

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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AUG 28 2014

APPEAL FROM RICHLAND COUNTY
DeAndrea Gist Benjamin, Circuit Court Judge

SC Court of Appeals

Case No. 2010-CP-40-5214

Demetrius Mack, Respondent,

v.

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

**REPLY TO RESPONDENT'S RETURN TO
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 Respondent Demetrius Mack has now filed a return to which a brief reply is warranted.

The Respondent Mack contends that this case turns on "what the officer [Deputy Gore] saw and could prove" and specifically "on the trial court's

credibility assessment of the officers' testimony." *See*, Respondent's Return, pp. 1-2. Mack insists that Judge Benjamin ruled in his favor because she did not believe the officers' testimony. This view of the case is frankly wrong.

The case does not turn on a subjective determination of what Deputy Gore saw or believed he saw. The determination of probable cause is based on an objective test – what matters is whether an objectively reasonable police officer would believe probable cause exists. In determining whether there was probable cause to arrest, the court should determine the historical facts and then evaluate whether an objectively reasonable police officer would believe that probable cause exists based on those historical facts. Thus, Judge Benjamin was required to first determine what the historical facts were, and based thereon, then determine whether an officer in Gore's position may have reasonably perceived the arrest of Williamson by Mack to have occurred in the public street. If an objectively reasonable officer could have perceived the arrest as occurring in the street, then probable cause existed for Mack's arrest, and judgment should be entered for Sheriff Lott.

In this case, both the trial court and this Court have the benefit the dashboard video from Deputy Parish's vehicle. Not surprisingly, Mack attempts to discount the video as showing only the "aftermath" of the events. While the video does not show Williamson being dragged from beneath the white car by Mack, it does show the position of the car in question, which is at least partially in the street, and it

shows Williamson at least partially in the street after his arrest. There is no disputing that. In fact, Mack's counsel conceded as much with his questioning of Deputy Parish at trial, as the following examples show:

Q. And that white vehicle was half on the side of the road and a half on the property of 109 Weir Avenue?

(R. 206).

Q. And when you arrived on the scene, Mr. Williamson was half on the grass of 109 Weir Avenue and half on the roadway, is that correct?

(R. 209).

Q. Officer Parish, I believe in your testimony with me you said that the white vehicle was all the way in the road. Would you agree with me that that video depicts it half on the grass and a half on the side of the road?

(R. 233).

Thus, Mack took the position at trial that the white vehicle was halfway in the road and that Williamson was also positioned at least halfway in the road. These are critical concessions, and ones that are supported by the dashboard video.

In effect, by Mack's own admission and supported by video evidence, Williamson was under arrest while laying in the street. Importantly, there is no evidence to suggest that Williamson was arrested on the grass and then moved into the street. Instead, by Mack's own account, he pulled Williamson from under the white car that was positioned halfway in the street, and Williamson was then

placed under arrest and handcuffed while at least partially in the street. Mack himself confirmed on direct examination that Williamson was not moved after his arrest:

Q. ... And that is when you handcuffed him?

A. That is when the bouncers who came behind me to assist me said, go ahead and put the cuffs on him. And I cuffed him and pulled him out -- *after they pulled him out from under the car, I put the cuffs on him and we held him right there until one of deputies came down Weir Avenue, which was Deputy Parish. And one of the guys flagged her down where I held him right here.*

Q. Okay.

A. Uh-huh.

Q. *You didn't move him after he came out from under the car, did you?*

A. *No.*

Q. *After you put handcuffs on him?*

A. *No.*

(R. 145). (Emphasis added).

This is important and demonstrates why a remand is unnecessary. Even assuming the historical facts are as described by Mack and as confirmed on the video, an objectively reasonable officer in Gore's position, which was forty yards down the street (R. 102), would reasonably perceive that the arrest of Williamson occurred in the public street. Williamson could be seen handcuffed and laying at

least partially in the roadway. That has been conceded. Williamson was arrested and handcuffed where he lay. That has been conceded. Could an objectively reasonable officer viewing this from forty yards away conclude that the arrest occurred in the street? The answer is obviously "yes."

That conclusion is further supported by the physical evidence, specifically the road rash observed by Deputy Gore on Williamson when he came to the immediate scene. The road rash, which Mack now calls "scratches" on Williamson, is consistent with a person coming in contact with the asphalt of a roadway. The observation of road rash, therefore, provided additional corroborating evidence (i.e. historical fact) that an objectively reasonable officer in Gore's position would use as additional evidence that the arrest occurred in the public roadway and not on the grass adjoining the roadway.

In close, Mack argues that "[a]t trial, the judge found Mack's version of events more credible and ruled in his favor." *See*, Respondent's Return, p. 3. That is not necessarily true but is nonetheless immaterial to the question at issue. As Sheriff Lott has argued at trial and on appeal, even if the historical facts were drawn entirely from Mack's account, the court must find that an objectively reasonable officer observing the events would conclude that Mack's arrest of Williamson occurred at least partially in the 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. For that reason, a remand is not necessary, and judgment should be entered for Sheriff Lott.

Respectfully submitted,

DAVIDSON & LINDEMANN, P.A.

BY:  _____

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August 25, 2014

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DeAndrea Gist Benjamin, Circuit Court Judge

Case No. 2010-CP-40-5214

Demetrius Mack, Respondent,

v.

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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 **Reply to Respondent's Return to 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 25th day of August 2014:

Neal M. Lourie, Esquire
Lourie Law Firm, LLC
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SC Court of Appeals

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August 25, 2014

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The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

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 original and seven copies of the **Reply to Respondent's Return to Appellant's Petition for Rehearing** in the above referenced matter. Please file the original and return a clocked-in copy to me in the enclosed envelope.

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

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The Honorable Jenny Abbott Kitchings
August 25, 2014
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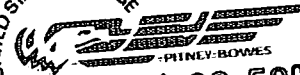
cc: (w/ Enclosure)

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