

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
DeAndrea Gist Benjamin, Circuit Court Judge

Case No. 2010-CP-40-5214

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AUG 07 2014

SC Court of Appeals

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Demetrius Mack, Respondent,

v.

Leon Lott, in his Official Capacity
as Sheriff of Richland County, Appellant.

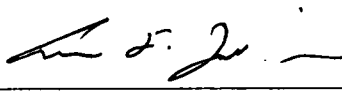
PETITION FOR REHEARING

The Appellant Leon Lott petitions the South Carolina Court of Appeals for a rehearing of the Court's recent decision in *Mack v. Lott*, Op. No. 5248 (S.C. Ct. App. filed July 23, 2014).

The grounds for the Appellant's petition for rehearing are addressed in detail in the supporting memorandum filed herewith and incorporated herein.

The Appellant's petition for rehearing is based on the Court's decision in *Mack v. Lott*, Op. No. 5248 (S.C. Ct. App. filed July 23, 2014); the supporting memorandum filed herewith; the briefs and Record on Appeal; Rule 221(a), SCACR; Rule 224, SCACR; and other rules of court.

DAVIDSON & LINDEMANN, P.A.

BY: 

ANDREW F. LINDEMANN
ROBERT D. GARFIELD
1611 Devonshire Drive
Post Office Box 8568
Columbia, South Carolina 29202
(803) 806-8222

Counsel for Appellant Leon Lott

Columbia, South Carolina

August 7, 2014

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**MEMORANDUM IN SUPPORT OF
APPELLANT'S PETITION FOR REHEARING**

The Appellant Leon Lott has petitioned this Court for a rehearing of its recent decision in *Mack v. Lott*, Op. No. 5248 (S.C. Ct. App. filed July 23, 2014). The Appellant Lott respectfully submits that the following points were overlooked or misapprehended by this Court:

I.

In its opinion, this Court concluded that the "trial court's findings of fact are insufficient under Rule 52(a)," and as a result, the Court remanded "for more detailed findings as to whether Mack met his burden of proving Gore did not have probable cause to arrest him." Slip Op. at 4. Sheriff Lott does not disagree with this ruling. The Sheriff agrees that the trial court's findings of fact are insufficient and fail to support the court's ultimate ruling that Gore lacked probable cause.

However, Sheriff Lott seeks rehearing because (1) a remand is unnecessary and (2) the Court appears to apply a subjective test on the issue of probable cause. These two issues are addressed below.

II.

In its opinion, the Court boils down the essence of this dispute to the following:

If Mack arrested Williamson on Club Essence property, any assault Mack committed during the arrest was lawful. However, if Williamson was in the roadway when Mack arrested him, Mack acted without legal authority to make the arrest and would be guilty of assault.

Slip Op. at 3. Sheriff Lott agrees with that analysis.

The Court then continues: "Therefore, Gore had probable cause to arrest Mack if Gore reasonably believed Mack arrested Williamson in the road—not on Club Essence property." Slip Op. at 3-4. Further clarifying, the Court explains

that "Mack was required to prove as a matter of fact that Gore did not reasonably believe Mack arrested Williamson in the road." Slip Op. at 4. The Court later reiterated that "the primary factual issue in the case" is "whether Gore reasonably believed Mack was off Club Essence property at the time he arrested Williamson." Slip Op. at 4.

Sheriff Lott, however, respectfully disagrees with how the Court has posited the "primary factual issue in the case." The Sheriff submits that probable cause requires an objective analysis – not a subjective one where a factfinder attempts to determine the subjective beliefs of the arresting officer. Frankly, it is unclear whether the Court is applying an objective test rather than a subjective test. Sheriff Lott requests that the applicable test be clarified on rehearing.

Sheriff Lott is concerned that the Court's phrasing of the dispositive issue suggests that the factfinder must assess what Gore's subjective belief was and then whether that belief was reasonable. That is not the proper test and may result in further error on remand.

By way of background, in *Jackson v. City of Abbeville*, 366 S.C. 662, 623 S.E.2d 656 (Ct. App. 2005), this Court ruled that "[p]robable cause is determined as of the time of the arrest, based on facts and circumstances -- *objectively measured* -- known to the arresting officer." 623 S.E.2d at 659. (Emphasis added). Similarly, this Court has explained that "[a] probable cause analysis involves the

use of a *fact-based, objective perspective*." *State v. Morris*, 395 S.C. 600, 720 S.E.2d 468, 472 (Ct. App. 2011). (Emphasis added).

This requirement of an objective test is mandated by United States Supreme Court case law. In *Ornelas v. United States*, 517 U.S. 690 (1996), the Supreme Court explained that "[t]he principal components of a determination of ... probable cause will be the events which occurred leading up to the ... search [or seizure], and then the decision whether these historical facts, *viewed from the standpoint of an objectively reasonable police officer*, amount ... to probable cause." 517 U.S. at 696. (Emphasis added).¹ As Judge Kittredge wrote in a dissenting opinion,

Concerning probable cause, we are guided by Fourth Amendment jurisprudence. In this regard, an officer's "[s]ubjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis." The proper inquiry is an objective one, based on what would a reasonable police officer believe under the same circumstances.

State v. Brannon, 379 S.C. 487, 666 S.E.2d 272, 292 (Ct. App. 2008) (Kittredge, J., dissenting), *citing Whren v. United States*, 517 U.S. 806, 813 (1996). *See also, United States v. Porter*, 71 Fed.Appx. 277, 278 (4th Cir. 2003) ("the Supreme Court has emphasized that the analysis of whether probable cause exists is an objective one, that is unaffected by the officer's subjective beliefs or state of

¹ An almost identical recitation of the law is included in this Court's opinion in *State v. Morris*, 395 S.C. 600, 720 S.E.2d 468 (Ct. App. 2011), where this Court wrote: "The principal components of the determination of probable cause will be whether the events which occurred leading up to the search [or seizure], viewed from the standpoint of an objectively reasonable police officer, amount to probable cause." 720 S.E.2d at 472.

mind"). *See also, State v. Banda*, 371 S.C. 245, 639 S.E.2d 36, 40, n.3 (2006) *citing Whren v. United States*, 517 U.S. 806, 814 (1996) ("subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis").

In sum, if this Court intends for the trial court on remand to apply a subjective test and to determine what Gore, as the arresting officer, believed or did not believe, then Sheriff Lott submits that that would be in error. Instead, with all due respect, the Court should require the trial court to determine whether an objectively reasonable police officer in Gore's position would believe that Mack was off the Club Essence property at the time he arrested Williamson. That is the dispositive issue in this case.

III.

Sheriff Lott also submits that a remand is not even necessary in order to determine whether an objectively reasonable police officer in Gore's position would believe that Mack was off the Club Essence property at the time he arrested Williamson. Sheriff Lott argued in his briefs and during oral argument that a remand is not necessary because the existence of probable cause may be determined as a matter of law based on the undisputed evidence contained in the record and the concessions Mack made in his own sworn testimony. That includes

the dashboard video evidence, which given its very nature, should be deemed undisputed.²

In its opinion, however, the Court did not address this issue. Despite this issue being properly raised and briefed, the Court never explains why the issue of probable cause cannot be determined as a matter of law taking the material evidence in a light most favorable to Mack. On rehearing, the Court is respectfully requested to address this issue and to further rule that probable cause existed for Mack's arrest.

Mack conceded in sworn testimony that he was actively pursuing McKenzie Williamson on foot, that Williamson fell under a parked vehicle, that the vehicle had been partially situated in the public roadway, that Mack then proceeded to physically "grab" and "pull" Williamson out from under the vehicle, and that Mack then restrained Williamson by handcuffing him. (R. 143-144, 187-192). Deputy Stacy Parish was responding to a call for backup at a Weir Avenue location past Club Essence where other deputies were working a narcotics arrest. With her

² The United States Supreme Court's decision in *Scott v. Harris*, 550 U.S. 372 (2007), is instructive on the controlling effect of video evidence over inconsistent witness testimony. In that case, the Supreme Court had the benefit of a videotape of the high-speed police pursuit at issue. The Court concluded that the videotape contradicted the version of events presented by the plaintiff. As a result, the Court held as follows: "Respondent's version of events is so utterly discredited by the record that no reasonable jury could have believed him. The Court of Appeals should not have relied on such visible fiction; it should have viewed the facts in the light depicted by the videotape." 550 U.S. at 380-381. The same standard is equally applicable in the case at bar. This Court is urged to view the critical facts as they are depicted by the indisputable video evidence.

dashboard video activated, Deputy Parish turned from Two Notch Road onto Weir Avenue and passed the location of Williamson, which is depicted in the video. (R. 227, 347). The video reflects that Williamson was supine in front of a white vehicle with his legs located in the roadway extending beyond the vehicle itself. At this point in time, Williamson had already been pulled from underneath the vehicle and was handcuffed. (R. 228, 347). One of Mack's fellow security guards can be seen attempting to stop Deputy Parish as she drove by. (R. 145, 187, 192, 347).

The dashboard video evidence is critical because it shows the position of the vehicles on the roadway including the position of the white vehicle from underneath which Williamson was "grabbed" and pulled by Mack. As indicated, the video also shows conclusively that Williamson is located in the roadway after he was detained by Mack. There is no disputing that his feet clearly extend past the row of vehicles. Moreover, the video shows the position of the vehicles lining Weir Avenue, including the white vehicle at issue. The daytime photographs of that location on Weir Avenue, which are in evidence, may also be used as reference points when examining the video on this issue. (R. 344, 348). Weir Avenue is a two-lane road; yet the parked vehicles lining the street essentially reduced the street to one lane – as evidenced by the limited space that Deputy Parish had to maneuver her vehicle. That demonstrates conclusively that the

vehicles, including the white vehicle, were parked at least partially in the roadway. (R. 347, 348).³

Finally, Mack's concessions regarding the evidence of "road rash" support the Sheriff's position and a finding of probable cause. Sheriff Lott has explained that the injuries to Williamson as observed by the officers, which appeared to be consistent with "road rash," provided further information that would allow an objectively reasonable officer on the scene to conclude that the injuries were sustained in the public roadway which was outside of Mack's jurisdiction rather than on the grassy side of the road which was within his jurisdiction. In his response brief, Mack agrees that the "road rash" "is also entirely consistent with Mack's observation of Williamson slipping under the car." *See*, Respondent's Brief, p. 13. Mack thus agrees that Williamson was located at least partially in the public roadway when underneath the white vehicle. At the very least, as the Sheriff maintains, the "road rash" allows a objectively reasonable officer to believe that Williamson, when he was "grabbed" and "pulled" by Mack from beneath the white car, had been located on the pavement of the public roadway.

³ From his response brief, it appears that Mack concedes that the white vehicle was partially in the public roadway and that Williamson, after he was pulled from under the white vehicle, was partially in the public roadway. It further appears from Mack's counsel's questioning of Deputy Parish at trial, including his use of leading questions, that he was making these factual concessions at trial. (R. 206, 209, 213, 233).

The video thus provides indisputable evidence that the vehicles were parked partially in the roadway, including the white vehicle from underneath which Mack claims to have "grabbed" and pulled Williamson. (R. 227, 347). That video also provides indisputable evidence that Williamson was handcuffed and detained for police while he was lying partially in the roadway. (R. 228, 347). In short, as a matter of law, these historical facts would lead an objectively reasonable officer on the scene to believe Mack's actions occurred, at least in part, in the public roadway, and as a result, outside of Mack's jurisdiction. Stated differently, an objectively reasonable police officer in Gore's position could have perceived and concluded that Mack committed an unwanted touching resulting in injuries sustained in the public roadway. Thus, based on the undisputed evidence contained in the record and concessions Mack made in his sworn testimony, there can be no question that probable cause existed for Mack's arrest. As a result, judgment in Mack's favor should be reversed, and the Court should conclude that Mack failed to prove his cause of action for false arrest/imprisonment. The Court is urged on rehearing to so rule -- which will also alleviate the need for the remand for specific findings of fact.

CONCLUSION

Based on the foregoing discussion, the Appellant Leon Lott respectfully requests that the Court rehear its decision and reverse the orders of Circuit Court Judge DeAndrea G. Benjamin and remand with instructions that judgment be entered in favor of Sheriff Lott.

Respectfully requested,

DAVIDSON & LINDEMANN, P.A.

BY: 

ANDREW F. LINDEMANN
ROBERT D. GARFIELD
1611 Devonshire Drive
Post Office Box 8568
Columbia, South Carolina 29202
(803) 806-8222

Counsel for Appellant Leon Lott

Columbia, South Carolina

August 7, 2014

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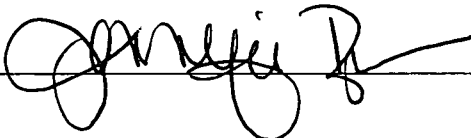
Leon Lott, in his Official Capacity
as Sheriff of Richland County, Appellant.

CERTIFICATE OF SERVICE

The undersigned employee of Davidson & Lindemann, P.A., counsel for the Appellant, does hereby certify that service of the **Petition for Rehearing** and **Memorandum in Support of Appellant's Petition for Rehearing** in the above-captioned matter was made upon all counsel of record by placing copies in the United States Mail, first class postage prepaid, at the below listed addresses clearly indicated on said envelopes this the 7th day of August 2014:

Neal M. Lourie, Esquire
Lourie Law Firm, LLC
Post Office Box 12089
Columbia, South Carolina 29211

Joshua S. Kendrick, Esquire
Christopher S. Leonard, Esquire
Kendrick & Leonard, P.C.
Post Office Box 886
Columbia, South Carolina 29202-0866



DAVIDSON & LINDEMANN, P.A.

ATTORNEYS AND COUNSELLORS AT LAW

William H. Davidson, II
Andrew F. Lindemann*
James M. Davis, Jr.†
Robert D. Garfield
Michael B. Wren

1611 Devonshire Drive, Second Floor
Post Office Box 8568
Columbia, South Carolina 29202-8568
Telephone: (803) 806-8222
Facsimile: (803) 806-8855
www.dml-law.com

Daniel C. Plyler
Joel S. Hughes
Justin T. Bagwell
David A. DeMasters
Steven R. Spreeuwiers
Todd R. Flippin

*Also Admitted In North Carolina
†Certified Mediator

August 7, 2014

Of Counsel
Kenneth P. Woodington

Writer's Email: alindemann@dml-law.com

Hand Delivered

The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
Edgar Brown Building
1205 Pendleton Street
Columbia, South Carolina 29201

RE: Demetrius Mack v. Richland County Sheriff Leon Lott, in his Official Capacity
SCCA Case Number: 2012-212277
Civil Action Number: 2010-CP-40-5214
Our File Number: 314.8515

Dear Ms. Kitchings:

Please find enclosed for filing the originals and seven copies each of the **Petition for Rehearing** and **Memorandum in Support of Appellant's Petition for Rehearing** in the above referenced matter. Please file the originals and return a clocked-in copy of each document to me by way of my courier. I have also enclosed my firm's \$25.00 check for the filing fee.

By copy of this letter, I am serving copies on all counsel of record.

Thank you for your assistance in this matter.

Sincerely,

DAVIDSON & LINDEMANN, P.A.



Andrew F. Lindemann

AFL/jmb
Enclosures

The Honorable Jenny Abbott Kitchings
August 7, 2014
Page Two

cc: (w/ Enclosures)

Neal M. Lourie, Esquire
Lourie Law Firm, LLC
Post Office Box 12089
Columbia, South Carolina 29211

Joshua S. Kendrick, Esquire
Christopher S. Leonard, Esquire
Kendrick & Leonard, P.C.
Post Office Box 886
Columbia, South Carolina 29202-0866