

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Charleston County

Deadra L. Jefferson, Circuit Court Judge

RECEIVED

DEC 15 2014

S.C. Supreme Court

THE STATE,

PETITIONER,

V.

DANIEL J. JENKINS,

RESPONDENT

2012-212544

BRIEF OF RESPONDENT

KATHRINE H. HUDGINS
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, S. C. 29211-1589
(803) 734-1343

ATTORNEY FOR RESPONDENT.

TABLE OF CONTENTS

TABLE OF CONTENTS 1

TABLE OF AUTHORITIES.....2

STATEMENT OF ISSUES ON APPEAL.....3

STATEMENT OF THE CASE4

ARGUMENT

The Court of Appeals correctly remanded the case for an evidentiary hearing to determine if the State could meet the burden of proving that law enforcement agencies investigating or the solicitor’s office prosecuting respondent inevitably would have obtained respondent’s genetic profile or would have obtained the profile from an independent source, the State DNA database, and prove that a lawfully obtained profile could be compared to the profile developed from semen found upon examination of the witness because the trial court did not have an opportunity to make factual findings in regard to inevitable discovery or independent source and there is no evidence in the record that respondent’s DNA profile is actually in the State database and that an expert could have used that profile at trial. 5

The Court of Appeals correctly found that the trial court’s error in admitting the unlawfully obtained DNA evidence was not harmless..... 11

CONCLUSION..... 14

TABLE OF AUTHORITIES

Cases

<u>Chapman v. California</u> , 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967)	12
<u>Delaware v. Van Arsdall</u> , 475 U.S. 673, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986)	13
<u>Florida v. Wells</u> , 495 U.S. 1, 4 (1995).....	7
<u>Franklin v. Catoe</u> , 346 S.C. 563, 552 S.E.2d 718 (2001)	12
<u>Kastigar v. United States</u> , 406 U.S. 441, 457, 92 S.Ct. 1653, , 32 L.Ed.2d 212 (1972). 10	
<u>Murphy v. Waterfront Comm'n of New York Harbor</u> , 378 U.S. 52, 84 S.Ct.1594, 1609, 12 L.Ed.2d 678 (1964).....	10
<u>Nix v. Williams</u> , 467 U.S. 431, 104 S. Ct. 2501, 2508-09, 81 L. Ed. 2d 377 (1984)....	7,10
<u>State v. Black</u> , 400 S.C. 10, 732 S.E.2d 880, 890 (2012).....	12
<u>State v. Charming</u> , 313 S.C. 147, 437 S.E.2d 88 (1993)	11
<u>State v. Fossick</u> , 333 S.C. 66, 508 S.E.2d 32 (1998).....	13
<u>State v. Holmes</u> , 320 S.C. 259, 464 S.E.2d 334 (1995).....	13
<u>State v. Jenkins</u> , 398 S.C. 215, 727 S.E.2d 761 (Ct. App. 2012).....	4, 5, 9, 11
<u>State v. Key</u> , 256 S.C. 90, 180 S.E.2d 888 (1971).....	12
<u>State v. Mitchell</u> , 378 S.C. 305, 316, 662 S.E.2d 493, 499 (2008).....	12
<u>State v. Mizzell</u> , 349 S.C. 326, 333, 563 S.E.2d 315, 318 (2002).....	12, 13
<u>State v. Spears</u> , 393 S.C. 466, 713 S.E.2d 324 (Ct. App. 2011).....	7
<u>State v. Tapp</u> , 398 S.C. 376, 728 S.E.2d 468 (2012).....	11
<u>United States v. Allen</u> , 159 F.3d 832 (4 th Cir. 1998).....	9
<u>Wilson v. State</u> , 132 Md. App. 510, 752 A.2d 1250 (Md. App. 2000)	8
<u>Wong Sun v. United States</u> , 371 U.S. 471 (1963).....	7

Statutes

S.C. Code §17-25-45	4
---------------------------	---

STATEMENT OF ISSUES ON APPEAL

1. Did the Court of Appeals correctly remand the case for an evidentiary hearing to determine if the State could meet the burden of proving that law enforcement agencies investigating or the solicitor's office prosecuting respondent inevitably would have obtained respondent's genetic profile or would have obtained the profile from an independent source, the State DNA database, and prove that a lawfully obtained profile could be compared to the profile developed from semen found upon examination of the witness because the trial court did not have an opportunity to make factual findings in regard to inevitable discovery or independent source and there is no evidence in the record that respondent's DNA profile is actually in the State database and that an expert could have used that profile at trial?

2. Did the Court of Appeals correctly find that the trial court's error in admitting the unlawfully obtained DNA evidence was not harmless?

STATEMENT OF THE CASE

In September 2006, the Charleston County Grand Jury indicted Jenkins for criminal sexual conduct first degree, indictment #2006-GS-10-9254. On December 8, 2008, Jenkins proceeded to jury trial before the Honorable Deadra L. Jefferson. Attorneys Jason King and Reece Stidham represented Jenkins at trial. Attorneys Chad Simpson and Chris Neeley prosecuted the case. The jury returned a verdict of guilty and, pursuant to S.C. Code §17-25-45, Judge Jefferson sentenced Jenkins to life imprisonment. A timely notice of intent to appeal was filed on December 10, 2008.

The direct appeal was perfected and on March 28, 2012, the South Carolina Court of Appeals issued an opinion remanding the case for an evidentiary hearing. State v. Jenkins, 398 S.C. 215, 727 S.E.2d 761 (Ct. App. 2012). The State filed a petition for rehearing. On June 20, 2012, The Court of Appeals granted the State's petition for rehearing, withdrew the original opinion and substituted with a new opinion¹, still remanding the case for an evidentiary hearing. State v. Jenkins, 398 S.C. 215, 727 S.E.2d 761 (Ct. App. 2012). On September 7, 2012, the State filed a petition for writ of certiorari. Respondent filed a return on December 7, 2012. On September 24, 2014, this court granted the State's petition for writ of certiorari. On October 23, 2014, the State filed the brief of petitioner. This brief of respondent follows.

¹ The new opinion simply adds an additional footnote #7.

ARGUMENT

1. The Court of Appeals correctly remanded the case for an evidentiary hearing to determine if the State could meet the burden of proving that law enforcement agencies investigating or the solicitor's office prosecuting respondent inevitably would have obtained respondent's genetic profile or would have obtained the profile from an independent source, the State DNA database, and prove that a lawfully obtained profile could be compared to the profile developed from semen found upon examination of the witness because the trial court did not have an opportunity to make factual findings in regard to inevitable discovery or independent source and there is no evidence in the record that respondent's DNA profile is actually in the State database and that an expert could have used that profile at trial.

The State does not challenge the finding by the Court of Appeals that the trial court erred in admitting DNA test results because the affidavit in support of the search warrant for DNA samples did not meet the constitutional and statutory requirements for issuance of the warrant. Instead, the State argues that the Court of Appeals erred in remanding for an evidentiary hearing because, despite the fact that the inevitable discovery doctrine and the independent source doctrine were not argued before the trial court, according to the State's argument, the record is sufficient to allow this Court to determine if the State met its burden of proof in regard to inevitable discovery. The State also argues that the DNA test results obtained as the result of the unlawful search should not be suppressed because the police would have obtained Jenkins's DNA from an independent source, the State DNA database. The State's argument is not supported by the record and asks the Court to assume facts not in evidence.

In State v. Jenkins, 398 S.C. 215, 230, 727 S.E.2d 761, 769 (Ct.App. 2012) the Court of Appeals wrote, "Given the important policy considerations behind the exclusionary rule and the inevitable discovery doctrine, we believe the determination of whether the illegally seized evidence of Jenkins' DNA must be suppressed should not be made by this

Court on a blank record. Rather, the determination should be made first by the trial court after an evidentiary hearing.” In footnote seven, the only change to the substituted opinion issued after the State filed a petition for rehearing, the Court of Appeals wrote:

The State’s petition for rehearing includes an uncertified copy of a printout from SLED indicating the State DNA database contains Jenkins’ DNA profile. The printout has not been authenticated under Rule 901(a), SCRE, is not part of the record on appeal, and contains no indication a DNA expert could actually use the profile. The State’s contention that the printout proves its inevitable discovery claim misses the point of the inevitable discovery doctrine. The issue as to inevitable discovery is not whether a state agency separate from the prosecutor has Jenkins’ profile in its database. Rather, the doctrine places on the State the burden of proving that the law enforcement agencies investigating or the solicitor’s office prosecuting Jenkins inevitably would have obtained Jenkins’ genetic profile from this database and that the lawfully-obtained profile could be compared to the profile developed from the semen found in the victim. Standing alone, the printout establishes only that the solicitor’s office or investigating agency *might have* obtained the profile from the State DNA database. The inevitable discovery doctrine requires the State to establish it inevitably *would have* obtained it and could have used it.

Jenkins, 398 S.C. at 228, 727 S.E.2d at 768. The appellate record fails to establish that the State can meet its burden to prove that the DNA evidence obtained as a result of the unlawful search should not be suppressed based on the inevitable discovery doctrine or the independent source doctrine. The Court of Appeals correctly remanded the case to allow the State an opportunity to meet that burden. On remand, the trial court would determine if the inevitable discovery doctrine or the independent source doctrine is applicable under the facts presented and if applicable, if the State can meet its burden as required.

Evidence obtained from an illegal search must be suppressed as fruit of the poisonous tree. Wong Sun v. United States, 371 U.S. 471 (1963). The exclusionary rule exists to deter police misconduct and constitutional violations. See Nix v. Williams, 467 U.S. 431, 442-43 (1984). Despite the illegality of an original search, “[I]f the prosecution can establish by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means ... then the deterrence rationale has so little basis that the evidence should be received.” Id. at 444. Therefore, once it is determined that the evidence was illegally seized, the burden shifts to the State to prove that an exception to the exclusionary rule applies. If the State fails to meet its evidentiary burden then the evidence must be suppressed.” The State must present evidence, not conjecture, to meet its burden. See Florida v. Wells, 495 U.S. 1, 4 (1995) (requiring the State to present evidence of police procedures when arguing evidence would be inevitably discovered during an inventory search).

In State v. Spears, 393 S.C. 466, 713 S.E.2d 324 (Ct.App. 2011), the Court of Appeals properly applied the inevitable discovery doctrine based on a search warrant that was valid, separate and apart from the unlawful consent to search. The remand hearing in the present case will determine if an exception to the exclusionary rule exists. If an exception exists, then the trial court would determine if the State can meet the burden of proving that law enforcement agencies investigating or the solicitor’s office prosecuting respondent inevitably would have obtained, separate and apart from the defective warrant, respondent’s genetic profile. The trial court could additionally determine if the State would have obtained respondent’s genetic profile from an independent source, the State DNA database, and determine if the lawfully obtained profile could have been compared to the

profile developed from semen found upon examination of the witness and the results presented as evidence at trial.

In Wilson v. State, 132 Md. App. 510, 752 A.2d 1250 (Md. App. 2000), the Maryland Court of Special Appeals properly applied the inevitable discovery doctrine finding that although a 1991 warrant may have been defective, the police had obtained a valid warrant in 1998 and had simply not executed that warrant because of the 1991 sample. The valid warrant was obviously a part of the record in Wilson and was fully developed at trial. In the present case, there is no valid warrant to meet the requirement of the inevitable discovery doctrine.

The State argues that the inevitable discovery rule should apply because, “Critically, had the magistrate judge found the search warrant affidavit to be insufficient because it did not identify the source or basis of the information contained within in it, Detective Antonio logically and inevitably would have provided that information to the magistrate judge as she was well aware of the fact supporting probable cause at the time the warrant was issued since she investigated the case, spoke with Victim, and was present when Victim positively identified Jenkins as her attacker.” (Brief of Respondent p. 13). The premise that the State can cure a defective warrant under the guise of the inevitable discovery doctrine misconstrues both the exclusionary rule’s purpose of deterrence as well as the rationale behind the inevitable discovery rule. Allowing the State to argue that the officers would have made the warrant valid provides the State with a third bite at the apple when the State has already received a second bite at the apple in the form of the remand. Additionally, the argument ignores the fact that “[t]he affidavit in this case does not contain any indication as to whether the police had other DNA

evidence to which Jenkins' profile could be compared." Jenkins, 398 S.C. at 224, 727 S.E.2d at 766. In footnote two the Court noted that the officer admitted that when she prepared the affidavit, she did not know the results of the rape examination.

The State's attempt to distinguish United States v. Allen, 159 F.3d 832 (4th Cir. 1998) is misplaced. The State writes, "However, the situation in Jenkins' case is far different from the circumstance of Allens case. Significantly, unlike the officers in Allen, an officer involved in Jenkins' case unquestionably did seek a warrant **before** the improper search, which clearly demonstrated the officer's intent to obtain a warrant for Jenkins' DNA sample." (Brief of Respondent p. 14) (emphais in the original). It is precisely this warrant that was sought and obtained that the Court found and the State concedes was defective. The Allen case involved an unlawful warrantless search and seizure, the police were not seeking a warrant and the court found the inevitable discovery doctrine did not apply. "As the Fourth Circuit has stated: "The inevitable discovery doctrine cannot rescue evidence obtained via an unlawful search simply because probable cause existed to obtain a warrant when the government presents *no* evidence that the police would have obtained a warrant. Any other rule would emasculate the Fourth Amendment." United States v. Allen, 159 F.3d 832, 842 (4th Cir.1998)." State v. Jenkins, 398 S.C. 215, 227-228, 727 S.E.2d 761, 768 (Ct.App. 2012) (footnote omitted). The unlawful seizure in the present case was pursuant to an unlawful defective warrant and can not be cured by arguing, under the guise of inevitable discovery, that the police would have obtained a valid warrant, when, in fact they did not. Respondent submits that, under the facts of this case, the inevitable discovery doctrine is inapplicable.

Respondent's DNA profile could only be obtained through a valid warrant or order, not present in this case, or through an independent source.

The State boldly asserts, without evidentiary support, that respondent's DNA profile is available through the South Carolina DNA database and that the sample would have been obtained and could have been used at trial against respondent, rendering the DNA admissible under the independent source doctrine. In Nix v. Williams, 467 U.S. 431, 443-44, 104 S. Ct. 2501, 2508-09, 81 L. Ed. 2d 377 (1984), the United States Supreme Court wrote:

The independent source doctrine allows admission of evidence that has been discovered by means wholly independent of any constitutional violation. That doctrine, although closely related to the inevitable discovery doctrine, does not apply here; Williams' statements to Learning indeed led police to the child's body, but that is not the whole story. The independent source doctrine teaches us that the interest of society in deterring unlawful police conduct and the public interest in having juries receive all probative evidence of a crime are properly balanced by putting the police in the same, not a worse, position that they would have been in if no police error or misconduct had occurred. See Murphy v. Waterfront Comm'n of New York Harbor, 378 U.S. 52, 79, 84 S.Ct.1594, 1609, 12 L.Ed.2d 678 (1964); Kastigar v. United States, 406 U.S. 441, 457, 458-459, 92 S.Ct. 1653, 1663-1664, 32 L.Ed.2d 212 (1972). When the challenged evidence has an independent source, exclusion of such evidence would put the police in a worse position than they would have been in absent any error or violation. There is a functional similarity between these two doctrines in that exclusion of evidence that would inevitably have been discovered would also put the government in a worse position, because the police would have obtained that evidence if no misconduct had taken place. Thus, while the independent source exception would not justify admission of evidence in this case, its rationale is wholly consistent with and justifies our adoption of the ultimate or inevitable discovery exception to the exclusionary rule. (footnote omitted).

On remand the trial court should determine if the State would have obtained respondent's DNA profile from an independent source and if so, if the State would have been able to use that profile at trial. Respondent submits that the State will not be able to

meet their burden in this regard. The Court of Appeals, however, properly remanded the case to the trial court to make that determination. The State should be given the opportunity to try and meet its burden in regard to both the inevitable discovery and the independent source doctrines.

2. The Court of Appeals correctly found that the trial court's error in admitting the unlawfully obtained DNA evidence was not harmless.

The State's evidence relied in large part on the victim's testimony. Additionally, the State introduced evidence that respondent's fingerprints were found on an ashtray in the victim's home. The unlawfully seized DNA evidence was a critical factor in the State's case. As the Court of Appeals noted, "Without the DNA in this case, on the other hand, the State would have been forced to rely heavily on the credibility of the victim. Jenkins' fingerprint in the victim's home proved he was there, the presence of fluids in her body proved someone had sex with her, and the facial injuries proved someone violently assaulted her. However, removing the DNA leaves only the victim's credibility to prove two key facts necessary for a conviction: that Jenkins was the person who had sex with her, and that the sex was not consensual." State v. Jenkins, 398 S.C. 215, 226, 727 S.E.2d 761, 767 (Ct.App. 2012) (footnote omitted).

In State v. Tapp, 398 S.C. 376, 389-390, 728 S.E.2d 468, 475 (2012) this court wrote:

The key factor for determining whether a trial error constitutes reversible error is "whether it appears 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" State v. Charping, 313 S.C. 147, 157, 437 S.E.2d 88, 94 (1993) (quoting Chapman

v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967), *overruled on other grounds by Franklin v. Catoe*, 346 S.C. 563, 552 S.E.2d 718 (2001)). “Whether an error is harmless depends on the circumstances of the particular case.” State v. Mitchell, 378 S.C. 305, 316, 662 S.E.2d 493, 499 (2008). “No definite rule of law governs this finding; rather, the materiality and prejudicial character of the error must be determined from its relationship to the entire case. Error is harmless when it ‘could not reasonably have affected the result of the trial.’ ” *Id.* (quoting State v. Key, 256 S.C. 90, 180 S.E.2d 888 (1971)).

Engaging in this harmless error analysis, we note that our jurisprudence requires us not to question whether the State proved its case beyond a reasonable doubt, but whether beyond a reasonable doubt the trial error did not contribute to the guilty verdict. *See State v. Mizzell*, 349 S.C. 326, 334, 563 S.E.2d 315, 319 (2002) (harmless error jurisprudence requires that the error not contribute to the verdict obtained).

The State failed to prove beyond a reasonable doubt that the error in admitting the DNA evidence did not contribute to the guilty verdict. The State did not present overwhelming evidence of guilt. Contrary to the State’s position, the presence of respondent’s fingerprints on an ashtray inside the home does not link him to the criminal sexual conduct. The fingerprints merely establish that at some unknown point in time, respondent touched the ashtray.

The Court of Appeals further found that the DNA evidence bolstered the witness’ credibility in regard to the important issue of consent. *Id.* at footnote #5. In State v. Black, 400 S.C. 10, 732 S.E.2d 880, 890 (2012), this Court wrote:

In determining harmless error regarding any issue of witness credibility, we will consider the importance of the witness's testimony to the prosecution's case, whether the witness's testimony was cumulative, whether other evidence corroborates or contradicts the witness's testimony, the extent of cross-examination otherwise permitted, and the overall strength of the State's case.”

State v. Fossick, 333 S.C. 66, 70, 508 S.E.2d 32, 34 (1998); *see also* State v. Mizzell, 349 S.C. 326, 333, 563 S.E.2d 315, 318 (2002) (listing these factors for assessing harmless error, as taken from Delaware v. Van Arsdall, 475 U.S. 673, 684, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986)). Van Arsdall involved a Confrontation Clause violation caused by the erroneous exclusion of evidence of a prosecution witness's bias. In State v. Holmes, this Court specifically adopted the factors articulated in Van Arsdall for assessing harmless error and held these factors shall likewise apply for any error concerning witness credibility. State v. Holmes, 320 S.C. 259, 265, 464 S.E.2d 334, 337 (1995) (“While the harmless error ruling in Van Arsdall dealt specifically with witness bias, we hold that the Van Arsdall factors apply with equal force in determining a harmless error violation relating to any issue of witness credibility.”).

The witness’ testimony in the present case was critical and was not cumulative. While there was no limitation on cross examination, there was not overwhelming evidence that respondent committed the crime alleged. The Court of Appeals correctly found that the error in admitting the DNA evidence was not harmless.

CONCLUSION

Based on the above arguments, the opinion of the South Carolina Court of Appeals should be affirmed and the case remanded to the trial court to make a determination in regard to whether the State can prove an exception to the exclusionary rule that would allow admission of the DNA profile.

Respectfully submitted,



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR RESPONDENT.

This 15th day of December, 2014.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Charleston County
Deadra L. Jefferson, Judge

THE STATE,

PETITIONER,

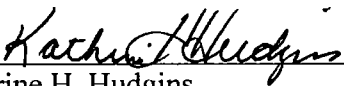
V.

DANIEL J. JENKINS,

RESPONDENT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Brief of Respondent in the above referenced case has been served upon Mark R. Farthing, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 15th day of December, 2014.



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR RESPONDENT.

SUBSCRIBED AND SWORN TO before me
this 15th day of December, 2014.

 (L.S.)

Notary Public for South Carolina

My Commission Expires: October 24, 2021 .