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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM GREENVILLE COUNTY
Court of General Sessions

The Honorable G. Edward Welmaker, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ERICK E. HEWINS,

APPELLANT

Appellate Case No. 2013-000224

PETITION FOR REHEARING

Pursuant to Rule 221(a) of the South Carolina Appellate Court Rules, Petitioner, Erick Hewins respectfully requests rehearing of the above referenced matter, as this Court erred when making a factual determination regarding consent, which was not decided by the trial court, nor supported by sufficient argument by the state during the trial of this matter. *State v. Provet*, 405 S.C. 101, 113,747 S.E.2d 453, 460 (S.C. 2013) (the state has the burden to demonstrate the voluntariness of consent when disputed by the Defendant.)

In this case, there is no ruling by the trial court that Petitioner voluntarily consented to a search. In addition, the state did not raise this as an argument for determination, nor did the state offer any additional evidence in support of this argument. Rather, during the trial of this matter, the arresting officer took the stand and alleged that, upon informing Petitioner that the officer intended to perform a *Terry* frisk for wearpons, the officer then asked Petitioner for permission to reach into

his pocket. (Record on Appeal, p. 14, ll. 7-25). Petitioner took the stand and denied having provided consent. (Record on Appeal p. 75-76, line 23).

Despite the contradictory testimony from the Petitioner, the state made no effort to ask the Court to rule on voluntary consent at this time, and provided no corroborating evidence of the encounter to support the Officer's contention that he received voluntary consent to search. The trial court did not rule on this matter, nor did any part of the court's decision on suppression involve a consensual search.

This Court indicates on page 5 of its opinion that a determination as to the arresting officer's reasonable susicion that Petitioner had contraband in his pocket was unnecessary because "[Officer] Gardner testified he received Hewins' consent to reach into the pocket." (citing *State v. Bailey*, 276 S.C. 32, 35-36, 274 S.E.2d 913, 915 (1981), recognizing consent as an exception to the warrantless search requirement.) This Court's reliance on *State v. Bailey* is misguided however, as the trial court in this case never made a determination on voluntary consent, nor did the state present any case in support of voluntary consent. *Provet, supra* ("[t]he existence of voluntary consent is determined from the totality of the circumstances. When the defendant disputes the voluntariness of his consent, the burden is on the State to prove the consent was voluntary.") Rather the entire basis for this Court's opinion on consent rests exclusively with Officer Gardner's testimony, which the Petitioner refuted when he took the stand at trial.

As this Court is aware, "[a] warrantless search is reasonable within the meaning of the Fourth Amendment when voluntary consent is given for the search." *Palacio v. State,* 333 S.C. 506, 514, 511 S.E.2d 62, 66 (1999). To determine voluntary consent, a trial court must engage in a totality of the circumstances evaluation, with the burden on the state to demonstrate voluntary consent. *Id.* Here the Petitioner disputed the existence of consent in general, not just the existence of

voluntary consent. If the state intended for consent to be a dispositive issue, it was thus the state's burden to raise the issue and provide sufficient evidence for the trial court to make a ruling. The state failed to raise the issue, however, and thus there is no ruling on this issue by the trial court, nor any record that the trial court weighed the totality of the circumstances regarding this issue.

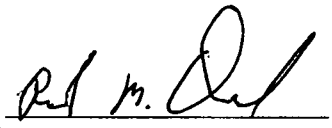
Moreover, this Court even recognizes that there is no opinion from the lower court as to the scope of any consent. In its opinion, this Court states plainly, "[t]he trial court did not make any finding as to whether the scope of consent included the second reach in Hewins' pocket." This Court went on to point out that is was "troubled by Gardner's bare assertion that he received consent for the second reach to justify his actions."[1] Citing *Johnson v. United States*, 333 U.S. 10, 13-14 (1948). Yet, this Court relied on Officer Gardner's bare assertion in finding that there was consent for an initial search into Petitioner's pocket, and ignores that the trial court did not opine in any way as to consent of the Petitioner for an initial search.

While Rule 220(c) of the South Carolina Appellate Court Rules allows this Court to affirm the lower court on any ruling, order, decision or judgment upon any ground appearing in the Record on Appeal, there is no ruling, decision or judgment regarding consent in this case. In fact, this Court's opinion indicates as much, because the basis for this Court's opinion is limited to the Officer's testimony, rather than a totality of the circumstances evaluation by the trial court.

Thus this Court has made a factual determination, not ruled upon by the trial court, and unsupported by the Record on Appeal, with regard to consent. Moreover, this Court's decision

[1] Petitioner thinks it is instructive that this Court states on page 6 of its opinion that "[i]f Gardner had Hewins' consent to conduct the first reach into the pocket, the scope of the consent granted could have been limited to determining what the lump in Hewins' pocket was." This statement illustrates that the question as to consent was never answered by the trial court, and is an inappropriate basis for this Court's decision. *State v. Brockmeyer*, 406 S.C. 324, 336 n.8, 751 S.E.2d 645, 651 n.8 (2013) ("Because the trial court did not rule on this argument, it is not preserved for appellate review and we do not reach it.")

places the burden on the Petitioner to challenge consent, despite the clear mandate in *Provet* that the burden rests with the State to prove voluntary consent when challenged. Finally, this Court declined to determine whether the arresting Officer reasonably believed that the Petitioner had contraband upon him based upon this Court's finding of consent. Petitioner submits that it was error for this Court to make this dispositive factual determination, which was unsupported by the Record on Appeal, and which the state failed to raise at the trial level. For this reason, Petitioner requests rehearing.

By: 

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January 6, 2015

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Greenville County
G. Edward Welmaker, Circuit Court Judge

THE STATE,

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V.

ERICK HEWINS,

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APPELLATE CASE NO. 2013-000224

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Petition for Rehearing in the above-entitled case has been served upon Mary S. Williams, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 this 6th day of January, 2015.

Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

SWORN TO BEFORE ME this 6th day
of January, 2015.

(L.S.)
Notary Public for South Carolina

My Commission Expires: December 9, 2024.