STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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SC Court of Appeals

Appeal from Newberry County
The Honorable Frank R. Addy, Jr., Circuit Court Judge

Appellate Case No. 2013-000921

THE STATE,

Respondent,

v.

JEFFREY GLENN MCCOY,

Appellant.

INITIAL BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF ISSUE ON APPEAL 1

STATEMENT OF THE CASE 2

STATEMENT OF THE FACTS 3

ARGUMENT 7

The trial court properly denied Appellant's motion to suppress evidence seized from his vehicle and his hotel room because the evidence initially discovered in the car fell under the plain view exception to the warrant requirement, and the hotel was searched after the police had obtained a warrant based in part upon the evidence from the car 7

CONCLUSION 15

TABLE OF AUTHORITIES

Cases:

Horton v. California, 496 U.S. 128 (1990) 10

State v. Abdullah, 357 S.C. 344, 592 S.E.2d 344 (Ct. App. 2004) 10

State v. Benton, 338 S.C. 151, 526 S.E.2d 228 (2000) 12

State v. Bowman, 366 S.C. 485, 623 S.E.2d 378 (2005) 8

State v. Brown, 401 S.C. 82, 87, 736 S.E.2d 263, 265 (2012). 9

State v. Bultron, 318 S.C. 323, 457 S.E.2d 616 (Ct. App. 1995) 9, 12

State v. Baccus, 367 S.C. 41, 48, 388, 625 S.E.2d 216, 220 (2006) 8

State v. Flowers, 360 S.C. 1, 598 S.E.2d 725 (Ct. App. 2004) 8

State v. Khingratsaiphon, 352 S.C. 62, 572 S.E.2d 456 (2002) 8, 9

State v. Rivera, 384 S.C. 356, 682 S.E.2d 307 (Ct. App. 2009) 8

Robinson v. State, 407 S.C. 169, 185, 754 S.E.2d 862, 870 (2014) 10, 11

State v. Weaver, 374 S.C. 313, 649 S.E.2d 479 (2007) 6, 9

State v. Wright, 391 S.C. 436, 706 S.E.2d 324 (2011) 10

United States v. Martinez-Fuerte, 428 U.S. 543 (1976) 9

United States v. Mendenhall, 446 U.S. 544 (1980) 9

United States v. Whitehorn, 813 F.2d 646 (4th Cir. 1987) 6

Segura v. United States, 468 U.S. 796 (1984) 6

Wong Sun v. United States, 371 U.S. 471 (1963) 13

Other Authorities:

S.C. Const. art. I, § 10 9

U.S. Const. amend. IV 9

STATEMENT OF ISSUE ON APPEAL

The trial court properly denied Appellant's motion to suppress evidence seized from his vehicle and his hotel room because the evidence initially discovered in the car fell under the plain view exception to the warrant requirement, and the hotel was searched after the police had obtained a warrant based in part upon the evidence from the car.

STATEMENT OF THE CASE

A Newberry County Grand Jury indicted Appellant for safecracking, five counts of second-degree burglary (violent), grand larceny, two counts of petit larceny, and possession of burglary tools. (R.* Indictments.) On April 22, 2013, the Honorable Frank R. Addy, Jr., held a pretrial hearing, during which he denied Appellant's request to suppress the evidence found in his car and hotel room. (Hearing Tr. 114-16.) On April 23-24, 2013, Appellant proceeded to trial before a jury. Charles V. Verner, Esquire, represented Appellant, and Deputy Solicitor C. Dale Scott and Assistant Solicitor C. Yates Brown represented the State. The jury found Appellant guilty on all charges. (Tr. 339-40.) Judge Addy sentenced him to fifteen years' imprisonment for safecracking, ten years' imprisonment for second-degree burglary (violent) to be served consecutively to the safecracking charge, five years' imprisonment each for grand larceny and for possession of burglary tools (both to be served concurrently with each other and with the safecracking), and thirty days for the petit larceny for a total sentence of twenty-five years. (Tr. 354-55.)

On April 29, 2013, Appellant filed a Notice of Appeal.

STATEMENT OF FACTS

On the morning of May 27, 2012, Officer Justin Weaver of the City of Newberry Police Department began checking property at Wilson Shopping Center in Newberry. (Tr. 50, line 19-Tr. 51, line 8.) He discovered a hole in the cinder block on the back of the Check Into Cash store, found the door unsecure, and called for backup. (Tr. 51, lines 9-17.) He and his backup officer entered the building, smelled burning metal, and noticed the safe had several cut marks on it. (Tr. 51, lines 18-24.) Weaver saw two grinders on the floor next to the safe and a couple of pry bars nearby. (Tr. 52, lines 1-3.) After checking the other four businesses in the center, he realized their doors were unsecure and that holes had been knocked in the walls between the stores. (Tr. 52, lines 7-20.)

Later that night, Officer Boris Alvarado patrolled the Bear Village area in response to the burglaries from the previous night. (Tr. 78, line 1-Tr. 79, line 3; Tr. 83, lines 3-8.) He began checking doors of the businesses and noticed an open storage unit. (Tr. 79, lines 6-18.) As he walked toward it to investigate, he saw Appellant kneeling behind an air conditioning unit. (Tr. 79, line 18-Tr. 80, line 2; Tr. 82, lines 13-20.) He asked him to identify himself, radioed in Appellant's name and date of birth, and found out he was from Tennessee. (Tr. 82, line 21-Tr. 83, line 25.) Officer Randy Malloy discovered a vehicle with a Tennessee tag in a nearby parking lot and determined it belonged to Appellant. (Hearing Tr. 43, lines 18-22.) He saw a hotel key in plain view in the console of the vehicle. (Hearing Tr. 59, line 22-60, line 4; 61, lines 12-25.) At that time, Officer Desiree Busko began checking local hotels to see if Appellant was registered as a guest and discovered he had checked in to the Budget Inn. (Hearing Tr. 65, line 17-66, line 20.) She watched the hotel room until a search warrant was obtained,

at which time officers searched the room. (Hearing Tr. 66, line 21-67, line 12.) Eventually, Appellant was arrested and charged with safecracking, five counts of second-degree burglary (violent), grand larceny, two counts of petit larceny, and possession of burglary tools. (R* Indictments.)

Pretrial, Appellant moved to suppress the search of the car and hotel room on Fourth Amendment grounds. (Hearing Tr. 19, lines 18-23.) The State called Officer Boris Alvarado to testify regarding his role in the searches. (Tr. 20, lines 14-20.) Officer Alvarado explained that he encountered Appellant while patrolling and ran his information, discovering he was from Tennessee. (Hearing Tr. 25, lines 1-22.) When he eventually arrested Appellant, Alvarado found tools on his person. (Hearing Tr. 28, lines 6-9.)

Next, Officer Malloy testified that he looked in the general vicinity for a car from Tennessee, found one in a nearby BI-LO parking lot, and discovered it was registered to Appellant. (Hearing Tr. 43, lines 4-22.) He walked around Appellant's car and "could clearly see inside bags of tools or tool items such as saw blades, power tools, those type items." (Hearing Tr. 46, lines 17-20.) He also saw coins in the car's center console. (Hearing Tr. 47, lines 1-6.) Officer Malloy testified that he watched the car until the BI-LO closed to see whether anyone else came to get the car. (Hearing Tr. 47, line 24-48, line 10.) When no one did, he took inventory of the car per policy because Appellant had already been placed under arrest and because he had seen burglary tools in plain view when he looked into the car's window. (Hearing Tr. 48, lines 11-20; 58, lines 12-20.) Malloy also testified he saw a hotel key in plain view in the console. (Hearing Tr. 59, line 22-60, line 4; 61, lines 12-25.)

Officer Busko testified about finding a black bag containing tools on the ground near the AC unit where Appellant was located. (Hearing Tr. 64, lines 13-23.) She began checking local hotels to see if Appellant was registered as a guest and discovered he had checked in to the Budget Inn. (Hearing Tr. 65, line 17-66, line 20.) She watched the hotel room until a search warrant could be obtained, at which time officers searched the room. (Hearing Tr. 66, line 21-67, line 12.)

Investigator Kevin Goodman testified he spoke to a judge and secured search warrants for both the car and the hotel room. (Hearing Tr. 78, lines 2-9.) He explained the probable cause to obtain the search warrant for the hotel room was based on the coins found in the car that were consistent with what was stolen from Regional Finance and the burglary tools seen in Appellant's car and found behind the shopping center. (Hearing Tr. 79, line 17-Tr. 80, line 13.) Probable cause to obtain a search warrant for the car was based on the items found inside the car during the inventory: gold coins, quarters, stamps, and burglary tools. (Hearing Tr. 81, lines 19-24.) On cross-examination, Investigator Goodman explained that the procedure for the department is to inventory a car once they have made an arrest, including opening closed containers. (Hearing Tr. 86, lines 1-14; 87, line 16-Tr. 88, line 8.)

Appellant argued the warrantless search of the car did not fall under the inventory search exception because the car was not in the immediate possession of Appellant. (Hearing Tr. 93, line 3-Tr. 94, line 11.) Further, he argued that because the car was some distance away and lawfully parked, the car was not part of the arrest and there was no lawful reason for the police to take custody of Appellant's property. (Hearing Tr. 94, lines 11-20.) Appellant conceded during his argument that "there was in plain view evidence consistent with burglary tools." (Hearing Tr. 101, lines 7-9.) He specified he

was not challenging the inventory search; rather, he challenged whether the vehicle was lawfully impounded stating, "It's just whether they had the lawful grounds to seize the vehicle in the first place under the inventory search." (Hearing Tr. 102, line 23-Tr. 103, line 4.) The State argued that based on State v. Weaver[1], a warrant was not necessary as long as there was probable cause to search the vehicle. (Hearing Tr. 112, lines 1-18.) Thus, based on the fact that officers saw evidence in plain view in the car, sufficient probable cause existed. (Hearing Tr. 113, lines 1-20.) The trial court ruled, based on Weaver, U.S. v. Whitehorn[2], and Segura v. U.S.[3], that if there is probable cause to search the car, there is no problem with the initial search. (Hearing Tr. 114, lines 5-18.) Specifically, the trial court ruled the police had authority to secure the vehicle. (Hearing Tr. 114, line 19-Tr. 115, line 5.) Additionally, the trial court stated:

> I believe that they also clearly had probable cause to search the vehicle independent of any impounding of the car because of the facts that have been put on the record.
>
> The defendant is from Tennessee. That is known to them. The only car with Tennessee tags is located in a parking lot at a stone's throw of the incident location. When they find the car with Tennessee tags, they check in the window, they look around in the windows, and they can plainly see in plain view burglary tools.
>
> That is my conclusion that the bag in the back was open. They see other things in the car which gives them reasonable, articulable suspicion to search the car.

(Hearing Tr. 115, lines 5-19.) (emphasis added.) The trial court concluded the search was proper and within the bounds of both the State and Federal Constitutions. (Hearing Tr. 116, lines 14-18.)

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[1] 374 S.C. 313, 649 S.E.2d 479 (2007).
[2] 813 F.2d 646 (4th Cir. 1987).
[3] 468 U.S. 796 (1984).

The trial proceeded, and the jury found Appellant guilty on all charges. (Tr. 339-40.) The trial judge sentenced him to fifteen years' imprisonment for safecracking, ten years' imprisonment for second-degree burglary (violent) to be served consecutively to the safecracking charge, five years' imprisonment each for grand larceny and for possession of burglary tools (both to be served concurrently with each other and with the safecracking), and thirty days for the petit larceny for a total sentence of twenty-five years. (Tr. 354-55.)

ARGUMENT

The trial court properly denied Appellant's motion to suppress evidence seized from his vehicle and his hotel room because the evidence initially discovered in the car fell under the plain view exception to the warrant requirement, and the hotel was searched after the police had obtained a warrant based in part upon the evidence from the car.

Appellant argues the trial court erred in denying his motion to suppress evidence seized from his vehicle and his hotel room, claiming law enforcement searched the car without a warrant and without probable cause in violation of the Fourth Amendment. Furthermore, he argues the subsequent search of his hotel room was improper because it was based on evidence obtained in the unlawful search of the vehicle. To the contrary, law enforcement properly identified the vehicle as belonging to Appellant, saw burglary tools, items consistent with what was stolen, and a hotel key inside the car in plain view, and subsequently identified the hotel where Appellant was registered and searched it pursuant to a lawful search warrant. Accordingly, the trial court's denial of Appellant's motion to suppress should be affirmed.

In criminal cases, the appellate court sits to review errors of law only. State v. Baccus, 367 S.C. 41, 48, 388, 625 S.E.2d 216, 220 (2006). In Fourth Amendment search and seizure cases, the appellate court is limited to determining if there is *any* evidence to support the trial court's findings and can only reverse due to clear error. State v. Flowers, 360 S.C. 1, 5, 598 S.E.2d 725, 727 (Ct. App. 2004); State v. Bowman, 366 S.C. 485, 501, 623 S.E.2d 378, 386 (2005). The appellate court will not reverse merely because it would have reached a different conclusion than the trial judge. State v. Rivera, 384 S.C. 356, 361, 682 S.E.2d 307, 310 (Ct. App. 2009). The reviewing court may conduct its own review of the record to determine whether the trial judge's ruling is supported by the

evidence. State v. Khingratsaiphon, 352 S.C. 62, 70, 572 S.E.2d 456, 460 (2002). However, the appellate court *must* affirm the trial court if there is any evidence in the record to support the ruling. State v. Brown, 401 S.C. 82, 87, 736 S.E.2d 263, 265 (2012).

The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. However, "[t]he purpose of the Fourth Amendment is not to eliminate all contact between the police and the citizenry, but 'to prevent arbitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals.'" United States v. Mendenhall, 446 U.S. 544, 553-54 (1980) (quoting United States v. Martinez-Fuerte, 428 U.S. 543, 554 (1976)). The Fourth Amendment's exclusionary rule prohibits unreasonable searches and seizures. U.S. Const. amend. IV; see also S.C. Const. art. I, § 10. Any evidence seized as the result of an unreasonable search and seizure must be excluded from trial. State v. Weaver, 374 S.C. 313, 319, 649 S.E.2d 479, 482 (2007).

"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 may be constitutional if it falls within a recognized exception. Id. at 331-32, 457 S.E.2d at 621. South Carolina courts have recognized several exceptions to the warrant requirement, including: (1) search incident to a lawful arrest; (2) hot pursuit; (3) stop and frisk; (4) the automobile exception; (5) the plain view doctrine; (6) consent; and (7) abandonment. Brown, 401 S.C. at 89, 736 S.E.2d at 266. Under the plain view

exception, "a law enforcement officer who is lawfully in a position to view [an] object" may seize it. State v. Abdullah, 357 S.C. 344, 352, 592 S.E.2d 344, 349 (Ct. App. 2004).

> Under the "plain view" exception to the warrant requirement, objects falling within the plain view of a law enforcement officer who is rightfully in a position to view the objects are subject to seizure and may be introduced as evidence. Consistent with federal law prior to 1990, South Carolina case law regarding the plain view exception requires: (1) the initial intrusion which afforded the authorities the plain view was lawful; (2) the discovery of the evidence was inadvertent; and (3) the incriminating nature of the evidence was immediately apparent to the seizing authorities. However, in Horton v. California, 496 U.S. 128 (1990), the United States Supreme Court (USSC) discarded the inadvertent discovery requirement for the plain view exception. In doing so, the USSC noted, "evenhanded law enforcement is best achieved by the application of objective standards of conduct, rather than standards that depend upon the subjective state of mind of the officer." Moreover, "[t]he fact that an officer is interested in an item of evidence and fully expects to find it in the course of a search should not invalidate its seizure if the search is confined in area and duration by the terms of a warrant or a valid exception to the warrant requirement." We take this opportunity to join with the majority of states and adopt Horton, thereby discarding the inadvertence requirement of the plain view doctrine. Hence, the two elements needed to satisfy the plain view exception are: (1) the initial intrusion which afforded the authorities the plain view was lawful and (2) the incriminating nature of the evidence was immediately apparent to the seizing authorities.

State v. Wright, 391 S.C. 436, 443, 706 S.E.2d 324, 327 (2011) (citations omitted) (quoting Horton v. California, 496 U.S. 128 (1990)). "Furthermore, if police officers are following their standard procedure, they may inventory impounded property without obtaining a warrant." Robinson v. State, 407 S.C. 169, 185, 754 S.E.2d 862, 870 (2014).

In regard to the search of his car, Appellant argues the search incident to arrest exception does not apply in this case because he was not a recent occupant of the vehicle

and was not in close proximity to the vehicle at the time of his arrest. The State agrees that this exception is not applicable here and notes the trial court did not base its ruling on this particular exception to the warrant requirement. Rather, the trial court properly based its ruling on the plain view exception.

Appellant further argues officers had no valid reason to impound his vehicle so any inventory search was invalid. However, the State provided testimony regarding law enforcement policy on inventory searches at the suppression hearing. Officer Alvarado testified the Newberry City Police Department has written guidelines about inventory searches. Specifically, he stated, "We do an inventory search every time we take custody of a vehicle and have the vehicle towed." (Hearing Tr. 38, lines 9-16.) Investigator Goodman testified that the procedure for the department is to inventory a car once they have made an arrest, to include opening closed containers. (Hearing Tr. 86, lines 1-14; 87, line 16-Tr. 88, line 8.) Thus, the officers had the right to do an inventory search of the vehicle based on standard procedure. See Robinson, 407 S.C. at 185, 754 S.E.2d at 870 (finding police officers may inventory impounded property without obtaining a warrant if they are following their standard procedure).

Finally, Appellant states in his brief that "[t]he only other exception to the warrant requirement that could apply in this case is the automobile exception." (App. Br. 17.) He then argues the exception does not apply because the car was not readily mobile (as officers had the keys) and that because officers had the car under surveillance, no evidence could have been destroyed. Here, the trial judge decided his ruling based on the plain view exception. Thus, the State submits it is irrelevant whether the automobile exception applies. Furthermore, Appellant's failure to challenge the trial court's ruling on appeal means he has effectively abandoned any challenge to the search of his car.

In regard to the search of his hotel room, Appellant argues in his brief that tools alone are not suspicious and "it is unclear whether the bag of tools found on the backseat was even open at the time law enforcement looked through the windows of Appellant's car." (App. Br. 18.) However, Appellant conceded during the suppression hearing that the tools were in plain view. (Hearing Tr. 101, lines 4-9.) See State v. Benton, 338 S.C. 151, 156-57, 526 S.E.2d 228, 231 (2000) (an issue conceded in the trial court cannot be argued on appeal). Indeed, the trial court made a finding of fact the bag was open, and this Court is bound by that factual finding. While tools alone may not be suspicious with no other information, Appellant concedes in his brief that, here, officers had already located Appellant with tools on his person and suspected him of breaking into shops. Additionally, officers found a black bag containing tools on the ground near the AC unit where Appellant was located. (Hearing Tr. 64, lines 13-23.)

Further, he argues loose change is not suspicious and is commonly found in the center console of a car. However, the coins seen here were gold coins and quarters that were consistent with what was reported stolen from Regional Finance. (Hearing Tr. 47, lines 3-6; Tr. 77, lines 6-15.) Officer Malloy testified he saw coins in the center console in plain view before the car was opened and inventoried. (Hearing Tr. 47, lines 1-6.) He also testified he knew some of the general facts regarding the crime that occurred, which could reasonably demonstrate he knew coins were reported stolen. (Hearing Tr. 47, lines 17-19.) Later, when describing what was found during the inventory of the vehicle, he testified quarters and gold dollars were found in the center console. (Hearing Tr. 51, lines 6-7.)

> The standard for probable cause to conduct a warrantless search is the same as that for a search with a warrant. That is, a justifiable determination, based upon

> the totality of the circumstances and in view of all the evidence available to law enforcement officials at the time of the search, that there exists a practical, nontechnical probability that a crime is being committed or has been committed and incriminating evidence is involved.

State v. Bultron, 318 S.C. 323, 332, 457 S.E.2d 616, 621 (Ct. App. 1995) (citations omitted).

Here, the trial court determined there was probable cause to support the police officers' decision to secure the vehicle. (Hearing Tr. 114, line 19-Tr. 115, line 5.) Additionally, the trial court found probable cause to search the vehicle independent of any impounding of the car based on: (1) the officers' knowledge Appellant was from Tennessee, (2) their finding a vehicle with Tennessee tags nearby, (3) their seeing burglary tools in plain view in an open bag when looking into the window of the car, and (4) their seeing other things in the car that gave them reasonable, articulable suspicion to search it. (Hearing Tr. 115, lines 5-19.)

After seeing a hotel key in plain view inside Appellant's vehicle and discovering Appellant was staying at a nearby hotel, officers secured a search warrant to search his hotel room. Appellant argues the evidence from the search should have been suppressed because the search itself was based on evidence seized during the alleged unlawful search of the vehicle. However, because the search of the vehicle was supported by probable cause, the subsequent hotel room search was also valid. Unlike Wong Sun v. United States, 371 U.S. 471 (1963), which Appellant cites for the fruits of the poisonous tree doctrine, here no unlawful search or seizure led to the discovery of Appellant's hotel room and the subsequent valid warrant obtained to search it. Rather, officers saw a hotel room key in Appellant's vehicle in plain view before they seized the car or inventoried it. Their view of the hotel key, coupled with the knowledge Appellant was from Tennessee,

led them to investigate where he was staying and ultimately led to their obtaining a valid search warrant for his hotel room. Thus, both the search of Appellant's car and the search of his hotel room were valid under the Fourth Amendment.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

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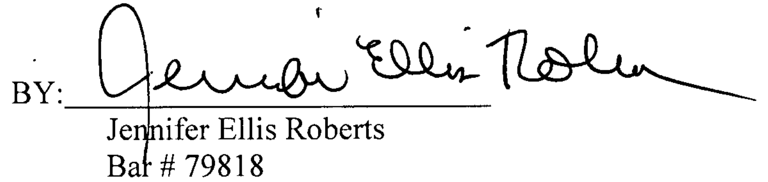

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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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THE STATE,

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v.

JEFFREY GLENN MCCOY,

Appellant.

PROOF OF SERVICE

I, Angela Bennett, certify that I have served the within Initial Brief of Respondent and Designation of Matter on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Lara M. Caudy, Esquire
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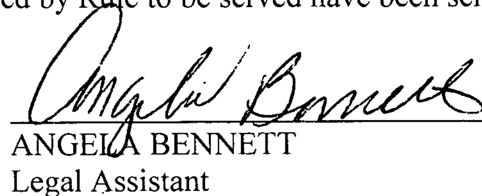
I further certify that all parties required by Rule to be served have been served.
This 8th day of July, 2014.



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RE: State v. Jeffrey Glenn McCoy
Appellate Case No. 2013-000921

Dear Ms. Caudy:

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

Sincerely,

Jennifer Ellis Roberts
Assistant Attorney General
Bar # 79818

JER/ab
Enclosures

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