STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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Appeal from Spartanburg County

J. Mark Hayes, II, Circuit Court Judge

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THE STATE,

RESPONDENT,

V.

RICKEY HEWINS MACK,

APPELLANT

APPELLATE CASE NO. 2012-213390

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# INITIAL BRIEF OF APPELLANT

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## STATEMENT OF ISSUE ON APPEAL

Did the trial judge err in refusing to suppress crack cocaine police found as a result of a warrantless search of the Acura car in which Appellant drove a co-defendant to a parking lot to buy marijuana from a confidential informant when the marijuana purchase took place inside the confidential informant's truck and the State failed to establish that the search of the Acura was valid as an inventory search?

## STATEMENT OF THE CASE

In March of 2010, the Spartanburg County Grand Jury indicted Mack for trafficking in cocaine base, trafficking in cocaine and trafficking in marijuana, indictments #2010-GS-42-2216, 2217, 2218. On October 24, 2012, Mack proceeded to jury trial before the Honorable J. Mark Hayes, II. Attorney J. Roger Poole represented Mack at trial. Attorney Joseph Hayes Holliday prosecuted the case on behalf of the State. The jury returned verdicts of guilty on each charge. Judge imposed a twenty five (25) year concurrent sentence for each charge. A timely notice of intent to appeal was served on November 5, 2012. This appeal follows.

## ARGUMENT

The trial judge erred in refusing to suppress crack cocaine police found as a result of a warrantless search of the Acura car in which Appellant drove a co-defendant to a parking lot to buy marijuana from a confidential informant when the marijuana purchase took place inside the confidential informant's truck and the State failed to establish that the search of the Acura was valid as an inventory search.

On November 5, 2009, Mack and co-defendant Keith Johnson were arrested as part of a buy-bust where the co-defendant had agreed to buy marijuana from a confidential informant [CI]. (Tr. p. 76, line 20 – p. 77, lines 1-6). Mack drove Johnson to the Burger King parking lot on Highway 101. Mack parked the Acura and then Mack and Johnson got out of the Acura and met the CI at his dually truck. Johnson got in the front seat of the truck while Mack got in the back seat. (Tr. p. 54, lines 1 – p. 55, lines 1-14). Once money was exchanged, the police moved in to arrest both Johnson and Mack for the marijuana purchase that was the subject of the bust-buy. (Tr. p. 27, lines 7-20; p. 54, lines 15 – p. 55, lines 1-7). Upon searching the truck, police found the 13 pounds of police supplied marijuana and a purse or bag containing a white powder substance in the back seat of the truck that tested positive as 12.02 grams of cocaine. (Tr. p. 56, lines 7- 17; pp. 88-89). Mack was charged with trafficking marijuana and trafficking cocaine.

During a pre-trial suppression hearing Investigator Paul Anthony Norris testified that after both Mack and Johnson were arrested, he searched the Acura, opened the center console and found what tested positive as 20.15 grams of crack cocaine. (Tr. p. 27, line 18 – p.28, lines 1-18; p. 89, line 21 – p. 90, line 1). Mack was additionally charged with trafficking crack cocaine. Investigator Norris admitted that at the time he searched the Acura, Mack was handcuffed and was not within reach of the interior of the Acura. (Tr. p. 29, lines line 23 – p. 30, lines 1-21). At trial the investigator confirmed that at the time he

searched the Acura both Mack and Johnson were in custody and did not have access to the Acura. (Tr. p. 64, line 16 – p. 65, lines 1-5).

The investigator testified that he wanted to inventory the car before it was towed. (Tr. p. 27, line 23 – p. 28, lines 1-3). The Acura belonged to Mack's sister, Levictory Hewens Mack. (Tr. p. 65, lines 6-20). Although her phone number was provided on the tow sheet, the investigator did not contact the sister to come and pick up the car. (Tr. p. 65, lines 15-20).

Mack moved to suppress the crack cocaine found in the Acura. (Tr. p. 21, line 20 – p. 22, 23, 24, lines 1-3). In support of the motion to suppress Mack cited Arizona v. Gant, 556 U.S. 332, 129 S.Ct. 1710, 173 L.Ed.2d 485 (2009). (Tr. p. 23, lines 7-18). After the pre-trial suppression hearing the State argued:

> Judge, I I I believe clearly had this automobile not belonged to these individuals and had someone been there to take that automobile, this clearly would've been a warrantless search. I – Arizona v. Gant clearly states that the automobile exception does not extend that far. Had they been driving this vehicle it woulda [sic] been different different occasion but but [sic]this was a vehicle they arrived in the location and then they got outta [sic] the vehicle, got in another car where the bust was made but, Judge, due to the fact that the car was to be inventoried and it was in fact inventoried, discovery of this material crack cocaine would be inevitable, any taint of the search, even if it is a a [sic]search for the officers, it it's [sic] would be cured by inevitability of discovery and, Judge, it's just our position that due to that, suppression is not the appropriate remedy in this case and we we [sic] believe that the crack cocaine found in the, in the Acura would in fact be admissible.

(Tr. p. 37, line 17 – p. 38, lines 1-8).

The judge denied the motion to suppress relying on State v. Jenkins, 398 S.C. 215, 727 S.E.2d 761 (Ct. App. 2012) and State v. Brown, 389 S.C. 473, 698 S.E.2d 811 (Ct.App.

2010)[1]. (Tr .p. 39, line 16 – p. 40, lines 1-7; p. 92, lines 3-14). The trial judge stated, "I'm not granting the motion cause I do believe that the State has met its burden by a preponderance of the evidence of establishing that an inventory search would have resulted in that particular compartment of the car being looked at and examined so I've got two case that I happen to probably have left on my desk that I will – that I reviewed but left on my desk that I will supplement the record with later and give ya'll the cites so that we will, so that those'll be, so we'll have those in the record but I believe that – I'm I'm not going to grant the motion, I believe the State's met its burden on on that search." The trial judge later announced that the two cases he referenced were State v. Jenkins, 398 S.C. 215, 727 S.E.2d 761 (Ct. App. 2012) and State v. Brown, 389 S.C. 473, 698 S.E.2d 811 (Ct.App. 2010). At trial counsel for Mack renewed the objection to the admission of the crack (Tr. p. 63, lines 23-24). The trial judge erred in admitting the crack.

In State v. Brown, 401 S.C. 82, 91, 736 S.E.2d 263, 267 (2012), the South Carolina Supreme Court, discussing Arizona v. Gant, 556 U.S. 332, 129 S.Ct. 1710, 173 L.Ed.2d 485 (2009), wrote, "The Supreme Court declared the following new two-part rule:

> Police may search a vehicle incident to a recent occupant's arrest only if [1] the arrestee is within reaching distance of the passenger compartment at the time of the search or [2] it is reasonable to believe the vehicle contains evidence of the arrest. When these justifications are absent, a search of an arrestee's vehicle will be unreasonable unless police obtain a warrant or show that another exception to the warrant requirement applies.(emphasis added)."

In Brown the South Carolina Supreme Court, relying on Davis v. United States, -- U.S. - - , 131 S.Ct. 2419, 180 L.Ed.2d 285 (2011) found that the evidence obtained pursuant to

[1] The South Carolina Court of Appeals decision in Brown was later reversed by State v. Brown, 401 S.C. 82, 736 S.E.2d 263 (2012).

a search conducted in objectively reasonable reliance on binding appellate precedent, was not subject to the exclusionary rule. The search in Brown took place on October 6, 2005, prior to the Court's ruling in Gant. The search in the present case took place on November 5, 2009, **after** the Court issued the opinion in Gant on April 21, 2009.

Evidence obtained from an illegal search must be suppressed as fruit of the poisonous tree. Wong Sun v. United States, 371 U.S. 471 (1963). The exclusionary rule exists to deter police misconduct and constitutional violations. See Nix v. Williams, 467 U.S. 431, 442-43 (1984) Pursuant to Gant, the search of the car in the present case was unreasonable and the exclusionary rule should operate to exclude the admission of the drugs found pursuant to the unreasonable search. At the time of the search of the Acura both Mack and his co-defendant had already been handcuffed and arrested for the marijuana that was the subject of the buy-bust and the cocaine that was found in the confidential informant's truck. As Mack and the co-defendant arrived to purchase marijuana from the confidential informant and the sale took place in the confidential informant's truck, it was not reasonable for the police to believe that the Acura contained evidence of the arrest. The search of the Acura after Mack and the co-defendant were arrested was illegal.

The judge in the present case, however, found that the drugs discovered pursuant to the search of the Acura met an exception to the exclusionary rule as the evidence would have inevitably been discovered pursuant to an inventory search. Despite the illegality of an original search, "[I]f the prosecution can establish by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means ... then the deterrence rationale has so little basis that the evidence should be

received." Nix v. Williams, 467 U.S. 431, 444 (1984) Once the court determines that evidence was illegally seized, the burden shifts to the State to prove that an exception to the exclusionary rule applies. If the State fails to meet its evidentiary burden then the evidence must be suppressed.

In order to prove that items would be found during an inventory search, the State must present evidence of "standardized criteria" or "established routines" regulating the opening of containers during inventory searches. Florida v. Wells, 495 U.S. 1, 4 (1990). The requirement that the State present such evidence "is based on the principle that an inventory search must not be a ruse for a general rummaging in order to discover incriminating evidence." Id. "The policy or practice governing inventory searches should be designed to produce an inventory." Id. "The individual police officer must not be allowed so much latitude that inventory searches are turned into 'a purposeful and general means of discovering evidence of crime.'" Id. (quoting Colorado v. Bertine, 479 U.S. 367, 376 (1987)).

The State presented no evidence of "standardized criteria" or "established routines" regulating impoundment[2] or regulating inventory searches. By failing to present such evidence the State failed to meet its burden to prove that the inventory was not a ruse for general rummaging in an attempt to discover incriminating evidence. The inevitable discovery exception to the exclusionary rule should not apply in this case because the State

[2] While the impoundment was not challenged at trial, the necessity of the impoundment of the car by the police is questionable when the car belonged to a family member and was legally parked in a public parking lot. See Canino v. State, 314 Ga.App. 633, 725 S.E.2d 782 (Ga.App. 2012).

failed to prove that the search was a proper inventory search. The drugs found in the Acura must be suppressed.

The trial judge's reliance on State v. Jenkins, 398 S.C. 215, 727 S.E.2d 761 (Ct. App. 2012) is puzzling as that case involved a search warrant lacking in probable cause and the Court of Appeals remanding the case to the trial court to determine if the inevitable discovery rule should apply. The issue in the present case involves a purported inventory search and the State's failure to prove that the search constituted a proper inventory search.

## CONCLUSION

Based on the above argument, the conviction and sentence for trafficking crack cocaine should be reversed.

Respectfully submitted,

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ATTORNEY FOR APPELLANT

This 25th day of September, 2013.

STATE OF SOUTH CAROLINA
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**DESIGNATION OF MATTER TO BE INCLUDED IN RECORD ON APPEAL**

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Appellant proposes the following be included in the Record on Appeal:

(1) True–billed indictments and sentencing sheets;
(2) Trial transcript pages 1-4; 20-41; 41-190;
(3) Defendant's Exhibit #1 – Motion to Suppress.

I certify that this designation contains no matter which is irrelevant to this appeal.

September 25th, 2013

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CERTIFICATE OF SERVICE

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The undersigned attorney hereby certifies that a true copy of the Initial Brief of Appellant and Designation of Matter in the above referenced case has been served upon Salley W. Elliott, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 and also served upon Mr. Rickey Hewins Macks at 4848 Gold Mine Highway Kershaw, SC 29067-8069, this 25th day of September, 2013.

Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 25th day of September, 2013.

(L.S.)
Notary Public for South Carolina
My Commission Expires: July 24, 2022.