ORIGINAL

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Krista L. Harrington, Circuit Court Judge

The State,

Respondent,

V.

Anthony Janirus Robinson

Appellant.

APPELLATE CASE NO. 2015-605

FINAL REPLY BRIEF OF APPELLANT

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The critical issue in this case, and the subject of Appellant's Statement of Issues on Appeal, concerns the validity of the North Charleston Police Department's search of an automobile for contraband under the guise of an inventory search. Not surprisingly, the State chooses to argue other issues, expending most of its efforts arguing that Appellant's trial counsel failed to preserve these issues for appeal and raising, ironically for the first time on appeal, an issue of standing that was never argued to the trial court. For the reasons stated in Appellant's main brief and as discussed below, the conviction should be reversed.

I. THE STATE FAILED TO SUSTAIN ITS BURDEN TO JUSTIFY THE WARRANTLESS SEARCH.

On appeal, the State demonstrates as much difficulty justifying the search and seizure as the Solicitor had in arguing the suppression motion. At both the trial and appellate levels, the State seems to be throwing out exceptions to the warrant requirement until it sees which one might "stick." As the State correctly notes in its brief, a warrantless search is generally *per se* unreasonable unless an exception to the warrant requirement applies. Further, the burden of establishing the existence of circumstances constituting an exception to the warrant requirement rests on the State. (Respondent's Brief at 21).

It is certainly true that the Automobile Exception is a well-established exception to the search warrant requirement, and legions of cases stand for the proposition that the automobile exception is constitutionally justified. At its core, the automobile exception holds that "if probable cause justifies the search of a lawfully

stopped vehicle, it justifies the search of every part of the vehicle and its contents that may conceal the object of the search." *United States v. Ross*, 456 U.S. 798, 825 (1982).

In this case, however, the automobile exception has nothing to do with the appeal in this case. The trial court clearly expressed the basis for her ruling, and the basis for the Court's decision clearly was an inventory search. (R. p. 8, lines 8-21).

Moreover, the automobile exception does not apply under these circumstances. The record does not reflect that the North Charleston Police Department possessed probable cause to search the vehicle based only on the odor of marijuana that the officer claims to have experienced. The issue of whether an odor of marijuana alone provides probable cause to search remains controversial. Most recently, the Fourth Circuit refused to be drawn into a debate over whether the mere odor of burnt marijuana in a vehicle was ever sufficient to give rise to probable cause to search its trunk. The court avoided the question because of the multiple other factors on which the Court based its determination that probable cause existed. Those factors, in addition to the odor of marijuana, included admissions by occupants of the car and inconsistent stories given by the occupants regarding their travel plans. *United States v. Champion*, 609 F. App'x. 122 (4th Cir. 2015).

In *State v. Morris*, 411 S.C. 571, 769 S.E.2d 854 (2015) the Supreme Court noted multiple factors other than the odor of burnt marijuana contributing to a finding of probable cause. There, the police officer testified he observed unrolled and hollowed cigars, tobacco that had been removed from the cigars, the occupant's inconsistent stories, their driving a rental car and finding empty cans of Red Bull, all of which combined to provide probable cause. Other courts have considered other factors in

addition to marijuana odor, including a positive alert from a drug dog. *United States v. Mason*, 628 F.3d 123 (4th Cir. 2010).

Finally, the circumstances of this case do not lend themselves to applying the automobile exception. For the exception to apply, the vehicle must be "readily mobile" or moving. *See Pennsylvania v. Labron*, 518 U.S. 938, 940 (1996). The Oldsmobile that Officer Greenawalt placed under surveillance was not moving and was unoccupied while the Appellant was in the night club. Officer Greenawalt essentially had control of the vehicle while he had it under surveillance, so the policy reason justifying the automobile exception to the warrant requirement does not exist. There was ample opportunity for Officer Greenawalt to procure a search warrant for the vehicle if he felt that probable cause existed under the circumstances. He did not do so and instead placed the vehicle under his surveillance and placed the Appellant and his companion under detention as soon as they arrived at the vehicle. The car was not moved from its parking space at the club and the appellant was not allowed to enter it before being apprehended.

As noted in the Appellant's main brief, the vehicle search was not justified as an inventory search because 1) the vehicle was never taken into custody; 2) the vehicle was released to the vehicle's owner; and 3) it was never impounded or towed. As such, no "inventory" was ever necessary. Further, the police officer searching the vehicle had an invidious motive in conducting the search: he was searching for evidence of a crime as he admitted in his trial testimony, stating that it was his practice to list on the "tow sheet" any valuables that are inside the vehicle or "anything illegal" that was inside. (R. p. 48, lines 15-17). In addition, the State failed to submit any evidence of policies and procedures governing the conduct of inventory searches to prevent inventory searches

from being used as a pretext for the discovery of incriminating evidence under *United States v. Matthews*, 591 F.3d 230 (4th Cir. 2009).

While the State tried to justify the search as an inventory search at the suppression hearing, the trial court's ruling upholding the search was clearly erroneous. The Court decided that the police officer had the right to an inventory search to make sure that there was "no further contraband or illegal items in there." (R. p. 8, lines 17-19). In the State's brief in this appeal, the State discusses the inventory search issues in just over one page out of a 25-page brief that fails to address appellant's arguments or otherwise justify the search under that exception. Because the trial court clearly committed error in failing to suppress this evidence, Appellant's conviction should be reversed.

II. THE STATE ARGUES FOR THE FIRST TIME ON APPEAL THAT THE APPELLANT LACKS STANDING TO CHALLENGE THE SEARCH AND SEIZURE.

At no time during the suppression hearing did the Solicitor argue that the Appellant did not have standing to make a challenge to the search and seizure of this evidence. The State's standing argument is illogical because the premise of the prosecution in the first instance was that 1) an odor of marijuana emanated from the Oldsmobile; 2) the appellant had the keys and presumably control over the Oldsmobile; and 3) there was a reasonable suspicion for the police officer to stop and detain the Appellant. To now say that he lacks standing to question the search and seizure is illogical under the State's theory. If the State could not tie Mr. Robinson to the

Oldsmobile and thus to the contraband inside it, they would have no evidence whatsoever.

The State seems to argue that based on the testimony of the vehicle owner, Ms. Brown, Appellant was not a permissive user of the vehicle so that the State may invoke several cases holding that the driver of a stolen car has no standing to challenge the search and seizure of that car. That argument is unavailing under the facts of this case. Ms. Brown knew that the Appellant was going to be using the vehicle as she had seen him ride in the vehicle with Ms. Rivers. The only testimony was that Ms. Brown gave permission to Ms. Rivers to drive the car, and she testified that no one else had her express permission to drive it. (R. p. 130, lines 4-13). Nowhere in her testimony did she say that she expressly forbad Mr. Robinson from driving the car. Never did Ms. Rivers complain of Mr. Robinson driving the car. The "stolen car" cases simply do not apply under these facts.

The State cites two cases involving rental cars. *United States v. Luster*, 324 F. App'x. 224 (4th Cir. 2009) was an unpublished decision of the Fourth Circuit which did not provide a discussion regarding the circumstances of the search and seizure. The second unpublished Fourth Circuit decision cited by the State is *United States v. Mincy*, 321 Fed. App'x. 233 (4th Cir. 2008). In that case, the rental car company did give consent to the officer to search the vehicle after it had been stopped and after it was revealed that an unauthorized driver was operating it. The rental agreement expressly prohibited operation of the vehicle by any persons other than the renter and the car's owner expressly authorized the search. That case is also of no relevance, here.

The State also argues that there was no legitimate expectation of privacy on the part of the appellant with respect to the vehicle. Mr. Robinson possessed the keys to the vehicle, however, and the car was locked. How he lacked an expectation of privacy under those circumstances is unexplained in the State's argument. It would be reasonable for an occupant of a vehicle who has the keys in hand to have an expectation of privacy with respect to the vehicle. The State's untimely argument that Mr. Robinson lacks standing to challenge the search should be rejected.

III. THE STATE'S ISSUE PRESERVATION ARGUMENTS ARE UNAVAILING BECAUSE THE TRIAL COURT'S RULING ON THE MOTION TO SUPPRESS WAS FINAL AND ANY FURTHER EXCEPTIONS WERE UNNECESSARY AND FUTILE.

The public defender was not required to re-state or reiterate his objection to the evidence because it was clear from the trial court's ruling on the motion to suppress that her ruling was final: "Your motion to suppress is denied. Note your exception to my ruling." (R. p. 8, lines 20-21). Moreover, at the directed verdict hearing, the trial judge stated, "As to all your previous motions, I stand by the Court's original ruling. I haven't heard anything that would cause me to change my ruling at this time." (R. p. 139, lines 4-7).

Under applicable South Carolina law, it was not necessary for trial counsel to re-state his objection to the introduction of the evidence before the jury. Even when evidence does not immediately follow the ruling on a motion in limine, if the trial court "clearly indicates its ruling is final, rather than preliminary, the issue is preserved for appellate review." *State v. Wiles*, 383 S.C. 151, 157, 659 S.E.2d 172, 175 (2009).

In *State v. Humphries*, 346 S.C. 435, 551 S.E.2d 286 (Ct. App. 2001), *reversed on other grounds*, 354 S.C. 87, 579 S.E.2d 613 (2003), the trial court stated to defense counsel: "I am sure that you take exception to that ruling and I will tell you that your position is protected without the necessity of further objection on forward." 346 S.C. at 439. The evidence that was the subject of the trial judge's motion in limine was admitted without objection during the trial. The Court held that the trial court indicated its ruling was indeed final thus the defense need not object to the evidence at the time of admission. Accordingly, the issue was preserved notwithstanding the appellant's failure to raise an objection at trial. Id.

In the present case, the trial judge's statement to counsel, "Note your exception to my ruling" has the same effect. The trial court's comments at the directed verdict stage further support that the trial judge did not intend to change her ruling, and she expressly stated that she stood by her rulings. Under these facts, there is no unfairness to allowing the Appellant to challenge the admission of evidence notwithstanding the lack of a contemporaneous trial objection.

South Carolina cases also recognize a number of other common sense exceptions to the preservation rules. Primary among these is the rule of futility. "[O]ur courts have developed the doctrine of futility, which recognizes that in circumstances where it would be futile to raise an objection to the trial judge, failure to raise the objection will be excused." *State v. Passmore*, 363 S.C. 568, 584, 611 S.E.2d 273, 282 (Ct. App. 2005). South Carolina courts have also recognized that where the "tone and tenor" of the trial judge's remarks in making rulings indicate that further objection would be futile, the failure to make a contemporaneous objection or otherwise take exception is

excused. *See State v. Higgenbottom*, 344 S.C. 11, 14 n.4, 542 S.E.2d 718, 719 (2001); and *State v. Pace*, 316 S.C. 71, 74, 447 S.E.2d 186, 187 (1994).

By focusing its argument on appeal on error preservation, the State puts form over substance. "Rules of practice and procedure are devised to promote the ends of justice, not to defeat them. ... Orderly rules of procedure do not require sacrifice of the rules of fundamental justice." Blume and Wilkins, Death by Default: State Procedural Default Doctrine in Capital Cases, 50 S.C.L. Rev. 1 (1998). In this case, there can be no doubt that the court heard full arguments at the suppression hearing. She made her ruling based on the arguments advanced at that time and, as she said during the directed verdict motion, nothing changed. In other words, there was no development at trial and no evidence that was adduced at trial that would have changed her ruling on the suppression motion.

One of the fundamental bases for error preservation rules is fairness to the trial court. That is simply not a consideration in this case considering how the trial was conducted. The other basis for the rule is notice to the opponent. Again, the State argued the motion fully at the suppression hearing. There does not appear to be any evidence inconsistent with that proffered at the suppression hearing and it does not appear from the record that the State changed its position or its presentation of evidence based upon the trial court's ruling. In any event, however, the justifications for these procedural rules must be subordinate to the need for a fair trial and vindication of the constitutional and statutory rights of accused defendants. *See, Blume, supra* at 10.

The State's issue preservation arguments extend to the Appellant's Brief on Appeal. The State asserts that a conclusory assertion in the conclusion of the appellate

brief without citation of authority abandoned the argument that the Appellant's confession should have been suppressed as a fruit of the poisonous tree. (*See,* Respondent's Brief at 18). Respectfully, the State is wrong. Page 9 of the appellant's brief does argue, with citation of authority, that because the search was invalid, all of the physical evidence seized thereby "as well as the defendant's alleged 'confession' were improperly admitted as the fruits of an unlawful search and seizure." (Appellant's Brief at 9). The State also misconstrues the public defender's statement during the *Jackson v. Denno* hearing that he had no objection to the admissibility of the appellant's statement. The *Jackson v. Denno* hearing concerned the voluntariness of the appellant's statements to the police. To the extent those statements were made because an unlawful search and seizure had been made, trial counsel did not waive or abandon his argument directed to the out-of-court statements.

CONCLUSION

Based on the foregoing, and the arguments and authorities stated in Appellant's Main Brief, the appellant's conviction for possession of cocaine should be reversed and the matter remanded to the Circuit Court for dismissal.

Respectfully submitted,

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This 15th day of June, 2016.

STATE OF SOUTH CAROLINA

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THE STATE,

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V.

ANTHONY JANIRUS ROBINSON,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Reply Brief of Appellant in the above referenced case has been served upon Amie L. Clifford, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 15th day of June, 2016.

Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 15th day of June, 2016.

(L.S.)
Notary Public for South Carolina
My Commission Expires: October 30 2022.