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THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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On Writ of Certiorari to the Court of Appeals

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Appeal from Charleston County

The Honorable J. C. Buddy Nicholson, Jr., Circuit Court Judge S.C. Supreme Court
Appellate Case No. 2012-212779

STATE OF SOUTH CAROLINA,

Respondent,

v.

ALFRED ADAMS,

Petitioner.

BRIEF OF RESPONDENT

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STATEMENT OF ISSUE ON CERTIORARI

The Court of Appeals properly determined Adams' intervening criminal acts leading to a valid traffic stop sufficiently cured any constitutional violation arising from law enforcement's prior placement of a tracking device on Adams' car, and suppression of the drugs found on his person pursuant to the traffic stop was not warranted.

STATEMENT OF THE CASE

Respondent concurs with Petitioner's procedural Statement of the Case.

STATEMENT OF FACTS

In July 2008, during an investigation into an attempted robbery and shooting associated with a drug deal, members of the North Charleston Police Department's ("NCPD") Narcotics Unit learned Petitioner Alfred Adams ("Adams") was involved in trafficking and distributing of drugs. Based on Adams' history, a police confidential informant made several recorded phone calls to Adams over the next few months, and arranged to purchase narcotics from him. Adams set up a meeting with the informant, and Adams' wife delivered thirty grams of cocaine to the informant, with the understanding the informant would pay Adams for the cocaine when he sold it to a third party. The informant's conversations with Adams revealed Atlanta, Georgia was one source for Adams' drugs. (Record on Appeal [R.], pp.27-28, 34-37, 39).

On November 11, 2008, detectives placed a mobile tracking device on the undercarriage of Adams' wife's car ("Adams' car"), a 2003 white Chevrolet Trailblazer, while it was parked in a public parking garage. The device was small, and attached to the undercarriage magnetically. It only sent signals revealing the car's location. (R., pp. 28-91).

Five days later, on November 16, 2008, detectives learned via the tracking device that Adams' car traveled to Atlanta, remained there for less than an hour, and was on the way back to South Carolina that evening. Detectives notified Sgt. Timothy Blair ("Sgt. Blair") of the NCPD K9 Unit to look out for a 2003 white Chevrolet Trailblazer on eastbound I-26, and to stop it if he observed any traffic violations. (R., pp. 31-32).

Sgt. Blair positioned his car at a rest area on I-26, heading east. When he saw Adams's car, he immediately turned on his vehicle's video camera and pulled onto I-26 behind Adams' car. He did not activate his blue lights or siren at that time. While following Adams' car, he observed two traffic violations, both of which were captured on video. (State's Exhibit 1; R., pp. 42-45).¹

Based on these traffic violations, Sgt. Blair initiated a traffic stop of Adams' car, which ended in a gas station parking lot. Adams was driving the car, and Sgt. Blair requested his license and registration. Sgt. Blair noticed Adams was acting nervous and concealing his hands. He also observed another vehicle sitting on the interstate exit, and the occupant had the window down, was acting "kind of panicky," and appeared to be watching the traffic stop. (R., pp. 45-47).

When Adams did not respond to Sgt. Blair's instruction to show his hands, Sgt. Blair radioed for back-up assistance. Officer Timothy Greenawalt ("Officer Greenawalt") arrived less than 2 minutes later, and asked Adams to exit the vehicle so he could conduct a NCIC check while Sgt. Blair performed a perimeter sniff with his drug dog. The dog immediately alerted at the driver's side door, and alerted a second time at the center console after he was deployed in the car. (R., pp. 47-49, 66-68).

While Sgt. Blair was escorting the dog around the vehicle, Sgt. Greenawalt noticed Adams was acting very nervous and making furtive movements as if he was going to run, so he told Adams at least three times to put his hands on the hood of the police car. After the drug dog alerted, Officer Greenawalt conducted a pat down based

¹State's Exhibit S-1 [In-car video] was transported to the Court of Appeals for consideration.

on the dog's response and for officer safety. During the pat down, Officer Greenawalt felt a jagged, round object in Adams's groin area, and based on his training and experience, he believed the object was drugs. He then handcuffed Adams and retrieved the item, which was subsequently determined to be 142 grams of cocaine. Sgt. Blair arrested and mirandized Adams, who was charged with one count of trafficking cocaine 100-200 grams, and possession with intent to distribute cocaine in proximity of a school (Charleston Southern University). (R., pp. 140-141, 50-57, 67-71; 24-25).²

The case was called for a bench trial before the Honorable J. C. Buddy Nicholson, Jr., Circuit Court Judge, on January 27, 2010. Prior to trial, Adams moved to suppress the cocaine, contending placement of the tracking device violated the Fourth Amendment protection against unreasonable searches and seizures because officers failed to obtain a court order pursuant to S.C. Code §17-40-140 (Supp. 2008). The State argued the officers' placement of the tracking device on the car while it was in a public parking garage complied with the standards for installing and monitoring tracking devices established by the United States Supreme Court in United States v. Knotts, 460 U.S. 276 (1983), and Adams had no reasonable expectation of privacy in his movements from one location to another. The State further argued Adams' two traffic violations, which actually led to the traffic stop and discovery of the cocaine, constituted intervening criminal acts. (R., pp. 76-105).

The circuit court denied the motion to suppress, finding there might be a technical statutory violation, but under Knotts, there was no constitutional violation. Adams again

²The proximity charge was *nol prossed* at trial and is not at issue in this appeal. (R., p. 137).

argued the statute required a court order to place the tracking device on his car. The court stated the statute probably should be followed, but again found suppression of the drugs was not warranted in this case. (R., pp. 106-108, 112-113).

Based on the evidence presented, the circuit court found Adams guilty of trafficking cocaine, and sentenced him to twenty-five years incarceration and a \$50,000 fine. (R., pp. 137-139). This appeal followed.

By Opinion filed April 25, 2012, the South Carolina Court of Appeals affirmed Adams' conviction, finding placement of the tracking device on Adams' wife's car was unconstitutional under United States v. Jones, 132 S.Ct. 945 (2012), but Adams' traffic violations constituted intervening criminal acts sufficient to cure any taint arising from information obtained via the unlawfully installed tracking device. (Appendix, pp. 1-12). The Court of Appeals denied Adams' Petition for Rehearing by Order filed July 28, 2012. On August 23, 2012, Adams filed a Petition for Writ of Certiorari to the Court of Appeals, seeking review of the Court of Appeals decision, which this Court granted by Order dated November 6, 2013.

ARGUMENT

The Court of Appeals properly found Adams' traffic violations constituted intervening criminal acts sufficient to cure any constitutional violation arising from law enforcement's prior placement of a tracking device on Adams' car, and suppression of the drugs found on his person after a valid traffic stop and pat-down was not warranted.

Relying on Jones, which held (in a five justice majority opinion) that a warrant is required for the installation and monitoring of a tracking device, Adams contends the Court of Appeals erred in "holding that an improper lane change trumps the exclusionary rule under the Fourth Amendment." He further contends the Court of Appeals erred because the drugs seized from his person after the traffic stop would not have been discovered but for the warrantless installation of a tracking device on his car. These contentions misrepresent the Court of Appeals decision, and ignore key evidence in the record.

A. Intervening Criminal Act

As discussed below, Jones was a major shift in then prevailing Fourth Amendment jurisprudence regarding tracking devices. Even in light of that change, however, the Court of Appeals correctly determined suppression was not warranted in this case because the drug evidence offered at trial was **not** obtained as a result of information from the tracking device. Rather, the evidence was seized as a result of Adams' **undisputed** traffic violations, which led to a **valid** traffic stop and pat-down.³

³Adams does not challenge the validity of the traffic stop or the drug dog sniff. Thus, the circuit court's rulings that both were valid is the law of the case. *See, e.g., State v. Woods*, 882 S.C. 153, 676 S.E.2d 128 (Ct. App. 2009); *Reliance Ins. Co. v. Smith*, 327 S.C. 528, 489 S.E.2d 674, 679 (Ct. App. 1997). Further, as the Court of Appeals noted,

The United States Supreme Court has expressly declined to hold that all evidence is “fruit of the poisonous tree” simply because it would not have come to light but for illegal police actions. *See, e.g., Wong Sun v. United States*, 371 U.S. 471 (1963); *see also* 5 W. LaFare, Search and Seizure: A Treatise on the Fourth Amendment, §11.4 [3d ed. 1996]). Since Wong Sun, courts have recognized that new and distinct criminal acts following an illegal stop do not qualify as fruit of the poisonous tree simply because such acts were causally connected to the police misconduct. *See State v. Nelson*, 336 S.C. 186, 519 S.E.2d 786, 789-90 (1999) (citing John Wesley Hall, Jr., Search and Seizure, at 364 (2d ed. 1991) (same); *see also United States v. Sprinkle*, 106 F.3d 613 (4th Cir.1997) (police did not have any reasonable suspicion to stop the defendant, but the defendant’s intervening illegal acts of running from and shooting at the police made the gun admissible); United States v. Nooks, 446 F.2d 1283 (5th Cir.1971) (even though the initial stop was illegal, suppression was not warranted when the defendant fled from the police at speeds in excess of 100 m.p.h. and fired several shots at them subsequent to the initial stop); United States v. Bailey, 691 F.2d 1009 (11th Cir.1982) (notwithstanding a strong causal connection in fact between lawless police conduct and a defendant’s response, if the defendant’s response is itself a distinct crime then the police may arrest the defendant for that crime).

When Sgt. Blair got behind Adams on the interstate, he turned on the video camera in his police car but did not activate the blue lights or siren, and simply followed Adams’ car. Sgt. Blair observed Adams swerve from the left lane into the right lane in

Adams does not contend the officers’ actions unduly extended the traffic stop. (Appendix, p. 9, n. 10).

close proximity to another car, causing that driver to step on his brakes. Adams swerved back over into the left lane, subsequently merged in front of that car, and quickly took the next exit off the interstate. Sgt. Blair followed Adams at the exit, but still did not attempt to stop him. (R., pp. 42-43).

After Adams turned off the exit ramp, Sgt. Blair observed him make another illegal lane change by going into the left lane while his right turn signal was activated. After observing the **second** traffic violation, Sgt. Blair initiated the traffic stop. As evidenced by the video, Adams knew he was stopped because of the illegal lane change, and told Sgt. Blair he swerved because he was “texting.” (R, pp. 44-45).

The subsequent pat-down and discovery of the cocaine on Adams resulted from the **legal** traffic stop and the officers’ observations during that stop, including a positive alert on Adams’ car by the drug dog. Even if Sgt. Blair was initially behind Adams’ car because of the tracking device information, the tracking device did **not** cause Adams to violate any traffic laws, and his undisputed traffic violations purged any possible taint from the tracking device information.

Adams’ contention the tracking device information was the only way law enforcement could have gotten behind him on the interstate is contrary to the evidence. The investigating officer testified, without contradiction, that based on law enforcement’s knowledge of Adams’ involvement in the narcotics trade, and the fact Adams had money supplied by law enforcement, the officers would have conducted physical surveillance of Adams if the tracking device had not been on the car. (R., pp. 32, 96-97). Therefore, without the tracking device, law enforcement would have visually tracked Adams’

movements, would have known about his trip to Georgia, and would have asked Sgt. Blair to look for Adams' car on the interstate that night.

This case is on point with the facts of In Re Jeremiah W., 361 S.C. 620, 625, 606 S.E.2d 766 (2004), in which this Court held the defendant's threats to police officers after he was unlawfully arrested for disorderly conduct constituted a new and distinct criminal act justifying his arrest for threatening a police officer.⁴ In reaching that conclusion, the Court stated:

Simply because respondent's threat was causally connected to police misconduct does not therefore mean that the threat qualifies as 'fruit of the poisonous tree.' While it is true the second offense would not have arisen but for the unlawful arrest for the first offense, as stated in Nelson, there is a strong policy reason for holding that a new and distinct crime, even if triggered by an unlawful arrest, is a sufficient intervening event to provide independent grounds for arrest.

Id. at 768-769 (internal citations omitted).

Adams asserts the Court of Appeals misapplied the intervening criminal act doctrine because it only applies to cases involving criminal acts committed in response to police misconduct, and his traffic violations were not in response to the tracking device installation or monitoring. Taking this assertion to its logical conclusion, intervening criminal acts that are not committed in response to police misconduct, regardless of the nature of those acts, are absolutely insulated from arrest and prosecution. Thus, under Adams' argument, if all other facts in this case remained the same, but Sgt. Blair saw

⁴Significantly, this Court reversed the Court of Appeals' holding that the initial illegal arrest rendered the subsequent charge of threatening a police officer invalid. See In re Jeremiah W., 353 S.C. 90, 576 S.E.2d 185 (Ct. App. 2003) (actions leading to defendant's subsequent charge were "part of a continuous flow of action and conduct emanating directly from the unlawful arrest").

Adams commit a hit and run or a drive-by shooting rather than a lane change traffic violation, Adams could not be arrested and prosecuted for those crimes simply because they were not committed in response to the improperly installed tracking device. Such a result is nonsensical on its face.

As in Jeremiah W., even if Sgt. Blair was behind Adams' car because of the tracking device information, Adams' undisputed traffic violations constituted separate and distinct crimes justifying the subsequent traffic stop and search.⁵ Since the undisputed traffic violations led to the traffic stop and pat down rather than the tracking device information, the Court of Appeals correctly affirmed the circuit court, and held the evidence seized during the traffic stop and pat down was admissible.

B. Exclusionary Rule

The circuit court expressly relied on Knotts in finding the placement of the tracking device did not constitute a search prohibited by the Fourth Amendment. In Knotts, the Supreme Court held a tracking device inserted into a container, which was then put on a vehicle police officers monitored, was not a "search" or "seizure" under the Fourth Amendment, and no warrant was required. 460 U.S. at 285. The Court specifically found there was no legitimate expectation of privacy in one's movements from one location to another, and when a person travels over the public streets, he voluntarily conveys his movements to anyone who wants to watch him. *Id.* at 282-283.

⁵The facts of this case are much less egregious than the facts in Jeremiah W., because Adams was not arrested until **after** the intervening traffic violations, a valid traffic stop, a valid drug dog alert, and a valid pat-down.

Knotts was the controlling constitutional authority regarding placement of tracking devices on vehicles at the time law enforcement put the tracking device on Adams' car in November, 2008, and when the case was called for trial in January, 2010. Knotts continued as the controlling authority until the United States Supreme Court's January 2012 decision in Jones.

In Jones, government officers obtained a warrant authorizing installation of a tracking device on a car registered to the defendant's wife.⁶ They monitored the device for twenty-eight days, and at trial, introduced data from the device as substantive evidence of the defendant's involvement in a conspiracy to distribute narcotics. 132 S.Ct. at 948.

Relying on common law trespass principles, a Supreme Court majority held installation of a tracking device on a target vehicle, and subsequent monitoring of the device, constitute a search for Fourth Amendment purposes, and a warrant is required. *Id.* at 949-953. A minority of the Court concurred in the result based on the government's lengthy monitoring of the device, but citing Knotts, opined installation of a tracking device and short term monitoring over public highways does not implicate a reasonable expectation of privacy, and therefore, does not violate the Fourth Amendment. *Id.* at 957-964.

Even though Jones was not the law at the time of the traffic stop or trial in this case, Adams essentially contends it mandates exclusion of the evidence seized during the traffic stop. This contention ignores the purpose of the exclusionary rule, as well as case

⁶The warrant contained very specific requirements regarding when and where the device could be installed, but the officers did not comply with those requirements.

law holding exclusion is not mandated even in the face of conduct by police subsequently determined to violate a constitutional right when the officers acted in good faith under existing law.

The exclusionary rule is a judicially created tool designed to safeguard Fourth Amendment rights, and should only be used as a last resort. Hudson v. Michigan, 547 U.S. 580 (2006); United States v. Calandra, 414 U.S. 338 (1974); Coolidge v. New Hampshire, 403 U.S. 443 (1971); State v. Chandler, 267 S.C. 138, 226 S.E.2d 553, 555 (1976). The main purpose of the exclusionary rule is the deterrence of police misconduct, and it should be applied only where deterrence is clearly served. State v. Harvin, 345 S.C. 190, 547 S.E.2d 497, 500 (2001); State v. Sachs, 264 S.C. 541, 216 S.E.2d 501, 514 (1975). Recognizing the rule's harsh consequences, the United States Supreme Court stated:

Suppression of evidence, however, has always been our last resort, not our first impulse. The exclusionary rule generates substantial social costs, which sometimes include setting the guilty free and the dangerous at large. We have therefore been cautious against expanding it, and have repeatedly emphasized that the rule's costly toll upon truth-seeking and law enforcement objectives presents a high obstacle for those urging its application. We have rejected indiscriminate application of the rule, and have held it to be applicable only where its remedial objectives are thought most efficaciously served. That is, where its deterrence benefits outweigh its substantial social costs.

Hudson, 514 U.S. at 591 (internal quotations omitted).

As set forth above, when the tracking device was placed on Adams' car in November, 2008, the car was on public property, and case law indicated there was no Fourth Amendment violation in placing and/or monitoring the device as the car moved on the public highways. See Knotts; United States v. Pineda-Moreno, 591 F.3d 1212 (9th

Cir. 2010) (*reh'g denied*, 2010 WL 3169573 [August 12, 2010]) (No search or seizure occurred when police went onto the curtilage of defendant's home to put a tracking device on the underside of his vehicle and continuously monitored the device to ascertain the vehicle's location.); United States v. Garcia, 474 F.3d 994 (7th Cir. 2007) (No search or seizure occurred from placement and monitoring of a global positioning device under bumper of defendant's car, because device merely served as a substitute for the activity of physically following the car on a public street.); United States v. Jones, 31 F.3d 1304 (4th Cir. 1994) (Knotts held that scientific enhancement raises no constitutional issues which visual surveillance would not also raise, and postal inspector's use of a tracking device to monitor movement of a mail pouch the defendant put in his van did not constitute a search under the Fourth Amendment.). In determining whether violation of the statute regarding installation of tracking devices warranted exclusion of the evidence, the circuit court properly looked to the prevailing law and determined there was no constitutional violation.⁷ See Hutto v. State, 376 S.C. 77, 654 S.E.2d 846, 848 (2007) (the exclusionary rule should be limited to constitutional violations not statutory violations).

Installation of the tracking device in this case occurred over three years before Jones, and under the controlling authority of Knotts and its progeny. Further, unlike

⁷ The officers did not obtain a court order under S.C. Code §17-30-140 (Supp. 2012) to install the tracking device. That issue is not raised in the Brief of Appellant, but is discussed in detail at pages 10-12 of the Final Brief of Respondent before the Court of Appeals. It was undisputed the officers involved did not know about the statute until the assistant solicitor discovered it just before trial and told the officers, as well as defense counsel, about its requirements. (R., pp. 95-96). In any event, as the circuit court found, violation of the statute alone would not warrant suppression.

Jones, the tracking device data at issue in this case was not offered as substantive evidence of Adams' guilt on the trafficking charge, which was based solely on the amount of drugs actually found on his person. Rather, it was only before the circuit court on Adams' motion to suppress the drug evidence.

The officers in this case acted in good faith based on their knowledge of the law in 2008. The holding in Jones significantly changed the landscape of Fourth Amendment law regarding tracking devices, however, and after Jones, there is absolutely no reason to believe police officers will knowingly install a tracking device without obtaining a warrant to do so. Indeed, Adams makes no serious argument to the contrary.⁸ Therefore, application of the exclusionary rule in this case would **not** serve to deter future police misconduct, exclusion of the evidence seized during the traffic stop in this case is not warranted, and the Court of Appeals properly affirmed Adams' conviction. See Davis v. United States, 131 S.Ct. 2419 (2011) (exclusion of evidence clearly unwarranted where suppression would fail to yield appreciable deterrence; and deterrence rational loses much of its force when police act with objectively reasonable good faith belief their conduct is lawful); United States v. Wilks, 647 F.3d 520 (4th Cir. 2011) (before applying the exclusionary rule in a given case, the court must analyze whether any exception to the

⁸Adams cites United States v. Katzin, 732 F.3d 187 (3rd Cir. 2013), as authority for the proposition the exclusionary rule applies to warrantless tracking device cases. As a threshold matter, whether the exclusionary rule applies to such cases in general is not at issue here; rather, the issue is whether it should apply in this case. Further, there was a lengthy dissenting opinion in Katzin concluding the officers acted in good faith reliance on pre-Jones jurisprudence, including Knotts, and therefore, the district court erred in excluding the tracking device evidence. *Id.* at 216-241. Finally, on December 12, 2013, the Third Circuit granted the Government's petition for rehearing *en banc*, and vacated the original opinion pending rehearing. United States v. Katzin, 2013 WL 7033666 (filed December 12, 2013, 3rd Cir. 2013)

rule, such as the good faith exception, applies, and suppression was not warranted when officer acted in good faith reliance on binding precedent subsequently overruled by the Supreme Court).⁹

⁹The Court of Appeals declined to address the good faith reliance issue raised by the State in response to Adams' assertion of Jones as a basis for excluding the drug evidence. (Appendix, pp. 6-7, n. 8).

CONCLUSION

Based on the foregoing, Respondent respectfully submits the Court of Appeals decision should be affirmed.

Respectfully submitted,

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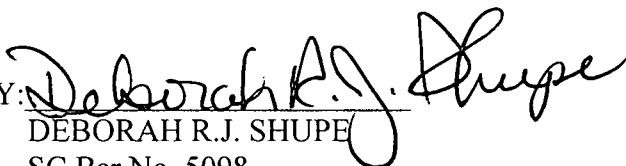
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January 31, 2014

THE STATE OF SOUTH CAROLINA
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Appeal from Charleston County
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Appellate Case No. 2012-212779

STATE OF SOUTH CAROLINA,

Respondent,

v.

ALFRED ADAMS,

Appellant.

PROOF OF SERVICE

I, Sally B. Ellison, certify I served the Return to Petition for Writ of Certiorari to the Court of Appeals on Petitioner by depositing two copies in the United States mail, postage prepaid, addressed to:

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I further certify that all parties required by Rule to be served have been served.

This 31th day of January, 2014.



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