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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Charleston County
Honorable David P. Caraker, Jr., Circuit Court Judge
Appellate Case No. 2024-001615

STATE OF SOUTH CAROLINA,

Appellant,

vs.

ELISABETH ANNE GERMAIN,

Respondent.

BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

1. Notwithstanding the contradiction in the State's Statement of Issue on Appeal, is it the law of the case that a pre-trial dismissal is not procedural error because the State conceded in their initial brief the Defendant's arrest was unlawful and chose not to challenge the trial court's dismissal of the Resisting Arrest indictment?
2. Was it an abuse of discretion, and therefore error, for the trial judge to grant the Defendant's request to dismiss two misdemeanor indictments after a pretrial hearing during which testimony and body worn camera video was reviewed by the court that showed a clearly egregious violation of the Defendant's rights under the Fourth Amendment when law enforcement performed a warrantless arrest by forcibly removing her from her home absent exigent circumstances?

STATEMENT OF THE CASE

On the evening of July 19, 2023, Elisabeth Germain was taken into custody via a warrantless arrest for two misdemeanor charges: Resisting Arrest in violation of South Carolina Code of Laws §16-9-320(A) and Unlawful Use of 911 in violation of South Carolina Code §23-47-80. She was indicted for both offenses by a Charleston County Grand Jury on November 6, 2023. Her case was called for trial on August 21, 2024. Prior to trial Germain, by and through her attorney, Scott Bischoff, filed a Motion to Dismiss due to egregious Fourth Amendment violations by the arresting officers. The presiding trial judge the Honorable David Caraker held a pretrial hearing on the first day of trial without objection from the State. After the hours-long hearing, Judge Caraker ruled in favor of the Defense and dismissed both indictments. His Order stating the reasons for dismissal was filed on September 24, 2024. The State subsequently filed a timely notice of appeal and their initial brief was filed on February 3, 2025. This Respondent's brief follows.

STATEMENT OF FACTS

On the evening of July 18, 2023, and into the early morning hours of July 19, 2023, Elisabeth Germain, a former sexual assault survivor, and two deputies were involved in an incident outside Germain's home in Charleston, South Carolina. (Tr. 5). The incident consisted of the two deputies, Deputy Hendricks and Deputy Durista, working in concert with one another to arrest Germain for Unlawful Use of 911 and Resisting Arrest. Germain made multiple calls to 911 the night of her arrest regarding what she felt was threatening and intimidating behavior by her live-in boyfriend at the time who refused to leave the house where they were living together. (Tr. 6). It took government officials 73 minutes to respond to Germain's house from the time she made her initial 911 call, during which she spoke clearly, calmly and respectfully when she was asking for help. (Tr. 103).

The excessive delay in anyone responding to her requests for help was emotionally triggering for Germain, as was evident on the bodyworn camera video both deputies wore the night of her arrest. (Tr. 105). After several exchanges back and forth with Germain while she was inside her home, and after being told by one of the deputies her refusal to come outside was grounds to charge her with resisting arrest, that she was making things worse by not coming outside where they were waiting for her, and that he would kick her door in if she did not open the door, Germain cracked open the door to her house. (Tr. 107). She was then immediately and forcibly removed from her house by deputies while she told them they were not welcome in her home. Neither of the deputies had an arrest warrant nor a search warrant.

Later that night she was charged with two misdemeanor offenses: 1. Unlawful Use of 911 and 2. Resisting Arrest. Her case was called for trial on August 21, 2024. Prior to swearing a jury, and after Germain by and through her attorney, Scott Bischoff, filed a Motion to Dismiss, the

presiding trial judge the Honorable David Caraker held a pretrial hearing without objection from the State. During the hours-long hearing, Judge Caraker, who himself is a former police officer, heard testimony from both deputies; reviewed their bodyworn camera video from the night of Germain's arrest; heard testimony from Germain; and ultimately issued an Order that was filed on September 24, 2024, dismissing both indictments.

ARGUMENT

It is the law of the case that the trial court's pre-trial dismissal was not procedural error because the State conceded in their initial brief the Defendant's arrest was unlawful and chose not to challenge the trial court's dismissal of the Resisting Arrest indictment.

Because the State concedes in their brief that the arrest of the Defendant was unlawful and in violation of the Fourth Amendment, it is now the law of the case. *See Town of Mt. Pleasant v. Jones*, 335 S.C. 295, 516 S.E.2d 468 (Ct.App. 1999) (holding because the Town has failed to appeal the lower courts' ruling that the citizen's arrest was invalid, it is the law of this case that detention of the Defendant Jones was unlawful) (citing *ML-Lee Acquisition Fund. L.P. v. Deloitte Touche*, 327 S.C. 238, 489 S.E.2d 470 (1997) (an unchallenged ruling, right or wrong, is the law of the case). Despite the Statement of Issues which says they are challenging dismissal of both indictments, they subsequently state that the trial judge was in fact permitted to dismiss the Resisting Arrest indictment on account of the unlawful arrest. (*See State's initial brief*, pg. 10, sentences 1-3). The State proceeds to argue and explicitly states they are "solely focused on the trial judge's judicial dismissal of the misuse of 911 charge." *Id.* As such, the appeal of the dismissal of the Resisting Arrest indictment has effectively been waived and is no longer before the court for review. *See Wright v. Craft*, 372 S.C. 1, 21, 640 S.E.2d 486, 497 (Ct.App. 2006) (holding an issue listed in statement of issues on appeal but not addressed in brief is abandoned) and *Hotel & Motel Holdings, LLC v. BJC Enters., LLC*, 414 S.C. 635, 780 S.E.2d 263 (Ct.App. 2015) (quoting *State v. Lindsey*, 394 S.C. 354, 363, 714 S.E.2d 554, 558 (Ct. App. 2011)) (holding an issue is deemed abandoned and will not be considered on appeal if the argument is raised in a brief but not supported by authority).

Additionally, a logical conclusion of their waiver of any challenge to the dismissal of the Resisting Arrest indictment, is that they agree with the trial court that the arrest was a clear violation of the right under the Fourth Amendment to be free from unreasonable search and seizure, especially in their own home. Therefore, the State is ultimately not challenging the trial judge's authority to dismiss an indictment pretrial. This is now the law of the case. The only issue left for this Court on appeal is whether the trial judge abused his discretion in dismissing the Unlawful Use of 911 indictment, and this question must be answered in the context created by the specific arguments of the State in their brief. *Id.*

It was not an abuse of discretion nor error for the trial judge to grant the Defendant's request to dismiss two misdemeanor indictments after a pretrial hearing during which testimony and body worn camera video was reviewed by the court and showed a clearly egregious violation of the Defendant's rights under the Fourth Amendment when law enforcement performed a warrantless arrest by forcibly removing her from her home absent exigent circumstances.

Because the State also explicitly states in their brief the only focus of their argument on appeal is whether dismissal of the Unlawful Use of 911 indictment by the trial judge after a pretrial hearing was error, the only issue for this Court to decide is whether the trial court abused its discretion and committed reversible error by dismissing the Unlawful Use of 911 indictment. For all the reasons stated below, and under these specific factual and procedural circumstances, the trial judge's pretrial dismissal of both indictments should be affirmed.

Procedurally, having waived both the right to contest a dismissal of an indictment after a pre-trial hearing and the right to contest unlawful arrest as a basis for the dismissal, the State's attempt to differentiate the dismissal of the Unlawful Use of 911 charge is unpersuasive. The State contends that because the unlawful arrest happened after the officer's had probable cause for the charge of Unlawful Use of 911, the unlawful arrest cannot be the foundation for dismissal of the Unlawful Use of 911 charge. They cite no authority for their position nor do they acknowledge that the unlawful arrest also occurred chronologically after officers formed the belief that they had probable cause to arrest for Resisting Arrest. Thus, under the State's own law of the case, the dismissal of the Unlawful Use of 911 charge was within the judge's discretion.

Factually, this case presents a rare opportunity for the trial court, and by extension this appellate Court, for two reasons: one, all conduct by the Defendant and the arresting law enforcement officers who effectuated the arrest of the Defendant outside her home was recorded by video and audio in the form of body-worn camera (BWC) video and 911 calls; and two, there is no victim in this case such that prejudice could result for want of the South Carolina Victim's Bill of Rights, therefore allowing the trial court an opportunity to wholly focus on Fourth Amendment jurisprudence, specifically the historical purpose of the exclusionary rule, which is to deter similar egregiously unreasonable government conduct in the future. It is within this context that the trial court made the determination dismissal was appropriate due to the unreasonable conduct by two male law enforcement officers who forcibly removed a female

Defendant from her home without a warrant to effectuate a misdemeanor arrest. Even the State concedes in their brief the officers' conduct was unreasonable and in violation of the Fourth Amendment, something this court on appeal should not overlook.

The primary issue on appeal is whether the trial court abused its discretion and committed reversible error when it granted the Defendant's request to dismiss both indictments pretrial for the clear and egregious violation of the Defendant's rights under the Fourth Amendment. The touchstone of the Fourth Amendment is reasonableness. *United States v. Leon*, 468 U.S. 897 (1984). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." *State v. Kromah*, 401 S.C. 340, 349, 737 S.E.2d 490, 494-495 (2013) (quoting *State v. Douglas*, 369 S.C. 424, 429, 632 S.E.2d 845, 847-48 (2006); cited by *State v. Simmons*, 430 S.C. 1, 18, 841 S.E.2d 845, 853 (2020) and *State v. Jones*, 440 S.C. 214, 241, 891 S.E.2d 347, 361 (2023)). "The admission or exclusion of evidence is a matter addressed to the sound discretion of the trial court and its ruling will not be disturbed in the absence of a manifest abuse of discretion accompanied by probable prejudice." *Kromah* at 349 (citing *Douglas* at 429). An error without prejudice does not warrant reversal. *State v. Lindsey*, 394 S.C. 354, 714 S.E.2d 354 (Ct.App. 2011). Generally, the prosecution has unfettered discretion to bring properly a drawn indictment to trial and the judge cannot circumvent that with a pre-trial dismissal. However, the judiciary is empowered to infringe on the exercise of prosecutorial discretion when it is necessary to review and interpret the results of the prosecutor's actions when those actions violate certain constitutional mandates. The judiciary can also check prosecutorial discretion by dismissing flawed indictments, directing a mistrial of a case wrongfully brought or prosecuted, or granting a directed verdict for lack of credible evidence. *Ex Parte Littlefield*, 343 S.C. 212, 219, 540 S.E.2d 81, 84 (2000) (citing *State v. Thrift*, 312 S.C. 282, 291-92, 440 S.E.2d 341, 346 (1994)). This Court is also permitted to decide the question of whether the trial judge abused his discretion and committed error based on an assessment of which option (reverse and remand or affirm) would best comport with the law and public policies of this state and the court's sense of law, justice, and what is right. *State v. Barnes*, 431 S.C. 66, 80 (Ct.App. 2020).

First, this Court should determine whether an abuse of discretion occurred while considering the State concedes in their brief there was a Fourth Amendment violation in this case where law enforcement effectuated a warrantless misdemeanor arrest of the Defendant by

forcibly removing her from inside her home. Notwithstanding, however, the State asserts the trial judge erred and abused his discretion because the proper remedy for a Fourth Amendment deprivation of rights is suppression of the “fruits” of the unlawful arrest, which Fourth Amendment jurisprudence suggests is a sufficiently suited remedy; however, in this case there is no evidence to suppress because law enforcement did not obtain any evidence after the Fourth Amendment violation that they planned or necessarily had to admit at trial, thus, the exclusionary rule is a remedy without a practical application in this case. This distinction is significant and lends support to the conclusion the trial judge, who was in the best position to evaluate the facts and circumstances of the case, did not abuse his discretion by granting the Defendant’s request to dismiss.

Further lending support to the trial court’s decision to dismiss the indictments, is the purpose of the exclusionary rule. Fourth Amendment precedent has clearly established that the central aim of the exclusionary rule is to deter similar government misconduct in the future. *Leon*, 468 U.S. 897, 906 (1984) (quoting *United States v. Calandra*, 414 U.S. 338, 348 (1974) (the exclusionary rule operates as “a judicially created remedy designed to safeguard the Fourth Amendment ...”). Dismissal, although not contemplated by the exclusionary rule, is still a permissible exercise of judicial discretion, particularly in this case where the State concedes a Fourth Amendment violation occurred and chose not to challenge the indictment most connected to the violation (the Resisting Arrest indictment). This Court should allow judicial intervention in a case such as this where there is no victim and there has been a clear violation of a citizen’s Constitutionally protected right to be free in their home from unreasonable government search and seizure. While the Defendant acknowledges pre-trial dismissal was held to be error in *State v. Williams*, 321 S.C. 381, 385 (1996), the holding in *Williams* does not preclude this Court from affirming the trial court’s Order of Dismissal, as the facts of *Williams* are clearly distinguishable.

In *Williams* the trial court dismissed Arson, Second Degree indictments against three co-defendants after a pretrial hearing was held and the court determined there was insufficient evidence of the *corpus delicti* of the crime. In holding the trial court’s dismissal was an abuse of discretion, the Supreme Court stated:

We agree with the State that the trial judge abused his discretion by dismissing the charges without first allowing the State to present its case. Clearly, the trial judge substituted himself for the finder of fact during this unusual and unnecessary pre-trial hearing. Had the State been allowed to fully present its case, other facts might have been adduced which would have further proven the corpus delicti. At the conclusion of the State's case, the judge could have directed a verdict in favor of the defendants if he deemed such a ruling appropriate.

Id. The Defendant's case is distinguishable from *Williams* because the trial judge in the Defendant's case was able to view all the evidence that existed against the Defendant during the pretrial hearing. There were no additional witnesses who were pertinent or relevant to the determination of whether there was probable cause to arrest the Defendant in the manner they chose. The arresting officers and their BWC showed the trial judge all that he needed to make a deprivation of rights determination. The Defendant's case was entirely based on the theory that she should not have used profanity in calling 911 and further complicated her situation by not acquiescing to the officers' demands that she unlock and open the door to her home so she could be arrested for alleged misdemeanor misconduct. The trial judge viewed the BWC video of the officers and heard their testimony. There was nothing else to present to a jury but this evidence. As such, the state was not prevented from fully presenting their case and, therefore, *Williams* is distinguishable. Pretrial dismissal can be an appropriate exercise of discretion in certain circumstances.

Perhaps there is no other situation more appropriate for dismissal than the Defendant's case where she was forcibly removed from her home by two police officers without a warrant to be arrested for misdemeanor. There were no exigent circumstances and no concern for destruction of evidence. There is no victim in the case, either. This is a case where prosecutors ignored clear violations of the Defendant's right under the Fourth Amendment and doubled down on a dual prosecution knowing the facts did not support the charges. After reviewing the BWC from the scene, the trial judge determined dismissal was appropriate. As stated in *Ex Parte Littlefield*, 343 S.C. 212, 219 (2000), "[t]he judiciary is empowered to infringe on the exercise of prosecutorial discretion when it is necessary to review and interpret the results of the prosecutor's actions when those actions violate certain constitutional mandates." To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort and for an agent of the State to pursue a course of action whose objective is to

penalize a person's reliance on his legal rights is patently unconstitutional. *Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978). The State's pursuit of the charge of Resisting Arrest with the objective to penalize Defendant's reliance on her legal right to remain within her home was itself unconstitutional. When the judge found that the prosecution had unconstitutionally abused its own discretion this invited him to infringe on the actions of the State. Dismissal of a misdemeanor brought in accompaniment with a charge pursued unconstitutionally until the eve of trial is not an abuse of the trial judge's discretion and should not be overturned on appeal.

Finally, when deciding whether the trial court abused its discretion, this Court should also consider the existing public policy implications of affirming the lower court's decision to dismiss as opposed to reversal. Rarely will this Court be presented with the question of whether there was judicial overreach in dismissing a victim-less misdemeanor crime case where all relevant conduct was captured on BWC of the arresting officers. The State has also already acknowledged the arrest was unlawful and is not challenging dismissal of the indictment for Resisting Arrest. Therefore, this Court is in a unique position to review the actions of law enforcement regarding a clear Fourth Amendment violation wherein no serious crime occurred nor does any greater harm to society hang in the balance. Reversal would effectively tell the trial judge to err on the side of the prosecution when there has been an egregious violation such as this. Reversal would effectively approve of the misconduct of the arresting officers in this case who threatened to kick in the door of a woman's home and take her into custody without a warrant. Reversal would say to citizens that their home is their castle except when law enforcement impulsively decides it isn't. If there is to be any deterrent effect to violations of the Fourth Amendment, particularly those where a Defendant is forcibly removed from their home without a warrant for a misdemeanor arrest, this Court must not reverse the trial judge's decision to dismiss both indictments.

CONCLUSION

This Court is presented with a case decided by a trial judge who is a former police officer, held a pretrial hearing whereby he viewed all relevant body worn camera video from the scene such that there is no ambiguity regarding the facts, and thereafter sought to give a South Carolina citizen, who was forcibly removed from her home, the full protection of the Fourth Amendment, while also staying true to the Exclusionary Rule's purpose of deterring similar government misconduct in the future. The State is not challenging dismissal of the Resisting Arrest indictment due to an arrest of the Defendant that they concede was not lawful. There is universal agreement among the trial court, the Petitioner, and the Respondent that there was a clear violation of the Defendant's right under the Fourth Amendment to be protected from unreasonable search and seizure. Yet, the State still asks this Court to reverse the trial judge's dismissal of the first charge, the Unlawful Use of 911, because the Defendant's conduct associated with this charge occurred *before* she was forcibly removed from her home without a warrant for two misdemeanors. Yet, they cite no authority stating the chronology of a Defendant's conduct within the context of the Fourth Amendment's protections is relevant to the inquiry of whether dismissal is justified. The primary question for this Court is whether there is evidence within the record, and within the context of the State's argument on appeal, to reverse the trial court exercising its discretion in a victimless, misdemeanor case. For all the reasons stated herein, this Court should affirm the lower court's decision to dismiss both indictments.

Respectfully submitted,

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