

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Richland County

Doyet A. Early, III, Circuit Court Judge

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APR 25 2016  
SC Court of Appeals

Opinion No. 2016-UP-040 (S.C. Ct. App. filed 1/20/2016)

13-GS-40-04661

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THE STATE,

RESPONDENT,

V.

JONATHAN XAVIER MILLER,

PETITIONER

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PETITION FOR WRIT OF CERTIORARI  
TO THE COURT OF APPEALS

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CERTIFICATE OF COUNSEL

Counsel for petitioner certifies that the petition for rehearing was filed on February 4, 2016, but denied by the Court of Appeals on March 24, 2016.

QUESTION PRESENTED

The Court of Appeals erred in upholding the propriety of a police search of petitioner's vehicle located on private property by relying on S.C. Code Ann. § 56-5-20 because said statute allows for searches of vehicles found on public property (highways/roadways), but prohibits searches of vehicles located on private property.

## STATEMENT OF THE CASE

Petitioner Jonathan Xavier Miller was indicted for possession with intent to distribute crack cocaine, but found guilty of simple possession of crack cocaine per jury trial held during the August 2013 term of the Richland County General Sessions Court before Judge Doyet A. Early. Petitioner was sentenced to imprisonment for a period of nine years. Lucas Hawks and Jessamine Grice represented petitioner at trial, and Assistant Solicitors Brent Avant and Jennifer McKellar appeared on behalf of the state.

Petitioner appealed his trial court conviction and sentence, but his case was affirmed on appeal. See State v. Miller, Unpublished Opinion No. 2016-UP-040 (Ct. App. January 20, 2016). App. 1-3. A petition for rehearing was filed on February 4, 2016. App. 4-9. On March 24, 2016, the petition for rehearing was denied. This petition for writ of certiorari to the South Carolina Court of Appeals follows. App. 10.

## ARGUMENT

The Court of Appeals erred in upholding the propriety of a police search of petitioner's vehicle located on private property by relying on S.C. Code Ann. § 56-5-20 because said statute allows for searches of vehicles found on public property (highways/roadways), but prohibits searches of vehicles located on private property.

The state's case consisted of three witnesses: Chemist Brenda Jenkins and Police Officers James Westbury and Shaun McDonald. At trial, Officer Westbury testified that he was responding to a theft call in the Rosewood section of Columbia, South Carolina, on January 10, 2013, when he received a neighborhood complaint regarding a particular vehicle that had large silver and green rims seen in the same neighborhood and how this vehicle was allegedly connected to drug sales in the area. Minutes later during a routine patrol of the area, Officer Westbury happened upon the vehicle in question at a nearby mini-mart and followed the vehicle until the driver pulled into and stopped in a private driveway in front of a private residence. Officer Westbury stated that he confronted the driver, i.e. petitioner, and arrested him after learning that he was driving under a suspended license. Westbury added that it was police policy to tow the vehicle after petitioner's arrest. R. 24 – R. 39, l. 21. R. 113, l. 22 – R. 123, l. 17.

Officer McDonald, who arrested Officer Westbury during this traffic stop, testified at trial verifying Officer Westbury's account of the events, and added that if a driver is arrested for DUS, then the proper protocol is to have the vehicle towed thereafter. R. 59, l. 12 – R. 66, l. 16. R. 142, l. 4 – R. 147, l. 7; R. 64, l. 4 – 9.

The events that transpired after petitioner's DUS arrest became the subject of the illegal search and seizure issue in the case. Officer Westbury summarized the events that occurred subsequent to petitioner's arrest as follows:

Q. Then what occurred next?

A. At that time I called for a tow of the vehicle.

Q. Why did you do that?

A. When the driver is arrested in a vehicle and it's obvious the individual is not the – the vehicle owner is not on the scene, the vehicle has to be towed. Due to that, we also have to do an inventory search of the vehicle which is where we go through the vehicle making sure there's no items in there that could be damaged or stolen, anything like that, while its being towed or stored. We have to do an inventory search of the vehicle. R. 123, l. 20 – R. 124, l. 5.

Prior to trial, defense counsel had moved to suppress the crack cocaine seized pursuant to the inventory search of the vehicle driven by petitioner before the vehicle was towed because police officers had no authority to do so per S.C. Code Ann § 56-5-2520 (1976), (which the state cited as authority in support of the inventory search and subsequent tow), because this code section<sup>1</sup> applied to vehicles left without drivers stranded **on highways only**, and did not grant any authority to tow vehicles under similar circumstances found on private property. R. 22 – R. 23, l. 19.

Officer Westbury stated that after petitioner was arrested for DUS on private property, an inventory search of the car was conducted and crack cocaine was found under the driver's seat, and that when petitioner stated the vehicle did not belong to him, the call for the tow was placed because the owner of the vehicle was not on the scene. R. 34, l. 3 – R. 35, l. 18; R. 78, l. 12 – 21; R. 56, l. 7 – 8; R. 59, l. 3- 6.

The Court inquired regarding the location of the vehicle as follows:

Examination by the Court

Q. Officer McDonald, the vehicle that you ultimately inventoried, where was it parked?

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<sup>1</sup> § 56-5-2520

A. It was parked in a driveway on Timberlane.

Q. Is a driveway party of the highway system?

A. No.

Q. What authority did you have to – what authority did you rely in removing it from the private driveway?

A. Like I said, sir, to my knowledge, it wasn't his residence, and I was trained from day one that is the person gets arrested and it's not their residence that the vehicle gets towed.

Q. So if it's out in the middle of a field, anywhere not on the highway, you still tow it?

A. Correct. R. 66, l. 19 – R. 67, l. 18.

Before and after the in camera hearing, Officers Westbury and McDonald gave their accounts of the events that led to petitioner's arrest and the towing of the vehicle, then defense counsel objected to the search on the ground that the statute (S.C. Code Ann. § 56-5-2520) which the state relied upon in support of the inventory search and tow did not give the officers the authority to tow and conduct the inventory search that followed because this code section referenced such authority only upon public highways as opposed to private highways. R. 75, l. 2 – R. 76. The state argued that the statute did not limit or exclude the authority to tow on public property only. R. 76, l. 18 – R. 77, l. 16. S.C. Code Ann. § 56-5-2520 reads as follows:

(a) Whenever any police officer finds a vehicle in violation of any of the provisions of § 56-5-2510 he may move the vehicle or require the driver or the other person in charge of the vehicle to move it to a position off the roadway.

(b) Any police officer may remove or cause to be removed to a place of safety any unattended vehicle illegally left standing upon any **highway**, bridge, causeway or in any tunnel in such position or under such circumstances as to obstruct the normal movement of traffic.

(c) Any police officer may remove or cause to be removed to the nearest garage or other place of safety any vehicle found upon a **highway** when:

- (1) A report has been made that the vehicle has been stolen or taken without the consent of its owner.
- (2) The person in charge of the vehicle is unable to provide for its custody or removal.

The trial judge's preliminary ruling follows:

The Court: But the problem you've got with that it is it says highway. I mean, I see where its probably – they need rely on this statute and this statute says upon a highway, am I not limited to reading the statute and giving it its ordinary reading? R. 82, lines 10 – 15.

Later, however, the trial judge denied the motion to suppress and ruled that the inventory search pursuant to the tow in question were both proper and allowed the admission of the crack cocaine found inside the car to be entered into evidence at trial based on S.C. Code Ann. § 56-5-5635. R. 88, l. 1 – 7. R. 83, l. 14 – R. 84, l. 10. The defense argued that this was an erroneous statutory interpretation. R. 84, l. 11 – R. 87, l. 16.

S.C. Code Ann. §56-5-5635 reads as follows:

(A) Notwithstanding another provision of law, a law enforcement officer who directs that a vehicle be towed for any reason, whether on public or private property, must use the established towing procedure for his jurisdiction. A request by a law enforcement officer resulting from a law enforcement action including, but not limited to, a vehicle collision, vehicle breakdown, or vehicle recovery incident to an arrest, is considered a law enforcement towing for purposes of recovering costs associated with the towing and storage of the vehicle unless the request for towing is made by a law enforcement officer at the direct request of the owner or operator of the vehicle.

At the close of the state, petitioner renewed the motion to suppress the drugs based on an unlawful search. R. 163, lines 20 – 23. The court denied the motion. R. 163, lines 24 – 25.

On appeal, petitioner raised the following issue before this Court:

The trial judge erred in denying the pre-trial motion to suppress the crack cocaine found under the seat of the vehicle driven by petitioner after the traffic stop because the seizure of the drugs that occurred during the inventory search prior to the towing of the vehicle constituted an illegal search and seizure as the vehicle was located on private property, which in turn meant that the actions taken by the police in this case were neither statutorily authorized under S.C. Code Ann §56-5-2520 nor allowed via an exception under S.C. Code Ann § 56-6-5635.

On appeal, this Court affirmed and ruled as follows:

As to whether the trial court erred in denying Miller's pre-trial motion to suppress crack cocaine found during an inventory search of his vehicle: S.C. Code Ann. § 56-5-5635(A) (2006) ("Notwithstanding another provision of law, a law enforcement officer who directs that a vehicle be towed for any reason, whether on public or private property, must use the established towing procedure for his jurisdiction. A request by a law enforcement officer resulting from a law enforcement action, including...vehicle recovery incident to an arrest, is considered a law enforcement towing..."). App. 2.

This case boiled down to a statutory interpretation of S.C. Code Ann. 56-5-2520 and 56-5-5635, and whether the officers erred in towing the vehicle petitioner drove from its location on private property and in conducting the inventory search that occurred as a result of the decision to tow, since this ultimately led to the discovery of crack inside the vehicle. As a rule, the words of a statute are to be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation. State v. Manning, 2014 WL 1805319 (May 7, 2014 S.C. App), citing to State v. Sweat, 386 S.C. 339 688 S.E.2d 564 (2010). Here, the statute in question (56-5-2520) only allows police to tow or "remove" a vehicle off a road way for whatever reason if the vehicle is found "upon a **highway**." At the time of his arrest, petitioner had already parked the vehicle on a private driveway. Therefore, since the vehicle petitioner drove prior

to his arrest was not parked on a highway, which is public, then the towing of the vehicle and the inventory search that was conducted prior to the towing were illegal and statutorily unauthorized actions taken by police. Again, the vehicle petitioner had been driving at the time of the arrest was parked in a private roadway. The words of the statute clearly refer to circumstances that would warrant the removal of a vehicle from a public highway as opposed to a private highway. Where the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court had no right to expand or impose another meaning. State v. Manning, supra, citing to State v. Jacobs, 393 S.C. 584, 713 S.E.2d 621 (2011).

Nonetheless, the trial judge used S.C. Code Ann. §56-5-5635 ( Cum. Supp. 2004), to justify the towing as proper and the admission of the crack cocaine seized via the inventory search that preceded the towing into evidence as proper as well. However, this statute<sup>2</sup> referred not to the authority to tow (and the accompanying inventory search prior to the tow), but rather to the proper procedure (“must use the established towing procedure”) and the recovery of costs for towing a vehicle instead. To the contrary, this statute presupposes that an officer had the proper authority to tow and was previously authorized to tow any such vehicle. In other words, the proper towing procedure under S.C. Code Ann §56-5-5635, **would apply only after the threshold requirement to tow had been authorized** in the first place per S.C. Code Ann. § 5-56-2500. Therefore, since S.C. Code Ann. § 56-5-5635 was inapplicable and misapplied by the trial judge in the case at bar, the search and seizure in the case were unconstitutional and in violation of the Fourth and Fourteenth Amendments to the United States Constitution and article 1,§10 of the South Carolina

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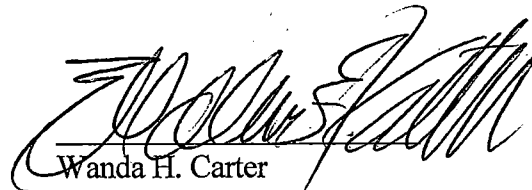
<sup>2</sup> S.C. Code Ann. §56-5-5635.

State Constitution; and as a result, the crack seized constituted fruit of the poisonous tree<sup>3</sup> and should have been suppressed at trial.

CONCLUSION

Bases on the foregoing argument, counsel for petitioner requests that this Court grant the petition and allow full briefing on the issue.

Respectfully submitted,



Wanda H. Carter  
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER.

This 25th day of April, 2016

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<sup>3</sup>Wong Sun v. United States, 371 U.S. 471 (1963).

STATE OF SOUTH CAROLINA

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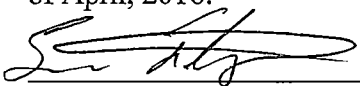
\_\_\_\_\_  
CERTIFICATE OF SERVICE  
\_\_\_\_\_

I certify that a true copy of the petition for writ of certiorari and a copy of the appendix, in this case has been served on J. Benjamin Aplin, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, Mr. Jonathan Xavier Miller #277973, at Kershaw Correctional Institution, 4848 Gold Mine Highway, Kershaw, SC 29067-8069, and the S.C. Court of Appeals this 25th day of April, 2016.

  
Wanda H. Carter  
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 25th day  
of April, 2016.

  
\_\_\_\_\_  
(L.S.)

Notary Public for South Carolina  
My Commission Expires: October 30, 2022.



# SCCID

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

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Robert M. Dudek, Chief Appellate Defender  
Wanda H. Carter, Deputy Chief Appellate Defender

April 25, 2016

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APR 25 2016  
SC Court of Appeals

J. Benjamin Aplin, Esquire  
Interim Senior Assistant Attorney Deputy General  
Office of the Attorney General  
Post Office Box 11549  
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Re: The State v. Jonathan Xavier Miller

Dear Ben:

Enclosed are two copies of the petition for writ of certiorari and the appendix in the above case that I filed with the South Carolina Supreme Court today.

If you have any questions concerning this matter, please contact me.

Sincerely,

Wanda H. Carter  
Deputy Chief Appellate Defender

WHC/smf

Enclosures

cc: Court of Appeals