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S.C. Supreme Court

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

On Certiorari to the Court of Appeals
Appeal from Horry County
Honorable Steven H. John, Circuit Court Judge

THE STATE,

Petitioner,

vs.

DANNY CORTEZ BROWN,

Respondent.

BRIEF OF PETITIONER

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STATEMENT OF ISSUES ON APPEAL

I.

Did the Court of Appeals err in reversing the trial judge's denial of Brown's suppression motion where the challenged evidence inevitably would have been discovered regardless of the propriety of the search conducted incident to Brown's arrest?

II.

Did the Court of Appeals err in reversing the trial judge's denial of Brown's suppression motion where the officer conducted the search of the duffle bag incident to Brown's arrest in compliance with the controlling legal precedent in effect at the time of the search?

STATEMENT OF THE CASE

On October 6, 2005, Respondent Danny Cortez Brown was arrested following a traffic stop during which he was observed with an open container of alcohol. In March of 2006, the Horry County grand jury indicted Brown for trafficking in cocaine in an amount between 100 and 200 grams. On September 12, 2006, Brown proceeded to trial in the Horry County court of general sessions with the Honorable Steven H. John, circuit court judge, presiding. At the conclusion of trial, the jury convicted Brown as indicted. The trial judge sentenced Brown to a term of imprisonment of twenty-five years. Brown then timely filed and perfected an appeal.

Following oral argument, the South Carolina Court of Appeals issued a published opinion reversing Brown's conviction.[1] State v. Brown, 389 S.C. 473, 698 S.E.2d 811 (Ct. App. 2010). Subsequently, the State petitioned the Court of Appeals for a rehearing, and the petition was denied. The State then filed a petition for a writ of certiorari in the South Carolina Supreme Court, and the petition was granted on December 15, 2011.

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[1] This opinion was filed on June 14, 2010, as Opinion No. 4697.

STATEMENT OF FACTS

On the evening of October 6, 2005, Officer Daryl Williams of the Horry County Police Department was on patrol in Myrtle Beach. (R. pp. 1-2). Around 7:00 p.m., Officer Williams glanced over at a vehicle to his side and noticed the passenger, Respondent Danny Cortez Brown, was holding a beer can. (R. pp. 2-3). Brown made eye contact with the officer and quickly attempted to tuck the beer can between his legs. (R. p. 2). Officer Williams then initiated a traffic stop based on the open container violation he observed Brown committing. (R. p. 2).

After the officer activated his blue lights, the driver of the other car, Rodney Smith, stopped his vehicle in the roadway. (R. p. 4; p. 12; p. 23; p. 87). When Officer Williams approached, Smith began behaving very nervously while Brown appeared to be "artificially laid back." (R. p. 4; p. 25; p. 32). Officer Williams asked Brown about the beer can, and Brown initially denied having one. (R. p. 4). However, Brown then pulled a beer can up from between his legs and showed it to the officer. (R. p. 4; pp. 17-18). Officer Williams instructed Brown to step out of the vehicle and placed him under arrest for the open container violation. (R. pp. 4-5). As he arrested Brown, he observed a black duffle bag between Brown's legs. (R. pp. 5-6). Officer Williams then removed the bag and placed it on the sidewalk for safety reasons so the driver would not be able to access it, and Brown claimed ownership of the duffle bag. (R. pp. 6-7; p. 24; p. 26). After securing the duffle bag, Officer Williams then moved Brown into the back of his police vehicle. (R. p. 8).

Once Brown was secured in the officer's patrol car, Officer Williams returned to Smith's car and casually spoke with Smith. (R. p. 9). While speaking with Smith, he unzipped Brown's duffle bag and looked inside. (R. p. 9; pp. 24-25). Inside the bag, he

located a crumpled package of Fritos chips, opened it, and discovered a plastic bag containing 122.65 grams of cocaine hidden within. (R. p. 9; pp. 116-117). He then closed the duffle bag, walked over to Smith, asked for his driver's license, and discovered it was suspended. (R. p. 11). After other officers arrived on the scene, Officer Williams arrested Smith for driving under suspension, and Smith was placed into another police vehicle. (R. pp. 11-12; p. 27).

Meanwhile, Detective Tom Delpercio, a narcotics investigator with the Horry County Police Department, responded to the scene after being alerted cocaine had been discovered during the traffic stop. (R. pp. 34-35). He took custody of the duffle bag, advised Brown of his rights, and attempted to speak with him. (R. p. 37). Brown declined to do so. (R. p. 37). The officers then searched Smith's vehicle and discovered a smaller bag of drugs under the driver's seat containing a medley of narcotics, including crack cocaine, Xanax pills, marijuana, and powder cocaine.[2] (R. pp. 37-38; p. 49). Subsequently, Smith waived his rights and claimed ownership of the drugs found under his driver's seat. (R. pp. 40-41).

Sometime after his arrest, Brown was released from custody. (R. p. 45). Following his release, Brown attempted to retrieve his possessions from the police department. (R. p. 26; pp. 44-45). Upon request, an evidence technician returned the black duffle bag, various items of clothing, and a cell phone to Brown on October 12, 2005, after Brown provided a driver's license and signed for the property's release.[3] (R.

[2] Regarding the search, Detective Delpercio testified: "Under a lawful search incident to arrest of the vehicle, in the passenger area, and pursuant also to guidelines of doing inventory of the vehicle before towing, we searched that vehicle." (R. p. 37).

[3] Lori Rabon, an evidence custodian with the Horry County Police Department, testified the duties of an evidence technician generally included safely returning non-relevant personal items and property back to its owner. (R. p. 113).

p. 112). The narcotics located in the duffle bag were not returned to Brown. (R. pp. 44-45). Subsequently, Brown was indicted for trafficking in cocaine, and he proceeded to trial. (R. pp. 181-182).

During trial, Officer Williams and Detective Delpercio recounted the circumstances of the traffic stop and the ensuing discovery of the drugs. (R. p. 1; p. 34). Following their testimony, Brown moved to suppress the evidence seized from the black duffle bag. (R. p. 63). Brown asserted Officer Williams should have ended his search after performing a pat-down search and needed consent to search any further. (R. p. 64). The trial judge took the matter under advisement. (R. pp. 68-70).

Smith then testified about the circumstances of the traffic stop. (R. pp. 72-73). Smith stated he stopped at a gas station and Brown approached his vehicle. (R. pp. 72-73; p. 74). Smith indicated Brown asked him if wanted to purchase some narcotics and he told Brown he did. (R. p. 74). He testified he then attempted to give Brown a ride home so he could purchase some cocaine from him, and Brown retrieved a black duffle bag from another vehicle. (R. pp. 72-73). Smith then stated they were stopped by a police officer a short distance from the gas station because Brown was drinking a beer. (R. p. 73). Smith testified he stopped his vehicle in the middle of the highway and the officer initially asked for his driver's license, which was suspended. (R. p. 73; p. 87; pp. 90-91; p. 93). Smith indicated the officer then arrested Brown and placed him in the police vehicle. (R. pp. 90-91). Smith stated the officer searched the duffle bag and arrested him for driving under suspension. (R. p. 93; p. 95). Smith further acknowledged he was a drug dealer and user, his drugs were found underneath his seat, and he had $250 in his pocket at the time of the traffic stop that he intended to use to purchase an "eight ball" of cocaine from Brown. (R. pp. 77-78; p. 84; p. 100).

After the State rested its case, Brown renewed his motion for the suppression of the narcotics, arguing the search was not a valid search incident to an arrest.[4] (R. pp. 129-134). In response to Brown's motion, the solicitor asserted the search was valid under the controlling United States Supreme Court precedent of New York v. Belton, 453 U.S. 454 (1981), and Thornton v. United States, 541 U.S. 615 (2004). (R. pp. 134-143). Following the solicitor's response, the trial judge asked Brown if the drugs would have inevitably been discovered while the duffle bag, which indisputably belonged to Brown, was inventoried during the arrest and booking process. (R. pp. 143-144). Brown responded: "It may be inevitable that they be found, but it doesn't make it proper." (R. p. 144). The trial judge denied the suppression motion, finding the search to be proper under the test announced in Belton. (R. pp. 151-153). The trial judge additionally noted: "[The duffle bag] could have been inventoried at the same time [Brown] was transported to the detention center and booked and arrested." (R. p. 150). However, he noted the search in this case was not an inventory search. (R. p. 150). Subsequently, at the conclusion of trial, Brown was convicted as charged and sentenced to a term of incarceration of twenty-five years.

Following his conviction, Brown timely filed and perfected an appeal. During the pendency of the appeal, the United States Supreme Court issued an opinion in the case of Arizona v. Gant, 556 U.S. 332 (2009), which significantly limited the Supreme Court's earlier holdings in Belton and Thornton. Subsequently, applying Gant, the South Carolina Court of Appeals reversed Brown's conviction after finding the search was not a

[4] Earlier, during the testimony of the drug analyst, the cocaine seized from Brown's duffle bag was admitted into evidence over objection. (R. pp. 118-120).

valid search incident to an arrest.[5] State v. Brown, 389 S.C. 473, 480-481, 698 S.E.2d 811, 815 (Ct. App. 2010). The Court of Appeals further found the search was not valid under the automobile exception to the warrant requirement. Id. at 483, 698 S.E.2d at 816. Finally, the Court of Appeals rejected the contention the drugs would have inevitably been found during a routine inventory search. Id. at 483-484, 698 S.E.2d at 816. In finding the inevitable discovery doctrine did not apply to Brown's case, the Court of Appeals held:

> The State provided very scant testimony, at best, that the duffel bag or car would have been taken into police custody after Brown and the driver were arrested. Although commonsense dictates the police would have done exactly this, we are confined by the law that the prosecution bears the burden to establish by a preponderance of the evidence that the evidence would inevitably have been discovered. Additionally, police must follow standard procedures to conduct an inventory search and no such testimony was presented. Thus, we conclude the inevitable discovery doctrine does not apply and the trial court erred by failing to exclude the evidence.

Id. at 484, 698 S.E.2d at 817 (footnotes and citations omitted).

Thereafter, the State petitioned the Court of Appeals for a rehearing, and the petition was denied. The State then petitioned the South Carolina Supreme Court for a writ of certiorari, and this Court granted the State's petition.

[5] In reversing the trial judge's ruling based on the decision in Gant, the Court of Appeals acknowledged: "In fairness to the trial court, it did not have the guidance provided to us by the United States Supreme Court in the Gant case." Brown, 389 S.C. at 481, n.2, 698 S.E.2d at 815.

ARGUMENT

I.

Did the Court of Appeals err in reversing the trial judge's denial of Brown's suppression motion where the challenged evidence inevitably would have been discovered regardless of the propriety of the search conducted incident to Brown's arrest?

The Court of Appeals erred in not finding Brown's cocaine would have been inevitably discovered. Although recognizing common sense dictated the duffle bag inevitably would have been taken into custody after Brown and Smith were arrested, the Court of Appeals concluded there was insufficient evidence to establish the cocaine inevitably would have been discovered. To the contrary, the evidence presented showed the officers intended to perform a routine inventory search contemporaneous with the towing of Smith's vehicle. Additionally, even if an inventory search of the vehicle would not have been performed, Brown's duffle bag, which Brown claimed ownership of at the time of his arrest, would have inevitably been taken into custody and inventoried as part of the standard booking process. Therefore, as Brown's narcotics would have inevitably been discovered even if the officer had not searched the duffle bag incident to Brown's arrest, the Court of Appeals' holding was erroneous. The decision of the Court of Appeals should be reversed, and Brown's conviction should be affirmed.

The Fourth Amendment protects "[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. This guarantee protects against unreasonable searches and seizures, including those involving only a brief detention. State v. Pichardo, 367 S.C. 84, 97, 623 S.E.2d 840, 847 (Ct. App. 2005). However, "[t]he purpose of the Fourth Amendment is not to eliminate all contact between the police and the citizenry, but 'to prevent arbitrary

and oppressive interference by enforcement officials with the privacy and personal security of individuals.' " United States v. Mendenhall, 446 U.S. 544, 553-554 (1980) (quoting United States v. Martinez-Fuerte, 428 U.S. 543, 554 (1976)).

Any evidence seized as the result of an unreasonable search and seizure must be excluded from trial. State v. Weaver, 374 S.C. 313, 319, 649 S.E.2d 479, 482 (2007). The well-settled rule is warrantless searches are unreasonable per se unless they fall under an exception to the Fourth Amendment's warrant requirement. State v. Peters, 271 S.C. 498, 501, 248 S.E.2d 475, 476 (1978).

The inevitable discovery doctrine has been adopted as such 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, should not be excluded during trial. 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. While the exclusionary rule is designed to ensure the prosecution will not be placed in a better position than it would have been without an illegal search or some police misconduct, the inevitable discovery doctrine ensures the prosecution is not placed in a worse position simply because of some earlier police error or misconduct. Id. at 443.

In the case sub judice, the evidence presented at trial established Brown's cocaine would have been inevitably discovered either in an inventory search during the booking process or in an inventory search of Smith's vehicle following his arrest. Regarding the vehicle inventory search, Detective Delpercio testified he searched Smith's car pursuant to guidelines regarding inventory searches of vehicles before they are towed. The

evidence further established Smith's vehicle was stopped in the middle of a roadway at the time of incident. Therefore, the officers clearly would not have abandoned the vehicle in the roadway after arresting both the passenger and driver. See State v. Lemacks, 275 S.C. 181, 184, 268 S.E.2d 285, 286 (1980) (finding an inventory search to be justified after a vehicle was discovered abandoned in the roadway because the towing of a vehicle in the roadway was reasonably foreseeable). Logically, the vehicle and the personal property connected to it would have been taken into law enforcement custody and secured. See United States v. Johnson, 383 F.3d 538, 545, n.8 (7th Cir. 2004) (finding the contents of the trunk would have inevitably been discovered in an inventory search because the officers would have taken possession of the vehicle after the driver was arrested); see also United States v. Hairston, 409 F. App'x 668, 670 (4th Cir. 2011) ("In this case, if the officer had not conducted a search incident to arrest, an inventory search of the car would have been conducted, wherein the evidence in question would have been discovered. Because the items seized would have been inevitably discovered, the district court was correct in denying Hairston's motion to suppress."); United States v. Johnson, 112 F. App'x 138, 139-140 (3rd Cir. 2004) (holding, where an officer stopped a vehicle and determined the driver did not have a valid license and had outstanding warrants, a search of a duffle bag in the vehicle should not be suppressed because the drugs found inside would have inevitably been discovered during an inventory search). After the vehicle and property were secured, an inventory search would have been necessary to protect the suspects' belongings and also to protect the police department from claims of lost or stolen property. See Whren v. United States, 517 U.S. 806, 812, n.1 (1996) ("An inventory search is the search of property lawfully seized and detained, in order to ensure that it is harmless, to secure valuable items (such as might be kept in a

towed car), and to protect against false claims of loss or damage."). Therefore, Brown's duffle bag would have inevitably been searched during a routine inventory search after Smith's car was taken into custody, and Brown's cocaine would have inevitably been found regardless of the propriety of the search performed at the scene.

Additionally, even if Brown's duffle bag would not have been discovered in a routine inventory search of Smith's vehicle, it would have been discovered during a search of Brown and his property during the routine booking process that followed his arrest. See Illinois v. Lafayette, 462 U.S. 640, 648 (1983) ("[I]t is not 'unreasonable' for police, as part of the routine procedure incident to incarcerating an arrested person, to search any container or article in his possession, in accordance with established inventory procedures."). Immediately after Brown was arrested, Officer Williams removed Brown's duffle bag, which had been tucked between Brown's legs, from the vehicle and placed it on the sidewalk. Brown then claimed ownership of the duffle bag. Undeniably, Brown was lawfully arrested for the open container violation and was the owner of the duffle bag.[6] Therefore, following Brown's arrest, Officer Williams inevitably would have transported and **did** transport Brown and his property to the detention center for booking as part of the arrest process. Cf. United States v. Andrade, 784 F.2d 1431, 1433 (9th Cir. 1986) (finding cocaine discovered in a garment bag recovered from the defendant's feet was admissible during trial regardless of the lawfulness of the search incident to arrest that was conducted because the cocaine would have inevitably been discovered when the defendant's belongings were searched during a standard inventory search as a part of the routine booking process). Even if Brown's cocaine had not been

[6] Brown continued to claim ownership of the black duffle bag during his testimony at trial. (R. p. 158; p. 160).

discovered during the on-the-scene search of his duffle bag, the drugs would have been discovered when his property was inventoried, catalogued, and secured for safe-keeping at the police department. See, e.g., In re Angel R., 162 Cal. App. 4th 905, 909, 77 Cal. Rptr. 3d 905, 908 (Cal. Ct. App. 2008) ("We need not address the merits of the suppression motion because the discovery of the stickers was inevitable in this situation: Angel would have been searched at booking as incident to his arrest . . . and the stickers would have been discovered at that point."); Manna v. State, 803 So. 2d 866, 867 (Fla. Dist. Ct. App. 2002) ("[A]s a practical matter, the marijuana would have been inevitably discovered during a routine booking search of appellant at the county jail."); State v. Brooks, 779 So. 2d 1055, 1057-1058 (La. Ct. App. 2001) (finding the inevitable discovery doctrine applied to Brooks' case where the officer had probable cause to arrest Brooks before discovering Brooks' cocaine and the officer testified she was going to arrest Brooks, search him, and bring him to the police station for booking even before she discovered the drugs). Therefore, as the narcotics would have been inevitably discovered during a search of Brown's property during the routine booking process, the evidence was properly admitted during trial.

Furthermore and critically, although the Court of Appeals found the evidence presented was insufficient to establish an inventory search would have occurred, the trial testimony clearly establishes an inventory search **was** performed after Brown's arrest. Most significantly, an evidence technician testified she released Brown's non-illegal property to Brown after he was released from custody, including his duffle bag, different articles of clothing, and a cell phone. Additionally, demonstrating the existence of protocol regarding inventory searches and the handling of suspects' property, the evidence technician testified she released Brown's property to him only after he was

required to verify his identity with a driver's license and sign for the items. Therefore, the testimony in this case clearly illustrated Brown's property would have been and was inventoried as part of the routine booking procedures, and the drugs would have inevitably been discovered when Brown's bag was searched and its contents were inventoried and catalogued.

Notably, during trial, Brown acknowledged to the trial judge the drugs may have inevitably been discovered, but he contended that did not make the search proper and was a moot point because an inventory search was not done in his case. (R. pp. 144-145). However, Brown misunderstood the issue because the inevitable discovery doctrine prevents the exclusion of evidence that would inevitably have been discovered regardless of the existence of an earlier improper search. The fact the cocaine was not actually first discovered in an inventory search was irrelevant if it would have inevitably been discovered by lawful means. See, e.g., Andrade, 784 F.2d at 1433, n.3 ("There was an actual inventory search conducted at the DEA facility. However, the district court correctly noted that the inevitable discovery doctrine requires only that the government show the evidence *would have been discovered* inevitably by *lawful means.* Actual discovery of the challenged evidence is not required." (italics in original)). In Brown's case, the narcotics would inevitably have been discovered during a routine and lawful inventory search of the automobile **or** of Brown's belongings during the booking process if they had not been first discovered in the search conducted at the scene. See, e.g., United States v. Zapata, 18 F.3d 971, 978 (1st Cir. 1994) ("Evidence which comes to light by unlawful means nonetheless can be used at trial if it ineluctably would have been revealed in some other (lawful) way so long as (i) the lawful means of its discovery are independent and would necessarily have been employed, (ii) discovery by that means is

in fact inevitable, and (iii) application of the doctrine in a particular case will not sully the prophylaxis of the Fourth Amendment."). Brown's acknowledgment regarding the inevitability of the discovery of the drugs demonstrates exactly why the narcotics should not have been suppressed.

As the Court of Appeals noted, common sense dictated the duffle bag and Smith's vehicle would have been taken into custody following the arrests. The evidence and testimony showed an inventory search of the duffle bag would have been and **was** performed. See Nix, 467 U.S. at 444 ("If 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. **Anything less would reject logic, experience, and common sense.**" (emphasis added)). Therefore, Brown's drugs should not have been suppressed based on the inevitability of their discovery by lawful means. The Court of Appeals erred in finding Brown's narcotics would not have inevitably been discovered during an inventory search. The Court of Appeals' decision is inconsistent with the inevitable discovery doctrine and the goals it serves, and the ruling, if permitted to stand, would result in unnecessarily high societal costs by excluding relevant evidence that would have been discovered even if no search was conducted at the scene following Brown's arrest. See Id. at 443 ("[T]he prosecution is not to be put in a better position than it would have been if no illegality had transpired. By contrast, the derivative evidence analysis ensures the prosecution is not put in a worse position simply because of

some earlier police error or misconduct."). Therefore, the Court of Appeals' decision should be reversed, and Brown's conviction should be affirmed.[7]

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[7] Additionally, under the specific facts and circumstances of Brown's case, even if this Court were to find the evidence insufficient to show Brown's cocaine would have inevitably been discovered based on the testimony and evidence appearing in the record, the case should be remanded for further proceedings to determine if sufficient evidence existed regarding the inevitability of the discovery of the drugs through lawful means. During trial, the trial judge found the search as conducted was proper under the applicable United States Supreme Court precedent existing at the time of trial. Therefore, the trial judge did not need to reach the issue of whether the evidence would have inevitably been discovered. Thereafter, the United States Supreme Court altered the applicable law in regards to searches incident to lawful arrests, and the Court of Appeals reversed the trial judge's ruling based on more recent United States Supreme Court precedent not available to the trial judge at the time of Brown's trial. If this Court finds there is insufficient evidence to determine if the cocaine would have inevitably been discovered, a remand would allow the trial judge to more fully address the inevitable discovery issue and would best serve the goals of the exclusionary rule while avoiding the unnecessarily high societal costs that would result from the suppression of Brown's narcotics. See United States v. Griffiths, 47 F.3d 74, 78 (2nd Cir. 1995) (remanding a case for further proceedings regarding whether the cocaine would have been discovered pursuant to an established inventory procedure because the trial courts previously failed to reach the issue).

II.

Did the Court of Appeals err in reversing the trial judge's denial of Brown's suppression motion where the officer conducted the search of the duffle bag incident to Brown's arrest in compliance with the controlling legal precedent in effect at the time of the search?

Notwithstanding the inevitability of the discovery of Brown's narcotics, the Court of Appeals erred in reversing the trial judge's decision to deny Brown's suppression motion for an additional reason. Although recognizing the United States Supreme Court had not yet issued its decision in Arizona v. Gant, 556 U.S. 332 (2009), at the time the officer conducted the search of the duffle bag incident to Brown's arrest or when the trial judge considered Brown's suppression motion, the Court of Appeals determined the decision in Gant entitled Brown to a reversal of his conviction and the suppression of the narcotics discovered during the officer's search of the duffle bag. However, subsequent to the Court of Appeals' decision in Brown's case, the United States Supreme Court decided the case of Davis v. United States, ___ U.S. ___, 131 S. Ct. 2419 (2011), and held the exclusionary rule should not be applied to a search conducted by a police officer in reasonable reliance on the binding appellate court precedent in effect at the time of the challenged search.[8] In Brown's case, the officer relied on the controlling appellate court

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[8] Because the United States Supreme Court did not issue its opinion in Davis until after the Court of Appeals decided Brown's case and the State filed its Petition for Writ of Certiorari seeking review of that decision, the issue of whether the Court of Appeals erred in reversing the denial of Brown's suppression motion in light of the decision in Davis has not yet been raised on appeal. However, an appellate court can affirm a conviction for any ground appearing in the record. See Rule 220(c), SCACR ("The appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal."); see also Upchurch v. New York Times Co., 314 S.C. 531, 538, 431 S.E.2d 558, 562 (1993) ("We may affirm the trial judge for any reason appearing in the record."). Although this Court is not required to consider additional sustaining grounds that have not previously been raised, the State asks this Court to consider the additional sustaining ground in this case in light of the recent decision of the United States Supreme Court in Davis, which was issued subsequent to the Court of Appeals' earlier decision in Brown's case, and affirm the trial judge's ruling. See I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 420-421, 526 S.E.2d 716, 723-724 (2000) ("The appellate court may review respondent's additional reasons and, if convinced it is proper and fair to do so, rely on them or any other reason appearing in the record to affirm the lower court's judgment. . . . While the current rules do not require the respondent to present an issue to the lower court in order to raise it as an additional sustaining ground, an appellate court is less

precedent in effect at the time of the search and conducted the search of Brown's duffle bag in full compliance with that legal precedent. Because the officer conducted the search in a manner consistent with the controlling legal precedent at the time of the search and in light of the United States Supreme Court's holding in Davis, the Court of Appeals' erred in reversing the trial judge's denial of Brown's motion to suppress the narcotics discovered in the search based on legal precedent not available to the officer at the time of the search. Accordingly, the decision of the Court of Appeals should be reversed, and Brown's conviction should be affirmed.

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 State v. Brockman, 339 S.C. 57, 66, 528 S.E.2d 661, 666 (2000) ("[W]e will review the trial court's ruling like any other factual finding and reverse if there is clear error. We will affirm if there is any evidence to support the ruling."). The reviewing court may conduct its own review of the record to determine whether the trial judge's ruling is supported by the evidence. State v. Khingratsaiphon, 352 S.C. 62, 70, 572 S.E.2d 456, 460 (2002). However, the appellate court must affirm the trial court if there is any evidence supporting the ruling. Pichardo, 367 S.C. at 96, 623 S.E.2d at 846.

South Carolina courts have recognized several exceptions to the general Fourth Amendment warrant requirement, including an exception for searches incident to arrests. State v. Bailey, 276 S.C. 32, 36, 274 S.E.2d 913, 915 (1981). Under the "search incident

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likely to rely on such a ground when the respondent has failed to present it to the lower court. In such cases, the appellate court likely would perceive it as being unfair or unwise to resolve a case on a ground never mentioned by the respondent prior to appeal. Stated another way, the respondent may raise an additional sustaining ground that was not even presented to the lower court, but the appellate court is likely to ignore it.").

to arrest" exception, "[p]olice officers may make a search of an arrestee's person and the area within his immediate control for weapons and destructible evidence without first obtaining a search warrant." State v. Ferrell, 274 S.C. 401, 405, 266 S.E.2d 869, 871 (1980); see State v. Freiburger, 366 S.C. 125, 132, 620 S.E.2d 737, 740 (2005) (noting the historical rationales for the "search incident to arrest" exception are the need to disarm a suspect in order to take him into custody and the need to preserve evidence for later use at trial). Such a warrantless search is permissible so long as the search is conducted substantially contemporaneously with the arrest and is confined to the immediate vicinity of the arrest. State v. Brown, 289 S.C. 581, 587, 347 S.E.2d 882, 885 (1986). "The sole prerequisite is that there be a prior arrest supported by probable cause." Ferrell, 274 S.C. at 405, 266 S.E.2d at 871.

At the time of Brown's arrest, the controlling appellate court precedent on the scope of a search incident to arrest permitted an officer who lawfully arrested the occupant of a vehicle to search the passenger compartment of the automobile contemporaneously with the occupant's arrest. See New York v. Belton, 453 U.S. 454, 460 (1981) ("[W]e hold that when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile." (footnotes omitted)). Additionally, an officer was permitted to examine the contents of any container located in the passenger compartment regardless of whether the container was opened or closed. See Id. at 460-461 ("[T]he police may also examine the contents of any containers found within the passenger compartment, for if the passenger compartment is within reach of the arrestee, so also will containers in it be within his reach. Such a container may, of course, be searched whether it is open or closed, since the justification for the search is not that the

arrestee has no privacy interest in the container, but that the lawful custodial arrest justifies the infringement of any privacy interest the arrestee may have." (footnotes and citations omitted)); see also Thornton v. United States, 541 U.S. 615, 622-623 (2004) ("The need for a clear rule, readily understood by police officers and not depending on differing estimates of what items were or were not within reach of an arrestee at any particular moment, justifies the sort of generalization which Belton enunciated. Once an officer determines that there is probable cause to make an arrest, it is reasonable to allow officers to ensure their safety and to preserve evidence by searching the entire passenger compartment." (footnotes omitted)).

Subsequently, after Brown was convicted and while his case was pending on appeal, the United States Supreme Court decided the case of Arizona v. Gant. In Gant, the Supreme Court clarified its earlier decisions and limited the scope permitted by those decisions for a search incident to an arrest. Id., 556 U.S. at 350-351. Specifically, the Supreme Court acknowledged its earlier decision in New York v. Belton, 453 U.S. 454 (1981), was "widely understood to allow a vehicle search incident to the arrest of a recent occupant even if there is no possibility the arrestee could gain access to the vehicle at the time of the search." Gant, 556 U.S. at 341. However, the Supreme Court rejected such a broad reading of Belton and concluded vehicles could be searched incident to a recent occupant's arrest "only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest." Gant, 556 U.S. at 351.

Following the decision in Gant and after the Court of Appeals issued its opinion in Brown's case, the United States Supreme Court addressed in Davis v. United States the question of whether the exclusionary rule should be applied to a Fourth Amendment

violation that occurs when a police officer conducts a search in compliance with binding appellate court precedent but that precedent is subsequently overruled following the search. The Supreme Court noted the exclusionary rule was not a constitutional right and was not designed to redress an injury suffered as the result of an unconstitutional search. Davis, 131 S. Ct. at 2426. Instead, the Supreme Court instructed the exclusionary rule's sole purpose was to deter future Fourth Amendment violations and should only be applied when its application would yield appreciable deterrence. Id. at 2426-2427. Recognizing the exclusionary rule could not effectively discourage unlawful police conduct by penalizing a police officer for acting in a manner authorized by binding appellate court precedent in effect at the time of the challenged conduct, the Supreme Court held: "Evidence obtained during a search conducted in reasonable reliance on binding precedent is not subject to the exclusionary rule." Id. at 2429.

In Davis' case, Davis was arrested during a traffic stop and secured in the back of a police vehicle. Id. at 2425. Officers then searched the passenger compartment of the vehicle Davis was seated in at the time of his arrest and discovered an illegal firearm in Davis' jacket pocket. Id. During trial, Davis challenged the admission of the firearm on Fourth Amendment grounds, and his motion was denied based on the controlling appellate court precedent in effect at the time. Id. at 2426. Subsequently, while Davis' case was on appeal, the United States Supreme Court issued its opinion in Gant. Davis, 131 S. Ct. at 2426. After granting certiorari in Davis, the Supreme Court determined Gant was retroactively applicable to Davis' case. Davis, 131 S. Ct. at 2431. However, because the police officers in Davis' case reasonably relied on binding appellate court precedent at the time of search, the Supreme Court determined the officers' "blameless police conduct" was not properly subject to the exclusionary rule. Id. at 2434.

In the case sub judice, the officer searched Brown's duffle bag substantially contemporaneously with Brown's arrest after removing the duffle bag from the passenger compartment of the car Brown was seated in immediately before Brown was lawfully arrested. During the officer's search of the duffle bag, he discovered a Fritos package, looked inside the package, and located Brown's cocaine. Cf. United States v. Robinson, 414 U.S. 218, 236 (1973) ("Having in the course of a lawful search [incident to arrest] come upon the crumpled package of cigarettes, [the officer] was entitled to inspect it; and when his inspection revealed the heroin capsules, he was entitled to seize them as 'fruits, instrumentalities, or contraband' probative of criminal conduct." (citations omitted)). Thus, the officer conducted the search of the duffle bag incident to Brown's arrest in a manner authorized by and consistent with the binding appellate court precedent in effect at the time of the search. See Davis, 131 S. Ct. at 2425 (recognizing that five Supreme Court justices in Gant interpreted the decision in Belton to permit a search of the passenger compartment of a vehicle regardless of whether the arrested occupant of that vehicle was secured at the time of the search); see, e.g., Small v. United States, 586 F. Supp. 2d 417, 423 (D.S.C. 2007) ("It is an extremely well-settled proposition of the law that police may lawfully search an automobile if such a search is incident to an arrest.").

Thereafter, during trial, Brown objected to the admission of the narcotics discovered during the search of the duffle bag on the basis the search violated his Fourth Amendment rights. Relying on the United States Supreme Court's decision in Belton, the trial judge denied Brown's suppression motion and allowed the narcotics discovered during the search to be admitted into evidence during trial. Subsequently, the Court of Appeals reversed the trial judge's ruling based on the United States Supreme Court's decision in Gant, a case which was decided after the officer conducted the search of

Brown's duffle bag and after the trial judge considered the merits of Brown's suppression motion, and determined the narcotics discovered during the search of the duffle bag should have been suppressed.

However, just as in Davis, the officer who searched Brown's duffle bag conducted the search in a manner consistent with the controlling appellate court precedent in effect at the time of the search, and the trial judge relied upon that precedent in denying Brown's suppression motion. Cf. Narcisco v. State, __ S.C. ___, 723 S.E.2d 369, 373 (2012) ("The circuit court in this case applied the established law to a search executed pursuant to binding precedent. Thus, Davis v. United States, and our own standard of review, commands that the circuit court's decision be affirmed."). Critically, the search of Brown's duffle bag was conducted over three years before the United States Supreme Court issued its decision in Gant. Cf. Davis, 131 S. Ct. at 2425 ("The search at issue in this case took place a full two years before this Court announced its new rule in Gant."). Therefore, the officer was blameless in conducting the search in an approved manner that was only later declared to be invalid several years after the search was conducted.

For this reason, the exclusion of Brown's cocaine would not effectively serve the exclusionary rule's sole purpose of deterring future police misconduct and, instead, would result in the high societal costs that result from the exclusion of relevant evidence of a crime while punishing a police officer for complying with the law in effect at the time of his actions. See Narcisco, 723 S.E.2d at 373 ("[E]xcluding the evidence against Petitioner would not deter police misconduct because the police in this instance conducted a search incident to arrest pursuant to binding appellate precedent. Moreover, exclusion of the evidence in this case would result in severe social costs, including the

articulation of an inexplicable and undecipherable message to law enforcement regarding how to conduct a legal search. The protection of the Fourth Amendment can only be realized if police are acting under a set of rules which make it possible to reach a correct determination beforehand as to whether an invasion of privacy is justified in the interest of law enforcement." (citations omitted)). Such a result is incompatible with the underlying purpose of the exclusionary rule. See Davis, 131 S. Ct. at 2434 ("It is one thing for the criminal 'to go free because the constable has blundered.' It is quite another to set the criminal free because the constable has scrupulously adhered to the governing law. Excluding evidence in such cases deters no police misconduct and imposes substantial social costs." (citations omitted))

In light of the United States Supreme Court's decision in Davis, the Court of Appeals erred in determining the trial judge should have granted Brown's suppression motion. The officer in Brown's case searched the duffle bag in a reasonable manner in reliance on binding appellate court precedent in effect at the time of the search. See Florida v. Jimeno, 500 U.S. 248, 250 (1991) ("The touchstone of the Fourth Amendment is reasonableness."). Therefore, the trial judge did not err in declining to suppress the narcotics discovered in the search. Cf. United States v. Wilks, 647 F.3d 520, 524 (4th Cir. 2011) ("The Supreme Court's decision in Davis is on all fours with the case currently before this court. There is no dispute that Officer O'Cain's search of Wilks' car was in compliance with binding Fourth Circuit precedent that was later overruled by the Supreme Court. In such a case, per Davis, the exclusionary rule does not apply."). The Court of Appeals' decision should be reversed, and Brown's conviction should be affirmed.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the decision of the Court of Appeals be reversed and vacated and the judgment and conviction of the trial court be affirmed.

Respectfully submitted,

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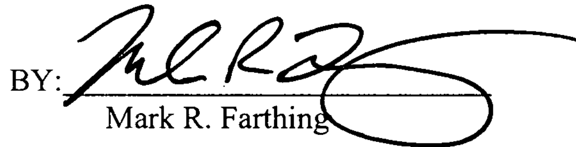

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May 11, 2012

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

On Certiorari to the Court of Appeals
Appeal from Horry County
Honorable Steven H. John, Circuit Court Judge

THE STATE,

Petitioner,

vs.

DANNY CORTEZ BROWN,

Respondent.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Brief of Petitioner 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, Ellen R. DuBois, certify that I have served the within Brief of Petitioner on Respondent by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

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I further certify that all parties required by Rule to be served have been served.
This 11th day of May, 2012.

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