STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM RICHLAND COUNTY
G. Thomas Cooper, Jr., Circuit Court Judge

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Appellate Case No. 2012-212242

THE STATE, .....RESPONDENT

v.

EDWARD M. DUNN, .....APPELLANT.

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# INITIAL BRIEF OF RESPONDENT

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## RESPONDENT'S STATEMENT OF ISSUE ON APPEAL

Whether Appellant's argument that the trial court erred in refusing to suppress all evidence flowing from the retention and use of his DNA profile to match seminal fluid discovered at the crime scene is preserved for appellate review because the specific grounds argued on appeal were neither raised to nor ruled upon by the trial court, and even if preserved, whether the evidence was properly admitted because Appellant's expectation of privacy in his saliva sample and the DNA contained therein was extinguished when he voluntarily consented to give the sample to State authorities without any limitation on the scope of his consent?

## STATEMENT OF THE CASE

Appellant was indicted by the Richland County grand jury for assault with intent to commit criminal sexual conduct (CSC) in the first degree (2011-GS-40-3518), armed robbery (2011-GS-40-3525), kidnapping (2011-GS-40-3526), and burglary in the first degree (2011-GS-40-3527). He was represented by Victor Li and Deon O'Neil, Esquires. (Tr.p.1). On May 21-24, 2012, Appellant proceeded to trial by jury pursuant to which he was acquitted of assault with intent to commit first-degree CSC but was found guilty of the remaining charges. He was sentenced by the Honorable G. Thomas Cooper, Jr., to three concurrent terms of thirty (30) years' imprisonment for armed robbery, kidnapping, and first-degree burglary. (Tr.546, line 6-p.547, line 3). Appellant timely filed a notice of intent to appeal his convictions and sentences and subsequently submitted a Brief in support of his appeal. This Brief of Respondent (the State) follows.

## STATEMENT OF FACTS

Sometime between 2 a.m. and 3 a.m. on May 28, 2011, seventy-four year old Indira Lonsdale (Victim) was in her sitting room drinking coffee and listening to music when a male intruder entered her home, came from behind, grabbed her by the shoulders, and ordered her to do what he said or he would kill her. The man led Victim to her bedroom, removed the sash from her bathrobe, which was the only article of clothing she was wearing, used the sash to tie her hands behind her back, and told her to bend over the bed. Victim could see a gun in the man's hand. The man then unzipped his pants, put his penis between Victim's legs and, without penetrating her, thrust several times until he ejaculated. Next he made Victim put a pair of her own underwear over her head before leading her to the bathroom. The man gave her a washcloth and told her: "wash yourself good." Victim wiped the ejaculate from her vaginal area, after which the man rinsed the washcloth in the sink and told her to wash again. She wiped herself again and left the used washrag in the sink. The intruder then led Victim to her bedroom and made her lay face down on the floor while he went through her dresser drawers looking for money. In fear that she would be shot if the intruder was not able to find any money, she told him she had $120 in her wallet and told him where to find it. He then asked Victim for her car keys and left the house. Victim got up, ran to the phone, and called 9-1-1. When she was later interviewed by the police, Victim described the intruder as a young, small built, black male with a northern accent and curly hair that hung over the side of his face. (Tr.p.199, line 12-p.213, line 19; p.229, line 5-p.230, line 25).

The Richland County Sheriff's Department collected the washcloth from Victim's sink and developed a DNA profile from seminal fluid detected and extracted from the cloth. (Tr.p.289, line 12-p.293, line 18; p.336, line 5-p.338, line 21; p.344, line 3-p.346,

line 14). Appellant's DNA profile was already on file with the Sheriff's Department as a result of his providing a sample in September of 2010, in an unrelated matter. (Tr.p.311, line 1-p.313, line 15). Although the washcloth contained a mixture of DNA, the major contributor of that DNA was matched within a reasonable degree of scientific certainty to be seminal fluid from Appellant. Indeed, the frequency of seeing the contributor's profile in the African-American population was approximately one in 140 quintillion. (Tr.p.346, line 12-p.347, line 14; p.363, line 13-p.364, line 16). Based on the DNA match, warrants were obtained for Appellant's arrest.

After Appellant was arrested he was told his DNA was found on the washcloth discovered in Victim's house. Appellant then gave an oral statement admitting his participation in the burglary but denying participation in the attempted sexual assault. He gave an alternative explanation for the presence of his semen on the washcloth. (Tr.p.382, line 19-p.394, line 21). Appellant subsequently gave a written statement repeating his explanation. In those statements he claimed he was outside serving as a lookout while a co-defendant named "Shorty" was inside committing the burglary. Appellant said after about fifteen or twenty minutes he walked into the house and discovered Shorty in Victim's bed: "fucking her from the back." Appellant said: "I got a little excited, so I started to jack off. I used the towel to clean up. I saw it on the ground. I went back outside by the gate and kept watching." (Tr.p.395, line 13-p.406, line 21; States Exhibits Nos. 1 and 2). Appellant gave a similar story in a telephone call to his mother from the jail. (Tr.p.419, line 11-p.420, line 10).

Motion to Suppress

Prior to trial, Appellant made a motion "to suppress the DNA profile that was used for comparison in this case." He articulated two grounds. First Appellant claimed he did not voluntarily consent to giving the DNA sample. Second he claimed even if the consent was voluntary, the use of the DNA sample in the subsequent criminal investigation was outside the scope of his consent. Appellant argued that since the DNA match should be suppressed, all other evidence obtained as a result of that match would be fruit of the poisonous tree, and should also be suppressed. He handed up a written motion in support of the argument which was marked as Court's Exhibit No. 2. (Tr.p.24, line 8-p.25, line 6). The State responded by providing the trial court with a copy of State v. McCord, 349 S.C. 477, 562 S.E.2d 689 (Ct. App. 2002). (Tr.p.25, lines 9-18).

In the written motion Appellant first asserted "that under the totality of circumstances his consent was not voluntary." He argued his decision to give the DNA was "coerced and involuntary" because he was 16 years old and, even though he was accompanied by his parents, felt coerced to comply with law enforcement and signed the consent form because he was under arrest and not free to leave. Next Appellant asserted "that law enforcement exceeded the scope of any alleged consent by retaining his DNA in their in house database." Relying on State v. Forrester[1] and State v. Mattison,[2] Appellant argued he never consented to having his DNA stored in the Richland County in house crime lab, did not know the lab even existed, and that his consent was only given for the September 20, 2011, burglary being investigated at the time he gave the DNA sample. Finally, Appellant asserted "all evidence derived from the illegal retention and

[1] 343 S.C. 637, 541 S.E.2d 837 (2001).

[2] 352 S.C. 577, 575 S.E.2d 852 (Ct. App. 2003).

comparison of his DNA profile should be excluded as fruit of the poisonous tree." He argued that since the only probable cause for his arrest came from the DNA match obtained through "the illegally retained DNA profile," all written and recorded statements to law enforcement following the arrest should also be suppressed. Appellant never argued the issue of his consent should be analyzed under contract principles and never mentioned the word "contract" in his written motion. He also did not argue the Richland County database itself was illegal. (Court's Exhibit No. 2).

Suppression Hearing

The trial court conducted a suppression hearing on Appellant's motion. The State called Deputy John Carwell of the Richland County Sheriff's Department to the stand. Carwell testified he worked in the burglary unit in September of 2010 and was in charge of a particular burglary that brought him into contact with Appellant. On September 21, 2010, the day after that burglary, he obtained a "petition" for Appellant and had Appellant brought to headquarters.[3] Carwell read a DNA consent form to Appellant, after which Appellant signed the form and provided a swab from his mouth as a DNA sample. Carwell testified he did not make any promises to Appellant about what would happen if he provided the DNA sample and did not threaten or coerce him into giving consent. Carwell did not give Appellant any kind of qualifications about how the DNA sample would be used, kept, or maintained, or what it would be compared against. He testified Appellant understood what was being asked of him in providing the DNA sample and did not appear to be under the influence of any drugs or alcohol. (Tr.p.84, line 19-p.89, line 17).

[3] Although Carwell did not elaborate on this testimony, the State presumes he was referring to a juvenile delinquency petition alleging Appellant had participated in a non-violent second degree burglary in 2010, an event which is reflected on his juvenile legal history. (Court's Exhibit No. 9).

On cross-examination Carwell acknowledged he asked Appellant to give a sample of his DNA to compare it against DNA from the scene of a particular burglary and never mentioned it would be put in the Richland County DNA database. Carwell recognized Appellant was 16 years old when he gave consent but explained that regardless of the age of a suspect there was no requirement or internal policy to get parents involved before seeking consent for a DNA sample. He further explained that when a crime victim provides a DNA sample, his or her profile is not stored in the Richland County DNA lab.[4] (Tr.p.91, line 1-p.94, line 11). On re-direct, Carwell testified he made no promises about what the Sheriff's Department would do with Appellant's DNA profile after the conclusion of the investigation or that they would destroy the DNA profile if it did not match anything in the 2010 burglary investigation. (Tr.p.95, lines 3-23). Indeed, on re-cross Carwell testified the point of seeking Appellant's DNA was to compare it to items from the 2010 burglary AND to enter it into the database. (Tr.p.96, lines 1-7).

Next, Appellant testified on his own behalf. He said that when he gave the DNA sample in 2010, Carwell never told him they were going to put his DNA profile in the DNA lab in Richland County, or that they were going to store his DNA. Appellant testified if they had told him they were going to store his DNA, he would not have given the sample. In regard to the current case, he testified that if the police had not told him they had a DNA match, he would not have given statements to Investigator Mauldin. (Tr.p.97, lines 2-25). On cross-examination, Appellant confirmed the solicitor's

[4] This testimony is in contradiction to the claim made in Appellant's brief that Richland County retains DNA profiles of crime victims in the main database. (Brief of Appellant, p.12, n.2). Although a profile of a victim's DNA is developed by the lab for elimination purposes, and a copy of that profile is retained by the lab, there was no evidence a victim's DNA profile is kept in the criminal database used for future investigations.

suspicion that if he wasn't told the police had a DNA match, he would have simply claimed he was never at Victim's house.[5] He then acknowledged his signature on the DNA form and admitted the form said nothing about the sample being used only for the 2010 case or about the sample being destroyed after the initial comparison. (Tr.p.98, line 5-p.99, line 17).

The trial court then heard arguments from Appellant and the State. Appellant argued his situation could be distinguished from McCord because the consent form in McCord included additional language that does not appear on the Richland County consent form. He further argued the State self-limited the scope of any consent he might have given by telling him they wanted his DNA for a particular reason. The State responded that the Richland County consent form was sufficiently broad and similar to the form in McCord to demonstrate consent. The trial judge questioned whether a sixteen year old is capable of giving consent and the State noted age was simply a factor like any other factor that must be considered in making the determination. The State argued Appellant had no reasonable expectation of privacy in the DNA profile once it had been given for a legitimate purpose. The State further argued that even if consent was not valid for some reason, Appellant's statements should not be suppressed because the police would have inevitably discovered he was involved in the crimes though other means. (Tr.p.101, line 7-p.110, line 17). The following morning the trial court heard additional arguments from Appellant and the State, further explaining their respective positions. Ultimately, the trial court denied Appellant's motion to suppress and ruled the DNA results were admissible. (Tr.p.116, line 18-p.127, line 21).

[5] This comment demonstrates Appellant's willingness to offer self-serving testimony and shows his lack of credibility. The State submits it lends support to the trial court concluding Appellant's consent was voluntary under the totality of the circumstances.

Trial

At trial, Investigator Carwell described the Richland County Sheriff's Department's "Consent to Search for D.N.A. Evidence" form which was signed by Appellant before he provided a DNA sample in 2010. He testified Appellant gave voluntary consent and then provided a swab from his mouth. The signed form was admitted into evidence subject to Appellant's previous objection. (Tr.p.311, line 1-p.313, line 20).

Forensic scientist John Barron with the Richland County DNA lab identified the buccal swab given by Appellant and testified he extracted DNA from that swab. The swab was admitted into evidence over Appellant's objection. (Tr.p.325, line 3-p.332, line 24). Forensic scientist Gray Amick with the Richland County DNA lab identified the washcloth from the Victim's house and testified he extracted DNA from seminal fluid on that cloth. Appellant renewed his previous objection to the results of that testing; however, the objection was overruled and Amick testified the fluid was a DNA match to Appellant. (Tr.p.333, line 16-p.347, line 14).

Investigator Josh Mauldin described Appellant's arrest and the various statements he provided in regard to the crimes. Without articulating specific grounds, Appellant renewed his previous objections to each statement and his objections were overruled. (Tr.p.392, lines 7-11; p.396, lines 21-25; p.401, lines 16-23; p.419, line 24-p.420, line 10). After the State rested and again after the defense rested Appellant renewed all of his previous motions and objections. (Tr.p.442, lines 15-17; p.455, lines 16-24).

## ARGUMENT

### I.

**Appellant's argument that the trial court erred in refusing to suppress all evidence flowing from the retention and use of his DNA profile to match seminal fluid discovered at the crime scene is not preserved for appellate review because the specific grounds argued on appeal were neither raised to nor ruled upon by the trial court, and even if preserved, the evidence was properly admitted because Appellant's expectation of privacy in his saliva sample and the DNA contained therein was extinguished when he voluntarily consented to give the sample to State authorities without any limitation on the scope of his consent.**

Appellant argues the trial court erred in refusing to suppress all evidence flowing from the retention and subsequent use of his DNA profile because his DNA was taken when he was juvenile and maintained in a database not authorized by state law, and because this use exceeded the scope of his "contractual consent." His argument hinges on the premise that the taking and use of his DNA should be analyzed under contract principles rather than under a standard Fourth Amendment exclusionary rule analysis. Appellant argues: (1) the sheriff had no "contractual right" to keep his DNA past the time necessary to test it in connection with the 2010 burglary because the "contract" to provide a DNA sample was limited solely to the sheriff's investigation of that burglary; (2) the "contract" is voidable because he made it prior to turning eighteen and never ratified it after reaching the age of majority; and (3) the "contract" is void *ab initio* as an illegal contract because the sheriff has no authority to maintain its own DNA database where the sole repository of citizens' DNA profiles is maintained by the State Law Enforcement Division (SLED) pursuant to the State DNA Database Act.

Issue Preservation

Initially, the State submits Appellant's argument is not preserved for appellate review because it was not specifically raised to and ruled upon by the trial court. State v. Brown, 402 S.C. 119, 125 n.2, 740 S.E.2d 493, 496 n.2 (2013) (describing the four basic requirements for preserving issues at trial for appellate review, including the requirement that the issue must have been raised to and ruled upon by the trial court); State v. Policao, 402 S.C. 547, 556, 741 S.E.2d 774, 778 (Ct. App. 2013) ("The general rule of issue preservation is if an issue was not raised to and ruled upon by the trial court, it will not be considered for the first time on appeal."); State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 693-94 (2003). The South Carolina Rules of Evidence provide that:

> Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, **and** . . . In case the ruling is one admitting evidence, **a timely objection or motion to strike appears of record, stating the specific ground of objection**, if the specific ground was not apparent from the context.

Rule 103, SCRE (emphasis added). This rule is generally in accord with prior South Carolina law which requires a contemporaneous objection with specific grounds to preserve an error for review. State v. Byers, 392 S.C. 438, 446, 710 S.E.2d 55, 59 (2011) ("An objection should be addressed to the trial court in a sufficiently specific manner that brings attention to the exact error."); State v. Hoffman, 312 S.C. 386, 440 S.E.2d 869 (1994) (finding that a contemporaneous objection is required to preserve an issue for appellate review); State v. Bailey, 253 S.C. 304, 170 S.E.2d 376 (1969) (holding that specific grounds are required and that a general objection preserves nothing).

At trial, Appellant articulated two grounds in support of his motion to suppress. First he claimed he did not voluntarily consent to giving the DNA sample. Second he

claimed even if the consent was voluntary, the use of the DNA sample in the subsequent criminal investigation was outside the scope of his consent. Appellant argued that since the DNA match should be suppressed, all other evidence obtained as a result of that match would be fruit of the poisonous tree, and should also be suppressed. He handed up a written motion in support of the argument which was marked as Court's Exhibit No. 2. (Tr.p.24, line 8-p.25, line 6). Appellant never argued his consent to give the DNA sample should be analyzed under contract principles and he never mentioned the word "contract" in his written motion to suppress. He also did not argue the Richland County database itself was illegal. (Court's Exhibit No. 2). As a result, the trial court was not given an opportunity to make a ruling about the propriety of an analysis under contract law or the specific contract grounds raised by Appellant in this appeal. Likewise, the trial court was deprived of the opportunity to consider the underlying legality of the Richland County DNA database. Instead, the trial court reviewed Appellant's motion to suppress under traditional Fourth Amendment principles, denied that motion, and ruled the DNA results were admissible. (Tr.p.116, line 18-p.127, line 21). Because the argument and grounds now raised in this appeal were neither raised to nor ruled upon by the trial court, they are not preserved for review. Rule 103, SCRE; Brown, supra; Byers, supra; Bailey, supra.

To the extent this Court finds Appellant's current argument is adequately preserved for review, the State nonetheless submits it is without merit because Appellant's underlying premise is flawed. A motion to suppress evidence on grounds it was taken without consent, or that its use exceeded the scope of the consent that was given, falls squarely within the ambit of the Fourth Amendment and its prohibition

against unreasonable searches and seizures. Thus, the trial court properly considered Appellant's motion to suppress under a traditional Fourth Amendment analysis, and appropriately applied that analysis before deciding to admit the DNA evidence.

Standard of Review

In criminal cases, an appellate court sits to review only errors of law, and it is bound by the trial court's factual findings unless they are clearly erroneous. State v. Brown, 401 S.C. 82, 87, 736 S.E.2d 263, 265 (2012), cert. denied, ___ U.S. ___, 133 S. Ct. 2779 (2013); State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006); State v. Wilson, 345 S.C. 1, 6, 545 S.E.2d 827, 829 (2001); State v. Manning, 400 S.C. 257, 264, 734 S.E.2d 314, 317 (Ct. App. 2012). The admission or exclusion of evidence is left to the sound discretion of the trial judge, whose decision will not be reversed on appeal absent an abuse of discretion. Brown, 401 S.C. at 87, 736 S.E.2d at 265; State v. Saltz, 346 S.C. 114, 121, 551 S.E.2d 240, 244 (2001). An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support. Brown, 401 S.C. at 87, 736 S.E.2d at 265; State v. Jennings, 394 S.C. 473, 477–78, 716 S.E.2d 91, 93 (2011); State v. Morris, 376 S.C. 189, 205-06, 656 S.E.2d 359, 368 (2008). The appellate court does not re-evaluate the facts based on its own view of the preponderance of the evidence, but simply determines whether the trial judge's ruling is supported by any evidence. Wilson, 345 S.C. at 6, 545 S.E.2d at 829. Thus, when reviewing a Fourth Amendment search and seizure case, an appellate court must affirm the trial court's ruling if there is any evidence to support it; the appellate court may reverse only for clear error. Brown, 401 S.C. at 87, 736 S.E.2d at

265; State v. Missouri, 361 S.C. 107, 111, 603 S.E.2d 594, 596 (2004); State v. Pichardo, 367 S.C. 84, 95-96, 623 S.E.2d 840, 846 (Ct. App. 2005).

Law / Analysis

The Fourth Amendment to the United States Constitution protects people from unreasonable searches and seizures and provides that no warrants shall be issued except upon probable cause, supported by oath or affirmation and particularly describing the place to be searched and the persons or things to be seized. U.S. Const. amend. IV. The South Carolina Constitution provides similar protection against unreasonable searches and seizures and unreasonable invasions of privacy. S.C. Const. art. I, § 10. A search compromises the individual interest in privacy; a seizure deprives the individual of dominion over his or her person or property. Brown, 401 S.C. at 88, 736 S.E.2d at 266; State v. Wright, 391 S.C. 436, 442, 706 S.E.2d 324, 327 (2011) (quoting Horton v. California, 496 U.S. 128, 133 (1990)). The Fourth Amendment itself provides no remedy for a violation of the warrant requirement. Davis v. United States, ___ U.S. ___, 131 S.Ct. 2419 (2011). However, the United States Supreme Court has fashioned a judicially-created remedy, the exclusionary rule, which is a deterrent sanction by which the prosecution is barred from introducing evidence obtained in violation of the Fourth Amendment. Davis, 131 S.Ct. at 2423; Brown, 401 S.C. at 88, 736 S.E.2d at 266. Warrantless searches and seizures are unreasonable absent a recognized exception to the warrant requirement. Brown, 401 S.C. at 89, 736 S.E.2d at 266; Wright, 391 S.C. at 442, 706 S.E.2d at 327. These exceptions include the following: (1) search incident to a lawful arrest, (2) hot pursuit, (3) stop and frisk, (4) automobile exception, (5) the plain view doctrine, (6) consent, and (7) abandonment. Brown, 401 S.C. at 89, 736 S.E.2d at 266;

State v. Dupree, 319 S.C. 454, 456, 462 S.E.2d 279, 287 (1995); State v. Moore, 377 S.C. 299, 309, 659 S.E.2d 256, 261 (Ct. App. 2008). Where the accused voluntarily consents to give a biological sample to law enforcement without any limitation on the scope of his consent, it extinguishes his expectation of privacy in that sample. McCord, 349 S.C.at 485, 562 S.E.2d at 693.

Consent to Search and Provide DNA Sample

Appellant contends he did not consent to provide a sample of his DNA because the totality of the circumstances shows he did not knowingly and voluntarily waive his privacy rights in his DNA profile. The State disagrees.

Whether consent to search was voluntary or the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of the circumstances. State v. Wallace, 269 S.C. 547, 550, 238 S.E.2d 675, 676 (1977); State v. Mattison, 352 S.C. 577, 584, 575 S.E.2d 852, 855 (Ct. App. 2003). The State bears the burden of establishing the voluntariness of the consent. Schneckloth v. Bustamonte, 412 U.S. 218 (1973); Mattison, 352 S.C. at 584, 575 S.E.2d at 855. The "totality of the circumstances" test applies whether the consent was given in a non-custodial or custodial situation. Wallace, 269 S.C. at 550, 238 S.E.2d at 676; Mattison, 352 S.C. at 584, 575 S.E.2d at 855. In a custodial situation, the custodial setting is a factor to be considered in determining whether consent was voluntarily given. Wallace, 269 S.C. at 552, 238 S.E.2d at 677; Mattison, 352 S.C. at 584, 575 S.E.2d at 855. Custody alone, however, is not enough in itself to demonstrate a coerced consent to search. Mattison, 352 S.C. at 584, 575 S.E.2d at 855; State v. Brannon, 347 S.C. 85, 90, 552 S.E.2d 773, 775 (Ct. App. 2001).

The issue of voluntary consent, when contested by contradicting testimony, is an issue of credibility to be determined by the trial judge. Mattison, 352 S.C. at 584-85, 575 S.E.2d at 856; State v. Dorce, 320 S.C. 480, 482, 465 S.E.2d 772, 773 (Ct. App. 1995). A trial judge's conclusions on issues of fact regarding voluntariness will not be disturbed on appeal unless so manifestly erroneous as to be an abuse of discretion. Mattison, 352 S.C. at 585, 575 S.E.2d at 856; State v. Rochester, 301 S.C. 196, 200, 391 S.E.2d 244, 247 (1990) (dealing with voluntariness of a statement); State v. Greene, 330 S.C. 551, 557, 499 S.E.2d 817, 820 (Ct. App. 1997).

At the suppression hearing, Deputy Carwell testified he read the DNA consent form to Appellant, after which Appellant signed the form and provided a swab from his mouth as a DNA sample. On the form Appellant acknowledges: "This written permission, is being given be me, to the above named Investigator, freely, voluntarily, and without threats or promises of any kind." (State's Exhibit # 4 [Richland County Sheriff's Department Consent to Search for D.N.A. Evidence] & Court's Exhibit # 2). Carwell testified he did not make any promises to Appellant about what would happen if he provided the DNA sample and did not threaten or coerce him into giving consent. He testified Appellant understood what was being asked of him in providing the DNA sample and did not appear to be under the influence of any drugs or alcohol. (Tr.p.84, line 19-p.89, line 17). On cross-examination, Carwell acknowledged Appellant was sixteen years old when he gave consent but explained that regardless of the age of a

suspect there was no requirement or internal policy to get parents involved before seeking consent for a DNA sample.[6] (Tr.p.91, line 1-p.94, line 11).

Appellant testified that when he gave the DNA sample in 2010 Carwell never told him they were going to put his DNA profile in the DNA lab in Richland County, or that they were going to store his DNA, and claimed if they had told him, he would not have given the sample. (Tr.p.97, lines 2-25). However, on cross-examination, Appellant acknowledged his signature on the DNA form and admitted the form said nothing about the sample being used only for the 2010 case, or about the sample being destroyed after the initial comparison. (Tr.p.98, line 5-p.99, line 17). Appellant never claimed he was promised the DNA would not be stored or used for other purposes, offered no testimony to suggest he felt threatened or coerced to consent, and never claimed his age, maturity, education, intelligence or lack of experience rendered his decision involuntary.

The trial court denied Appellant's motion to suppress and ruled the DNA results were admissible because Appellant consented to give the sample in 2010. (Tr.p.116, line 18-p.127, line 21). Based on the existence of evidence in the record, particularly the signed consent form, the State submits there was no abuse of discretion in the trial court's ruling that Appellant's consent was voluntarily given. It was a conclusion of fact determined from the totality of the circumstances which was not manifestly erroneous; therefore, the State submits it should be affirmed. Rochester, supra; Mattison, supra.

Scope of Search: Retention and Use of DNA Profile

At trial Appellant also maintained that even if he did voluntarily consent to initially give the DNA sample, the Sheriff's Department exceeded the permissible scope

[6] While age is an appropriate factor to consider in determining whether an accused gave voluntary consent, the ultimate determination is based on a consideration of the totality of the circumstances. U.S. v. Boone, 245 F.3d 352 (4th Cir. 2001).

of consent when it kept the DNA profile in an in-house database and later used it to match him to the crime scene. The State disagrees.

Under our state constitution suspects are free to limit the scope of the searches to which they consent. State v. Forrester, 343 S.C. 637, 648, 541 S.E.2d 837, 843 (2001); State v. Funderburk, 367 S.C. 236, 240, 625 S.E.2d 248, 250 (Ct. App. 2006); Mattison, 352 S.C. at 585, 575 S.E.2d at 856. When relying on the consent of a suspect, a police officer's search must not exceed the scope of the consent granted or the search becomes unreasonable. Forrester, 343 S.C. at 648, 541 S.E.2d at 843; Funderburk, 367 S.C. at 240, 625 S.E.2d at 250; Mattison, 352 S.C. at 585, 575 S.E.2d at 856. Even in a situation where police have received a general and unqualified consent, " 'the police do not have carte blanche to do whatever they please.'" Forrester, 343 S.C. at 648-49, 541 S.E.2d at 843 (quoting 3 Wayne R. LaFave, *Search and Seizure* § 8.1(c), at 612 (3d ed. 1996)). The scope of the consent is measured by a test of "'objective' reasonableness - what would the typical reasonable person have understood by the exchange between the officer and the suspect?" Florida v. Jimeno, 500 U.S. 248, 251 (1991); Mattison, 352 S.C. at 585-86, 575 S.E.2d at 856.

At the suppression hearing, Carwell did not give Appellant any kind of qualifications about how the DNA sample would be used, kept, or maintained, or what it would be compared against. (Tr.p.84, line 19-p.89, line 17). He testified he made no promises about what the Sheriff's Department would do with Appellant's DNA profile after the conclusion of the investigation or that they would destroy the DNA profile if it did not match anything in the 2010 burglary investigation. (Tr.p.95, lines 3-23). Indeed,

Carwell testified the point of seeking Appellant's DNA was both to compare it to items from the 2010 burglary AND to enter it into the database. (Tr.p.96, lines 1-7).

Appellant testified that when he gave the DNA sample in 2010 Carwell never told him they were going to put his DNA profile in the DNA lab in Richland County, or that they were going to store his DNA, and claimed if they had told him, he would not have given the sample. (Tr.p.97, lines 2-25). However, on cross-examination, Appellant acknowledged his signature on the DNA form and admitted the form said nothing about the sample being used only for the 2010 case or about the sample being destroyed after the initial comparison. (Tr.p.98, line 5-p.99, line 17). Appellant never claimed he was promised the DNA would not be stored or used for other purposes.

The trial court denied Appellant's motion to suppress and ruled the DNA results were admissible because Appellant consented to give the sample in 2010. (Tr.p.116, line 18-p.127, line 21). The State submits the trial court did not err in denying the motion to suppress because evidence exists to support this finding. The record indicates Appellant imposed no limits on the scope of the search he granted when he signed the consent to search form. On the form he says: "I am aware that any evidence obtained as a result of this search can be used against me in a court of law." The State submits that a reasonable person would have understood that consent to encompass the Sheriff Department's retention and possible future use of the DNA sample.

Appellant argues McCord, supra, supports his position because the federal written consent form at issue contained broader language than the Sheriff Department's waiver in Appellant's case. In particular, the federal form noted the blood sample could be used "for whatever purpose the Violent Crime Task Force Department may see fit." Appellant

contends that without this additional language the consent form in his case was not broad enough to extend his consent beyond testing for the 2010 burglary. The State disagrees and submits Appellant has misconstrued McCord. The compelling portion of both the federal form and the consent form in Appellant's case includes language that the evidence may be used against the accused in court. In addition, neither form puts limitations on the scope of consent. The federal form may be stronger due to the additional language about use of the sample, but both forms demonstrate a grant of consent without limitations on use. Again, under a totality of circumstances this evidence supports the trial court's determination, and that determination should be affirmed.

Withdrawal of Consent

Appellant suggests he effectively withdrew his contractual consent when he failed to ratify it upon reaching the age of majority.[7] However, as explained above, Appellant gave written consent for the Sheriff to take his DNA, placed no limits on the scope of that consent, and made no statement or act to withdraw that consent. Conduct falling short of "an unequivocal act or statement of withdrawal" is not sufficiently indicative of an intent to withdraw consent. Mattison, 352 S.C. at 587, 575 S.E.2d at 858; United States v. Alfaro, 935 F.2d 64, 67 (5th Cir. 1991). Effective withdrawal of consent to search requires unequivocal conduct, in the form of either an act, statement or some combination of the two that is inconsistent with consent previously given. Mattison, 352 S.C. at 585, 575 S.E.2d at 858; Burton v. United States, 657 A.2d 741 (D.C. 1994). The State submits Appellant's failure to ratify his previously given consent when he turned eighteen falls far short of an unequivocal act or statement of withdrawal. See Mattison, 352 S.C. at

[7] Appellant claims when he "discovered that his DNA had been kept, he asked that it be suppressed." To the contrary, Appellant gave a statement implicating himself in the crimes when he learned his DNA had been kept, and only asked that it be suppressed when the case was called for trial.

585, 575 S.E.2d at 858 (holding Mattison's act of lowering his hands as the officer searched his groin area fell short of an unequivocal act or statement of withdrawal).

For all of the reasons above, the State submits the trial court's denial of Appellant's motion to suppress did not constitute an abuse of discretion. Therefore, Appellant's conviction should be affirmed. To the extent Appellant continues to argue his consent should be analyzed under contract principles, the State submits he should attempt to advance that argument in the proper forum. Appellant is free to pursue a civil action for breach of contract, specific performance, damages, or whatever other remedy he believes is applicable to his alleged contract with the Sheriff's Department.

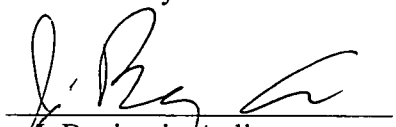
## CONCLUSION

For all of the foregoing reasons, the State respectfully requests that the judgment, conviction, and sentence of the lower court be affirmed.

Respectfully submitted,

ALAN WILSON
Attorney General

J. BENJAMIN APLIN
Assistant Attorney General

BY: 
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ATTORNEYS FOR RESPONDENT

Columbia, South Carolina
September 26, 2013

STATE OF SOUTH CAROLINA
In The Court of Appeals



APPEAL FROM RICHLAND COUNTY
G. Thomas Cooper, Jr., Circuit Court Judge

Appellate Case No. 2012-212242

THE STATE, .....RESPONDENT

v.

EDWARD M. DUNN, .....APPELLANT.

**DESIGNATION OF MATTER**

In addition to the matter designated by Appellant, Respondent proposes the following to be included in the Record on Appeal:

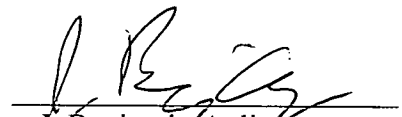
**1.** Trial Transcript pages 289-293.

To facilitate the preparation of the Final Brief, Respondent requests that counsel for Appellant retain the page numbers of the trial transcript in the Record on Appeal, in addition to the new page numbers.

The undersigned hereby certifies this Designation contains no matter which is irrelevant to this appeal.

ALAN WILSON
Attorney General

J. BENJAMIN APLIN
Assistant Attorney General

BY: 

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THE STATE, .....RESPONDENT

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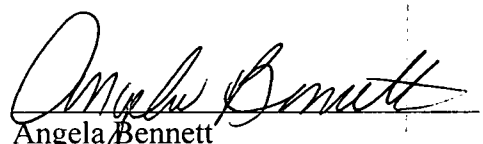
**PROOF OF SERVICE**

---

I, Angela Bennett, Executive Legal Assistant, hereby certify that I have served the within *Initial Brief of Respondent* and *Designation of Matter*, both dated September 26, 2013, on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to his attorney of record:

David Alexander, Appellate Defender
S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, SC 29211-1589

I further certified that all parties required by Rule to be served have been served. This 26th, day of September, 2013.



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ALAN WILSON
ATTORNEY GENERAL

September 26, 2013



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The State v. Edward M. Dunn
Appellate Case No. 2012-212242

Dear Mr. Alexander:

I am enclosing two (2) copies of the Initial Brief of Respondent and Designation of Matter in the above-referenced case.

Sincerely,

J. Benjamin Aplin
Assistant Attorney General
S.C. Bar No. 8729

JBA/ab
Enclosures

cc: Honorable Jenny A. Kitchings (original enclosed)
Victim Services