d 479, 482 (2007). "However, a warrantless search will withstand constitutional scrutiny where the search falls within one of several well recognized exceptions to the warrant requirement. One such exception is in cases of a search incident to arrest." State v. Freiburger, 366 S.C. 125, 132, 620 S.E.2d 737, 740 (2005) (citing *inter alia* State v. Ferrell, 274 S.C. 401, 409, 266 S.E.2d 869, 873 (1980) (in the case of a lawful custodial arrest, the full search of a person does not require a search warrant and is considered reasonable under the Fourth Amendment)).

The fundamental question in determining the lawfulness of an arrest is whether probable cause existed to make the arrest. Probable cause for a warrantless arrest exists when the circumstances within the arresting officer's knowledge are sufficient to lead a reasonable person to believe that a crime has been committed by the person being arrested. State v. Baccus, 367 S.C. 41, 49, 625 S.E.2d 216, 220 (2006) (citing State v. George, 323 S.C. 496, 509, 476 S.E.2d 903, 911 (1996) (finding probable cause for warrantless arrest for murder)). "Whether probable cause exists depends upon the totality of the circumstances surrounding the information at the officer's disposal." Id. (emphasis added) (citing inter alia Beck v. Ohio, 379 U.S. 89, 91 (1964)).

In Beck, the United States Supreme Court found a reviewing court must consider "whether, at the moment the arrest was made, the officers had probable cause to make it—whether at that moment the facts and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the [Petitioner] had committed ... an offense." Id. This Court overlooked the State's evidence supporting the arrest of Petitioner.

A review of the facts known by the trial court in this case indicate the State presented sufficient evidence from which the trial court could, and properly did, conclude probable cause existed to arrest Petitioner based on the totality of the circumstances known to the officer. The State informed the trial court it was not going forward on an attempt to distribute heroin charge against Petitioner. The court knew the charge originated out of information and the use of a confidential informant. The court also knew the confidential informant was deceased at the time of trial. (App.52). Further, it was clear the facts of this case were discussed off the record based on counsel for Petitioner's statement to the court. Counsel indicated he did not know how the State would prove probable cause if they can't discuss the CI in front of the jury.[2] He states: "Again, . . . we mentioned this in chambers yesterday." (App.53). The discussion in chambers was never put on the record because counsel waived an *in camera* suppression hearing pre-trial (App. 58) and then argued the State should have to present the information in front of the jury and not *in camera* when the State offered to proffer the evidence to the court. (App. 117-130).[3]

At trial, Agent Mullinax testified he was employed with the Myrtle Beach Police Department and assigned to the Fifteenth Circuit Drug Task Force. He testified without objection his job is to develop cases against people suspected of dealing drugs. (App.82-83). He testified the task force was conducting an investigation into an individual named "Fats." (App.83).

[2] Again, the State notes counsel seems to believe the facts have to be presented to the jury when the determination is actually one for the court.

[3] As the dissent states, it was conduct of Petitioner and not the State which precluded any further evidence being placed on the record for consideration.

Petitioner objected to the discussion of "Fats" and argued to the court: "He got that information from the confidential informant in this case." (App.84). Accordingly, the trial court knew information related to Petitioner, "Fats," came through the confidential informant. Counsel for Petitioner and the court specifically note the information from the CI lead to the investigation of Petitioner. (App.86-87).

This Court then details a portion of Agent Mullinax's testimony before the jury but omits a critical component of the testimony. The colloquy was as follows:

> Q. Officer . . . Agent Mullinax, did you all have a tactical plan you had developed with . . . regard to this particular defendant?
> A. Yes ma'am, we did. . . . Myself, along with other agents were in the area . . . Planned on speaking with a person in regards to . . . drugs. **The drugs were to be delivered.**

(App.90). Agent Mullinax then made contact with Petitioner through a phone call. (App. 91). The Court then details the testimony from Agent Mullinax indicating Petitioner arrived at the location established in the tactical plan **for the delivery of drugs**, Petitioner was arrested on a separate charge[4], and the heroin was found in a search of Petitioner's person and automobile in a search incident to his arrest.[5]

The majority of this Court found:

> The Record in the instant case is devoid of any evidence that police had probable cause to seize the drug evidence presented at trial. . . . Specifically, we can only glean from the officer's testimony that he was present at a location where Petitioner later arrived, and upon Petitioner's arrival, he and another officer searched Petitioner and seized drugs.

[4] This is clearly established by the State and counsel for Petitioner to be the charge of attempt to distribute heroin during all of the discussions with the court.

[5] As will be discussed below, Agent Mullinax then discusses taking the heroin into his possession and putting it into a Best Evidence Packet, identifies the heroin, as well as the "numerous bindles" in the packet, in court before the jury, identifies his signature on the packet, and testifies he was the only person to handle the drugs. (App.92-94).

The Court continued:

> The Record in this case does not demonstrate that probable cause supported Petitioner's arrest. The officer's testimony describes Petitioner's arrival at a certain location, and Petitioner's subsequent arrest, but does not explain why these events triggered the search. Simply put, it is unknown what it was about Petitioner's arrival at the location that supported a good faith belief that Petitioner was guilty of a crime.

The Court's holding that there was no connection between Petitioner's arrival at the location and his arrest is based on the majority of the Court overlooking and omitting the above emphasized testimony. Agent Mullinax specifically testified the tactical plan developed in regards to Petitioner included having drugs delivered. The testimony, while it could be articulated more clearly, adequately demonstrated the connection the Court seeks. The plan included the delivery of drugs, Petitioner was contacted by the officers by phone, Petitioner arrived at the location to deliver drugs, and Petitioner was arrested based on his attempt to distribute heroin. The evidence presented to the jury, as well as the information clearly known by the trial court through counsel, included sufficient evidence to demonstrate Petitioner was legally arrested on the charge of attempt to distribute heroin.

Harmless Error

The majority of this Court fails to conduct any harmless error analysis regarding the admission of the drugs into evidence in this case. As the dissent points out, any possible error in admitting the physical drugs was entirely harmless in light of the fact the drugs were merely cumulative to the clearly unobjected-to testimony provided by Agent Mullinax.

As discussed above, "The admission or exclusion of evidence is a matter within the trial court's sound discretion, and an appellate court may only disturb a ruling admitting or excluding evidence upon a showing of a 'manifest abuse of discretion **accompanied by probable prejudice**.'" Commander, 396 S.C. at 262-263, 721 S.E.2d at 417 (emphasis added). The admission of evidence obtained from an illegal search may still be harmless in light of the entire record. See State v. Herring, 387 S.C. 201, 215, 692 S.E.2d 490, 497 (2009). The key factor for determining whether a trial error constitutes reversible error is "whether it appears 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.' " State v. Charping, 313 S.C. 147, 157, 437 S.E.2d 88, 94 (1993). "Whether an error is harmless depends on the circumstances of the particular case." State v. Mitchell, 378 S.C. 305, 316, 662 S.E.2d 493, 499 (2008). "No definite rule of law governs this finding; rather, the materiality and prejudicial character of the error must be determined from its relationship to the entire case. Error is harmless when it 'could not reasonably have affected the result of the trial.'" State v. Tapp, 398 S.C. 376, 389, 728 S.E.2d 468, 475 (2012); see also, State v. McFarlane, 279 S.C. 327, 330, 306 S.E.2d 611, 613 (1983) ("It is well settled that the admission of improper evidence is harmless where it is merely cumulative to other evidence.").

The only objection in this case came as a result of the State seeking to admit the physical drugs into evidence. Testimony by Agent Mullinax regarding the investigation, arrest, search, and finding of the drugs was admitted without evidence. Further, Agent Mullinax testified a "brown powdered substance which subsequently field tested for . . . heroin" was located on Petitioner's person. Further, he testified an "additional amount of

. . . brown powdered substance that field tested positive for heroin" was found in the center console of Petitioner's vehicle. (App92). He testified he took possession of the drugs, placed them in a Best Packet provided by the drug enforcement unit, and dropped the packet off in the Horry County drug drop. (App.92-93). When showed the Best Packet, he identified the "brown powdered substance . . .heroin . . .along with . . . numerous bindles of . . . heroin. Those bindles are actually . . . what appears to be a wax paper substance . . . normally used for stamps . . .that has heroin in it . . .a brown powder substance." (App.93). He further testified he signed the Best Packet, he was the only one to handle the Best Packet, he did not tamper with the drugs or change the drugs in the Best Packet, and he dropped the Best packet off in the drop box. (App.94). Accordingly, his testimony established a full chain of custody from collection to placement in the drug drop box. It also detailed the substance being heroin, and numerous bindles which all contained heroin.

Subsequent to Agent Mullinax's testimony, Lisa Floyd testified she retrieved the drugs from the drug box. She tested the drugs, which tested positive for heroin. She weighed a portion of the drugs and found the weight to be 4.76 grams. She indicated the remaining bindles were not opened or weighed but that the total weight would not exceed 14 grams. (App.109-112). This testimony was all received without any objection by Petitioner.

Any error in admitting the drugs, as the dissent finds, was entirely harmless in light of the evidence presented by Agent Mullinax and Ms. Floyd. The drugs themselves were entirely cumulative when Agent Mullinax testified he secured the brown powdered substance that field tested positive and Ms. Floyd confirmed the substance was heroin

and provided a weight in excess of 4 grams. The improper admission of the physical drugs into evidence could not have altered the outcome of the trial. The State presented sufficient evidence to convict Petitioner and could have convicted him without ever admitting the drugs into evidence.

CONCLUSION

For all of the foregoing reasons, the State requests the panel grant the petition for rehearing, find the Court of Appeals properly affirmed the trial court, and affirm Petitioner's conviction and sentence.

Respectfully submitted,

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September 12, 2013

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PROOF OF SERVICE

I, Sally Ellison, certify that I have served the within Petition for Rehearing by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Jerry L. Finney, Esquire
The Finney Law Firm, Inc.
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I further certify that all parties required by Rule to be served have been served.
This 12th day of September, 2013.

Sally Ellison

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