STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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SC Court of Appeals

Appeal from Pickens County

The Honorable Vernon F. Dunbar, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

KIEKY DAWN WILLIAMS DURHAM,

APPELLANT

APPELLATE CASE NO. 2025-001979

INITIAL BRIEF OF APPELLANT

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II.

Whether the trial court erred in denying Appellant's motion for a mistrial due to juror misconduct and premature deliberations?

STATEMENT OF THE CASE

Appellant was indicted during the July 2025 term of the Pickens County grand jury for shoplifting (enhancement), possession with intent to distribute (PWID) fentanyl, PWID methamphetamine, three counts of possession of a controlled substance, and providing false information to the police. R. (Indictments). On September 15, 2025, the state called the case to trial before the Honorable Vernon F. Dunbar and a jury. Jacob Lampke and Hunter Dunn represented the state; Appellant was represented by retained counsel Jarrett Roman. Tr. 1.

After a three-day trial, Appellant was found guilty as indicted on all charges except PWID methamphetamine of which the jury found Appellant guilty of the lesser-included offense of simple possession. Tr. II, 147-150. Judge Dunbar sentenced Appellant to fifteen (15) years' incarceration, suspended to an active eight years followed by probation for one year on the PWID fentanyl, ten (10) years' incarceration followed by one year of probation on the simple possession of methamphetamine, eight (8) years' incarceration on the shoplifting, one (1) year on each simple possession charge, and thirty days on the false information to police, all sentences to run concurrently. Tr. II. 161-163. Appellant timely filed a notice of intent to appeal.

This brief of appellant follows.

ARGUMENTS

I.

The trial court erred in failing to suppress the drug evidence found in Appellant's car during a purported inventory search following her arrest for shoplifting from a local Wal-Mart.

Standard of Review

The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion. 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. State v. Wright, 391 S.C. 436, 442, 706 S.E.2d 324, 326 (2011) (citations and internal quotation marks omitted). "[W]hile the need for deference remains, particularly in determining issues of credibility, it is no longer necessary for us to defer to the trial court's overall ruling in every case." State v. Frasier, 437 S.C. 625, 632-34, 879 S.E.2d 762, 766 (2022). Hence, "appellate review of a motion to suppress based on the Fourth Amendment involves a two-step analysis. This dual inquiry means we review the trial court's factual findings for any evidentiary support, but the ultimate legal conclusion … is a question of law subject to de novo review." Id.

Relevant Facts

On April 10, 2023, Chief Randall Beach with Pickens Police Department (PPD) received a call from the local Wal-Mart Asset Protection (AP) employee in relation to a suspected shoplifting incident. Beach called officer Lindsay Mason to respond to the incident. Officer

Alex Koppen also responded to the Wal-Mart.[1] Both officers were equipped with body-worn cameras that recorded the encounter.[2] Tr. 87, ll. 17-23.

The AP employee stated that Appellant was concealing items from throughout the store in a large purse. Tr. 89, ll. 20-24. They watched Appellant at the self-checkout and witnessed her pay for items in her cart. After Appellant had walked past all points of sale and was in the vestibule of the Wal-Mart, the AP employee and the officers approached her to discuss the alleged shoplifting. Pre-trial State's Exhibit 2 at 7:59; Tr. 90, ll. 1-5. Appellant was directed into a small room off to the side of the vestibule area where she promptly admitted to knowing why she was stopped. Pre-trial State's Exhibit 2 at 8:21. After receiving Miranda[3] warnings, Appellant admitted to shoplifting items in her purse without paying for them. Pre-trial State's Exhibit 2 at 9:00.

The officers first discussed Appellant's car roughly four minutes prior to encountering her and establishing that she had in fact shoplifted. Mason first mentions the car by reminding Koppen "don't forget about the car, chief always saying 'don't forget about the car.'" When Koppen expressed confusion, Mason continued "the car in the parking lot." Pre-trial State's Exhibit 2 at 4:38. About ten minutes into the encounter, Mason asks Appellant how she got to Wal-Mart. Appellant stated she came alone and drove her mother's car which was in a parking spot in the Wal-Mart parking lot. Pre-trial State's Exhibit 1 at 10:00-11:00. About fifteen

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1 A third officer who was undergoing training also responded to the call but was not meaningfully involved in the arrest of Appellant or the subsequent search of her vehicle. Tr. 90, ll. 6-15; Tr. 213, ll. 7-17

2 Pre-trial State's Exhibit 1 (Mason BWC) and Pre-trial State's Exhibits 2, 3 and 4 (Koppen BWC 1, 2, 3) from the September 15, 2025 hearing are on file with this Court.

3 384 U.S. 436 (1966)

minutes into the encounter, Mason asks Appellant further questions about the car that is in the parking lot, if Appellant only made one trip into Wal-Mart, and if there is anything illegal or "weird like that" in the car. Appellant stated she had only made a single trip into the Wal-Mart that night. Pre-trial State's Exhibit 1 at 15:00-16:00.

Approximately seventeen-and-a-half minutes into the encounter, Mason and Koppen step out of the room leaving Appellant inside with the AP employee and the training officer. Mason and Koppen then have a conversation in lowered voices where Mason can be heard asking if she should ask for consent to search the vehicle before placing Appellant under arrest. Mason states that they will have to tow the car, unless they are given consent to search, and then they could ask the AP employee if the car could remain in the parking lot overnight. Koppen is heard stating if Mason does not get consent that "it will be a thing." Pre-trial State's Exhibit 2 at 17:38. Once Mason reenters the room, she clarifies that there is no one else with Appellant before requesting consent to search the vehicle "to make sure there was nothing illegal in it." Pre-trial State's Exhibit 1 at 19:05. Appellant did not provide consent.

Almost twenty-two minutes after arriving at Wal-Mart, Mason placed Appellant under arrest for shoplifting and then asked her if she needed to make a phone call. Pre-trial State's Exhibit 2 at 21:41. Approximately thirty minutes into the encounter, and roughly six minutes after being placed in handcuffs, Mason informs Appellant they will have to tow the car and will fill out an inventory with any valuables. Appellant states there is "all kinds of stuff" in the trunk that is hers, including her clothes. Koppen then asks if there is anything illegal or weird in the car, to which Appellant responds "no." Pre-trial State's Exhibit 1 at 30:11. Prior to leaving the office, Appellant requested to call someone to pick up her car to avoid a tow bill, but no on responded to the request. Pre-trial State's Exhibit 1 at 35:00.

Eventually, the three officers and Appellant walk out of Wal-Mart and approach Appellant's mother's legally parked car. The items she purchased at Wal-Mart were placed into the vehicle, and the "inventory" begun. Pre-trial State's Exhibit 1 at 36:25. Mason asked Appellant if there was anything of value in the trunk, to which she replied "a plumbing thing" and her clothes. Pre-trial State's Exhibit 1 at 38:10. Koppen is seen digging through numerous containers in the trunk that contain shoes, clothing, and other personal items such as children's clothes that still had tags on them and a Delta plumbing fixture. Pre- trial State's Exhibit 3. At no point does Koppen state what he is seeing in the trunk nor does he make a list of any type. He is seen generally feeling in the bags and opening the containers in what appears to be a search for contraband. Pre-trial State's Exhibit 3. At one point, Koppen removes a Columbia brand jacket from the trunk at Appellant's request. Pre-trial State's Exhibit 1 at 41:03.

While Koppen was looking through the trunk, Mason began to walk around the vehicle and look through the windows when she saw a small plastic bag on the console of the car mostly concealed under a pack of cigarettes. Pre-trial State's Exhibit 1 at 42:16; State's Trial Exhibit 9 (photo of plastic baggie on console)(on file with this Court) Mason is heard saying "there is a baggie right there, *but it looks clean.*" Pre-trial State's Exhibit 1 at 42:27. When asked, Appellant stated nothing was in the baggie. Pre-trial State's Exhibit 1 at 42:45. When asked a second time about the baggie, Appellant again stated that nothing was in it and told Mason she could look. At this point in time, Koppen can be seen already in the back seat of the vehicle, allegedly inventorying the items in the back seat.[4] Pre-trial State's Exhibit 1 at 46:34. Koppen eventually states there is "a little bit of jewelry and makeup" in the back seat before he moves to

4 Koppen's body camera was not on during this point of the search and is not turned back on until after the narcotics are found. Tr. 130, l. 22 – 131, l. 9

the front seat. Pre-trial State's Exhibit 1 at 47:26. Koppen discovered the narcotics in a purse under the front seat. Pre-trial State's Exhibit 1 at 51:08; Pre-trial State's Exhibit 4.

Defense counsel moved *in limine* to suppress the drug evidence found in the vehicle Appellant had driven to Wal-Mart. Both parties submitted written motions[5] to the trial court prior to the hearing. R. (Motion). Defense counsel argued that the "impound was unreasonable, unnecessary, unconstitutional, as well as the inventory search of the vehicle was unnecessary, unreasonable, unconstitutional." Tr. 82, ll. 1-6. He further argued that PPD lacked the standardized policies and procedures for inventory searches required by law. Tr. 82, ll. 6-10. The state argued the officers' actions were permitted under S.C. Code Ann. § 56-5-2520(c), that the PPD policies were sufficient under U.S. v. Matthews[6], that the officers did not act in bad faith, and "even if the officers did have a parallel investigative motive, that didn't otherwise taint the lawful inventory search of the vehicle." Tr. 82, ll. 14-22.

Officer Mason testified that PPD had General Order 1.2 on the limits of police authority and discretion and General Order 5.4 on towing regulations. Tr. 92, l. 16-25. She testified that it was the policy of PPD to tow any vehicle "with private property" when the owner/operator has been arrested for shoplifting. Tr. 94, ll. 23-25. She stated that Wal-Mart "always asked for the vehicle to be towed on top of our policy to – from our chief that we tow every vehicle." Tr. 95, ll. 2-4. She further testified that when it came to shoplifting "we tow every vehicle, so there's not really a determination. We just tow every vehicle unless there's a person on scene that owns the vehicle. Sometimes we may have discretion, but we have to get approval through our chain

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5 The state requested its written motion be clocked and filed, but undersigned counsel was unable to obtain a copy from either the Clerk, defense counsel, or the solicitor.

6 Undersigned counsel believes this is in reference to the Fourth Circuit case U.S. v. Matthews, 591 F.3d 230 (2009).

of command." Tr. 99 l. 21 – 100, l. 4. Mason further testified that she observed a small plastic baggie that had a bit of residue in it, and she indicated this gave her and Koppen a reason to search "the vehicle a little bit deeper since we found the residue of the illegal drug" which led to Koppen locating the narcotics under the front seat. Tr. 106, l. 16 – 107, l. 14.

On cross-examination, Mason could not recall stating they could ask the AP to leave the car in the parking lot if Appellant had consented to the search. Tr. 109, ll. 3-14. She confirmed that General Order 1.2, page 7, referenced inventory searches and directed officers that "the inventory must be done pursuant to written departmental policy. Refer to General Order 15.11." R. Pre-trial State's Exhibit 5 (Pickens General Order), p. 7. General Order 15.11, however, referred to the PPD Ride-Along program. R. Pre-trial Defense Exhibit 1 (Pickens General Order). She maintained that whether Appellant had given consent or not, they would have towed the vehicle. Tr. 114, ll. 7-9. When asked about her mindset, she stated, "My goal was to make sure there was – to ask her, for her to be honest about if there was anything in the vehicle that I should be concerned about, because I'm going to be inside of the vehicle." Tr. 124, ll. 9-12.

Officer Koppen testified that Wal-Mart "always trespass anyone that they've caught shoplifting…they prefer it if the vehicle is not there, so that way when they get out of jail, they don't end up back there to get the car…" Tr. 136, ll. 6-12. He stated that officers did not have authority to not tow a vehicle due to the policy in place at that point in time. Tr. 138, ll. 16-22. Koppen also testified that Mason observed the plastic baggie, and after that he did a more thorough search of the car. Tr. 141, l. 17 – 142, l. 10. Koppen ultimately listed "clothing, miscellaneous Wal-Mart merchandise, and cleaning supplies" on the inventory tow form. Tr. 149, ll. 19-21.

The trial court did not hear further arguments from the parties after the officers testified. In denying the motion to suppress, the court ruled:

> When I first looked at the video, I sincerely thought that it was more investigated, particularly when you look at the trunk, what happened there. And I could see defendant's need to file this motion to suppress. So, it was a very fine line, but I am going to deny the motion to suppress. And let me tell you why I'm doing it. The defendant did drive to Walmart alone, and there was no one who could immediately take possession of the automobile, as I understand, an inventory search.
>
> Also, with respect to an inventory search, it is up to the police to make certain that there are no things that are valuable in the car or that would constitute a danger to society, such as handguns, which people commonly have in their car. Also, it was on private property. And let me tell you why this case was difficult, because I looked at US v Marshall, as cited in the defendant's motion, and I could make a distinction from the facts of that case because someone there had been firing a weapon and later parked that same vehicle from which the weapons were fired on private property. Well, in this particular case, this car was located on private property and is understandable that the police, nor Walmart, wishes to be liable for any damage to the car if it were vandalized. I'm not certain whether this particular Walmart is 24 hours. I had initially thought about that in terms of looking at this motion to suppress, because if it's 24 hours, the likelihood of someone vandalizing is probably slim to none. But after really trying to undertake some analysis, I don't believe that's really that vital or important.
>
> I think the main thing that really led to my decision to deny the motion is that once the defendant was taken out to the parking lot and the trunk was searched, which I still believe was more investigative than anything else, but officer Mason clearly saw what she believed to be contraband on the front seat of the car that was visible. And as a result of that, she saw the baggie and asked the defendant, and the defendant said, you could look. There's nothing in there. I think that was consent when she said, you can look. And as a result of that, the other things were found.
>
> I think the fact that the drugs were found in a purse is significant, because if the police found the purse in a car, I certainly would want the police to get that and take it into custody so no one will break into the car to steal it. So for that reason, I am

> respectfully denying your motion to suppress, and I will note your objection to my ruling.

Tr. 150, l. 16 – 152, l. 12.

Discussion

The trial court found that the search was proper because Appellant had driven by herself to Wal-Mart, the police had to make certain there were no valuables or items in the car that would be a danger to society, the car was on private property, and halfway through the search Appellant gave "consent." The court gave these points as the reason justifying the inventory search, even though it "sincerely thought that it was more investigated." Implicit in the court's ruling is finding that the impounding of the vehicle was proper. The evidence in the record does not support the trial court's determination. In this case, the officers has no reason to impound the vehicle that was legally parked in the parking lot of a business. Because the impound was unreasonable, the inventory was improper. The inventory was just a ruse to search the car for anything illegal and was not done according to proper procedures. Appellant's purported "consent" does not save the search. This Court should reverse the trial court, find the search a violation of the Fourth Amendment, and suppress the drug evidence.

The basic purpose of the Fourth Amendment, as recognized repeatedly by the United States Supreme Court, is "to safeguard the privacy and security of individuals against arbitrary invasions by government officials." Cady v. Dombrowski, 413 U.S. 433, 453 (1973) (Brennan, J. dissenting). Through its exclusionary rule, the Fourth Amendment to the United States Constitution prohibits unreasonable searches and seizures. U.S. Const. Amend. IV.

When evaluating a search through the framework of the Fourth Amendment, "[t]he ultimate standard set forth…is reasonableness." Dombrowski at 439. "Whether a search and seizure is unreasonable within the meaning of the Fourth Amendment depends upon the facts and circumstances of each case." S. Dakota v. Opperman, 428 U.S. 364, 375 (1976). Evidence seized in violation of the Fourth Amendment will be excluded in both state and federal court. See Mapp v. Ohio, 367 U.S. 643 (1961); State v. Forrester, 343 S.C. 637, 643, 541 S.E.2d 837, 840 (2001).

"Generally, a warrantless search is per se unreasonable and thus violative of the Fourth Amendment's prohibition against unreasonable searches and seizures." State v. Bultron, 318 S.C. 323, 331, 457 S.E.2d 616, 621 (Ct. App. 1995). "However, a warrantless search will withstand constitutional scrutiny where the search falls within one of a few specifically established and well delineated exceptions to the Fourth Amendment exclusionary rule." Id. at 331-32, 457 S.E.2d at 621. In such cases, the *burden is upon the State to justify a warrantless search.* State v. Bailey, 276 S.C. 32, 35, 274 S.E.2d 913, 915 (1981) (emphasis added).

One of the exceptions to the warrant rule is an inventory search conducted according to standard police procedures. Robinson v. State, 407 S.C. 169, 185, 754 S.E.2d 862, 870 (2014) (stating "if police officers are following their standard procedures, they may inventory impounded property without obtaining a warrant" (*citing* Colorado v. Bertine, 479 U.S. 367, 374 (1987))). "For an inventory search to be valid, the vehicle searched should first be in the valid custody of the law enforcement officers conducting the inventory." United States v. Brown, 787 F.2d 929, 931-32 (4th Cir. 1986) (*citing* Opperman, 428 U.S. at 374); See Also State v. Miller, 423 S.C. 95, 111, 814 S.E.2d 166, 175 (Beaty, C.J. Dissenting) (2018). "The question ... is ... whether the police officer's decision to impound was reasonable under the circumstances." Brown, 787 F.2d at 932.

However, "[a]n inventory search will not be sustained where the court believed that the officers were searching for incriminating evidence of other offenses." U.S. v. Feldman, 788 F.2d 544, 553 (9th Cir. 1986) *citing* Opperman, 428 U.S. at 376. In analyzing inventory searches the United States Supreme Court has explained,

> [A]n inventory search must not be a ruse for a general rummaging in order to discover incriminating evidence. The policy or practice governing inventory searches *should be designed to produce an inventory.* 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 a crime.'

Florida v. Wells, 495 U.S. 1, 4 (1990) (emphasis added). The California Court of Appeals for the Fourth District further elaborated on the principle outlined in Wells, *supra*, stating,

> Just as inventory searches are exceptions to the probable cause requirement, they are also exceptions to the usual rule that the police officer's [s]ubjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis...*courts will explore police officers subjective motivations for impounding vehicles in inventory search cases, even when some objectively reasonable basis exists for the impounding.*

People v. Torres, 188 Cal. App. 4th. 775, 787-788, Cal. Rptr. 3d 48 (4th Dist. 2010), as modified on denial of reh'g, (Oct. 21, 2010) (emphasis added).

Reasonableness of the Encounter and Impound

As then-Chief Justice Beatty stated in his dissent in Miller, *supra*, before analyzing the reasonableness of an inventory search, "the Court must first determine whether the predicate seizure was lawful as the inventory search is contingent on the seizure of the vehicle." Miller at 111, S.E.2d at 175 (Beatty, C.J., Dissenting). In Miller, our Supreme Court held that the decision to seize Miller's vehicle from a private parking lot was reasonable because the officers were acting pursuant to lawful authority and in accordance with the requirements set forth in a written police department policy. Id. at 101, 814 S.E.2d at 169. That policy included three requirements that the Court held were "standardized criteria" that limited the officers' discretion to impound a vehicle and "the officers' compliance with the requirements render[ed] the decision to tow it reasonable under the Fourth Amendment." Id. at 102-105, 814 S.E.2d at 170-171.

However, while the exercise of police discretion in towing a vehicle is allowed when that discretion is exercised according to standard criteria, it must also be exercised on the basis of something other than suspicion of evidence of criminal activity. Id. at 113, 814 S.E.2d at 176 (Beatty, C.J., Dissenting). In Miller, then-Chief Justice Beatty opined that the officer's decision to tow Miller's vehicle when no traffic violation preceded the encounter was based solely on the suspicion of drug activity, and therefore the seizure was improper. Id. He further stated that even if the stop was justified and the impoundment was not pretextual, "the mere existence of a police department policy is insufficient to satisfy the State's burden of proving the applicability of the inventory search exception to the Fourth Amendment." Id. See also People v. Spencer, 408 Ill. App. 3d 1, 8–9, 948 N.E.2d 196, 203 (2011) ("[T]he existence of a police regulation cannot be used as a predicate to determine the lawfulness or reasonableness of an inventory search of a vehicle." To hold otherwise would grant the police an unlimited ability to evade the requirements of the fourth amendment by promulgating regulations that authorize the use of inventory searches following every arrest.).

In the present matter, the impoundment of Appellant's car was wholly unreasonable. The state cited S.C. Code Ann. § 56-5-2520(c) as providing the officer's authority to tow the car. That statute is irrelevant to the case as it only applies to "any vehicle found upon a highway." S.C. Code Ann. § 56-5-2520(c). It is undisputed that Appellant's car was in the parking lot of a business and not upon a highway. S.C. Code Ann. § 56-5-2520(c) did not provide any authority to impound the car in this case. Additionally, PPD General Order 1.2 provided no instruction regarding when to impound a car, stating only that police must take custody of the vehicle or other property as a threshold requirement for an inventory search. R. Pre-trial State's Exhibit 5, p. 7. The testimony of the officers revealed there was no standardized criteria for determining the propriety of impounding the vehicle. The body-worn cameras showed that officers clearly considered letting Appellant leave the car in the parking lot overnight, but only if she consented to a search to see if "anything illegal" was in the car. Pre-trial State's Exhibit 1 at 19:05. The testimony was contradictory as to whether Wal-Mart wanted the car towed, with Mason saying they required towing and Koppen saying they preferred towing. There was also testimony that the policy of the Chief of PPD was to always tow the vehicles, but that is not memorialized in any documentation.

In US v. Sanders, 796 F.3d 1241 (2015), the United States Court of Appeals for the Tenth Circuit held that police can constitutionally impound a vehicle that was legally parked, not impeding traffic or impairing public safety *only if* the impoundment was guided by standardized criteria *and* a legitimate community-caretaking rationale. If either reason was absent, then the inventory was unconstitutional. Id. at 1242-43. In the present matter, the PPD policies do not instruct when to impound a car, and the testimony of the officers was that anytime someone is arrested for shoplifting, the vehicle is towed. Impounding a vehicle anytime an arrest takes place, regardless of the circumstances, is not "standardized criteria" sufficient to support an inventory seizure and search. The police also lacked a legitimate community-caretaking rationale in this case, as the vehicle was not a threat to public safety nor impeding the flow of traffic, Opperman 428 U.S. 368-69, and the likelihood it would have been vandalized was extremely low, as it was legally parked in a well-lit, frequently-traveled major store parking lot that was under video surveillance.

The impoundment of the vehicle in this case does not pass constitutional muster. Here, the state's interest in impounding a legally parked vehicle from a well-lit parking lot did outweigh Appellant's Fourth Amendment right to be free of unreasonable searches and seizures. Here, the impoundment and subsequent inventory were "a medium to search for contraband" and nothing more. See State v. Carter, 305 Ga.App. 814, 817, 701 S.E.2d 209, 213 (2010). There is nothing in the record evincing that it was necessary for police to impound the vehicle. The impoundment was unreasonable and thus the resulting inventory search was unreasonable under the Fourth Amendment. United States v. Brown, 787 F.2d 929, 931-32 (4th Cir. 1986) (*citing* Opperman, 428 U.S. at 374).

Reasonableness of the "Inventory" Search

While privacy expectations in an automobile are somewhat diminished, "the word 'automobile' is not a talisman in whose presence the Fourth Amendment fades away..." Any search, even of an automobile, is a substantial invasion of privacy. Opperman at 387-88 (Marshall, J., Dissenting). The main purpose of the inventory exception is that police may "search a lawfully impounded vehicle *to compile an inventory list of the vehicle's contents* without violating the Fourth Amendment." United State v. Rowland, 341 F.3d 774, 779 (8th Cir. 2003) *citing* Opperman, 428 U.S. at 376 (emphasis added). The prevailing justification for inventory searches has been in the "community caretaking duties" ascribed to police officers. Inventory searches are designed to be "totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute." Dombrowski at 441. The Supreme Court of the United states has stated that these "caretaking duties" are made up of "three distinct needs: the protection of the owner's property while it remains in police custody;

the protection [of] the police against claims or disputes over lost or stolen property; and the protection of the police [and the public] from potential danger." Opperman at 369.

In U.S. v. Taylor, 636 F.3d 461 (2011), Kansas City police were responding to a request by a fellow officer to follow a green 1500 Chevrolet truck and initiate a traffic stop if the driver committed a traffic violation. Id. at 463. The officers were informed that the driver of the vehicle was a suspect in a drug investigation, and that narcotics were believed to be in the vehicle. Officers observed the truck change lanes without signaling and initiated a traffic stop. When Taylor could not provide proof of insurance, he was arrested, and the truck was impounded and searched pursuant to Kansas City Police Department's written policies. Id.

While searching the truck under the guise of an inventory, officers located seventy-four grams of cocaine, along with various clothing, toiletries, tools, equipment, and papers. On the inventory form, the officer merely listed the myriad of items in the truck as "misc. tools." Id. The United States Court of Appeals for the Eighth Circuit held that the search of the truck was not justified by the inventory search exception to the warrant requirement because the officer's description of "misc. tools" was insufficient to remove the inference that the search was investigatory. Id. at 465. Additionally, the Court of Appeals held that in addition to not adhering to the procedures, the fact that the officers were asked to follow the vehicle suggested that the police were engaging in their criminal investigatory function, not their caretaking function, when they searched the truck. Id. See People v. Spencer, 408 Ill. App. 3d 1, 8–9, 948 N.E.2d 196, 203 (2011) ([T]he existence of a police regulation cannot be used as a predicate to determine the lawfulness or reasonableness of an inventory search of a vehicle).

The officers in this case were motivated by their criminal investigatory function, not their community care taking function, when they searched Appellant's car. Prior to establishing she shoplifted, they were discussing the car. Prior to arresting her, they repeatedly asked if there was anything illegal in the car. In fact, Mason asked for consent specifically "to see if anything illegal" was in the car. The body camera footage reveals that *if* Appellant had consented, she could have possibly left her vehicle at Wal-Mart, but only if she consented to the search. Further, the trial court found the search to be investigative in nature, and the actions of the officers on the body camera support the finding that it was wholly investigatory.

Most revealing is the inventory sheet filled out by Koppen. Despite specifically requesting the Delta plumbing fixture be on the sheet, it was not listed. The general description of clothing did nothing to indicate what quantity of clothing there was or what potential value it contained. The Columbia jacket that was removed from the trunk was a valuable item, and it reasons that other such items were in the trunk as well that should have been individually listed. Koppen found some jewelry in the backseat, but that is not on the inventory sheet. The inventory sheet broadly claims "clothing, misc. Walmart merchandise, cleaning supplies" were located in the car. However, there is nothing distinctive about these items that would assist someone claiming lost or stolen property from the vehicle while in the custody of police. The officers did not create an inventory of the items in the car but instead used the guise of inventory to engage in "purposeful and general means of discovering evidence of a crime." See Florida v. Wells, 465 U.S. 1, 4 (1990).

Appellant's "Consent"

The trial court found that Appellant, detained in handcuffs, watching officers go through her vehicle somehow removed the illegal taint from the search by responding to Mason that she could look at the baggie. The consent to search, if it can be called that, occurred during the illegal inventory of the car while Appellant watched in handcuffs. Appellant's "consent" was nothing more than an exploitation of an already illegal seizure and search. The giving of "consent" in this case was not sufficiently attenuated from the purported illegal inventory search to dissipate the taint of the illegal search.

The state bears the burden of establishing the voluntariness of consent. State v. Harris, 277 S.C. 274, 286 S.E.2d 137 (1982); State v. Mattison, 352 S.C. 577, 575 S.E.2d 852 (Ct. App. 2003). When there is conflicting testimony, consent is an issue of credibility to be determined by the trial judge. State v. Maybank, 352 S.C. 310, 573 S.E.2d 851 (Ct. App. 2002).

"Undoubtedly, a law enforcement officer may request permission to search at any time. However, when an officer asks for consent to search *after* an unconstitutional detention, the consent procured is *per se* invalid unless it is 'both voluntary *and* not an exploitation of the unlawful [detention]'." State v. Pichardo, 367 S.C. 84, 105, 623 S.E.2d 840, 851 (2005); State v. Williams, 351 S.C. 591, 571 S.E.2d 703, 710 (Ct. App. 2002), *quoting* State v. Robinson, 306 S.C. 399, 412 S.E.2d 411, 414 (1991). Proof of a voluntary consent alone is not sufficient. Pichardo *citing* Williams, 351 S.C. at 604, 571 S.E.2d at 710. The relevant factors include the temporal proximity of the illegal seizure and consent, intervening circumstances, and the purpose and flagrancy of the official misconduct. Id.

The record does not support the trial court's ruling that Appellant gave consent, as her consent was not voluntary and was an exploitation of the unlawful inventory search. When Mason first asked Appellant for consent to search the car prior to arresting Appellant, she was firmly told no. Once police unreasonably impounded the car and began the illegal inventory search, Appellant had no ability to stop them from searching. Her "consent" at that point in time had no effect on the officers, as they were already in the middle of an illegal investigatory inventory search. Even if her consent was somehow construed as voluntary, while she stood in handcuffs watching the search, the consent occurred during the illegal search such that it could not be found to remove the taint of the illegal search.

The trial court erred in admitting the drug evidence seized from Appellant's car where the impounding of the vehicle and subsequent inventory search were unreasonable and not performed based upon standardized criteria and policies. Appellant telling Mason she can go look at the baggie was not voluntary consent and it did not remove the taint of the illegal impound and inventory search. This court should reverse the trial court and suppress the drug evidence found in Appellant's vehicle.

II.

The trial court erred in denying Appellant's motion for a mistrial where juror misconduct and premature deliberations occurred.

Standard of Review

A trial judge's decision denying a mistrial will be reversed on appeal if the denial amounts to an abuse of discretion. State v. Rowlands, 343 S.C. 454, 458, 539 S.E.2d 717, 719 (Ct. App. 2000). "Whether a mistrial is manifestly necessary is a fact specific inquiry. It is not a mechanically applied standard, but rather is a determination that must be made in the context of the specific difficulty facing the trial judge." Id. at 457–58, 539 S.E.2d at 719 (internal quotations and citations omitted). Although the decision to grant or deny a mistrial is within the sound discretion of the trial court, the appellate court must reverse the ruling if the decision was an abuse of discretion amounting to an error of law. State v. Dial, 405 S.C. 247, 257, 746 S.E.2d 495, 500 (Ct. App. 2013) (*citing* State v. Wiley, 387 S.C. 490, 495, 692 S.E.2d 560, 563 (Ct. App. 2010)).

Relevant Facts

After jury selection, the trial court instructed the empaneled jury that it was not to "discuss this case in any way, shape, or manner...Do not discuss this case with anyone. Those are my strict orders." The court instructed the jury not to do any independent research and explained that the evidence would come from inside the courtroom before excusing the jury for the day. Tr. 29, l. 14 – 30, l. 4. The following morning, the trial court explained the general framework of a trial to the jury prior to opening statements but did not remind the jury that they were not to discuss the case until they began deliberations. The trial court did, when selecting a foreperson, explain their job was in part to prevent premature discussions about the case. Tr.

159, l. 12 – 163, l. 16. Throughout the course of the trial, the trial court regularly reminded the jury to not discuss the case, to not do research, and to not deliberate. Tr. 183, ll. 11-16; Tr. 217, ll. 3-4; Tr. 256, ll. 18-20; Tr. 291, ll. 1-9.

On the second day of trial, the jury was excused at 4:04 p.m. with instructions to not deliberate or conduct research in the case. Tr. 291, ll. 1-13. As court was winding down the judge came back on the record to mark a jury note as Court's Exhibit 1. The trial court informed the parties that "the rumor is there's an allegation that a juror was discussing the case" and the court would handle that issue in the morning. The state asked for clarification as to the actual verbiage of the note. The trial court read the note which said, "I was just told by a juror that *some* were discussing the case." (emphasis added). Tr. 296, ll. 9-21; Court's Exhibit 1.

The following morning, the bailiff informed the court that Juror No. 108, Mr. Hencken, was the juror that had brought forth the concern about premature deliberations. Tr. II. 3, ll. 4-11. Mr. Hencken was brought before the court where the following exchange occurred:

> THE COURT: It's my understanding that you overheard a conversation on yesterday. Can you tell me when you heard that conversation and what was the ...
>
> JUROR NO. 108: It was just during a break. And *they* were just, you know, *discussing some of the parts of the case*, you know, just like what was happening. Nothing specific about who, or who's guilty or innocent, or nothing like that.
>
> THE COURT: Okay. Who was listening? Did everyone hear it or just a few hear it?
>
> JUROR NO. 108: *Yeah. Every -- a whole discussion in the room. I mean, everybody could hear*. I can't say, you know, who was discussing it, but it just seemed like the one alternate has a lot of opinions about everything and, from what I understood, he wasn't supposed to be saying anything anyway. You know, they're not supposed to be speaking.
>
> THE COURT: That's correct.

> JUROR NO. 108: So, I mean, I didn't really want to be singled out like this now, but ...
>
> THE COURT: All right. So the entire –
>
> JUROR NO. 108: I mean, yeah. It was just like, just a couple things around the room. *You know. Everybody could hear it in the room.* You know.
>
> THE COURT: And do you remember those couple things, what was said?
>
> JUROR NO. 108: Not specifically. It was just about, you know, either like what a, you know, the expert said or this and that. And, you know, it wasn't nothing specific like guilt or innocence.
>
> THE COURT: So no deliberations took place --
>
> JUROR NO. 108: No. No.
>
> THE COURT: -- but just commenting on what transpired?
>
> JUROR NO. 108: Yeah.
>
> THE COURT*: And that involved the entire group? They could hear it?*
>
> JUROR NO. 108: *Yes.*

Tr. II. 3, l. 13 – 4, l. 25 (emphasis added).

The trial court believed a firm admonishment to the jury to not discuss the case would be a sufficient curative instruction. Defense counsel disagreed and moved for a mistrial, arguing that Appellant was prejudiced by the premature discussions, that it was not clear whether deliberation had occurred, that the entire jury had been impacted, and that the jury had made up its mind before closing arguments were made. Tr. II. 5, l. 8 – 6, l. 3.

The state argued that State v. Aldret, 333 S.C. 3074, 509 S.E.2d 811 (1999), controlled in the situation and suggested that the court *voir dire* the jury to discover if premature deliberations had occurred. Tr. 6, l. 5 – 7, l. 23. The trial court then individually spoke with each juror in the presence of the parties. Juror No. 5, the first alternate, reported a gentleman had twice made "a really general comment" but did not relay the specifics of the comment. He stated when the man "said the comment everyone realized, it's like they didn't want to engage with it." Tr. II. 8, l. 6 – 10, l. 4. Juror No. 75 reported hearing that "the Defendant's attorney...didn't seem like he was doing too good of a job." He believed just a few jurors heard the comment and did not recall conversations about "guilt or innocence." Tr. II. 10, l. 7 – 12, l. 4. Juror No. 82 reported hearing "something about 16 grams" either someone saying, "sixteen grams sounds like a lot" or "wow, 16 grams." Tr. II. 12, l. 10 – 13, l. 16. Juror No. 93 did not "really recall much of anything about that" as he may not have been paying much attention and had not heard anything that "really popped out to my ear." Tr. II. 13, l. 19 – 15, l. 1.

Juror No. 99 maintained that he had not discussed the case or overheard any improper discussions. Tr. II. 15, l. 4 – 16, l. 2. Juror No. 110, the second alternate, stated the jury may have discussed things, but he did not hear it. Tr. 16, l. 12 – 17, l. 18. Jurors No. 123, 147, 165, and 171 stated they had not overheard any improper discussions. Tr. II. 17, l. 21 – 19, l. 22; Tr. II. 24, l. 15 – 25, l. 21; Tr. II. 25, l. 25 – 27, l. 10. Juror No. 149 stated a gentleman made some comment about "the cop touching the fentanyl with no hand – I mean no gloves." Tr. II. 20, ll. 1-24. Juror No. 150 reported overhearing something like "well, we all know how this is going to go" but said no one responded or interacted with the speaker. Tr. II. 21, l. 10 – 22, l. 18. Juror No. 162 stated no one was discussing the case but also stated they were "talking about, you know, whether the Defendant – just looking at the Defendant, generally what was going on in the court, but nothing about the case." Tr. II. 22, l. 21 – 24, l. 12. All jurors informed the court they could remain fair and impartial.

After speaking with each juror, the court denied the motion for a mistrial finding a majority of the jurors indicated that they had not heard anything, and even if they did hear something, it was in passing and would not impact their ability to be fair and impartial. Tr. II. 27, ll. 20-24. The trial court acknowledged that at least one juror was repeatedly making comments and decided to remove that juror. Further investigation revealed that Juror No. 99, who had reported that he had not engaged in premature discussions or heard anything, was the juror who had made the "we all know how this is going to go" comment. He was removed from the jury and replaced by Juror No. 110. Tr. II. 27, l. 25 – 35, l. 2.

Discussion

"[P]remature jury deliberations may affect 'fundamental fairness' of a trial such that the trial court may inquire into such allegations and may consider affidavits in support of such allegations." State v. Aldret, 333 S.C. 307, 312, 509 S.E.2d 811, 813 (1999). However, premature deliberations alone do not require an automatic reversal; rather, the complaining party must also show prejudice. Id. at 313-314, 509 S.E.2d 814 (*citing* State v. Kelly, 331 S.C. 132, 414, 502 S.E.2d 99, 104 (1998)). But see State v. Gill, 273 S.C. 190, 192, 255 S.E.2d 455, 457 (1979) (holding that a trial judge's improper instruction that amounted to an invitation to the jurors to begin their deliberations before the close of the close of the case was inherently prejudicial and required reversal).

Further, the Supreme Court established procedures for trial judges to follow upon learning of premature deliberations. Aldret, 333 S.C. at 315, 509 S.E.2d at 815. Applicable to this case, the Court explained that if a trial judge is made aware of premature deliberations, the judge should "conduct a hearing to ascertain if, in fact, such premature deliberations occurred, and if the deliberations were prejudicial." Id. If requested, "the court may voir dire the jurors, and if practicable, 'tailor a cautionary instruction to correct the ascertained damage.'" Id. However, "[i]f the trial court determines the deliberations were prejudicial, such findings should be set forth on the record, and a new trial ordered." Id.

Our Supreme Court explained that "a jury should not begin discussing a case, nor deciding the issues, until all of the evidence, the argument of counsel, and the charge of the law is completed." State v. McGuire, 272 S.C. 547, 551, 253 S.E.2d 103, 105 (1979). According to the Court, "[t]he reason for the rule [was] apparent." Id. at 552, 253 S.E.2d at 105. "The human mind is constituted such that when a juror declares himself, touching any controversy, he is apt to stand by his utterances to the other jurors in defiance of evidence. A fair trial is more likely if each juror keeps his own counsel until the appropriate time for deliberation." Id. See also State v. Joyner, 289 S.C. 436, 437-438, 346 S.E.2d 711, 712 (1986) (holding a judge's instruction to not make up their minds, but allowing the jurors to talk about the case prior to completion was reversible error and that discussing the case was "tantamount to deliberations"); State v. Pierce, 289 S.C. 430, 433, 346 S.E.2d 707, 710 (1986) (same); State v. Gill, 273 S.C. 190, 192, 255 S.E.2d 455, 456-457 (1979) (same); Gallman v. State, 307 S.C. 273, 277, 414 S.E.2d 780, 782 (1992) (granting post-conviction relief where trial counsel failed to object to instructions that permitted the jurors to talk about the case prior to the completion of the trial).

The trial court incorrectly found that premature deliberations had not occurred and that anything that was heard by the jurors had not impacted the jury. The record does not support this conclusion. Numerous jurors reported hearing varying comments throughout the trial including comments on defense counsel's "bad job", discussion of evidence in the case, and opinions on the outcome such as "we all know how this is going to go." Any one of these comments in isolation would be concerning, that comments were pervasive in the jury room and repeated should have raised the alarm bells to the trial court. It was clear that there had been premature discussions about the case and at least one juror had expressed to the jury that he had determined "how it was going to go." The trial court erred in finding that no premature deliberations or discussions had occurred.

The trial court felt it could cure any damage done by removing the juror who said "we all know how its going to go." That ended up being Juror No. 99 who had, most tellingly, told the trial court that he had neither engaged in discussions about the case nor overheard any discussions. However, as the adage goes, while you can remove the skunk from the jury box, you cannot remove the stink. Here, the damage had been done by Juror No. 99, who had been talking about the case apparently throughout trial. It also appears from the record that others were discussing the case.

The various reports of different comments by different jurors indicate that extensive discussion was occurring about the case while the trial was still ongoing. Simply removing one juror did not cure the prejudice suffered by Appellant, and the trial court failed to give any curative instruction to the remaining jurors to ensure the taint of the premature deliberations was removed. See Aldret, 333 S.C. at 315, 509 S.E.2d at 815 (If practicable the court can 'tailor a cautionary instruction to correct the ascertained damage'). Appellant was prejudiced, as jurors made up their minds about the case and evidence prior to the trial being concluded. This Court should reverse the trial court and find that Appellant was entitled to a mistrial due to premature jury deliberations.

CONCLUSION

Based on the foregoing arguments, Appellant respectfully requests that, as to Issue I, this Court hold the inventory search was unconstitutional and suppress the drug evidence in the case, and as to Issue II, this Court hold Appellant is entitled to a new trial due to prejudicial premature jury deliberations.

Jessica M. Saxon
Appellate Defender

ATTORNEY FOR APPELLANT

This 24th day of August, 2026.