ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Marion County

William H. Seals, Jr., Circuit Court Judge

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MAY - 4 2015

S.C. Supreme Court

Opinion No. 2014-UP-366 (S.C. Ct. App. filed 10/29/2014)

09-GS-33-0106

THE STATE,

RESPONDENT,

V.

DARRELL LEE BIRCH,

PETITIONER

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

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The Court of Appeals issued its decision on October 29, 2014. App. 1 – 3. Counsel for petitioner certifies that the petition for rehearing was made on November 13, 2014 and finally ruled on by the Court of Appeals on December 17, 2014.[1] App. 4 – 13; App. 14.

[1] Neither Appellate Defense nor the Attorney General's Office received a copy of the Order Denying the Petition for Rehearing when it was filed in the Court of Appeals. A Remittitur was issued on February 17, 2015. App. 15. On February 26, 2015, Petitioner filed a Motion to Recall Remittitur in the Court of Appeals and a Motion to File the Petition for Writ of Certiorari to the Court Of Appeals and Accompanying Appendix Out of Time in this Court, neither of which were opposed by Assistant Attorney General William M. Blitch, Jr. App. 16 – 21.

On April 2, 2015, the Court of Appeals granted the Motion to Recall Remittitur. App. 22. Pursuant to this Court's Order dated March 5, 2015, Petitioner must serve and file the petition for writ of certiorari and appendix under Rule 242, SCACR, within thirty days of the filing of the order recalling the remittitur.

QUESTIONS PRESENTED FOR REVIEW

I. Whether the Court of Appeals erred in affirming the trial court's denial of Petitioner's motion to suppress where the officer's search of Petitioner's person violated the Fourth Amendment and the evidence seized as a result of the unlawful search should be suppressed because Petitioner's mere presence at a private residence being searched pursuant to the consent of the homeowner did not provide probable cause for the officer to search Petitioner?

II. Whether the Court of Appeals erred in affirming the trial court's denial of Petitioner's motion to suppress where the officer's search of Petitioner's person violated the Fourth Amendment and the evidence seized as a result of the unlawful search should be suppressed because the officer lacked reasonable suspicion that Petitioner was engaged in criminal activity to justify an investigatory detention and frisk where Petitioner was merely standing in the home being searched with his hand in his pocket and made no movements toward the officer?

III. Whether the Court of Appeals erred in affirming the trial court's denial of Petitioner's motion to suppress where the officer's search of Petitioner's person violated the Fourth Amendment and the evidence seized as a result of the unlawful search should be suppressed because the officer exceeded the scope of a pat-down search of the outer clothing of Petitioner where the officer forcibly removed Petitioner's hand from his pocket and removed the ball cap from Petitioner's head?

STATEMENT OF THE CASE

On May 14, 2009, Petitioner Darrell Lee Birch was indicted by the Marion County Grand Jury for (1) possession of cocaine base with intent to distribute in violation of S.C. Code Ann. § 44-53-375(B)(2); and (2) possession of ecstasy in violation of § 44-53-370(d)(2). R. 192.

Birch was tried before the Honorable William H. Seals, Jr. and a jury on November 28-30, 2011. Birch was represented by William Vickery Meetze, and the State was represented by Assistant Solicitors Todd S. Tucker and Matthew R. Ozment. R. 1.

On November 30, 2011, the jury found Birch guilty on both charges as indicted. R. 182, ll. 9-19. Because Birch was only present for the first day of trial, the sentence was sealed and subsequently read on October 17, 2012. Sentencing R. 188. Judge Seals sentenced Birch to thirty years for possession of cocaine base with intent to distribute and one year for possession of ecstasy, to be served consecutively. Sentencing R. 188; Sentencing sheets, R. 194.

Birch appealed and the South Carolina Court of Appeals heard oral argument on October 14, 2014. On October 29, 2014, the South Carolina Court of Appeals affirmed Birch's conviction and sentence. State v. Birch, Opinion No. 2014-UP-366 (S.C. Ct. App. filed Oct. 29, 2014). App. 1 – 3. Birch subsequently filed a petition for rehearing on July 11, 2013. App. 4 – 13. The South Carolina Court of Appeals issued an Order denying the petition for rehearing on December 17, 2014. App. 14. As discussed in footnote 1, supra, an Order recalling the remittitur was filed April 2, 2015. App. 22.

This petition for a writ of certiorari to the Court of Appeals follows.

STATEMENT OF FACTS

On December 3, 2008, Sergeant Aurelius Cribb, a lieutenant for the Marion Police Department and a sergeant for the Marion County Combined Drug Unit, received a call from Officer Ernie Grice that he had seen an individual named Byron Horne at the IGA grocery store. Mr. Horne had warrants out for his arrest, and Sergeant Cribb served the warrants on him and placed him under arrest at the IGA. R. 82, l. 20 – 84, l. 18; 103, l. 4 – 104, l. 17.

Sergeant Cribb then verbally asked Horne if he could search his residence, and Horne consented to the search of his residence. R. 104, l. 18 – 107, l. 20. After Horne gave consent to search his residence, Sergeant Cribb, Officer Grice, and Agent Collins went to search Horne's residence. R. 107, l. 21 – 108, l. 2.

Officer Grice assisted Agent Collins in clearing the house. R. 85, l. 23 – 86, l. 1. After Officer Grice entered the home, he came in contact with the petitioner in this case, Darrell Birch. Officer Grice testified that when he entered the residence, there was an individual in the front room wearing a ball cap, coat, and jeans. Officer Grice claimed that the individual had his left hand in his pants pocket and that Officer Grice told the individual several times to remove his hand. Officer Grice said that when the individual refused to remove his hand from his pocket, Officer Grice "forcibly removed his hand and when [he] did an object fell out on the floor." R. 86, l. 11 – 87, l. 8.

Officer Grice described what fell on the floor as a medicine bottle wrapped in black electric tape. R. 87, ll. 9-11.

After this container fell on the floor, Officer Grice removed the individual's ball cap and said he recognized the individual as Darrell Birch and knew that the Marion County Combined Drug Unit for looking for Birch. R. 88, ll. 1-8.

Officer Grice arrested Birch and searched him further, finding an Icebreakers canister containing several different colored pills. R. 91, ll. 2-22. He also opened the black container and found white rock like substances consistent with crack cocaine. R. 91, l. 24 – 92, l. 8.

Birch was ultimately indicted on May 14, 2009, by the Marion County grand jury for possession of crack cocaine with intent to distribute and possession of ecstasy.

Prior to trial, Birch moved to suppress the drug evidence because the drug evidence was seized in violation of the Fourth Amendment. More specifically, Birch argued the search of his person constituted an unlawful search and seizure and that while officers had consent from Horne to search Horne's residence, officers were not entitled to search Birch who was inside Horne's residence. R. 34, l. 9 – 58, l. 19. The trial court denied the motion to suppress.

ARGUMENT

I. The Court of Appeals erred in affirming the trial court's denial of Petitioner's motion to suppress where the officer's search of Petitioner's person violated the Fourth Amendment and the evidence seized as a result of the unlawful search should be suppressed because Petitioner's mere presence at a private residence being searched pursuant to the consent of the homeowner did not provide probable cause for the officer to search Petitioner.

The Court of Appeals erred in affirming the trial court's denial of Petitioner's motion to suppress the drug evidence seized as the result of an unlawful search and seizure. Birch was merely present in the home of his cousin during the execution of a consent search for drugs. The officer lacked the requisite reasonable suspicion of criminal activity to justify a pat-down of Birch. At most, the officer may have been justified in detaining Birch until the search was completed. However, even if the pat-down were justified, the officer was not permitted to forcibly remove Birch's hand from his pocket or his hat from his head. Furthermore, the drug evidence would not have been inevitable discovered due to Birch's outstanding warrants.

The Fourth Amendment, made applicable to the States by way of the Fourteenth Amendment, guarantees "[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; Mapp v. Ohio, 367 U.S. 643 (1961). The United States Supreme Court has observed time and time again that "searches and seizures 'conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment – subject only to a few specifically established and well delineated exceptions.'" Minnesota v. Dickerson, 508 U.S. 366, 372 (1993) (emphasis in original) (internal citations omitted).

There is no exception to the Fourth Amendment authorizing the search of Birch in this case. "A person's mere presence at the scene of suspected criminal activity does not entitle the police

officers to search that individual." State v. Broadnax, 654 P.2d 96, 104 (Wash. 1982). While the officers may have had consent from Horne to search Horne's residence, Horne's consent did not extend to authorize the search of an individual like Birch who was found on the premises. Id. at 103.

In Ybarra v. Illinois, the United States Supreme Court held that while a search warrant gave police officers authority to search the premises of a tavern and to search the bartender for narcotics, a pat-down search and seizure of a tavern patron was not constitutionally permissible. 444 U.S. 85 (1979). The court observed that while police may have probable cause to search a certain location, "a person's mere propinquity to others independently suspected of criminal activity does not, without more, give rise to probable cause to search that person." Id. at 91. The court further expounded:

> Where the standard is probable cause, a search and seizure of a person must be supported by probable cause particularized with respect to that person. This requirement cannot be undercut or avoided by simply pointing to the fact that coincidentally there exists probable cause to search or seize another or to search the premises where the person may happen to be. The Fourth and Fourteenth Amendments protect the "legitimate expectations of privacy" of persons, not places.

Id. (internal citations omitted).

The Ybarra court ultimately concluded that while a search warrant issued on probable cause gave officers authority to search the premises and the bartender, "it gave them no authority whatsoever to invade the constitutional protections possessed individually by the tavern's customers." Id. at 91-92. This same principle applies in this case. Horne may have given the officers consent to search the premises of his residence, but Horne's consent did not extend to a pat-down search of any individual found in his home. See Broadnax, 654 P.2d at 103-04.

In Michigan v. Summers, 452 U.S. 692 (1981), the United States Supreme Court did permit officers executing a search warrant to ***detain*** the ***occupant*** of the home while the search was completed. The basis for that limited intrusion was that:

> [t]he connection of an occupant to that home gives the police officer an easily identifiable and certain basis for determining that suspicion of criminal activity justifies a detention of that occupant.

Id. at 703-04. Summers, however, does not authorize searches of individuals on premises being searched pursuant to a search warrant. Summers only authorizes requiring occupants to remain on the premises. Footnote 4 of the Summers opinion makes it clear that the United States Supreme Court was only addressing the detention, and not the search, of occupants. Id. at 695-96 n.4; see Broadnax, 654 P.2d at 103 ("A footnote in Summers, however, suggests that while occupants of a private residences may be 'seized' while a proper search of the premises is conducted, any search of those occupants or others on the premises must meet the standards of Ybarra"). Additionally, in Summers the police did not search the defendant until after they had probable cause to arrest the defendant and had actually arrested him. 452 U.S. at 695. Thus, the Summers court reaffirmed its holding in Ybarra v. Illinois, 444 U.S. 85 (1979) that a search warrant authorizing the search of a certain location does not give rise to probable cause to search every person at that location. Id. at 695 n.4 (In Ybarra, "the Court concluded that the search of Ybarra was invalid because the police had no reason to believe he had any special connection with the premises, and the police had no other basis for suspecting that he was armed or in possession of contraband.").

In Broadnax, the Washington Supreme Court discussed Summers in conjunction with Ybarra to conclude:

> When Summers is read in conjunction with Ybarra, ***it becomes clear that persons not directly associated with the premises and not named in the warrant cannot be detained or searched without some independent factors tying those persons to the illegal activities being investigated.*** In other words, "mere presence" is not enough; there must be "presence plus" to justify the detention or search of an individual, other than an occupant, at the scene of a valid execution of a search warrant. See generally Carr, *Michigan v. Summers: Detentions Permitted While Search Warrant is Executed, 8 Search & Seizure* L.Rep. 115–19 (1981). It is well established that a warrant authorizing the search of a premises does not also extend to authorize the search of an individual found on the premises.

654 P.2d at 103 (emphasis added). Thus, the Court of Appeals reliance on Summers in support of its decision to affirm the trial court's suppression ruling in Birch's case was misplaced. See App. 2.

The Court of Appeals also cited Muehler v. Mena, 544 U.S. 93 (2005), for its holding that use of reasonable force to effectuate detention of occupants during the execution of a search warrant is permissible. See App. 2. In Mena, the respondent brought a civil action for deprivation of rights pursuant to 42 U.S. Code § 1983 after she was detained in handcuffs and questioned regarding her immigration status during execution of a search warrant at the residence that she and others occupied. 544 U.S. at 95. The search warrant was issued after an investigation of gang-related "drive by" shootings lead officers to believe that at least one member of the gang lived at the residence to be searched. Id. It authorized a broad search of the house and the premises for, among other things, deadly weapons and evidence of gang membership. Id. at 95-96. Mena was awoken from her bed by the SWAT team and detained under guard in the home's garage for two to three hours. Id. at 96.

In approving the officer's actions in Mena, the Supreme Court referenced its holding in Summers "that officers executing a search warrant for contraband have the authority 'to detain the occupants of the premises while a proper search is conducted.'" Id. at 98 (citing Summers,

452 U.S. at 705). The Mena Court noted again that "the detention of an occupant is surely less intrusive than the search itself, and the presence of a warrant assures that a neutral magistrate has determined that probable cause exists to search the home." Id. (finding "Mena's detention for the duration of the search was reasonable under Summers ***because a warrant existed*** to search 1363 Patricia Avenue and she was an ***occupant*** of that address at the time of the search" (emphasis added)). The Court also found that "inherent in [the] authorization to detain an occupant of the place to be searched is the authority to use reasonable force to effectuate the detention." Id. However, it also noted the extraordinary circumstances of the search in Mena, where the search was inherently dangerous because it involved a search for weapons. Id. at 99. The need to detain multiple occupants gave further justification for the use of handcuffs. Id.

It is significant that in both Summers and Mena, officers had obtained a search warrant for the search of the premises before entering and detaining the occupants. The Court in Summers observed that "[o]f prime importance" in accessing the detention was "the fact that the police had obtained a warrant to search respondent's house for contraband. A neutral and detached magistrate had found probable cause to believe that the law was being violated in that house and had authorized a substantial invasion of the privacy of the persons who resided there." 452 U.S. at 701. A search warrant therefore provides objective justification for the detention because a judicial officer has already determined there is probable cause to believe that an occupant of the home has committed a crime and there is minimal intrusion to require a person to remain in his home while the search warrant is being executed.

United States Supreme Court jurisprudence is therefore quite clear that individuals found on premises being searched pursuant to a proper warrant cannot be automatically detained and searched for their mere presence alone; there must be some more to justify the detention and

search of such an individual. Officers may not place their hands on citizens "in search of anything" without "constitutionally adequate, reasonable grounds for doing do." Sibron v. New York, 392 U.S. 40, 64 (1968).

In Birch's case, there was no search warrant issued by a neutral and detached magistrate. The search of the home was being conducted only on the consent of the homeowner. Horne's consent to the search of his home did not authorize the detention and search of Birch simply because Birch was found at the home. Accordingly, the officers had no probable cause to search Birch on this basis. Furthermore, the officers in Birch's case did not just try to simply detain him and require him to remain on the premises. There is no evidence in the record that Officer Grice asked Birch to identify himself or informed Birch that a search of the premises was being conducted. Instead, Officer Grice immediately proceeded with a search of Birch. This was not just a detention. Officer Grice yanked Birch's hand out of his pocket which led to the medicine bottle containing contraband to fall out of Birch's pocket and then pulled off Birch's ball cap which then led Officer Grice to recognize Birch. There is no exception to the Fourth Amendment permitting this warrantless search. Thus, Birch's presence at the premises, even if he were an occupant, was not sufficient to establish probable cause to search Birch's person.

The inevitable discovery doctrine does not apply in this case because the officer would not have been in a position to discover Birch's identity and the outstanding warrants on Birch absent the illegal search and seizure of Petitioner. 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 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.

In State v. Moralez, 300 P.3d 1090, 1094 (Kan. 2013), the Supreme Court of Kansas held that law enforcement's discovery of the defendant's outstanding arrest warrant "did not sufficiently purge the taint of his unlawful detention." In that case, during what began as a voluntary encounter, two law enforcement officers retained the defendant's identification and detained him while conducting a warrants check, all without any reasonable suspicion of criminal activity. After discovering an outstanding warrant for the defendant, the officers arrested him and seized marijuana from his pocket. The defendant was charged with felony possession of marijuana. The trial court denied the defendant's motion to suppress the marijuana as the fruit of an unlawful detention. Id.

The Kansas Supreme Court, in reversing the trial court's suppression ruling and the defendant's conviction, observed the following with respect to the discovery of outstanding warrants during a defendant's unlawful detention:

> Stated more succinctly, the preceding unlawful detention does not taint the lawful arrest on the outstanding warrant, nor does it prevent the officer from conducting a safety search pursuant to that arrest; *but it does taint any evidence discovered during the unlawful detention or during a search incident to the lawful arrest.*
>
> Were it otherwise, law enforcement officers could randomly stop and detain citizens, request identification, and run warrants checks despite the lack of any reasonable suspicion to support the detention, knowing that if the detention leads to discovery of an outstanding arrest warrant, any evidence discovered in the subsequent search will be admissible against the defendant in a criminal proceeding unrelated to the lawful arrest.

Id. at 1102 (emphasis added).

In Birch's case, the unlawful seizure of Birch by Officer Grice and Officer Grice's forcible removal of Birch's hand from his pocket and cap from his head taints the evidence discovered after

Officer Grice realized that the seized individual was Birch and that there were outstanding warrants out on Birch. Officer Grice would not have been in a position to learn that Birch was an individual wanted on outstanding warrants absent the illegal search and seizure of Birch. Therefore, the inevitable discovery doctrine does not apply, and the evidence seized as a result the unlawful search should be suppressed and Birch's convictions based on that evidence reversed. See State v. Grayson, 336 S.W.3d 138, 150–51 (Mo. 2011) (concluding officer's discovery of arrest warrant did not attenuate taint of unlawful stop, and neither independent source doctrine nor inevitable discovery applied); State v. Dixon, 218 S.W.3d 14 (Mo. Ct. App. 2007) (holding evidence must be excluded when officer learned of a warrant prior to actually effectuating the arrest, when the officer would not have been in a position to do so absent the illegal seizure of the defendant); State v. Topanotes, 76 P.3d 1159, 1163–64 (Utah 2003) (observing fact or likelihood that makes discovery inevitable must arise from circumstances other than those disclosed by illegal search itself).

II. Whether the Court of Appeals erred in affirming the trial court's denial of Petitioner's motion to suppress where the officer's search of Petitioner's person violated the Fourth Amendment and the evidence seized as a result of the unlawful search should be suppressed because the officer lacked reasonable suspicion that Petitioner was engaged in criminal activity to justify an investigatory detention and frisk where Petitioner was merely standing in the home being searched with his hand in his pocket and made no movements toward the officer.

During the pre-trial suppression hearing, Officer Grice testified that he "forcibly remove[d] [Birch's] hand from his pocket" when Birch refused to remove his hand. Officer Grice testified he removed Birch's hand for officer safety. When an object fell out of Birch's pocket after Officer Grice forcibly removed Birch's hand, Officer Grice then pulled off Birch's ball cap and arrested Birch based on prior knowledge that Birch had some outstanding warrants. R. 39, ll. 5-19. The State argued during the suppression hearing that Birch's refusal to remove his hand from his pocket justified the search of Birch. R. 58, ll. 10-16.

As discussed supra, Officer Grice's encounter with Birch on premises being searched did not authorize any sort of search of Birch. "A police officer may elevate a police-citizen encounter into an investigatory detention only if the officer has a reasonable suspicion supported by articulable facts that criminal activity may be afoot even if the officer lacks probable cause." United States v. Burton, 228 F.3d 524, 527-28 (4th Cir. 2000) (internal citations omitted). "Reasonable suspicion is something more than an inchoate and unparticularized suspicion or hunch, and it is the government's burden to articulate facts sufficient to support reasonable suspicion." Id. (internal citations omitted).

"Once an officer had a basis to make a lawful investigatory stop, he may protect himself during that stop by conducting a search for weapons if he has reason to believe that the suspect is armed and dangerous. . . . But an officer may not conduct this protective search for purposes of safety until he has a reasonable suspicion that supports the investigatory stop." Id. at 528

(internal citations omitted). Therefore, before an officer can conduct a protective search, the officer "must first have reasonable suspicion supported by articulable facts that criminal activity may be afoot." Id.

When officers entered Horne's home to search Horne's residence, they did not have any reason to suspect that Birch was engaged in criminal activity merely because he was present in Horne's residence. See Broadnax, 654 P.2d at 101 ("Merely associating with a person suspected of criminal activity does not strip away the protections of the Fourth Amendment to the United States Constitution."). Birch was simply "standing in the front room" of Horne's residence with his hand in his pocket. R. 29, ll. 5-7. Such conduct does not justify an officer's reasonable suspicion that criminal activity must be afoot.

Birch's refusal to remove his hand from his pocket also did not establish that reasonable suspicion that criminal activity was afoot to justify a protective search of Birch. "An individual's refusal to cooperate, without more, does not furnish the minimal level of objective justification needed for detention or seizure." Burton, 228 F.3d at 529 (quoting Florida v. Bostick, 501 U.S. 429, 437 (1991)); see also United States v. Flowers, 912 F.2d 707, 712 (4th Cir. 1990) (noting that a defendant has "the right to refuse to speak with . . . officers, who in turn possess no right to detain citizens who decline to talk or otherwise identify themselves).

In Burton, the United States Court of Appeals for the Fourth Circuit held that the refusal of the defendant to remove his hand from his pocket at the insistence of the police officer was not sufficient to establish reasonable suspicion that criminal activity was afoot. 288 F.3d at 528-29. The court further held that in the absence of reasonable suspicion, the officer in Burton could not frisk the defendant "merely because he felt uneasy about his safety." Id. The court concluded that the officer's reaching inside the defendant's coat was an unlawful search and the

handgun discovered as a result of the unlawful search should have been suppressed at trial. Id. Without the necessary reasonable suspicion, "the officer's alternative was to avoid a person he considers dangerous." Id.

Similarly, Birch's refusal to remove his hand from his pocket was also not sufficient to establish reasonable suspicion that criminal activity was afoot. The record is devoid of any evidence that Birch made any furtive movements as Office Grice approached. As in Burton, Officer Grice only forcibly removed Birch's hand from his pocket because Office Grice felt uneasy about his safety. But just as the court in Burton concluded that this was an insufficient basis to frisk the defendant in that case, Birch's refusal to remove his hand from his pocket was insufficient to justify Officer Grice forcibly removing Birch's hand from his pocket. Any evidence seized as a result of Office Grice unlawfully searching Brice and then subsequently arresting Birch after Officer Grice removed Birch's ball cap and discovered Birch's identity should have been suppressed and trial and accordingly, Birch's convictions reversed. As discussed more fully supra, the inevitable discovery doctrine is inapplicable to save the unlawful search and seizure in this case.

III. The Court of Appeals erred in affirming the trial court's denial of Petitioner's motion to suppress where the officer's search of Petitioner's person violated the Fourth Amendment and the evidence seized as a result of the unlawful search should be suppressed because the officer exceeded the scope of a pat-down search of the outer clothing of Petitioner where the officer forcibly removed Petitioner's hand from his pocket and removed the ball cap from Petitioner's head.

Even assuming *arguendo* that the search of Birch was justified, the scope of the search was impermissible. In conducting a constitutionally acceptable pat-down search, a law enforcement officer is confined to "patting the outer clothing of the suspect for concealed objects which might be used as instruments of assault." Sibron v. New York, 392 U.S. 40, 65 (1968). In Sibron, the United States Supreme Court found that a search was not reasonably limited in scope where the officer "with no attempt at an initial limited exploration for arms, . . . thrust his hand into Sibron's pocket and took from him envelopes of heroin." Id. Officer Grice's forcible removable of Birch's hand from his pocket and the pulling off of Birch's ball cap to reveal Birch's identity likewise exceeded the scope of a lawful pat-down.

The Court of Appeals cited to State v. Freiburger, 366 S.C. 125, 620 S.E.2d 737 (2005) for its holding that a full warrantless search of a person is permitted if he has been lawfully arrested and the search is conducted in the immediate vicinity of, and substantially contemporaneously, to the arrest. See App. 2. In Freiburger, the search of the defendant's person preceded a lawful arrest. Id. at 130, 620 S.E.2d at 739. The Supreme Court observed that a search may precede a formal arrest if the officer has probable cause to arrest at the time of the search. Id. at 132, 620 S.E.2d at 740. In Freiburger, the officer who searched the defendant testified that although the defendant had not been arrested at the time of the pat down search, he was going to be arrested for hitchhiking. Id. at 133, 620 S.E.2d at 741.

Freiburger is inapplicable to the present case. When Officer Grice forcibly removed Birch's hand from his pocket and pulled his ball cap off his head, Officer Grice did not at that time have probable cause to arrest Birch. Officer Grice only discovered Birch's identity and that there was an outstanding warrant for his arrest after the illegal search and seizure. Officer Grice testified that when he entered Horne's residence, there was an individual in the front room wearing a ball cap, coat, and jeans. At this point, Officer Grice did not know the identity of this individual and had no probable cause to arrest this individual. Officer Grice claimed that the individual had his left hand in his pants pocket and that Officer Grice told the individual several times to remove his hand. Officer Grice said that when the individual refused to remove his hand from his pocket, Officer Grice "forcibly removed his hand and when [he] did an object fell out on the floor." R. 86, l. 11 – 87, l. 8. After this container, which later was discovered to contain crack cocaine, fell on the floor, Officer Grice then removed the individual's ball cap and said he recognized the individual as Birch and knew that the Marion County Combined Drug Unit for looking for Birch. R. 88, ll. 1-8.

When the search of Birch occurred, Officer Grice did not yet have probable cause to arrest Birch. Therefore, Officer Grice was not entitled to conduct a full warrantless search of Birch. Officer Grice's forcible removable of Birch's hand from his pocket and the pulling off of Birch's ball cap to reveal Birch's identity accordingly exceeded the scope of a permissible pat-down of Birch's outer clothing.

But for the illegal search and seizure, Officer Grice would not have known that the person standing in Horne's house and minding his own business had outstanding warrants on him. But for this illegal search and seizure, Officer Grice would not have known that this individual was the person for whom the Drug Unit was looking. But for this illegal search and seizure, Officer Grice would not have had an independent and lawful reason for searching Birch's person. The only

reason Officer Grice learned that the person in Horne's house was Birch was because Officer Grice illegally yanked Birch's left hand out of his pocket and then illegally pulled Birch's ball cap off his head to reveal his identity after a container fell to the floor from Birch's pocket. As discussed more fully supra, the inevitable discovery doctrine is inapplicable to save the unlawful search and seizure in this case.

In summary, the officer in this case was not justified in searching Birch merely because Birch was present at the scene of premises being searched. In addition, the officer lacked any reasonable suspicion that criminal activity was afoot with respect to Birch, and the officer was therefore not entitled to conduct a protective search of Birch merely because Birch refused to remove his hand from his pocket. Finally, the pat-down search conducted by the officer was not reasonably limited in scope where the officer did not pat-down the outer clothing of Birch but instead forcibly removed Birch's hand from his pocket and pulled off Birch's ball cap. There is no applicable exception to the exclusionary rule to save this unlawful search. For these reasons, the evidence seized as a result of this unlawful search of Birch should be suppressed and his convictions based on that evidence reversed.

CONCLUSION

For the reasons set forth herein, Petitioner Darrell Birch respectfully requests this Court to grant his Petition and issue a writ of certiorari to the Court of Appeals to review the decision, reverse the Opinion of the Court of Appeals, and reverse Petitioner's convictions.

Respectfully submitted,

Laura R. Baer

Laura R. Baer
Appellate Defender

ATTORNEY FOR PETITIONER.

This 4th day of May, 2015.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Marion County

William H. Seals, Jr., Circuit Court Judge

Opinion No. 2014-UP-366 (S.C. Ct. App. filed 10/29/2014)
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THE STATE,

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PETITIONER

CERTIFICATE OF SERVICE

I certify that a true copy of the petition for writ of certiorari and a copy of the appendix, in this case has been served on William M. Blitch, Jr., Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, Darrell Lee Birch at Elmira Correctional Facility, Elmira, NY 14901, and the S.C. Court of Appeals this 4th day of May, 2015.

Laura R. Baer

Laura R. Baer
Appellate Defender
ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 4th day
of May, 2015.

Bailey Reed (L.S.)

Notary Public for South Carolina
My Commission Expires: October 24, 2021