STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Marion County

William H. Seals, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

V.

DARRELL LEE BIRCH,

APPELLANT

APPELLATE CASE NO. 2012-213215

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

I. The officer's search of Appellant's person violated the Fourth Amendment and the evidence seized as a result of the unlawful search should be suppressed where:

(1) Appellant'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 Appellant;

(2) the officer lacked reasonable suspicion that Appellant was engaged in criminal activity to justify an investigatory detention and frisk where Appellant was merely standing in the home being searched with his hand in his pocket and made no movements toward the officer; and

(3) the officer exceeded the scope of a pat-down search of the outer clothing of Appellant where the officer forcibly removed Appellant's hand from his pocket.

II. The Trial Court erred in denying Appellant's motion for a continuance where he was denied his right to effective assistance of counsel where his appointed counsel only had one day to prepare for trial.

III. The Trial Court erred in refusing to grant a mistrial where the police officer testified that that the county drug unit was looking for Appellant because this testimony constituted improper evidence of prior bad acts.

STATEMENT OF THE CASE

On May 14, 2009, Appellant 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. R. 1. Birch was represented by William Vickery Meetze, and the State was represented by Assistant Solicitors Todd S. Tucker and Matthew R. Ozment. Id.

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 Birth to thirty years for possession of cocaine base with intent to distribute and one year consecutive for possession of ecstasy. Id.; Sentencing sheets, R. 194.

Birch timely filed and served his Notice of Appeal on October 17, 2012.

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 appellant 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 for possession of crack cocaine with intent to distribute and possession of ecstasy.

ARGUMENT

I. **The officer's search of Appellant's person violated the Fourth Amendment and the evidence seized as a result of the unlawful search should be suppressed where:**

(1) **Appellant'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 Appellant;**

(2) **the officer lacked reasonable suspicion that Appellant was engaged in criminal activity to justify an investigatory detention and frisk where Appellant was merely standing in the home being searched with his hand in his pocket and made no movements toward the officer; and**

(3) **the officer exceeded the scope of a pat-down search of the outer clothing of Appellant where the officer forcibly removed Appellant's hand from his pocket.**

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 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 other 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 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 instruction 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. Discussing Summers, the Washington Supreme Court in Broadnax observed that "an occupant's constructive control over the premises which is the subject of a search warrant provides a sufficient connection with the suspected illegal activities to permit a detention of that individual." Broadnax, 654 P.2d at 103. The Washington Supreme Court further discussed Summers in conjunction with Ybarra to conclude:

> 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. Summers, 452 U.S. at 695-96 n.4.
>
> 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.

Broadnax, 654 P.2d at 103 (emphasis added).

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).

Here, officers searched Birch because he was present at Horne's home. Officers were not searching Horne's home pursuant to a valid search warrant, but only on the consent of Horne. 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.

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 above, 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 an 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 just "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. 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." 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. Burton, 228 F.2d at 528-59.

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.

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." , 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.

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. 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.

II. The Trial Court erred in denying Appellant's motion for a continuance where he was denied his right to effective assistance of counsel where his appointed counsel only had one day to prepare for trial.

Prior to trial, Birch's defense counsel moved for a continuance. The day before trial began, Birch thought he was being represented by counsel he retained. That particular counsel for unknown reasons decided to no longer represent Birch. The public defender did not know he would be represented Birch until the day before trial. The public defender requested a continuance so that he could have adequate time to prepare for Birch's trial and speak to certain witnesses that he only learned about that day. The Trial Court denied Birch's motion for a continuance. R. 4, l. 5 – 9, l. 14.

While the granting of a motion for continuance is within the sound discretion of the trial court and will not be disturbed absent a clear showing of an abuse of discretion, if a defendant is not granted sufficient time after the appointment of counsel to prepare his defense, it amounts in substance to the denial of the right to counsel. See Jones v. State, 371 N.E.2d 1314 (Ind. Ct. App. 1978), see also State v. Colden, 372 S.C. 428, 641 S.E.2d 912 (Ct. App. 2007). "The constitutional right to have the assistance of counsel . . . carries with it a reasonable time for consultation and preparation, and a denial is more than a mere abuse of discretion; it is a denial of due process of law." State v. Sain, 663 P.2d 493 (Wash. Ct. App. 1983).

There is no evidence that Birch was at fault for his non-representation where he believed he had retained an attorney to represent him even though ultimately that retained attorney decided not to represent him. Birch's appointed attorney should have been granted additional time to prepare rather than have been compelled to begin trial the next day. See Bacon v. State, 246 S.E.2d 475 (Ga. Ct. App. 1978) (holding where it was

unclear whether fault of nonrepresentation lay with defendant rather than his attorney, newly appointed public defender was entitled to a continuance to prepare for trial rather than have to start trial on the same afternoon as appointment).

The Trial Court denied Birch his Sixth Amendment right to effective assistance of counsel by not allowing his newly appointed attorney more time to prepare for trial. There is no evidence that this continuance would have delayed the trial unreasonably or that the State or witnesses would have been inconvenienced had the trial been continued. The delay was not purposeful. See United States v. McClendon, 146 Fed. Appx. 23 (6th Cir. 2005). Therefore, Birch requests this Court to reverse the Trial Court's denial of his motion to continue and grant a new trial.

III. The Trial Court erred in refusing to grant a mistrial where the police officer testified that that the county drug unit was looking for Appellant because this testimony constituted improper evidence of prior bad acts.

During his trial testimony, Officer Grice testified as to the following:

> After the container fell out of his pocket, like I said, he had a ball cap on, pulled down like he may be concealing his identity, I removed the ball call, I knew him as Darrell Birch and I also knew that the Marion County Combined Drug Unit was also looking for him as well.

R. 87, ll. 3-8.

Defense counsel objected to this testimony as improper bad act evidence and moved for a mistrial. R. 87, l. 19 – 88, l. 8. The Trial Court denied the motion for mistrial and gave a curative charge to which defense counsel also objected. R. 88, l. 9 – 89, l. 24.

Evidence that a defendant has committed other unrelated crimes or bad acts is inadmissible to prove the defendant's propensity to commit the crime with which he is charged. State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923). This is so because under our system of justice, a conviction must be based upon evidence of the offense for which the accused is on trial rather than upon prior criminal or immoral acts. State v. Gore, 283 S.C. 118, 322 S.E.2d 12 (1984). It is only in exceptional cases that another crime or bad act is relevant to an issue other than the accused's character. Such exceptions to the general rule which permit the admission of evidence of other crimes or bad acts are applicable only where the prior bad act directly supports some substantial element of the State's case or is relevant to establish a material fact or element of the crime charged. State v. Bell, 302 S.C. 18, 393 S.E.2d 364 (1990), *cert. denied*, 498 U.S. 881, 111 S.Ct. 227, 112 L.Ed.2d 182 (1990).

Evidence introduced for the sole purpose of implying a defendant has a prior criminal record is improper. State v. Tate, 288 S.C. 104, 341 S.E.2d 380 (1986). In Tate, the Supreme Court held that mug shots that implied a prior criminal record are inadmissible because they improperly placed Tate's character into evidence. Id. at 104, 341 S.E.2d at 381. The court found that the state did not have a demonstrable need to introduce the mug shots. Similarly, here there was no need for the officer to have testified that he specifically knew the Marion County Combined Drug Unit was looking for Birch. Birch was on trial for drug crimes and it was highly prejudicial for the jury to have heard that he was also previously wanted for other drug crimes. This prior bad act evidence was inadmissible and the Trial Court should have granted a mistrial after the jury heard this evidence.

In addition, although the Trial Court gave a curative charge, a curative instruction is not always sufficient to alleviate prejudice. State v. Jones, 343 S.C. 562, 541 S.E.2d 813 (2001). In this case, Officer Grice had already revealed to the jury the very prejudicial information that Birch was wanted for previous drug-related crimes. This created a great danger the jury would infer that he was also guilty of drug-related crimes for which he was on trial.

Therefore, the Trial Court erred in refusing to grant a mistrial upon defense counsel's motion.

CONCLUSION

For the reasons set forth herein, Appellant Darrell Lee Birch respectfully requests that the evidence seized in violation of the Fourth Amendment be suppressed and his convictions reversed. Alternatively, Appellant requests that his convictions be reversed and the case be remanded for a new trial.

Respectfully submitted,

Carmen V. Ganjehsani
Appellate Defender

ATTORNEY FOR APPELLANT

This 6th day of March, 2014.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

March 6th, 2014

Carmen V. Ganjehsani
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STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Marion County
William H. Seals, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

V.

DARRELL LEE BIRCH,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon William M. Blitch, Jr., Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 6th day of March, 2014.

Carmen V. Ganjehsani
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 6th day of march, 2014.

(L.S.)
Notary Public for South Carolina
My Commission Expires: July 3, 2023.

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March 6, 2014

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Re: The State v. Darrell Lee Birch

Dear William:

Enclosed are two copies of the Final Brief of Appellant in the above-entitled case, which I have filed today with the South Carolina Court of Appeals.

Please call me if you have any questions.

Sincerely,

Carmen V. Ganjehsani
Appellate Defender

CVG/mpm

Enclosure

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

RECEIVED
MAY - 4 2015
S.C. Supreme Court

Appeal from Marion County
Honorable William H. Seals, Jr., Circuit Court Judge
Appellate Case No. 2012-213215

THE STATE,

RESPONDENT,

vs.

DARRELL LEE BIRCH

APPELLANT

FINAL BRIEF OF RESPONDENT

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I. The trial court properly refused to suppress the drug evidence as there was no unlawful search and seizure of Appellant.

II. The trial court did not err in denying Appellant's motion for a continuance.

III. The trial court properly denied Appellant's motion for a mistrial and any error was cured by the trial court's curative instruction.

STATEMENT OF THE CASE

The State agrees with Appellant's procedural Statement of the Case.

STATEMENT OF FACTS

The Marion County Grand Jury indicted Appellant on charges of possession of cocaine base (crack cocaine) with intent to distribute and possession of ecstasy. Prior to trial, Appellant's counsel moved for a continuance. Appellant believed he would be represented by private counsel and then found out counsel did not intend to represent him. (T.4-6; R. 4-6). The public defender's office had Appellant's file as well as all discovery for Appellant. Further, the office had indicated it would be representing Appellant. (T.6-7; R. 6-7). Appellant's counsel indicated Appellant provided him with the names of some potential witnesses that counsel was not able to contact. (T.6; R. 6).

The trial court denied the motion for a continuance, but in effect granted a continuance. Specifically, he indicated he would start the trial the following day, thereby giving Appellant's counsel the afternoon and evening to get the witnesses. (T.9; R. 9). The trial court also contacted the private counsel Appellant believed he retained, and private counsel verified he was not representing Appellant on the current charges. (T.14; R. 14). Trial was recessed at 12:57 P.M. and resumed at 9:30 the following morning. (T.34; R. 34).

When trial resumed the following morning, counsel did not mention the witnesses, his search for the witnesses, the need for more time to find the witnesses, or the need for a further continuance. Appellant's counsel proceeded directly into a suppression hearing in which he moved to suppress the drugs found on Appellant. (T.34; R.34).

During the hearing, the State presented the testimony of Officer Grice, Agent Cribb and Agent Collins. Officer Grice observed Byron Horne and knew the Marion

County Drug Unit had outstanding narcotics warrants on him. Officer Grice contacted Agent Cribb and Agent Collins and they came to the scene and arrested Horne based on the warrants. (T.35-36; 41; R. 35-36). After he was arrested, Horne gave Agent Cribb consent to search his residence. (T.36; 41-42; R. 36; 41-42). Agent Cribb wanted to search the residence to locate drugs and Appellant. (T.44-45; R. 36; 44-45). Agent Cribb knew Appellant lived at or frequented the residence with Horne. Horne indicated his cousin (Appellant) was home and Agent Cribb had outstanding warrants on Appellant. (T.41-42; R. 41-42).

Officer Grice assisted with the search of Horne's residence. When they arrived, they found four people in the residence even though Horne had indicated only one person would be there. (T.49; R. 50). As a result, the officers conducted a security sweep prior to searching the residence.

Upon entering, Officer Grice made contact with Appellant in the front room. Appellant had a ball cap on his head and his hand in his pocket. Officer Grice told Appellant to remove his hand from his pocket for officer safety. Appellant refused to remove his hand. Officer Grice asked three or more times for Appellant to remove his hand from his pocket. For the safety of himself and other officers, Officer Grice forcibly removed Appellant's hand from his pocket. (T.39-40; R. 39-40). When he removed his hand, an object fell to the floor. Officer Grice also removed Appellant's ball cap, recognized Appellant, and knew the drug unit had narcotics warrants for Appellant. (T.39; R. 39).

Officer Grice placed Appellant in custody on the outstanding warrants. During a search incident to the arrest, an Icebreaker's can was found containing pills consistent

with narcotics. The pills later tested positive as ecstasy. (T.126-130; R. 127-131). The object that fell to the floor when Appellant's hand was removed from his pocket was a pill bottle and later determined to contain crack cocaine. (T.123-125; R. 124-126).

Appellant failed to return to court for the remainder of trial on November 29 or 30, 2011. The jury found Appellant guilty of both charges. His sentence was sealed and subsequently read on October 17, 2012. Judge Seals sentenced Appellant to thirty years for possession of cocaine base with intent to distribute and one year consecutive for possession of ecstasy.

ARGUMENT

I. The trial court properly refused to suppress the drug evidence as there was no unlawful search and seizure of Appellant.

Appellant contends the trial court erred in denying his motion to suppress the drugs found on his person because they were located as a result of an unconstitutional search and seizure. The officers had the clear authority to detain Appellant during the search of the home, had reasonable suspicion to believe he had a weapon or other danger to the officer's safety when he refused to remove his hand from his pocket, and had the right to remove his hand from his pocket in order to ensure their security and to exercise control of the situation during the search.

In Fourth Amendment search and seizure cases, the appellate court is limited to determining if there is any evidence to support the trial court's findings and can only reverse due to clear error. State v. Flowers, 360 S.C. 1, 5, 598 S.E.2d 725, 727 (Ct. App. 2004); see also, State v. Abdullah, 357 S.C. 344, 349, 592 S.E.2d 344, 347 (Ct. App. 2004) ("On appeal from a suppression hearing, this court is bound by the circuit court's factual findings if any evidence supports the findings."). A trial court's Fourth Amendment suppression ruling must be affirmed if supported by any evidence, and an appellate court may reverse only when there is clear error. State v. Groome, 378 S.C. 615, 618, 664 S.E.2d 460, 461 (2008). The appellate court will not reverse merely because it would have reached a different conclusion than the trial judge. State v. Rivera, 384 S.C. 356, 361, 682 S.E.2d 307, 310 (Ct. App. 2009).

The Fourth Amendment to the United States Constitution prohibits unreasonable searches and seizures. "The right of the people to be secure in their persons, houses,

papers, and effects, against unreasonable searches and seizures, shall not be violated, ..." U.S. Const. amend. IV. The ultimate touchstone of the Fourth Amendment is "reasonableness," and the warrant requirement is subject to certain exceptions. State v. Herring, 387 S.C. 201, 210, 692 S.E.2d 490, 494 (2009). One notable and relevant exception is a search for the protection of officers. Id.; Maryland v. Buie, 494 U.S. 325, 337 (1990). "An action is 'reasonable' under the Fourth Amendment, regardless of the individual officer's state of mind, 'as long as the circumstances, viewed objectively, justify [the] action.'" Herring, 387 S.C. at 210, 692 S.E.2d at 494 (quoting Scott v. United States, 436 U.S. 128, 138 (1978)).

In Michigan v. Summers, 452 U.S. 692 (1981), the United States Supreme Court held that officers executing a search warrant for contraband may "detain the occupants of the premises while a proper search is conducted." Id., at 705. A similar conclusion should apply to a search of the home pursuant to consent of the owner when others are found to be present during the search. The Supreme Court "posited three legitimate law enforcement interests that provide substantial justification for detaining an occupant: 'preventing flight in the event that incriminating evidence is found'; 'minimizing the risk of harm to the officers'; and facilitating 'the orderly completion of the search,' as detainees' 'self-interest may induce them to open locked doors or locked containers to avoid the use of force.'" Muehler v. Mena, 544 U.S. 93, 98 (2005) (quoting Summers, 452 U.S. at 702–703). An officer's authority to detain incident to a search is categorical; it does not depend on the "quantum of proof justifying detention or the extent of the intrusion to be imposed by the seizure." Summers, 452 U.S. at 705, n. 19.

"Inherent in Summers' authorization to detain an occupant of the place to be searched is the authority to use reasonable force to effectuate the detention. Indeed, Summers itself stressed that the risk of harm to officers and occupants is minimized 'if the officers routinely exercise unquestioned command of the situation.'" Muehler, 544 U.S. at 98-99 (quoting Summers, 452 U.S., at 703.). In Muehler, the officers effectuated the detention by placing the occupants in handcuffs during the duration of the search. The United States Supreme Court found this was a proper detention and exercise of authority during the search.

In the instant case, in order to properly exercise unquestioned command of the situation, Officer Grice was entitled to gain compliance from Appellant. Appellant refused after multiple commands to remove his hand from his pocket. In removing Appellant's hand, Officer Grice was merely using reasonable force to effectuate the detention allowed under Summers and Muehler. The removal of Appellant's hand is certainly less intrusive, and less a detention, than placing someone in handcuffs as in Muehler. Accordingly, the trial court properly refused to suppress the drugs found when Officer Grice removed Appellant's hand from his pocket when Appellant refused to comply with several valid commands based on officer safety.

Further, once properly detained, a protective frisk is constitutionally reasonable when a police officer "observes unusual conduct which leads him **reasonably** to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous." Terry v. Ohio, 392 U.S. 1, 30 (1968) (emphasis added). "The purpose of this limited search is not to discover evidence of a crime, but to allow the officer to pursue his investigation without

fear of violence." Minnesota v. Dickerson, 508 U.S. 366, 372 (1993). "In assessing whether a suspect is armed and dangerous, the officer **need not be absolutely certain** the individual is armed." State v. Blassingame, 338 S.C. 240, 248-249, 525 S.E.2d 535, 540 (Ct. App. 1999) (emphasis added). "There exists an indisputable nexus between drugs and guns, and where an officer has reasonable suspicion that drugs are present, there is an appropriate level of suspicion of criminal activity and apprehension of danger to justify a frisk." State v. Taylor, 401 S.C. 104, 119, 736 S.E.2d 663, 671 (2013) (citing State v. Banda, 371 S.C. 245, 253, 639 S.E.2d 36, 40 (2006)).

In the instant case, Officer Grice entered Horne's home in order to conduct the search. The search was being conducted to look for drugs or narcotic activity. The home was a known drug house. Further, it was suspected Appellant would be present at the house, and the officers knew Appellant had outstanding drug warrants.

Officer Grice came into contact with Appellant in the front room of the home. Appellant had a ball cap pulled down over his face like he was concealing his identity. Appellant also had his hand in his pocket. Officer Grice told him more than three times to remove his hand because Officer Grice believed Appellant could have a weapon or something to harm him or the other officers. Officer Grice had reasonable suspicion based on the totality of the circumstance—the search being of a known drug house, officers were looking for drugs and an individual known to have outstanding drug warrants, Appellant refusing to remove his hand from his pocket where he could have concealed a weapon—to conduct a pat-down of Appellant's person, which would include

the removal of his hand from his pocket to ensure there was nothing dangerous in Appellant's reach.[1]

Appellant cites Ybarra v. Illinois, 444 U.S. 85 (1979) and State v. Broadnax, 654 P.2d 96 (Wash. 1982), as authority indicating the officers did not have the right to search Appellant. Both cases are clearly distinguishable from the facts of this case.

In Ybarra, the officers had a warrant to search a tavern. They conducted a search and pat-down of a patron merely on site. The United States Supreme Court found the pat-down of the patron to be unconstitutional. In describing the facts relied on by the State to allow the search of Ybarra, the Court explained:

> When the police entered the Aurora Tap Tavern on March 1, 1976, the lighting was sufficient for them to observe the customers. Upon seeing Ybarra, they neither recognized him as a person with a criminal history nor had any particular reason to believe that he might be inclined to assault them. Moreover, as Police Agent Johnson later testified, **Ybarra, whose hands were empty, gave no indication of possessing a weapon, made no gestures or other actions indicative of an intent to commit an assault, and acted generally in a manner that was not threatening.** At the suppression hearing, the most Agent Johnson could point to was that Ybarra was wearing a 3/4-length lumber jacket, clothing which the State admits could be expected on almost any tavern patron in Illinois in early March. In short, **the State is unable to articulate any specific fact that would have justified a police officer at the scene in even suspecting that Ybarra was armed and dangerous.**

Ybarra, 444 U.S. at 93 (emphasis added). The Court stated: "The 'narrow scope' of the Terry exception does not permit a frisk for weapons on less than reasonable belief or suspicion directed at the person to be frisked, even though that person happens to be on

[1] To the extent Appellant argues the pat-down or search of his person exceeded the scope of that allowed under a Terry stop, this issue was never raised to the trial court and is not properly preserved for review on appeal.

premises where an authorized narcotics search is taking place." Id. at 94. In Ybarra, unlike the instant case, the defendant took no action which gave rise to the reasonable suspicion to believe the individual armed. Appellant, on the other hand, refused multiple times when asked by an officer to remove his hand from his pocket which could easily contain a weapon.

In State v. Broadnax, the police were executing a search warrant at a residence. The officers were met at the door by petitioner's father and, once inside the house, the officers encountered petitioner. Detective Roesler instructed petitioner's father and petitioner each to put their hands on their heads. The two men complied. Petitioner was searched by an officer who testified he did not believe petitioner was armed and even after doing a pat-down of his clothing did not believe the bulge he felt was a weapon. Broadnax, 654 P.2d at 99. The Court found the search was not based on reasonable suspicion of weapons, but instead the officer was searching for and found narcotics. Id. at 100-101. The officer in the instant case, however, always maintained the search of Appellant was based on concerns for officer safety and the fact he could have a weapon in his pocket. Appellant refused to remove his hand and so the removal by the officer was clearly reasonable and can be distinguished from the unconstitutional search in Broadnax.

Finally, the evidence would have been inevitably discovered during a search incident to Appellant's arrest based on the outstanding warrants. The inevitable discovery doctrine has been adopted as an exception to the exclusionary rule. Nix v. Williams, 467 U.S. 431, 444 (1984). If the prosecution can establish by a preponderance of the evidence that information or evidence would have inevitably been discovered by lawful

means, then the discovered evidence, even if obtained by unlawful means, is admissible. Id. "Exclusion of physical evidence that would inevitably have been discovered adds nothing to either the integrity or fairness of a criminal trial." Id. at 446.

In this particular case, the officers had outstanding arrest warrants on Appellant. Officers testified they believed he would be present and they were looking for him at the residence. (T.41; 44-45; 49-50; R. 41; 44-45; 50-51). Appellant was ultimately arrested on the outstanding warrants. As a result of the arrest, he was searched and it turned up the pills for which he was charged. (T.39; R. 39). During the same search, the crack cocaine would have been located had it not previously been found based on Appellant's failure to comply with a reasonable officer demand. State v. Freiburger, 366 S.C. 125, 620 S.E.2d 737 (2005) (when an arrest is made, it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape); State v. Ferrell, 274 S.C. 401, 409, 266 S.E.2d 869, 873 (1980) (in the case of a lawful custodial arrest, the full search of a person does not require a search warrant and is considered reasonable under the Fourth Amendment).

Accordingly, the trial court did not err in refusing to suppress the drug evidence.

II. The trial court did not err in denying Appellant's motion for a continuance.

Appellant maintains the trial court erred in denying his motion for a continuance. Appellant's counsel maintained he had not had sufficient time to locate and speak to witnesses Appellant wished to call on his behalf because he spoke with Appellant right before trial. The Court properly denied the continuance because Appellant was aware of his representation by the public defender's office. Further, Appellant's counsel was given until the next day to find and speak to witnesses. The following morning when trial began, he never renewed his motion for a continuance, and there is nothing in the record indicating a need for a continuance.

The trial court's denial of a motion for a continuance will not be disturbed on appeal absent a clear abuse of discretion. State v. McKennedy, 348 S.C. 270, 280, 559 S.E.2d 850, 855 (2002). Our appellate courts have shown great deference to trial judges in this matter. State v. Colden, 372 S.C. 428, 437, 641 S.E.2d 912, 917 (Ct. App. 2007). Further, reversals of refusal of a continuance are about as rare as the proverbial hens' teeth. McKennedy, 348 S.C. at 280, 559 S.E.2d at 855.

The South Carolina Supreme Court has "repeatedly upheld denials of motions for continuances where there is no showing that any other evidence on behalf of the defendant could have been introduced, or that any other points could have been raised, if more time had been granted to prepare for trial." Id.; see also, State v. Motley, 251 S.C. 568, 571, 164 S.E.2d 569, 570 (1968) ("When a motion for a continuance is based upon the contention that counsel for the defendant has not had time to prepare his case its denial by the trial court has rarely been disturbed on appeal.").

Pursuant to Rule 7(a), SCRCrimP, the presiding judge may grant a motion for continuance "only upon a showing of good and sufficient legal cause." Further, if the continuance is based on the absence of witnesses, Rule 7(b), SCRCrimP, requires:

> No motion for continuance of trial shall be granted on account of the absence of a witness without the oath of the party, his counsel, or agent to the following effect: the testimony of the witness is material to the support of the action or defense of the party moving; the motion is not intended for delay, but is made solely because he cannot go safely to trial without such testimony; and has made use of due diligence to procure the testimony of the witness or of such other circumstances as will satisfy the court that his motion is not intended for delay.

No such attestation was made or offered in this case. Specifically, Appellant's counsel indicated Appellant had several witnesses he wanted called. The witnesses were not named, the nature of their testimony was not provided, and their materiality to the trial was not explained. (T.6; R. 6).

Additionally, "[i]t is paramount that the party asking for the continuance show 'due diligence' was used in trying to procure the absent witness." Colden, 372 S.C. at 439, 641 S.E.2d at 919. In the instant case, the court provided Appellant and his counsel the remainder of a day to locate any desired witnesses. He never informed the court of his progress or success in talking with the witnesses provided by Appellant.

At the start of trial the next day, neither Appellant nor his counsel raised any issue related to the witnesses or the need for a further continuance to secure witnesses. As a result, there is no evidence the continuance was necessary for Appellant or Appellant's counsel and he has failed to demonstrate anything further he could have done had a continuance been granted. "Where there is no showing that any other evidence on behalf of the appellant could have been produced, or that any other points could have been

raised had more time been granted for the purpose of preparing the case for trial, the denial of a motion for continuance is not an abuse of discretion." State v. Williams, 321 S.C. 455, 459, 469 S.E.2d 49, 51-52 (1996) (citing State v. Squires, 248 S.C. 239, 149 S.E.2d 601 (1966)).

III. The trial court properly denied Appellant's motion for a mistrial and any error was cured by the trial court's curative instruction.

Appellant contends the trial court erred in denying his motion for a mistrial when Officer Grice testified he knew the Marion County Combined Drug Unit was looking for Appellant. The comment was a fleeting and single reference to Appellant's prior drug activity. The trial court properly offered and gave a curative instruction requiring the jury to ignore and not consider the testimony. As a result, any error in the testimony was cured. Further, Appellant cannot demonstrate the prejudice necessary to warrant the grant of a mistrial.

In this case, Officer Grice made a single comment regarding the fact he knew Appellant and knew the Marion County Combined Drug Unit was looking for him. The comment did not specify any particular reason or explain that it was because of outstanding arrest warrants for narcotics. It was merely a single comment that can be construed as referencing a prior bad act. (T.87; R. 88). The trial court immediately sustained an objection and issued a curative instruction. (T.89; R. 90).

"Generally, a curative instruction is deemed to have cured any alleged error." State v. Patterson, 337 S.C. 215, 226, 522 S.E.2d 845, 850 (Ct. App. 1999); State v. Jones, 325 S.C. 310, 479 S.E.2d 517 (Ct. App. 1996); see also, State v. Kelsey, 331 S.C. 50, 502 S.E.2d 63 (1998) (instruction to disregard inadmissible evidence is usually viewed as having cured the error in its admission); State v. George, 323 S.C. 496, 476 S.E.2d 903 (1996) (if trial judge sustains timely objection to testimony and gives jury curative instruction to disregard testimony, error is deemed to be cured); State v. White, 371 S.C. 439, 445, 639 S.E.2d 160, 163 (Ct. App. 2006) ("A curative instruction to

disregard incompetent evidence and not to consider it during deliberation is deemed to have cured any alleged error in its admission.").

The curative instruction in the instant case sufficiently cured any possible prejudice from the testimony even if it were inadmissible as improper prior bad act testimony. The trial court instructed:

> I want to instruct you that the testimony this officer gave when he said that when the individual's hat was removed he recognized him as Darrell Birch and that the officer had knowledge that the Marion County Drug Unit was looking for him, I want to instruct you that that is improper and is not evidence and is irrelevant, thus you should not consider that portion of this testimony for any purpose whatsoever during this trial and in your deliberations at the end of this case.

(T.89; R. 90). The jury is expected to follow the instructions given to it, and in this case the jury was to strike the question and answer. See Conner v. City of Forest Acres, 363 S.C. 460, 471, 611 S.E.2d 905, 910 (2005) (finding the case should be analyzed "in light of the presumption the jury followed the trial courts instructions to ignore any evidence" excluded by the court); Foye v. State, 335 S.C. 586, 590 n.1, 518 S.E.2d 265, 267 n.1 (1999) (jury is presumed to follow instructions).

Further, a trial judge's ruling on a motion for a mistrial will not be disturbed absent an abuse of discretion amounting to an error of law. State v. Sparkman, 358 S.C. 491, 495, 596 S.E.2d 375, 377 (2004); State v. Harris, 340 S.C. 59, 63, 530 S.E.2d 626, 628 (2000). This Court favors the exercise of wide discretion of the trial judge in determining the merits of such motion in each individual case. See State v. Patterson, 337 S.C. 215, 226, 522 S.E.2d 845, 851 (Ct. App. 1999).

A mistrial should be declared only when absolutely necessary. In order to receive a mistrial, the defendant must show error and resulting prejudice. Harris, 340 S.C. at 63, 530 S.E.2d at 628; State v. Ward, 374 S.C. 606, 612, 649 S.E.2d 145, 148 (Ct. App. 2007). "A mistrial should only be granted in cases of manifest necessity and with the greatest caution for very plain and obvious reasons." Patterson, 337 S.C. at 227, 522 S.E.2d at 851 (citing State v. Wasson, 299 S.C. 508, 386 S.E.2d 255 (1989); State v. Kirby, 269 S.C. 25, 236 S.E.2d 33 (1977) (power of court to declare mistrial ought to be used with greatest caution under urgent circumstances, and for very plain and obvious causes)). Granting of a mistrial is a serious and extreme measure which should only be taken when the prejudice can be removed no other way. State v. Edwards, 373 S.C. 230, 236, 644 S.E.2d 66, 69 (Ct. App. 2007) (citing State v. Stanley, 365 S.C. 24, 34, 615 S.E.2d 455, 460 (Ct. App. 2005)).

Any prejudice possibly created from the vague comment by the officer was not of the sort of urgent circumstances warranting the drastic measure of a mistrial. See State v. Council, 335 S.C. 1, 13, 515 S.E.2d 508, 514 (1999) (finding no prejudice resulted from the admission of testimony establishing that law enforcement already had Council's fingerprints on record at the time of his arrest for the charged offense); State v. Singleton, 284 S.C. 388, 392, 326 S.E.2d 153, 156 (1985) (finding an arresting officer's vague references to prior crimes in the jury's presence did not warrant the granting of a mistrial), *overruled on other grounds by* State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991); State v. Robinson, 238 S.C. 140, 150-151, 119 S.E.2d 671, 676 (1961) (finding testimony by a witness that Robinson told him that he was on the way to the "probation office" did not create an inference that Robinson had been convicted of another crime),

overruled on other grounds by State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991); State v. Thompson, 352 S.C. 552, 561, 575 S.E.2d 77, 82 (Ct. App. 2003) ("[A] vague reference to a defendant's prior criminal record is not sufficient to justify a mistrial where there is no attempt by the State to introduce evidence that the accused has been convicted of other crimes."). As a result, the trial court did not err in denying Appellant's motion for a mistrial.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

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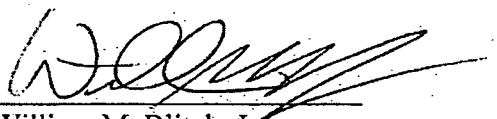
Attorney General

WILLIAM M. BLITCH, JR.
Assistant Attorney General
S.C. Bar No. 15608

BY: 
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ATTORNEYS FOR RESPONDENT

March 3, 2014

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Marion County
Honorable William H. Seals, Jr., Circuit Court Judge
Appellate Case Tracking No. 2012-213215

The State, Respondent,

vs.

Darrell Lee Birch, Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Appellant complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled, "Interim Guidance Regarding Personal Data Identifiers and other sensitive Information in Appellate Court filings."

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PROOF OF SERVICE

I, Sally Ellison, certify that I have served the within Final Brief of Respondent on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Carmen V. Ganjehsani, Esquire
S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, SC 29211

I further certify that all parties required by Rule to be served have been served.
This 3rd day of March, 2014.

Sally Ellison

SALLY ELLISON
Legal Assistant

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MAY - 4 2015

S.C. Supreme Court

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Marion County

William H. Seals, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

V.

DARRELL LEE BIRCH,

APPELLANT.

APPELLATE CASE NO. 2012-213215

FINAL REPLY BRIEF OF APPELLANT

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STATEMENT OF ISSUE IN REPLY

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

ARGUMENT IN REPLY

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

In its Respondent's Brief, the State argues that even if the search and seizure of Appellant Darrell Lee Birch violated the Fourth Amendment, the drug evidence would have been inevitably discovered during a search incident to Birch's arrest since he had some outstanding warrants.

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.

Here, the inevitable discovery doctrine does not apply. 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 Byron 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. 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 Darrell Birch and knew that the Marion County Combined Drug Unit for looking for Birch. R. 88, ll. 1-8.

But for this 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.

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).

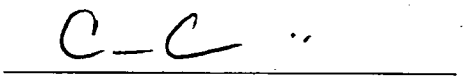
In Birch's case, the unlawful seizure of Birch by Officer Grice and Officer Grice's forcible removal of Birch's hand from his pocket and cap from his head taints the evidence discovered after Officer Grice realized the seized individual was Birch and that there were outstanding warrants out on Birch. 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. The inevitable discovery doctrine therefore 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).

CONCLUSION

For the reasons set forth herein and in Appellant Darrell Lee Birch's Appellant's Brief, Appellant respectfully requests that the evidence seized in violation of the Fourth Amendment be suppressed and his convictions reversed. Alternatively, Appellant requests that his convictions be reversed and the case be remanded for a new trial.

Respectfully submitted,



Carmen V. Ganjehsani
Appellate Defender

ATTORNEY FOR APPELLANT

This 6th day of March, 2014.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Reply Brief of Appellant complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

March 6th, 2014

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STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Marion County
William H. Seals, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

V.

DARRELL LEE BIRCH,

APPELLANT.

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Reply Brief of Appellant in the above referenced case has been served upon William M. Blitch, Jr., Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 6th day of March, 2014.

Carmen V. Ganjehsani
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 6th day of March, 2014.

(L.S.)
Notary Public for South Carolina
My Commission Expires: July 3, 2023.

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Wanda H. Carter, Deputy Chief Appellate Defender

March 6, 2014

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Assistant Attorney General
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Re: The State v. Darrell Lee Birch

Dear William:

Enclosed are two copies of the Final Reply Brief of Appellant in the above-entitled case, which I have filed today with the South Carolina Court of Appeals.

Please call me if you have any questions.

Sincerely,

Carmen V. Ganjehsani
Appellate Defender

CVG/mpm

Enclosure