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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Charleston County

Honorable Bentley Price, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

KYLE MOUZON,

APPELLANT

APPELLATE CASE NO. 2023-001755

FINAL REPLY BRIEF OF APPELLANT

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ARGUMENT IN REPLY

That the passenger was a "non-confidential" informant does not support a finding of probable cause. The inevitable discovery doctrine does not excuse the police action in searching Appellant's vehicle in violation of the Fourth Amendment.

Respondent argues that Herron's statements carry credibility sufficient to support probable cause because she was a face-to-face informant who "could potentially be held accountable if she provided false information to police. Also, she made incriminating admissions to officers by admitting to being a drug user and using drugs with Appellant which enhanced her reliability." IBOR pg. 8. Respondent further argues that under the doctrine of inevitable discovery the evidence would have been found by lawful means during an inventory search of the vehicle. Both arguments are unpersuasive.

Credibility and Probable Cause

In State v. Bellamy, 323 S.C. 199, 473 S.E.2d 838 (Ct. App. 1996), aff'd, 336 S.C. 140, 519 S.E.2d 347 (1999) this Court considered a non-confidential informant's credibility where the search warrant affidavit failed to fully establish his credibility. This Court looked at three specific considerations in determining the credibility of the known informant. "First, an informant's *detailed statement* regarding his *first-hand observations* can provide the informant with "built in credibility" because, unlike a paid informant, an eyewitness does not have the opportunity to establish a record of previous reliability." Id. at 204, 473 S.E.2d at 841 (emphasis added). "Second, a non-confidential informant should be given a higher level of credibility because he exposes himself to public view and to possible civil and criminal liability should the information prove to be false." Id. "Third, the *specificity of the informant's statements* coupled

with the *absence of ulterior motives* has been held sufficient to constitute reliability." Id. at 205, 473 S.E.2d at 842 (emphasis added).

Applying these considerations to the case *sub judice* shows that Herron's statements were not at all credible. First, her statements were not detailed or based on first-hand observations from that evening. Herron told officers that narcotics could possibly be in the vehicle and named different places within the vehicle for officers to search. R. 74, ll. 4-10. Herron did not specify what type of narcotics would be in the vehicle or the amount of the narcotics that would be in the vehicle. Herron's basis of knowledge was alleged past drug use with Appellant, but she gave officers no indication that she had recently used drugs with Appellant in the vehicle or that she had recently seen drugs in the vehicle. R. 74, ll. 9-22. Her statement boiled down to some unknown quantity and type of narcotics *could possibly* be in the vehicle in any number of places based on her prior unspecific use of narcotics with Appellant at some point in the past.

Second, Herron's statements would not have been likely to expose her to any potential future liability because the statements were equivocal and were not self-incriminating. She never definitively told officers that narcotics were in the vehicle, and she admitted at trial that she did not know if narcotics were in the vehicle at the time of the incident. Further, she did not make any self-incriminating statements. Possessing, manufacturing, trafficking, and distributing narcotics are criminal offenses. Using narcotics, however, is not a criminal offense. All Herron admitted to was being a drug user, which is not a crime and does not expose her to any liability.

Thirdly, Herron's statements lacked specificity and were coupled with an ulterior motive. Herron had learned that evening that Appellant had purportedly been cheating on her for the entirety of their roughly eighteen-month long relationship. The couple was actively arguing about the alleged cheating when law enforcement approached the vehicle. Herron, who was

admittedly intoxicated and angry, was described by law enforcement as emotional, upset, talkative, a little angry, distraught, and tearful. R. 67, ll. 4-8; R. 79, ll. 11-R. 81, l. 20; R. 85, ll. 1-10; R. 88, ll. 3-10. Herron alleged that drugs were in the vehicle because she was an upset, jilted lover, not because she had actual knowledge that narcotics were in the vehicle. She was not acting as a concerned citizen but was acting vindictively against Appellant whom she had accused of cheating.

The considerations articulated in Bellamy, *supra*, weigh against the credibility of Herron. Her lack of specificity, her lack of recent firsthand observations, her admitted lack of knowledge as to whether narcotics were in the vehicle at the time of the search, and her ulterior motive for making the statements significantly undermines any credibility an officer, or reviewing court, would reasonably rely on to find the warrantless search did not violate Appellant's Fourth Amendment rights.

Additionally, there is nothing in the record showing any corroboration of Herron's statements prior to the search. The police relied solely on the statements of an intoxicated, angry, upset, emotional girlfriend as the sole basis upon which to enter and search Appellant's truck. Respondent does not point to any behavior of Appellant that would support a suspicion of illegal activity – such as nervousness, the odor of drugs or alcohol, furtive movements, or the like - because none exist in the record. The record reflected Appellant was cool, calm, collected, and cooperative. Under the totality of the circumstances test, the police lacked probable cause as there was not a practical, nontechnical probability that evidence of a crime would have been discovered somewhere within Appellant's truck. See State v. Bonilla, 429 S.C. 253, 838 S.E.2d 1 (Ct. App. 2019) ("Probable cause exists where there is a justifiable determination, based upon the totality of the circumstances and in view of all the evidence

available ... at the time of the search, that there exists a practical, nontechnical probability that a crime is being committed or has been committed and incriminating evidence is involved.") (internal citations quotations omitted).

Inevitable Discovery

Respondent's argument that the lack of probable cause is cured by the doctrine of inevitable discovery is also unpersuasive as there is nothing in the record that establishes the police would have eventually discovered narcotics in Appellant's truck. The evidence in the record in fact militates against a finding that the doctrine of inevitable discovery would apply.

The exclusionary rule provides that evidence obtained as a result of an illegal search must be excluded. State v. Sachs, 264 S.C. 541, 560, 216 S.E.2d 501, 511 (1975). The inevitable discovery doctrine is an exception to the exclusionary rule and states that if the prosecution can establish by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means, the information is admissible despite the fact it was illegally obtained. Nix v. Williams, 467 U.S. 431, 443–44 (1984). The fruit of the poisonous tree doctrine, most often associated with violations of the Fourth Amendment's prohibition of unreasonable searches and seizures, prohibits the use of evidence obtained directly or indirectly through an unlawful search or seizure. Wong Sun v. U.S., 371 U.S. 471, 484 (1963).

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)).

Nix is instructive as to the specificity of the evidence required to satisfy the State's burden of proving that inevitable discovery applies. 467 U.S. at 448-49. In Nix, the defendant kidnapped and murdered a child on Christmas Eve. Police were engaged in a massive, systematic search for the child's body. While the search was ongoing, Williams led the police to the child's body. The search was halted. The evidence surrounding Williams' statements and helping police to find the body were suppressed because of violations of his Sixth Amendment right to counsel. Id. at 434-436.

However, the United States Supreme Court held that the state met its burden of showing that the police would have eventually discovered the child's body even if the defendant had not been questioned by police in violation of his Sixth Amendment right to counsel. See id. at 448-49. The prosecution presented the testimony of the agent in charge of the search. The agent testified that he had marked off two entire counties in grids and instructed the search teams to check all roads, ditches, culverts, abandoned farm buildings or any other places where a child's body would be found. Teams of four to six persons were assigned specific parts of the grid. The child's body was ultimately found in a culvert, exactly where the searchers had been instructed to look, and only two and one half miles from where the search had been suspended. The agent testified that the child's body would have been found within several hours of the time it was actually found had the search not been halted. See id. The Supreme Court held,

> *On this record* it is clear that the search parties were approaching the actual location of the body, and we are satisfied, along with three courts earlier, that the volunteer search teams would have resumed the search had Williams not earlier led the police to the body and the body inevitably would have been found.

Nix at 449-50 (emphasis added).

In State v. Brown, 389 S.C. 473, 698 S.E.2d 811 (Ct. App. 2010)[1] this Court applied Nix in determining that the inevitable discovery doctrine did not apply to permit the admission of cocaine seized during the warrantless search of the defendant's duffle bag. Brown was riding as a passenger in a car when an officer saw Brown drinking what he believed to be a beer and initiated a traffic stop. After confirming that Brown had been drinking a beer, Brown was removed from the car and arrested for an open container violation. When the officer removed Brown from the car, he placed Brown's duffle bag, which had been between his feet on the floorboard, on the sidewalk. While Brown was secure in the officer's patrol call, the officer searched the duffle bag and found cocaine concealed inside of a Fritos bag. The officer then ran the driver's information, learned that the driver had a suspended license and arrested the driver. Id. at 478; 698 S.E.2d at 814.

At trial, Brown moved to suppress the drugs as a violation of his Fourth Amendment rights. The trial court denied the motion finding sufficient probable cause to stop the car and finding the search proper as a search incident to a lawful arrest. Id. at 479, 698 S.E.2d at 814. On appeal, this Court properly found that the search was not a lawful search incident to arrest under the newly announced framework in Arizona v. Gant, 556 U.S. 332 (2009) (limiting New York v. Belton, 453 U.S. 454 (1981) and Thornton v. U.S., 541 U.S. 615 (2004). Id. at 480-481, 698 S.E.2d at 815. This Court held the automobile exception did not apply because the officer lacked probable cause to search the duffle bag. Id. at 482-483, 698 S.E.2d at 815-816. Finally,

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1 Reversed on other grounds by State v. Brown, 401 S.C. 82, 736 S.E.2d 263 (2012) wherein our Supreme Court agreed with this Court that the search incident to arrest exception did not apply in the case under Gant but concluded that Brown's conviction would stand because the exclusionary rule did not apply to preclude admission of the drug evidence where the officer had relied upon existing appellate precedent at the time he conducted the search.

this Court held that the doctrine of inevitable discovery was unavailable because the State had not met its burden *at trial* of establishing the evidence would inevitably have been discovered during an inventory search. This Court wrote,

> *The State provided very scant testimony, at best,* that the duffel bag or car would have been taken into police custody after Brown and the driver were arrested. Although commonsense dictates the police would have done exactly this, *we are confined by the law that the prosecution bears the burden to establish by a preponderance of the evidence that the evidence would inevitably have been discovered.* Nix, 467 U.S. at 443–44. Additionally, police must follow standard procedures to conduct an inventory search and *no such testimony was presented.* Thus, we conclude the inevitable discovery doctrine does not apply and the trial court erred by failing to exclude the evidence. See State v. Grant, 174 S.C. 195, 177 S.E. 148, 149 (1934) ("The right of people to go about their business without being subjected to undue search and seizure ... by the authorities of the law .... are essential to an orderly government.").

Id. at 483-4844, 698 S.E.2d at 816-817 (emphasis added).

On the record in this matter, there is no evidence or testimony that the officers would have inevitably discovered the narcotics through lawful means by way of an inventory search. Initially, there is no indication from the officer's testimony that Appellant would have been arrested solely for driving on a suspended license. In fact, Appellant was only arrested after the narcotics field tested positive, even though the officer knew of Appellant's DUS status prior to that point. R. 37, ll. 12-13. It is just as likely that the officer could have released Appellant with a citation for the DUS without impounding his vehicle as it is likely that the officer could have arrested Appellant for DUS.

Second, and most critically, there is no testimony from any of the officers regarding the standard procedures and policies that must be followed when conducting an inventory search. The State never argued at trial that an inventory search was applicable in this case. The concept of an inventory search was only mentioned by defense counsel in arguing that there was no indication from the discovery that the officers followed any policies or procedures with respect

to performing an inventory search or filling out an inventory search form. R. 4, ll. 12-25. Further, there is no testimony that even if Appellant had been arrested solely on the DUS that police would have towed his vehicle. It could have been parked safely on the side of the street, released to Appellant's girlfriend, or released to a third party. The record does not reflect what actions the police could have or would have taken had they arrested Appellant solely for DUS.

Finally, during the search the officers had to be directed by Herron to look in what was essentially a hidden factory compartment.[2] Officer Bailey testified,

> I believe at that time, we found out that the center console was --it lifted up and there was -- the -- as we're searching there, the -- *the young lady said that no, no, no, it's in a locked -- the -- the bottom part is locked, there's a secret compartment.*

R. 27, ll. 8-17. The compartment where narcotics were eventually located was not plainly or apparently visible, such as a glove box or the main center console is plainly visible. Thus, it is even more unlikely that *had* the officers arrested Appellant solely for the DUS that they would not have found the narcotics during a standard inventory search as the narcotics were in a "secret compartment." R. 27, ll. 16-20; R. 69, ll. 2-6.

For a reviewing court to hold that inevitable discovery cured the warrantless search of Appellant's truck would require the court to assume numerous facts that are simply not in evidence. The State was aware that it bore the burden, at trial, "to establish the circumstances constituting an exception to the general prohibition against warrantless searches." Brown at 480,

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2 Officer Bailey described the compartment as

> [I]n this style of pickup truck, the -- the -- the seats are separate but the center console is also like a third row -- third seating right in the middle that turns it into a bench seat. But if you put it down, it has the cup holders in the top. And then if you lift it all the way up, there's actually a lockbox on -- that you can use a key to open.

R. 28, ll. 4-13

698 S.E.2d at 815 citing State v. Weaver, 361 S.C. 73, 81, 602 S.E.2d 786, 790 (Ct. App. 2004). This maxim is true regardless of what exception the State may rely upon. It would be improper for a reviewing court to assume facts, even commonsense facts, where the record does not reflect evidence of the circumstances creating the exception to warrantless searches.

CONCLUSION

Based on the foregoing argument, as well as the argument set forth in Appellant's Initial Brief, Appellant respectfully requests that this Court reverse the lower court's ruling, suppress the illegally obtained evidence and reverse his conviction and sentence.

Jessica M. Saxon
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This 25th day of February, 2025.

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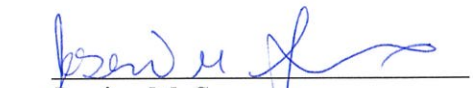
CERTIFICATE OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies true copies of the Final Reply Brief of Appellant in the above-referenced case have been served upon Ambree M. Muller, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS), this 25th day of February, 2025.



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