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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Richland County

Howard P. King, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

BRANDON J. BERRY,

APPELLANT

APPELLATE CASE NO. 2015-002557

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1.

Did the court err by finding Appellant did not have a reasonable expectation of privacy in the apartment leased by his girlfriend and the mother of his child to challenge the warrantless search of the home under the Fourth Amendment when Appellant frequently slept at the apartment, kept clothes and various belongings there, occasionally had a key, had the authority to exclude others from the apartment, engaged in domestic activities in the home, and had known and dated the owner for nearly five years?

2.

Did the court abuse its discretion by finding Appellant's girlfriend voluntarily consented to a search of her apartment when an investigator with the Richland County Sheriff's Department threatened to have the Department of Social Services (DSS) remove her minor child from her custody if she refused to consent and prove she could provide a safe home for the child?

STATEMENT OF THE CASE

A Richland County Grand Jury indicted Appellant at the February 11, 2015 term of the Court of General Sessions for attempted murder, resisting arrest, unlawful carrying of a pistol, and unlawful conduct towards a child, and at the September 9, 2015 term for attempted armed robbery. R. *. His case was called to trial on November 30, 2015 before the Honorable Howard P. King, and a jury. Tr. 1. Assistant Solicitors K. Luck Campbell, Meghan Walker, and John W. Steadman represented the state, and Aimee J. Zmroczek represented Appellant. Tr. 1.

On December 4, 2015, the jury found Appellant guilty as indicted. Tr. 713, l. 25 – 714, l. 15. Judge King sentenced him to twenty years imprisonment for attempted murder, twenty years concurrent for attempted armed robbery, one year concurrent for resisting arrest, one year concurrent for the weapons offense, and five years consecutive for unlawful conduct towards a child. Tr. 731, l. 13 – 732, l. 18. The aggregate sentence was twenty five years imprisonment.

This appeal follows.

STATEMENT OF FACTS

On July 29, 2014, Michael Keith returned to his apartment around 4:00 am after hosting "Knuckle Up," a legal boxing event at a nightclub in Columbia. Tr. 226, l. 21 – 228, l. 9. Keith hosted events at various nightclubs throughout the Columbia area and often returned home during the early morning hours with a large amount of cash. Tr. 228, ll. 21-25.

After parking his car, Keith got out, retrieved his bag from inside, and shut the door. When he looked up, he saw "an individual standing behind him" who "looked like death because he had on black everything: black mask, black shoes, just black everything." The man pointed a gun at Keith and demanded, "Give me the keys and give me the money." When Keith did not respond, the man said, "I'm gonna count down. If you don't give me the money by the time I count down, I'm gonna kill you." Tr. 228, l. 10 – 229, l. 21.

As the man was counting down, Keith decided to run. Both men began to run around the car. As they were circling the car, the man jumped on top of the car and began walking towards Keith. Keith ran towards his apartment door, but fell before he reached the door. The man jumped on top of Keith and continued to demand his money and keys. When Keith still refused, the man hit him with the gun and then shot him in the leg. Tr. 229, l. 23 – 231, l. 14. As the man was pointing the gun at Keith's head, his girlfriend, who heard the commotion, came outside on the porch and yelled, "What are you doing?" Tr. 221, l. 18 – 223, l. 1; Tr. 231, l. 20 – 232, l. 8. While the man was distracted, Keith punched him in the stomach area and the man took off. Tr. 232, ll. 13-14.

With the help of his girlfriend, Keith was able to make it inside his apartment where he waited for law enforcement and EMS to arrive. Tr. 234, ll. 3-9. He was transported by ambulance to the hospital where he underwent surgery. The gunshot fractured his tibia and he needed surgery to stabilize the fracture. Tr. 354, ll. 1-22.

While processing the scene, law enforcement collected two nine millimeter shell casings. Tr. 268, ll. 19-24; Tr. 270, ll. 6-12; Tr. 271, ll. 20-22; Tr. 274, ll. 7-18; Tr. 276, ll. 14-18. Investigators also had Keith's vehicle towed to the "forensic garage" at the Richland County Sheriff's Department so they could process it in a "controlled environment." Tr. 277, ll. 3-24. While processing the vehicle, an investigator lifted five latent fingerprints and numerous footwear impressions that were on top of the vehicle. Tr. 412, l. 15 – 414, l. 20.

About six hours later, Deputy Pennington with the Richland County Sheriff's Department stopped a car on Zimalcrest Drive just off of Broad River Road after he observed the occupants driving without seatbelts. Tr. 297, ll. 2-19. Nickilous Wallace was the driver of this vehicle and Appellant was the front seat passenger. During the course of the traffic stop, Wallace was asked to get out of the car. Tr. 298, l. 24 – 299, l. 5. As Deputy Pennington was speaking with Wallace at the rear of the car, Appellant moved to the driver's seat and fled in the vehicle. He drove through an apartment complex until he eventually stopped the car and then continued to flee on foot. Tr. 299, l. 12 – 300, l. 1. Deputy Pennington ultimately apprehended Appellant as he was climbing over a fence. Tr. 300, l. 12 – 301, l. 8.

During the chase, Pennington allegedly saw Appellant toss an object. Tr. 300, ll. 22-25; Tr. 303, ll. 3-4. After Appellant was arrested, Pennington returned to the location where he thought he saw Appellant throw this object. He eventually discovered two black bags. Inside one of the bags were two black masks, gloves, zip ties, and various clothing items. Inside the other black bag were some diapers and a Glock nine millimeter handgun. Tr. 307, l. 6 – 309, l. 1.

When Wallace and Appellant were stopped, Appellant's two year old daughter was sitting in the backseat. She was not properly secured in a child car seat as required by law. Tr. 300, ll. 2-11; Tr. 386, ll. 7-11. When Appellant fled in the car, his daughter remained unsecured in the backseat.

Tr. 300, ll. 12-19. The child's mother, Lourisa Katio, was notified at work of her daughter's involvement in the traffic stop. Katio left work and drove to the location of the stop to pick up her daughter. Tr. 363, l. 20 – 364, l. 4; Tr. 365, l. 3 – 366, l. 23.

When Katio arrived, she told officers Appellant was at her apartment the night before until around 9:00 or 10:00 pm and that he had returned to the apartment around 5:00 am that morning. Tr. 367, l. 14 – Tr. 368, l. 23. Investigator Carwell, who was investigating the attempted armed robbery of Michael Keith, threatened to call the Department of Social Services (DSS) if Katio could not prove she could provide a safe home for the child. Carwell claimed he wanted to search Katio's apartment for weapons since a gun was found in her daughter's diaper bag. Because he continued to threaten to call DSS, Katio ultimately consented to a search of her apartment and signed a consent to search form. Tr. 369, ll. 8-23; Tr. 372, l. 23 – 373, l. 23; Tr. 374, ll. 23-25.

During the search of Katio's apartment, Investigator Carwell asked Katio to identify all of Appellant's belongings that were inside the home. She pointed out a pair of black jeans in her bedroom closet and a pair of black shoes right outside the closet door and said they belonged to Appellant. Tr. 558, l. 17 – 560, l. 23. Carwell seized these items. Tr. 369, l. 24 – 371, l. 20.

There were "reddish-brown stains" on the jeans and shoes that were later confirmed to be blood. Tr. 561, ll. 3-5. An agent with the South Carolina Law Enforcement Division (SLED) performed DNA testing and determined the blood stains from the black jeans matched the DNA profile of Michael Keith. Tr. 463, l. 4 – 465, l. 4; Tr. 473, l. 9 – 474, l. 2.

Additionally, SLED concluded that the two nine millimeter shell casings collected from the scene outside Keith's apartment were fired by the Glock nine millimeter handgun discovered in the black bag Appellant allegedly tossed while he was fleeing from Deputy Pennington. Tr. 504, l. 4 – 506, l. 11. Also, while the results were "inconclusive" because there were no "individual

characteristics" to compare, the size, design, and shape along with the "wear characteristics" of the black shoes seized from Katio's apartment were consistent with the footwear impressions lifted from Keith's car. Tr. 432, l. 19 – 437, l. 5.

The jury ultimately found Appellant guilty of attempted murder, attempted armed robbery, unlawful conduct towards a child, resisting arrest, and unlawful carrying of a pistol. Tr. 713, l. 25 – 714, l. 15.

ARGUMENT

1.

The court erred by finding Appellant did not have a reasonable expectation of privacy in the apartment leased by his girlfriend and the mother of his child to challenge the warrantless search of the home under the Fourth Amendment when Appellant frequently slept at the apartment, kept clothes and various belongings there, occasionally had a key, had the authority to exclude others from the apartment, engaged in domestic activities in the home, and had known and dated the owner for nearly five years.

Motion to Suppress

Defense counsel moved pretrial to suppress the evidence seized from Lourisa Katio's apartment on grounds that her consent to search was involuntarily given due to the threats made by Investigator Carwell involving DSS. The court conducted a pretrial hearing on Appellant's motion. Tr. 70, ll. 1-7.

Before hearing testimony, the state argued Appellant did not have "standing to contest" the search of Katio's apartment because "[h]e didn't live there, it's not his house." Tr. 87, ll. 17-25. Defense counsel argued the testimony would show Appellant had a child in common with Katio, that he often spent the night at her apartment, and that he "had a multitude of his personal items there." Tr. 88, ll. 9-20.

Lourisa Katio testified *in camera* that Appellant lived at her apartment "on occasion" depending on the status of their relationship. The two were "in and out" of dating. However, Katio said that during the month immediately before the search, Appellant "was there [at her apartment] more than he wasn't there." She also testified that Appellant spent the night at her apartment the

night before the search and that he kept his personal items there. Also, Appellant "[s]ometimes" had a key. Tr. 136, l. 9 – 137, l. 4.

Katio later clarified that when Appellant spent the night at her apartment, he slept in her bedroom with her. This is where he slept the previous two nights before the search. She also explained that some of Appellant's belongings were in her bedroom, "but mainly Brandon's [Appellant's] stuff was in the living room." Tr. 138, l. 23 – 139, l. 9; Tr. 146, ll. 18-22. According to Katio, Appellant would "[s]ometimes" have friends spend the night at the apartment and "entertain" guests at the apartment, but "not regularly." Tr. 146, l. 23 – 147, l. 7. However, whenever Appellant was at the apartment, he had the authority to invite people over and order people to leave. Tr. 147, ll. 18-21.

When questioned by the assistant solicitor, Katio said Appellant's name was not on the lease to the apartment. The only people listed on the lease were Katio, her daughter, and her grandmother. However, Appellant still spent the night often. Tr. 144, ll. 1-18.

Destiny Katio, Lourisa Katio's sister, testified that Appellant stayed at Katio's apartment "off and on sometimes depending on the relationship." She did not know whether Appellant kept his personal belongings there or whether he had a key, but she testified that he helped pay the bills for the apartment "[w]hen he could." Tr. 150, ll. 5-21.

Arguments of Counsel

The solicitor argued "there was no testimony that he [Appellant] had a key at the time, there was no testimony that he was on the lease, there was no testimony that he stayed there on a regular

basis, just that he stayed there sometimes." Tr. 159, ll. 20-24. The state maintained this evidence established Appellant did not have "standing" to challenge the search of Katio's apartment.[1]

Defense counsel argued Appellant was an overnight guest and thus had an expectation of privacy in the apartment. She maintained the testimony established Appellant: (1) slept at the apartment "on and off," (2) stayed at the apartment the night before the search, (3) sometimes had a key, (4) had the right to exclude others from the apartment, (5) had known the owner for five years and they have a child together, (6) kept his belongings at the apartment, and (7) engaged in domestic activities in the home as opposed to commercial activities. Based on our Supreme Court's holding in State v. Robinson, 410 S.C. 519, 528-530, 765 S.E.2d 564, 569-570 (2014), counsel argued these factors established Appellant had "standing" to challenge the search. Tr. 162, l. 25 – 164, l. 7.

Court's Ruling

The court found Appellant had "no reasonable expectation of privacy in the property search[ed] as required to prove a violation of his Fourth Amendment rights." Tr. 186, ll. 14-17. The court based this finding largely on the fact that Appellant was not listed on the lease and was not "the primary person in control" of the apartment. Tr. 185, l. 25 – 186, l. 5. The court stated:

> He [Appellant] did spend some nights there, but much of his property was left in the front room. He may have had some dominion and control to exclude others, but clearly from the testimony the primary person in control was Lourisa Katio. At best he was the father of a child they had in common, but at the time he was a sometime or part-time boyfriend who spent some nights on the premises. There was no legal relationship between the parties, they were not married legally or even a common law marriage. There's no evidence he paid rent, participated in domestic activities or claimed a proprietary or possessory interest in the property or to attempt to keep his activities in the home private.

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[1] In State v. Missouri, 361 S.C. 107, 111 n.2, 603 S.E.2d 594, 595 n.2 (2004), our Supreme Court stated, "The United States Supreme Court has expressly rejected the application of an analysis based on the standing doctrine; instead, the analysis is based on substantive Fourth Amendment law. The use of the term 'standing' has created confusion in this context, and therefore 'standing' is no longer appropriate to 'connote the legitimate expectation of privacy in the evidence seized or the premises searched.'" (internal citations omitted).

Tr. 186, ll. 1-13.

Discussion

The court erred by finding Appellant did not have a reasonable expectation of privacy in the apartment leased by Lourisa Katio, who was his girlfriend and the mother of his child, to challenge the warrantless search of the home under the Fourth Amendment since Appellant was clearly an overnight guest. Appellant frequently slept at the apartment, including the night before the search, kept clothes and other belongings there, occasionally had a key, had the authority to exclude others from the apartment, engaged in domestic activities in the home, and had known and dated Katio for nearly five years. It is obvious from the evidence that Katio chose to share the privacy of her apartment with Appellant on countless occasions and thus he had an actual and reasonable expectation of privacy in the apartment.

"The Fourth Amendment guarantees individuals the right to be free from unreasonable searches and seizures." State v. Missouri, 361 S.C. 107, 112, 603 S.E.2d 594, 596 (2004) (citing U.S. Const. amend. IV and S.C. Const. art. I, § 10). To claim protection under the Fourth Amendment, a defendant must show he has a legitimate expectation of privacy in the place searched. Id. (citing Rakas v. Illinois, 439 U.S. 128, 143 (1978)). "A legitimate expectation of privacy is both subjective and objective in nature: the defendant must show (1) he had a subjective expectation of not being discovered, and (2) the expectation is one that society recognizes as reasonable." Id. (citing Oliver v. United States, 466 U.S. 170, 177 (1984)).

In Minnesota v. Olsen, 495 U.S. 91 (1990), the United States Supreme Court found an overnight guest had a reasonable expectation of privacy in another's home. While the Court did not articulate what constituted an overnight guest, it stated generally, "From the overnight guest's perspective, he seeks shelter in another's home precisely because it provides him with privacy, a

place where he and his possessions will not be disturbed by anyone but his host and those his host allows inside." Id. at 99; Missouri, 361 S.C. at 113, 603 S.E.2d at 597.

In Missouri, our Supreme Court held the defendant had a reasonable expectation of privacy in the searched apartment when he (1) was good friends with the owner, (2) frequently visited the apartment, (3) occasionally spent the night, (4) at times had a key, and (5) kept a change of clothes there. Missouri, 361 S.C. at 115, 603 S.E.2d at 597-598. The Court held the defendant demonstrated a subjective expectation of privacy in the apartment and therefore was entitled to challenge the search under the Fourth Amendment. Id. at 115, 603 S.E.2d at 597-598.

In Kolle v. State, 386 S.C. 578, 590, 690 S.E.2d 73, 79 (2010), our Supreme Court held, "The fact that Kolle did not own or lease the apartment that was searched does not negate his standing to challenge the search and subsequent seizure." The Court emphasized its previous holding "that an overnight guest has a reasonable expectation of privacy, the legal prerequisite to confer standing on an individual." Id. (internal citations omitted). The Court concluded Kolle had a reasonable expectation of privacy in the searched apartment when the person who leased the apartment "befriended Kolle and permitted him to stay for an extended period of time at the residence." Id.

In Minnesota v. Carter, 525 U.S. 83, 90 (1998), the United States Supreme Court "held that the defendants did not have a reasonable expectation of privacy in the home of another when the nature of the defendant's visit was purely commercial, the visit was short, and there was no previous connection between the defendants and the lessee." Missouri, 361 S.C. at 114, 603 S.E.2d at 597 (citing Carter, 525 U.S. at 90).

Recently, in State v. Robinson, 410 S.C. 519, 528-530, 765 S.E.2d 564, 569-570, (2014), our Supreme Court held the following factors may be considered when determining whether a

defendant has a reasonable expectation of privacy to challenge a search or seizure: (1) whether the defendant owned the home or had property rights to it; (2) whether he was an overnight guest at the home; (3) whether he kept a change of clothes at the home; (4) whether he had a key to the home; (5) whether he had dominion and control over the home and could exclude others from the home; (6) how long he had known the owner of the home; (7) how long he had been at the home; (8) whether he attempted to keep his activities in the home private; (9) whether he engaged in typical domestic activities at the home, or whether he treated it as a commercial establishment; (10) whether he alleged a propriety or possessory interest in the premises and property seized; and (11) whether he paid rent at the home.

Here, Katio testified she had known Appellant for nearly five years and throughout their "on again, off again" relationship, Appellant frequently slept at her apartment and kept his clothing and other belongings there. In the month prior to the contested search, Katio maintained Appellant "was there [at the apartment] more than he wasn't there." Tr. 137, ll. 1-4. Significantly, Appellant slept at the apartment the night before or the morning of the search. Moreover, Katio's testimony established Appellant: (1) sometimes had a key, (2) invited friends over and could exclude others from the home, and (3) used the apartment for domestic activities, such as sleeping.

It is clear based on this testimony that Appellant was an overnight guest and that Katio chose to share the privacy of her home with Appellant on countless occasions over the course of several years. See Missouri, 361 S.C. at 115, 603 S.E.2d at 597-598. Thus, Appellant had an actual and reasonable expectation of privacy in the apartment and could challenge the search of the home pursuant to the Fourth Amendment. The trial court erred by finding otherwise.

When making its ruling, the trial court incorrectly emphasized the fact that Appellant was not listed on the lease, was not "the primary person in control" of the apartment, and had no legal

relationship to Katio, the lessee. However, these facts do not negate Appellant's legal right to challenge the search of the apartment and subsequent seizure. Kolle, 386 S.C. at 590, 690 S.E.2d at 79.

Respectfully, this Court should reverse the ruling of the trial court and hold Appellant had a reasonable expectation of privacy in the apartment and could challenge the search of the home pursuant to the Fourth Amendment.

2.

The court abused its discretion by finding Appellant's girlfriend voluntarily consented to a search of her apartment when an investigator with the Richland County Sheriff's Department threatened to have the Department of Social Services (DSS) remove her minor child from her custody if she refused to consent and prove she could provide a safe home for the child.

Relevant Facts

Defense counsel moved pretrial to suppress the evidence seized from Lourisa Katio's apartment on grounds that her consent to search was involuntarily given due to the threats made by Investigator Carwell involving DSS. The court conducted a pretrial hearing on Appellant's motion. Tr. 70, ll. 1-7.

Katio testified that she received a telephone call while she was at work on the morning of July 29, 2014. The caller told her Appellant and her baby were "with the police." Tr. 133, ll. 17-25. When she arrived at the location of the traffic stop, all Katio saw were police officers. She eventually spoke with Investigator Carwell, who told her Appellant and her daughter "were in a serious situation." When Katio tried to get her daughter, Carwell said "he would have to get DSS involved if [Katio] couldn't provide . . . a safe place for her [the child]." Tr. 134, l. 5 – 135, l. 6. In response, Katio said, "[S]o I can't get my daughter without DSS, and he [Carwell] said no." Tr. 135, ll. 7-11. Carwell said, "I have to call DSS." Tr. 143, ll. 304.

Investigator Carwell then began to question Katio about Appellant. He asked where Katio lived and whether Appellant had any "stuff" at her apartment. When Katio told Carwell that Appellant did have belongings at her house, Carwell told her he would allow her to take her child home if she would consent to a search of her apartment to "prove it's a safe place." Tr. 135, ll. 7-19. Katio maintained that she was willing to allow the officers to search her home in order to avoid

Carwell calling DSS. She said, "I was willing to do anything to get my child back." Tr. 138, ll. 2-12. She ultimately signed a consent to search form. Tr. 143, ll. 11-16. However, again, she stated she signed the form "[t]o get my baby back." Tr. 148, ll. 15-16.

Destiny Katio, Lourisa Katio's sister, testified that her sister called her after she learned about the traffic stop. Destiny drove to the location of the stop to support her sister and make sure her niece was okay. When Destiny arrived, Katio was very upset. She was "frantic" and "worried about her child." Destiny testified that she was present when the police told Katio "if she wasn't gonna let him search the apartment, then DSS would get involved." Tr. 150, l. 22 – 151, l. 23.

According to Investigator Carwell, Katio "volunteered for [him] to come back to her apartment" after she told him Appellant had returned to her apartment that morning around 5:00 am after "being out with a friend of his, Nickilous Wallace." Tr. 73, ll. 14-19. Carwell admitted he wanted to search Katio's apartment to look for "[a]nything to help me connect this shooting [of Michael Keith] to the two guys [Appellant and Wallace] that were in this car." Tr. 74, ll. 1-5. Carwell further testified that Katio signed a consent to search form. Tr. 74, ll. 6-23. He claimed he did not threaten Katio in order to obtain her consent to search. Tr. 74, l. 24 – 75, l. 14.

Carwell denied ever telling Katio he wanted to search her apartment to make sure it was safe because her daughter was found with a gun. He further claimed he "never mentioned anything about DSS or the child" when he asked Katio for consent to search. He also denied threatening Katio that "if she didn't allow [him] in her house that she could pick up her baby from DSS." Tr. 80, l. 7 – 81, l. 15.

Arguments by Counsel

The state argued Katio freely and voluntarily consented to the search of her apartment. The solicitor maintained Katio said she gave law enforcement permission to search her home because

"she had nothing to hide" and "she was more than happy for them to search her area." While the solicitor admitted DSS was "mentioned at the scene," she argued Investigator Carwell did not make any threats but was merely performing his "duty to ensure the safety of the child before [she was] returned to an environment that may cause [her] harm." Tr. 160, l. 12 – 162, l. 23.

Defense counsel argued Katio's consent to search was involuntarily given due to the threats involving DSS made by Investigator Carwell. She maintained Katio "felt compelled to give consent because the police told her that if she didn't give consent that they were gonna take the child or call DSS." Tr. 165, ll. 10-24. Defense counsel stressed Katio's testimony that before Carwell requested consent to search he asked Katio whether Appellant had any belongings at the apartment suggesting Carwell was not actually concerned about the child's safety, but wanted to search for any incriminating evidence against Appellant. Tr. 168, ll. 8-15. She concluded that Katio's consent was obtained through "coercion." Tr. 169, ll. 4-5.

Court's Ruling

The court found Lourisa Katio's consent to search her apartment was "freely and voluntarily given and not as a result of any attempts to intimidate her by threatening the use of DSS to take her child." In reaching this finding, the court found the testimony of Katio and her sister not credible. The court maintained the "law enforcement officers were simply trying to determine if the residence was safe to return the child. They were not using this fact as a threat to intimidate her into giving her consent." Therefore, the court denied Appellant's motion to suppress the evidence seized from Katio's apartment. Tr. 186, l. 18 – 187, l. 15.

Discussion

The court erred by finding Katio voluntarily consented to a search of her apartment when Investigator Carwell threatened to have DSS remove her daughter from her custody if she refused to

consent and prove she could provide a safe home for the child. The testimony established that when Katio arrived at the location of the traffic stop and ultimately gave consent, she was surrounded by law enforcement officers and was "very frantic" and "worried about her child." Tr. 150, l. 22 – 151, l. 23. This coercive atmosphere and the threats conveyed to Katio by Carwell regarding calling DSS rendered her consent to search involuntary. Because Katio's consent to search was involuntarily given, the trial court should have granted Appellant's motion to suppress the evidence seized from her apartment.

"Whether a consent to search was voluntary or the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of the circumstances." State v. Greene, 330 S.C. 551, 557, 499 S.E.2d 817, 820 (Ct. App. 1997) (citing State v. Dorce, 320 S.C. 480, 465 S.E.2d 772 (Ct. App. 1995)). "*The State has the burden of showing voluntariness.*" Greene, 330 S.C. at 557, 499 S.E.2d at 820 (emphasis added). "The issue of voluntary consent, when contested by contradicting testimony, is an issue of credibility to be determined by the trial judge." Id. "A trial judge's conclusions on issues of fact regarding voluntariness will not be disturbed on appeal unless so manifestly erroneous as to be an abuse of discretion." Id. (citing State v. Rochester, 301 S.C. 196, 391 S.E.2d 244 (1990)).

Here, the court abused its discretion by finding Katio voluntarily consented to a search of her apartment. The court's factual findings were not supported by the evidence and consequently were erroneous. When making its ruling, the court maintained the "law enforcement officers were simply trying to determine if the residence was safe to return the child. They were not using this fact as a threat to intimidate her into giving her consent." Tr. 186, l. 18 – 187, l. 15.

However, Investigator Carwell's testimony was that he sought consent to search Katio's apartment not to ensure the safety of the child, but to look for "[a]nything to help me connect this

shooting [of Michael Keith] to the two guys [Appellant and Wallace] that were in this car." Carwell, who was investigating the attempted armed robbery of Keith, admitted he only asked Katio for consent to search her apartment after she told him Appellant had returned to her apartment around 5:00 am that morning. Tr. 73, l. 14 – 74, l. 5; Tr. 81, ll. 1-4; Tr. 81, ll. 16-18. Based on his testimony, which the court found credible, Carwell was not "simply trying to determine if the residence was safe to return the child" as the court found. Instead, he was looking for incriminating evidence against Appellant. The court's finding was in direct conflict with Carwell's testimony.

Moreover, the court abused its discretion by finding Investigator Carwell's testimony credible. Carwell claimed under oath that he "never mentioned anything about DSS or the child" when he asked Katio for consent to search. Tr. 81, ll. 13-15. His testimony is completely contradicted by both Katio and Destiny's testimony. Even the solicitor indirectly admitted Carwell's testimony was false. While making her argument to the court, the assistant solicitor stated, "Was DSS mentioned at the scene? *No doubt, Your Honor*, because the police have a duty to ensure the safety of the child before it's [sic] returned to an environment that may cause it [sic] harm." Tr. 162, ll. 2-5 (emphasis added). Even the solicitor did not believe her own witness that DSS was "never mentioned" when the investigator obtained Katio's consent to search. She freely admitted Investigator Carwell told Katio he would have to contact DSS.

It is obvious from the evidence that Investigator Carwell was investigating the attempted armed robbery of Michael Keith, that he wanted to search Katio's apartment to look for evidence related to this offense after Katio stated Appellant had returned to her apartment that morning, and that he falsely claimed he wanted to ensure the apartment was safe for the minor child when he obtained consent from Katio. The threats Carwell made to Katio that he would contact DSS and that she would not be able to take her child home if she did not consent to a search of her apartment,

along with the coercive atmosphere at the scene of the traffic stop, rendered Katio's ultimate consent involuntary.

In State v. Corns, 310 S.C. 546, 552, 426 S.E.2d 324, 327 (Ct. App. 1992), this Court found the defendant's oral statements to law enforcement were involuntarily made when officers told Corns during several interviews that his wife could be arrested and their children taken by DSS. This Court found the officers' statements "amounted to an exertion of improper influence rendering Corns's statement involuntary" and remanded for a new trial. Id.

The threats in this case are very similar to threats made by the officers in Corns that this Court found rendered Corns' statements involuntary. This Court should likewise find the threats made by Investigator Carwell regarding contacting DSS rendered Katio's consent to search her apartment involuntary and suppress the evidence seized from within.

Because it is clear Investigator Carwell's testimony was not credible and that the factual findings made by the trial court in support of its ruling were erroneous, this Court should find the trial court abused its discretion by denying Appellant's motion to suppress the evidence seized from Katio's apartment and remand for a new trial given the threats made by Carwell when obtaining Katio's consent.

CONCLUSION

Based on the foregoing argument, Appellant respectfully requests this Court reverse his convictions and sentence and remand for a new trial. In the alternative, this Court should remand this case to the lower court for proper findings of fact and conclusions of law since Appellant had a reasonable expectation of privacy to challenge the search of Katio's apartment and the trial judge's factual findings related to the consent to search issue were incorrect.

Respectfully submitted,

Lara M. Caudy

Lara M. Caudy
Appellate Defender

ATTORNEY FOR APPELLANT

This 31st day of May, 2016.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Richland County

Howard P. King, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

BRANDON J. BERRY,

APPELLANT

APPELLATE CASE NO. 2015-002557

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Initial Brief of Appellant and Designation of Matter in the above referenced case have been served upon J. Benjamin Aplin, Esquire, at Rembert Dennis Building, Room 519, 1000 Assembly Street, Columbia, SC 29201, this 31st day of May, 2016.

Lara M. Caudy

Lara M. Caudy
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 31st day of May, 2016.

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