

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM HORRY COUNTY
Court of General Sessions

S.C. Supreme Court

The Honorable Benjamin H. Culbertson, Circuit Court Judge

The State of South Carolina, Respondent,

v.

Ervin Gamble, Petitioner.

BRIEF OF PETITIONER

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STATEMENT OF ISSUES

1. **DID THE SOUTH CAROLINA COURT OF APPEALS ERR IN AFFIRMING THE TRIAL JUDGE'S ERRONEOUS AND PREJUDICIAL ADMISSION OF NARCOTICS EVIDENCE INTO THE EVIDENTIARY RECORD AT THE TRIAL OF THIS MATTER OVER THE PETITIONER'S TIMELY OBJECTION THAT NO FOUNDATION HAD BEEN LAID FOR THAT EVIDENCE IN THAT THE PROBABLE CAUSE FOR THE WARRANTLESS SEARCH DURING WHICH THE EVIDENCE WAS COLLECTED WAS NOT ESTABLISHED?**
2. **DID THE SOUTH CAROLINA COURT OF APPEALS ERR IN AFFIRMING THE TRIAL JUDGE'S DENIAL OF THE PETITIONER'S MOTION FOR A NEW TRIAL IN THIS MATTER?**

STATEMENT OF THE CASE

This is an appeal arising from the conviction of the Petitioner, Ervin C. Gamble, Jr., that occurred at a trial on July 22, 2009 before The Honorable Benjamin C. Culbertson in the General Sessions Court in Horry County, South Carolina.

During the trial of this matter, over the timely objection of the Petitioner's trial counsel, the trial judge erroneously and with no explanation admitted the physical narcotics evidence into the evidentiary record despite no foundation for this evidence ever being laid. This disputed evidence was seized from the Petitioner during a warrantless search conducted as a result of an unlawful and unsupported arrest for which the arresting officer lacked probable cause, and for which no foundation whatsoever was ever laid. The trial judge also erroneously declined to grant the Petitioner's motion for a new trial timely argued at the conclusion of the trial. Upon conviction, the Petitioner was sentenced to twenty-five (25) years in the South Carolina Department of Corrections. The Petitioner is currently serving said sentence.

A timely notice of appeal to the South Carolina Court of Appeals was filed on the Petitioner's behalf. However, the South Carolina Court of Appeals dismissed the appeal with a *per curiam* decision containing no narrative discussion whatsoever and citing only two cases in support of a finding of no reversible error in the trial court's admission of evidence.¹ *State v. Gamble*, Op. No. 2011-UP-95 (2011)(App. 293).

The Petitioner timely filed a petition for rehearing; however, this petition was dismissed via Order Denying Petition for Rehearing filed by the South Carolina Court of Appeals on April 21, 2011. (App. 325).

¹ *State v. Patterson*, 324 S.C. 5, 482 S.E.2d 760 (1997) and *State v. Williams*, 303 S.C. 410, 401 S.E.2d 168 (1991).

The Petitioner timely filed a petition for writ of certiorari which was granted on April 5, 2012. This brief follows.

STANDARD OF REVIEW

In criminal cases, the appellate court sits to review errors of law only. State v. Preslar, 364 S.C. 466, 472, 613 S.E.2d 381, 384 (Ct.App. 2005). “A court's ruling on the admissibility of evidence will not be reversed by this Court absent an abuse of discretion or the commission of legal error which results in prejudice to the defendant.” State v. Hamilton, 344 S.C. 344, 353, 543 S.E.2d 586, 591 (Ct.App. 2001), *overruled on other grounds by* State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005); *accord* Preslar, 364 S.C. at 472, 613 S.E.2d at 384; State v. McLeod, 362 S.C. 73, 79, 606 S.E.2d 215, 218-219 (Ct.App. 2004); State v. Mansfield, 343 S.C. 66, 77, 538 S.E.2d 257, 263 (Ct.App. 2000); State v. Blassingame, 338 S.C. 240, 251, 525 S.E.2d 535, 541 (Ct.App.1999); State v. Patterson, 337 S.C. 215, 228, 522 S.E.2d 845, 851 (Ct.App. 1999); *see* State v. Jones, 343 S.C. 562, 572, 541 S.E.2d 813, 818 (2001) (“The trial judge's decision to admit or exclude the evidence is reviewed on appeal under an abuse of discretion standard.”); State v. Taylor, 333 S.C. 159, 172, 508 S.E.2d 870, 876 (1998) (“[I]n order for this Court to reverse a case based on the erroneous admission or exclusion of evidence, prejudice must be shown.”).

“An abuse of discretion arises from an error of law or a factual conclusion that is without evidentiary support.” State v. Irick, 344 S.C. 460, 463, 545 S.E.2d 282, 284 (2001) (citing Lee v. Suess, 318 S.C. 283, 285, 457 S.E.2d 344, 346 (1995)); *accord* State v. Sweet, 374 S.C. 1, 5, 647 S.E.2d 202, 204-205 (2007).

ARGUMENTS

I. THE SOUTH CAROLINA COURT OF APPEALS ERRED IN AFFIRMING THE TRIAL COURT'S ERRONEOUS AND PREJUDICIAL ADMISSION OF NARCOTICS EVIDENCE INTO THE EVIDENTIARY RECORD AT THE TRIAL OF THIS MATTER BECAUSE NO FOUNDATION WHATSOEVER WAS EVER ESTABLISHED FOR THIS EVIDENCE IN THAT THE RECORD IS DEVOID OF ANY PROBABLE CAUSE THAT COULD JUSTIFY THE INITIAL ARREST OF THE PETITIONER RENDERING THE SUBSEQUENT WARRANTLESS SEARCH OF PETITIONER'S VEHICLE INCIDENT TO THAT UNFOUNDED ARREST UNCONSTITUTIONAL.

The *per curiam* decision of the South Carolina Court of Appeals finding no reversible error in the trial court's admission of evidence is a misapplication of South Carolina law and a reversal is warranted. In support of its finding of no reversible error in the trial court's admission of evidence, the South Carolina Court of Appeals cited only two cases, *State v. Patterson*, 324 S.C. 5, 482 S.E.2d 760 (1997) and *State v. Williams*, 303 S.C. 410, 401 S.E.2d 168 (1991). Each of these cases is clearly distinguishable from the case at bar. There is also no narrative or explanation provided in support of the *per curiam* decision, and there is no analysis of the arguments set forth by the Petitioner in regard to the trial court's erroneous and prejudicial admission of the only physical evidence proffered at the trial of this matter, for which no proper foundation whatsoever had been laid.

"Foundation" is defined as "[t]he basis on which something is supported; esp. evidence or testimony that establishes the admissibility of other evidence." Black's Law Dictionary 666 (7th ed. 1999). It is axiomatic that a proper foundation is required prior to the proper admission of any disputed evidence during trial, particularly physical narcotics evidence in a criminal drug trial. Prior to the admission of any evidence seized during a warrantless search of an individual, South Carolina law imposes the burden "of

establishing probable cause and the existence of circumstances constituting an exception to the general prohibition against warrantless searches...” on the prosecution. State v. Freiburger, 366 S.C. 125, 131, 620 S.E.2d 737, 740 (2006) *citing* State v. Dupree, 319 S.C. 454, 462 S.E.2d 279 (1995) *and* State v. Bultron, 318 S.C. 323, 457 S.E.2d 616 (Ct. App. 1995). Further, “[t]urning to the question of probable cause, probable cause for a warrantless arrest generally exists ‘where the facts and circumstances within the arresting officer’s knowledge are sufficient for a reasonable person to believe that a crime has been or is being committed by the person to be arrested.’” State v. Moultrie, 316 S.C. 547, 552, 451 S.E.2d 34, 37 (Ct. App. 1994) *quoting* United States v. Miller, 925 F.2d 695, 698 (4th Cir.) *cert. denied*, 502 U.S. 833, 112 S.Ct. 111, 116 L.Ed.2d 80 (1991). As such, probable cause and the existence of circumstances constituting an exception to the general prohibition against warrantless searches constitutes the necessary foundation that South Carolina law requires prior to the admission of such evidence in trial. In the case at hand, testimony was presented that the Petitioner was “arrested on a separate charge” but no further foundation for the evidence the prosecution was seeking to admit nor probable cause for the arrest was given. (App. p. 91 lns 24-25). South Carolina courts have held that, “(t)he fundamental question in determining the lawfulness of an arrest is whether probable cause existed to make the arrest.” State v. Frazier, 394 S.C. 213, 220, 715 S.E.2d 650, 653 (Ct. App. 2011) *citing* State v. Baccus, 367 S.C. 41, 49, 625 S.E.2d 216, 220 (2006). The complete lack of probable cause for a search incident to Petitioner’s “separate arrest” in this matter is fatal in that the prosecution is unable to lay a proper foundation for the admission of the narcotic evidence and therefore any collection of potential evidence cannot be admitted into evidence. Accordingly, the trial

court's failure to require a proper or legally sufficient foundation for the disputed physical narcotics evidence during Petitioner's trial constitutes a clear abuse of the trial court's discretion. The trial court's failure also constitutes a clearly erroneous application of the law resulting in significant prejudice to the Petitioner. As such, the South Carolina Court of Appeal's decision affirming the trial court's actions as well as the Petitioner's conviction should be reversed.

By way of factual background, the Petitioner was arrested by Agent Mullinax of the Myrtle Beach Police Department on July 16, 2008 on two separate occasions, albeit closely connected in time. At trial, Agent Mullinax indicated that the Petitioner's only action with regard to this initial "arrest" was that the Petitioner "**arrived** at the location of 72 Offshore Drive." (App. p. 91, lns 22-23)(emphasis added). Agent Mullinax went on to state that "[a]t that time, he [Petitioner] was arrested on a **separate charge**... Upon...being placed under arrest, he was searched." (App. p. 91, lns 24-25)(emphasis added).² There was no search warrant obtained at any time, and the warrantless search of the Petitioner conducted subsequent to his initial "arrest" on this "separate charge" led to the seizure of physical narcotics evidence for which the Petitioner was ultimately arrested for the second time and ultimately charged with Trafficking in Heroin. The evidence seized pursuant to this initial "arrest" was also the only physical evidence presented by the State of South Carolina against the Petitioner during the trial of this matter. However, there was absolutely no testimony or evidence whatsoever submitted to establish a legally sufficient or proper foundation for this evidence in that the State presented no evidence whatsoever regarding the lawfulness of this "initial arrest" or probable cause for this "arrest" on this "separate charge." In fact, the nature of this "separate charge"

² It is noteworthy that the Petitioner had no outstanding arrest warrants at this time.

purportedly forming the foundation for the warrantless search yielding the disputed evidence was never established at trial. The only testimony presented prior to the admission of the narcotics into evidence was from Agent Chad Mullinax of the Myrtle Beach Police Department. Agent Mullinax testified that on July 16, 2008 he and other members of the 15th Circuit Drug Task Force “were -- uh --conducting a -- an investigation -- uh -- that day. We were able to -- uh -- uh -- gain information of a person. I -- We had the name of ‘Fats.’” (App. p. 83, lns 8-12). There was no other mention of the name “Fats” during the trial nor was there any connection or association of this nickname to any individual whatsoever, much less any connection or association of this nickname to the Petitioner in any capacity. Aside from this testimony, the name “Fats” was never mentioned again. Agent Mullinax next stated that he and the other agents had previously developed a “tactical plan” with regard to drugs in Horry County and that they “[p]lanned on -- uh -- speaking with a person in regards to -- uh -- drugs.... The drugs were to be -- uh -- be delivered.” (App. p. 90 lns 8-12). There was no testimony as to who this person was, if that person was ever contacted and if the delivery of drugs was ever confirmed. Agent Mullinax went on further to state that he and the other agents went to “72 Offshore Drive in the Murrell’s Inlet section of Horry County...” at “approximately -- uh -- 6:15” on July 16, 2008. (App. p 90 lns 22-23). There was no information provided as to why the agents went to this particular location; where the address for this location came from; or what, if anything, was supposed to happen at this location. While the agents were located at 72 Offshore Drive in Murrell’s Inlet, Agent Mullinax testified that he came into contact with Mr. Gamble when Mr. Gamble “arrived at the location of 72 Offshore Drive.” (App. p 91, lns 22-23). There is

no indication of any action taken by Mr. Gamble other than that he simply “arrived” at 72 Offshore Drive in Murrell’s Inlet, South Carolina. Clearly, the simple act of “arriving” at 72 Offshore Drive in Murrell’s Inlet is not - in and of itself - a crime. Based on this testimony, which was all that was presented at trial prior to the prosecution moving to admit the narcotics into evidence, there was absolutely no probable cause whatsoever to believe that Mr. Gamble had committed, or was in the act of committing any crime whatsoever as is required before officer’s can arrest an individual. *See, State v. Moultrie*, 316 S.C. 547, 551, 451 S.E.2d 34, 37 (Ct.App. 1994). Based upon the testimony presented during the trial of this matter, there was not even so much as reasonable suspicion to believe that any crime had been committed by anyone at all. As such, there was no legitimate justification for Agent Mullinax to arrest Mr. Gamble nor was there any legitimate basis to search his person or his vehicle incident to that arrest.

Without establishing that the “arrest” on the “separate charge” was a lawful arrest, any potential evidence seized from that warrantless arrest would be in violation of the Fourth Amendment to the United States Constitution. Courts throughout the United States have been clear in the opinion that “evidence seized in violation of the Fourth Amendment must be excluded from trial.” *State v. Freiburger*, 366 S.C. 125, 131, 620 S.E.2d 737, 740 (2005) *citing State v. Khingratsaiphon*, 352 S.C. 62, 572 S.E.2d 456 (2002), *citing Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961). Courts have also been clear in deciding that the fruits of a warrantless search that precedes a formal arrest cannot be used to justify the arrest. *State v. Moultrie*, 316 S.C. 547, 551, 451 S.E.2d 34, 37 (Ct.App. 1994) *citing Sibron v. New York*, 392 U.S. 40, 88 S.Ct. 1889, 20 L.Ed.2d 917 (1968). In this matter, the evidence seized from the

Petitioner preceding his arrest for Trafficking Heroin is not admissible to justify the Petitioner's arrest for Trafficking in Heroin because no foundation or probable cause was detailed by the prosecution.

At trial, Petitioner's trial counsel timely objected to the State's first attempt to admit the disputed physical narcotics evidence stating:

[t]he foundation [for the proffered physical evidence] has not been laid.... We don't know about - - He's [the arresting officer] going to testify that after an arrest on a separate charged, a search... I don't know if there is a basis for that arrest. I don't know what the charge was. I don't know if there was a consent to search. And I don't believe that under the Constitution as provided by the 4th Amendment...the law of search and seizure - - that they have a right to enter this evidence at this time.

(App. p. 94, lns. 6-7, 12-25)(App. p. 95, lns 12-25). While admittedly choppy, this objection clearly articulates a specific objection to the lack of foundation laid as to the proffered evidence at the time the prosecution attempted to admit the narcotics into evidence. Furthermore, this foundation argument is clearly grounded in a challenge to the constitutionality of the arrest upon which the prosecution based its sole justification for the warrantless search of the Petitioner that yielded the disputed evidence. *See McKissick v. J.F. Cleckley & Co.*, 325 S.C. 327, 344, 479 S.E.2d 67, 75 (Ct. App. 1996) *citing Broom v. Southeastern Highway Contracting Co.*, 291 S.C. 93, 352 S.E.2d 302 (Ct. App.1986) (an "objection should be sufficiently specific to bring into focus the precise nature of the alleged error so that it can be reasonably understood by the trial judge."). As it is undisputed that "[t]he burden of establishing probable cause and the existence of circumstances constituting an exception to the general prohibition against warrantless searches is upon the prosecution...", upon the Petitioner's objection to the proffered evidence's foundation, South Carolina law requires that the trial judge insure that a

sufficient and proper foundation in the form of probable cause for the initial arrest and probable cause for the warrantless search be established by evidence and testimony. State v. Freiburger, 366 S.C. 125, 131, 620 S.E.2d 737, 740 (2006) *citing* State v. Dupree, 319 S.C. 454, 462 S.E.2d 279 (1995) *and* State v. Bultron, 318 S.C. 323, 457 S.E.2d 616 (Ct. App. 1995). However, the trial judge in this matter failed to require such foundation. Over the objection of counsel and without any justification or explanation whatsoever, the trial court admitted the physical narcotics evidence into the record. The court indicated “[o]ver objection, I’m going to go ahead and admit State’s Exhibit Number 10 into evidence over Defendant’s objection.”³ (App. p. 96, lns 2-4). There was no further explanation whatsoever to support the admission of this evidence. This admission of evidence without a proper foundation was a clear and glaring abuse of discretion resulting in substantial prejudice to the Petitioner. The trial court’s failure to require such a foundation constitutes clear error and significant prejudice to the Petitioner as the prosecution was able to admit narcotics found following a warrantless arrest without having to prove probable cause. To allow this decision to stand would erode at the burden placed upon the prosecution to prove their case. Accordingly, the South Carolina Court of Appeals erred in affirming this decision and a reversal and a remand for a new trial is warranted.

Furthermore, based on Rule 17 of the South Carolina Rules of Criminal Procedure, because trial counsel for Petitioner made a timely objection to the prosecution’s attempt to admit the narcotics into evidence, there was no need for Petitioner to reserve rights concerning the objectionable evidence. Chief Justice Finney

³ The disputed physical narcotics evidence, which had been previously been marked for identification purposes only.

noted in his dissent in State v. Whipple, “if an objection has once been made at any stage to the admission of evidence, it shall not be necessary thereafter to reserve rights concerning the objectionable evidence.” State v. Whipple, 324 S.C. 43, 476 S.E.2d 683,689 (1996). Petitioner, therefore, would not be required to renew his objection to the lack of foundation for the narcotics that the trial court erroneously admitted into evidence and his objection would not be waived.

Again addressing the glaring lack of foundation and no established probable cause for the “arrest” on a “separate charge,” Petitioner’s trial counsel’s directed verdict argument again cogently articulated glaring lack of foundation issue stating,

We’ve got...a case where the only evidence presented to this Court...to this jury...of the reason for the search was that my client was arrested on a separate charge. There is no indication in the record of what that charge was. There is no indication in the record that it was a lawful arrest. It’s my understanding of the status of the law in the 4th amendment search and seizure law is that Search incident to a lawful arrest...would be allowed. But there has to be some determination that it was a lawful arrest. In fact, our position is: It was an unlawful arrest. The truth of the matter in this case is: They made an arrest for [a separate charge]...if law enforcement were allowed to come into court every time and say: We made an arrest on another matter; and they we searched and found this.... There’s got to be some finding in the record and some showing to this Court that they had a right to search my client. Just because they arrested him, does not give them the right to search him or anything else of his. They have to show this Court that it was a lawful arrest. And there is no showing at all in the record in this case. And again Your Honor: To the contrary, we believe it was an unlawful arrest. (App. p. 117, lns 15-25, p. 118 lns 1-14, p. 119 lns 1-12).

This argument is helpful substantively because the argument correctly observes that it was ultimately the prosecution’s burden to establish a proper foundation for the disputed evidence prior to the proper admission of the evidence, and that a proper foundation would have to come in the form of probable cause to justify the warrantless search and seizure. However, as articulated, the record is devoid of any such proper foundation for

the disputed evidence and should not have been admitted into evidence for the jury's consideration.

In addition, in response to this directed verdict motion, the State acknowledged unequivocally that the record was devoid of sufficient evidence that would establish a foundation for the evidence in the form of probable cause to support the initial arrest of the Petitioner and the resulting warrantless search. In fact, the prosecution actually offered to supplement the record with in camera testimony after the directed verdict motion stating, "if it is The Court's pleasure, the State would be more than happy, in camera, to go into those issues [the probable cause for the initial arrest], so the Court can make that ruling at this time." (App. pp. 121-122, lns 24-25, 1-2). This is a clear and unequivocal acknowledgment that the State had completely failed to establish a foundation for the evidence in the form of probable cause or the existence of circumstances constituting an exception to the general prohibition against warrantless searches as required by law. *See State v. Freiburger*, 366 S.C. 125, 131, 620 S.E.2d 737, 740 (2006). As such, the trial court's admission of this disputed evidence was clearly erroneous and resulted in substantial prejudice to the Petitioner for which a reversal was warranted. However, the South Carolina Court of Appeals erroneously affirmed the trial court in this matter citing *State v. Williams*, 303 S.C. 410, 401 S.E.2d 168 (1991).

In citing to the *Williams* case, the Court of Appeals noted that an objection must be made at the earliest opportunity to preserve an issue for appellate review: *State v. Williams*, 303 S.C. 410, 411, 401 S.E.2d 168, 169 (1991). This point is undisputed. However, the clear implication with this citation, particularly in light of Petitioner's timely objection during the trial of this case, is that the Petitioner failed to preserve his

right to challenge the disputed evidence by failing to make a pretrial motion to suppress the evidence.⁴ This holding is clearly erroneous because there is absolutely no requirement for a pretrial motion to suppress in South Carolina law. Contrarily, the South Carolina Supreme Court has articulated unequivocally that, “[w]e have no rule in this State requiring that a pretrial motion be made to suppress allegedly illegally obtained evidence.” State v. Goodstein, 278 S.C. 125, 128, 292 S.E.2d 791, 793 (1982). To the extent that the South Carolina Court of Appeals dismissed the Petitioner’s appeal because the Petitioner failed to make a pretrial motion to suppress, this erroneous decision must be reversed because there is absolutely no requirement whatsoever that a defendant make a pretrial motion to suppress under South Carolina law. *See* State v. Goodstein, 278 S.C. 125, 128, 292 S.E.2d 791, 793 (1982). Additionally, South Carolina courts have held that even with pretrial suppression hearings, trial judges are not precluded from considering admissibility of the evidence in question at the trial of the case. *Id.* As such, Petitioner’s trial counsel should not be limited by his strategic decision to not make a motion to suppress prior to the trial. Petitioner timely objected to the prosecution’s attempt to admit the narcotics into evidence and based his objection not only on the narcotics being obtained by a warrantless and illegal search, but also on the grounds of lack of foundation. The trial court’s admittance of the narcotics into evidence over Petitioner’s timely objections constitutes abuse of discretion and is highly prejudicial to the Petitioner. In addition, the South Carolina Court of Appeals erred in its affirmation of

⁴ This implication is even more apparent when the citation from *Williams* is read in connection with this Court’s quotation from *State v. Green* later in this decision. The quoted language from *Green* reads “the appropriate vehicle for challenging the admissibility of evidence based on an alleged search and seizure violation is a motion to suppress.” State v. Green, 350 S.C. 580, 585, 567 S.E.2d 505, 508 (2002).

the trial court's decision and its reliance on *State v. Williams*, 303 S.C. 410, 401 S.E.2d 168 (1991), and a reversal and a remand for a new trial is warranted.

The South Carolina Court of Appeals further cited to *State v. Green* in support of the decision to affirm the trial court in this matter. 350 S.C. 580, 567 S.E.2d 505 (2002). Because the facts of *Green* are distinguishable from the case at bar, this Court's ruling in *Green* actually serves to bolster the Petitioner's position in regard to whether the Petitioner preserved his right to challenge the admission of the disputed evidence. In *Green*, the appellant made no attempt whatsoever "at trial to suppress any evidence on constitutional grounds. Instead, Green attempted to raise the propriety of the police actions [for the first time] in a motion for directed verdict..." which was held to be improper. *Id.* at 585. This Court noted specifically:

[a]t trial, Green did not move, either in limine or during an evidentiary hearing pursuant to *Blassingame*,² to suppress evidence.... Moreover, he failed to object at any time to its admissibility... including the cocaine, which was introduced without objection.

FN 2. See *State v. Blassingame*, 271 S.C.44, 47-48, 244 S.E.2d 528, 530 (1978) ("Whenever evidence is introduced that was allegedly obtained by conduct violative of the defendant's constitutional rights, the defendant is entitled to have the trial judge conduct an evidentiary hearing out of the presence of the jury *at this threshold point* to establish the circumstances under which it was seized.") (emphasis in original), *modified by State v. Patton*, 322 S.C. 408, 472 S.E.2d 245 (1996).

Id. at 585 & 589 n.2. The Court also makes it clear in *State v. Patton*, 322 S.C. 408, 472 S.E.2d 245 (1996), that an evidentiary hearing can be granted by the trial judge upon counsel "articulat[ing] specific factual and legal grounds to support his contention that evidence was obtained by conduct violative of his constitutional rights." *State v. Patton*, 322 S.C. 408, 411, 472 S.E.2d 245, 247 (1996). Clearly, if a defendant is entitled to an evidentiary hearing during the trial and no pretrial motion to suppress is required under

South Carolina law, the South Carolina Court of Appeals' determination that the Petitioner failed to preserve his right to challenge the admissibility of evidence in failing to argue a pretrial motion to suppress is a misapplication of South Carolina law and reversal is warranted.

In this case, the Petitioner's trial counsel articulated a specific objection to the attempted introduction of the disputed evidence raising foundation arguments clearly grounded in a constitutional challenge of the search and seizure yielding the disputed evidence. This objection was made at the time that the disputed evidence was proffered into evidence by the prosecution. Petitioner's trial counsel's objection pointed specifically to the prosecutions lack of foundation and lack of probable cause for the "separate arrest." Not only did the trial judge fail to conduct an evidentiary hearing as required in *Blassingame* and *Patton*, but the trial court also failed to articulate any basis for overruling trial court's objection to the admission of the evidence. State v. Blassingame, 271 S.C. 44, 47-48, 244 S.E.2d 528, 530 (1978), State v. Patton, 322 S.C. 408, 472 S.E.2d 245 (1996); (App. p. 96).⁵ Similarly, the South Carolina Court of Appeals failed to address or analyze the trial court's erroneous admission of evidence and the Petitioner's challenge to the lack foundation for said evidence presented at the trial at the time that the evidence was admitted into the record. As such, reversal is warranted.

Further, South Carolina law mandates that evidence seized in violation of the Fourth Amendment must be excluded from trial. State v. Freiburger, 366 S.C. 125, 131, 620 S.E.2d 737, 740 (2006) *citing* State v. Khingratsaiphon, 352 S.C. 62, 572 S.E.2d 456

⁵ It is worth noting once again that the prosecution went so far as offering to supplement the record with an actual foundation for the disputed evidence after the directed verdict motion was argued. (R. pp. 120-121). This can only be viewed as an acknowledgment by the prosecution that there was in fact no sufficient foundation for the disputed evidence at the time the evidence was admitted at the trial.

(2002) *and* Mapp v. Ohio, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961). In addition, "[g]enerally, a warrantless search is per se unreasonable and violates the Fourth Amendment prohibition against unreasonable searches and seizures." State v. Freiburger, 366 S.C. 125, 131, 620 S.E.2d 737, 740 (2006) *citing* State v. Dupree, 319 S.C. 454, 462 S.E.2d 279 (1995). Accordingly, "[t]he burden of establishing probable cause and the existence of circumstances constituting an exception to the general prohibition against warrantless searches is upon the prosecution." State v. Freiburger, 366 S.C. 125, 131, 620 S.E.2d 737, 740 (2006) *citing* State v. Dupree, 319 S.C. 454, 462 S.E.2d 279 (1995) *and* State v. Bultron, 318 S.C. 323, 457 S.E.2d 616 (Ct.App. 1995). However, in the case at bar, the trial judge appears to have misinterpreted the law as espoused in *Freiburger*, which imposes the burden of establishing probable cause **upon the prosecution**. State v. Freiburger, 366 S.C. 125, 131, 620 S.E.2d 737, 740 (2006) *citing* State v. Dupree, 319 S.C. 454, 462 S.E.2d 279 (1995) *and* State v. Bultron, 318 S.C. 323, 457 S.E.2d 616 (Ct.App. 1995)(emphasis added). The trial court articulates this misinterpretation when trial court questioned defense counsel during the directed verdict arguments asking, "So, it's your position that: All evidence obtained pursuant to a lawful arrest, the State has the burden of proving that evidence is admissible; rather than the Defendant challenging it admissibility?" (App. p. 126, lns 2-6). The critical point at issue is that the trial court completely failed to determine the lawfulness or righteousness of the underlying "arrest" as the trial court simply proceeded as if this arrest were *per se* lawful despite the glaring lack of probable cause to support this arrest. Although the trial court ruled that Office Mullinax could testify as to why he was investigating the Petitioner, no evidence was presented by the prosecution as to the basis of Officer Mullinax's investigation. (App. p.

86-87, Ins. 25, 1-18). In fact the only testimony that could be construed as relating to the investigation of the Petitioner was that the Petitioner arrived at a location. (App. p. 91, Ins. 22-23). There was no testimony as to why officers were even present at the location the Petitioner arrived at on the day of his arrest. This vague and nonspecific testimony forms no foundation or probable cause whatsoever for any arrest or search of the Petitioner. To allow narcotics to be admitted into evidence based on this complete lack of foundation in strict opposition to South Carolina law which mandates a foundation to be laid for all evidence was clear error and constitutes an abuse of discretion that was significantly prejudicial to the constitutional rights of the Petitioner. As such, reversal is warranted.

Upholding the admission of evidence based upon the trivial and inconsequential facts and circumstances provided in this matter will completely dissolve the prosecution's burden of presenting sufficient probable cause that an exception to the warrant requirement exists as espoused in *State v. Freiburger*. 366 S.C. 125, 131, 620 S.E.2d 737, 740 (2006). This cannot stand. In the event that this decision is upheld on appeal, it is imminently foreseeable that law enforcement officers will completely change their tactics altogether as a direct result of this very case. Law enforcement officers would now be able to stop an individual without any reason or justification whatsoever, charge the individual with a "crime," search the individual pursuant to the arrest for this "crime," dismiss the original charge for which the individual was arrested as it was baseless, and ultimately come to court to say the individual was "arrested on a separate matter" and was searched pursuant to that arrest yielding the evidence for which this individual now stands trial. Officers would not be required to espouse any basis for the original charge,

nor produce any evidence of probable cause as to the arrest on the separate charge.

Based upon the evidence presented in the record in this matter, the above scenario is imminently possible if not outright foreseeable. This cannot stand as it would completely dissolve the protections that the 4th Amendment to the United States Constitution provides to individuals in the State of South Carolina against illegal search and seizures.

The 4th Amendment of the United States Constitution unequivocally requires the prosecution to articulate facts and circumstances on which a reasonable person would believe that a crime was being committed, or had been committed, to legitimize a warrantless search conducted pursuant to that arrest. The trial court in the case at bar failed to require the prosecution to articulate such facts and circumstances on the record in this matter, and this failure constitutes reversible error.

II. THE SOUTH CAROLINA COURT OF APPEALS ERRED IN RULING THAT PETITIONER ABANDONED HIS APPEAL OF TRIAL COURT'S DENIAL OF PETITIONER'S MOTION FOR A NEW TRIAL IN THIS MATTER.

Rather than analyzing the Petitioner's motion for new trial arguments, the Court of Appeals deemed the argument abandoned solely on the contention that an argument must be "supported by authority" citing to *State v. Tumbleston*. 376 S.C. 90, 102, 654 S.E.2d 849, 855-56 (Ct. App. 2007). This assertion is incorrect as it acknowledges only one of *Tumbleston's* "either or" analysis. *Tumbleston* actually states that an issue is abandoned where an appellant fails to either argue **or** identify supporting authority in his brief. *State v. Tumbleston*, 376 S.C. 90, 102, 654 S.E.2d 849, 855-56 (Ct. App. 2007). The *Tumbleston* Court cited directly to *First Sav. Bank v. McLean* on this specific issue and *First Sav. Bank v. McLean* holds that "an issue is abandoned where the appellant fails to provide argument **or** supporting authority." 314 S.C. 361, 363 444 S.E.2d 513, 515 (1994) (emphasis added); *see also Fassett v. Evans*, 364 S.C. 42, 45, 610 S.E.2d 841, 844 (Ct. App. 2005); *Glasscock, Inc. v. U.S. Fid. & Guar. Co.*, 348 S.C. 76, 77, 557 S.E.2d 689, 690 (Ct. App. 2001). Clearly, the Petitioner provided arguments in support of his challenge to the trial court's denial of Petitioner's motion for new trial and the issue was not abandoned on appeal. Moreover, even if supporting authority is the standard, the Petitioner clearly cited to all of the arguments and supporting authority that the Petitioner made in Arguments 1 and 2 of the Petitioner's final brief submitted in this appeal. (App. p. 248). The reference and incorporation of these arguments and authority negated the need to simply reproduce the identical arguments multiple times in the same brief and should not constitute an abandonment of this argument. As such, the Court of Appeals'

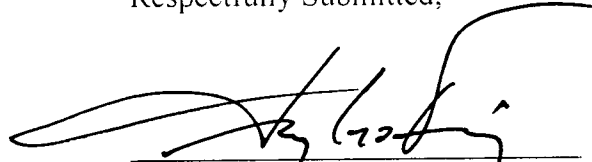
determination that Petitioner abandoned his arguments for a new trial should be reversed and the Petitioner should be granted a new trial on this matter.

All of the evidence presented at the trial of this matter lacked a proper or legally sufficient foundation in that all of the physical evidence was obtained during an unconstitutional warrantless search and seizure of the Petitioner. *See State v. Freiburger*, 366 S.C. 125, 131, 620 S.E.2d 737, 740 (2006). As such, all of the evidence presented at the trial should have been excluded by the trial judge meaning that the prosecution had failed to present any evidence supporting the offense charged. Denying the Petitioner's motion for a new trial in light of this was clear error by the trial judge resulting in significant prejudice to the Petitioner and warranting a reversal. Additionally, the South Carolina Court of Appeals, in affirming the trial court's denial of Petitioner's Motion for a New Trial in this matter through the misapplication of the logic of *State v. Tumbleston* was clear error and should be reversed.

CONCLUSION

For the reasons stated above, the Petitioner respectfully requests that this Court reverse the decision of the trial court as well as the Court of Appeals and remand for a new trial.

Respectfully Submitted,



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May 7, 2012

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of General Sessions

The Honorable Benjamin H. Culbertson, Circuit Court Judge

Case Number: 2009125406

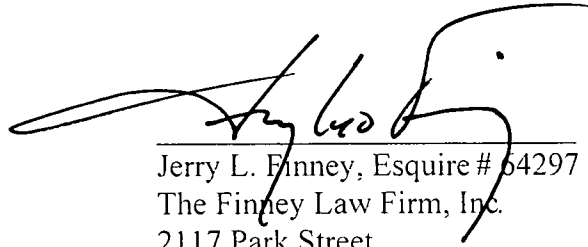
The State of South Carolina, Respondent,

v.

Ervin Gamble, Petitioner.

CERTIFICATE OF COUNSEL

Counsel for Petitioner hereby certifies that the Brief of Petitioner complies with Rule 211(b), SCACR.



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THE STATE OF SOUTH CAROLINA
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S.C. Supreme Court

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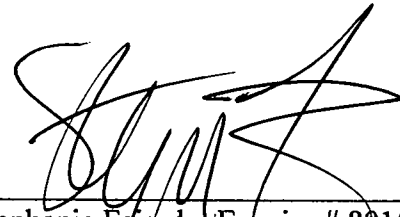
Ervin Gamble, Petitioner.

PROOF OF SERVICE

I, the undersigned, Stephanie R. Fajardo, Esquire, of The Finney Law Firm, Inc, attorney for the Appellant, do hereby certify that I have mailed a copy of the **Petitioner's Brief** by causing the same to be placed in the United States Mail, first-class postage prepaid, addressed as follows, on May 7, 2012:

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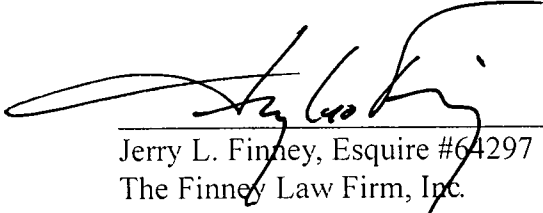
v.

Ervin Gamble, Petitioner.

PROOF OF SERVICE

I, the undersigned, Jerry L. Finney, Esquire, of The Finney Law Firm, Inc, attorney for the
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