STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED
NOV 21 2016
SC Court of Appeals

APPEAL FROM YORK COUNTY
Court of General Sessions
Daniel D. Hall, Circuit Court Judge

Appellate Case No. 2015-002595

THE STATE, ...RESPONDENT,

v.

DEVIONNE DEVAIGHN MCCLAIN, ...APPELLANT.

INITIAL BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

WILLIAM F. SCHUMACHER, IV
Assistant Attorney General

Post Office Box 11549
Columbia, SC 29211-1549
(803) 734-3922

KEVIN S. BRACKETT
Solicitor, Sixteenth Judicial Circuit

1675-1A York Hwy.
York, SC 29745
(803) 628-3020

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

Page

Table of Contents i

Table of Authorities ii

Respondent's Statement of Issues on Appeal 1

Statement of the Case 2

Statement of Facts 3

Argument:

The trial court properly found Officer McNeely had probable cause to believe Appellant was speeding where McNeely visually estimated Appellant's speed and said estimate was corroborated by a reading on his radar gun.. 8

Conclusion 16

TABLE OF AUTHORITIES

Cases:

Beck v. Ohio, 379 U.S. 89 (1964) 9
Delaware v. Prouse, 440 U.S. 648 (1979) 9
I'On, LLC v. Town of Mt. Pleasant, 338 S.C. 406, 526 S.E.2d 716 (2000) 12
Illinois v. Gates, 462 U.S. 213 (1983) 9
Maryland v. Pringle, 540 U.S. 366 (2003) 9
Ornelas v. United States, 517 U.S. 690 (1996) 9
State v. Adams, 377 S.C. 334, 659 S.E.2d 272 (Ct.App. 2008) 8
State v. Banda, 371 S.C. 245, 639 S.E.2d 36 (2006) 8, 9, 11, 13
State v. Bostick, 392 S.C. 134, 708 S.E.2d 774 (2011) 14
State v. Brannon, 347 S.C. 85, 552 S.E.2d 773 (Ct.App.2001) 9
State v. Brockman, 339 S.C. 57, 528 S.E.2d 661 (2000) 8
State v. Burgess, 391 S.C. 15, 703 S.E.2d 512 (Ct.App. 2010) 11
State v. Butts, 269 P.3d 862 (Kan.Ct.App. 2013) 14
State v. Freiburger, 365 S.C. 125, 620 S.E.2d 737 13
State v. Needs, 333 S.C. 134, 508 S.E.2d 857 (1998) 12
State v. Pichardo, 367 S.C. 84, 623 S.E.2d 840 (Ct.App. 2005) 8
State v. Ridge, 269 S.C. 61, 236 S.E.2d 401 (1977) 12
State v. Vinson, 400 S.C. 347, 734 S.E.2d 182 11
State v. Williams, 417 S.C. 209, 789 S.E.2d 582 (Ct.App. 2016) 12
State v. Wilson, 345 S.C. 1, 545 S.E.2d 827 (2001) 8
U.S. v. Sowards, 690 F.3d 583 (4th Cir. 2012) 10, 11, 13
United States v. Humphries, 372 F.3d 653 (4th Cir.2004) 9
Whren v. United States, 517 U.S. 806 (1996) 9

Statutes:

U.S. Const., amend. IV 8

STATEMENT OF ISSUES ON APPEAL

The trial court properly found Officer McNeely had probable cause to believe Appellant was speeding where McNeely visually estimated Appellant's speed and said estimate was corroborated by a reading on his radar gun.

STATEMENT OF THE CASE

On December 10, 2015, the York County Grand Jury indicted Appellant for failure to stop for a blue light. On December 15, 2015, Appellant proceeded to jury trial before the Honorable Daniel D. Hall. Jessica Russo, Esquire, represented Appellant; Assistant Solicitor Hannah Grove, Esquire, represented the State. The jury found Appellant guilty as indicted and sentenced him to five years' imprisonment. In addition, the trial judge revoked Appellant's probation for earlier convictions for possession with intent to distribute crack cocaine and possession with intent to distribute crack cocaine in proximity to a school and sentenced him to an additional nine years' incarceration to be served concurrently with his failure to stop for a blue light sentence.

Appellant filed a timely Notice of Appeal and subsequently submitted a Brief in support of his appeal. This Brief of Respondent follows.

STATEMENT OF FACTS

Arrest

On April 30, 2015, Officer Spencer McNeely was on patrol near the town of Clover, South Carolina. At approximately 3:00 a.m., Officer McNeely was driving down Kings Mountain Street when he noticed a vehicle approaching. He noticed the vehicle was going 45 mph in a 35 mph zone, confirmed his observation with his radar unit, and turned around to initiate a traffic stop. After activating his blue lights, Officer McNeely noticed the vehicle, a black sedan, accelerated and attempted to evade him. During the short vehicle pursuit, the sedan made several sharp turns at a high rate of speed before Appellant, the driver, lost control and crashed into an RV parked in a driveway. At this point, Appellant jumped out of the vehicle and attempted an escape. Officer McNeely radioed for backup and pursued Appellant on foot through the neighborhood. A short time later, Officer Nicholas Harris arrived and joined in the pursuit of Appellant. The officers chased Appellant into a park and apprehended him. (Tr.p.43, line 11–Tr.p.51, line 23).

Pretrial Hearing

During the pretrial hearing, Appellant moved to dismiss the charge arguing Officer McNeely did not have reasonable suspicion to initiate the traffic stop. He claimed Officer McNeely's visual estimation of speed was enough proof that Appellant was speeding and, because the stop was not proper, Appellant was within his rights to resist the unlawful stop. The trial judge allowed Officer McNeely to testify about his observations. The officer stated he made a visual estimate that Appellant was travelling 45 mph in a 35 mph zone, and then confirmed his estimate using the radar unit in his vehicle. When asked about how he observed the sedan speeding, Officer McNeely stated:

Officer McNeely:	[W]hen I documented in my report that I visually saw the vehicle speeding . . . I meant . . . that the radar unit itself is meant to confirm what you see . . . . What I am saying is I visually tracked . . . the vehicle going approximately 45 in a 35.
Solicitor Grove:	And did you confirm that with the radar?
Officer McNeely:	I did.
Solicitor Grove:	So the radar stated that the car was going –
Officer McNeely:	It's confirming what I was visually seeing.

(Tr.p.7, line 1–Tr.p.9, line 22).

Trial counsel cross-examined Officer McNeely, pointing out his written report of the incident did not mention his use of the radar unit and Officer McNeely claimed to have accurately assessed Appellant's speed in darkness near the completion of his shift. Officer McNeely further explained the omission of any reference to a radar unit in his report, stating: [W]hen I say I visually tracked [the sedan] . . . the radar unit is really only a confirmation of what I am seeing and during the visual tracking of the vehicle . . . I determined that the vehicle was speeding approximately 45 in a 35 [mph] zone." (Tr.p.10, line 3–Tr.p.12, line 21).

The trial judge denied the motion to dismiss, finding Officer McNeely's testimony about visually tracking the speed of the sedan and confirming his suspicions using the radar gun adequate. (Tr.p.13, lines 1–9).

Trial

At trial, Officer McNeely again testified about the facts of the attempted traffic stop, the chase, and Appellant's eventual arrest. He specifically testified:

Officer McNeely:	When it comes to apprehending a speeder . . . the radar unit itself is just to confirm what you are seeing. . . . You just don't look at the radar. The radar confirms what you're already seeing before you look at it. And I had

visually referrted to it. Visually tracking. I visually tracked this vehicle was going faster than 35[,] it looked to be approximately 45 [mph]. Ten miles an hour over the speed limit.

Solicitor Grove: And when you looked at the radar, what did the radar read?

Officer McNeely: The radar did confirm exactly what I was visualizing. The vehicle was moving approximately ten miles per hour over the speed limit.

(Tr.p.44, line 13–Tr.p.45, line 2).

On cross-examination, trial counsel again questioned Officer McNeely about his failure to reference his use of the radar unit and other details of the crime in his report.[1] Trial counsel also questioned Appellant why his dash cam video of the incident did not include a reading of his radar unit,[2] which appeared to be inactive throughout the entire video. (Tr.p.60, line 4–Tr.p.62, line 21).

On re-direct examination, Officer McNeely explained the recording system in his car was part of an L-3 system used by his police department. Each car is outfitted with recording equipment, and each individual officer has a USB stick which stores the information for that shift, including the dash cam video. However, the L-3 system is completely separate from a patrol car's radar unit, and as such does not record that data. (Tr.p.64, line 12–Tr.p.65, line 1).

[1] Trial counsel also questioned Officer McNeely about his failure to mention other facts in his report, such as Appellant accelerating after Officer McNeely initiated a traffic stop and Appellant's car generating smoke during the sharp turns. (Tr.p.60, line 4–Tr.p.61, line 8).

[2] The recording of the traffic stop consists not only of the video from the dash cam, but also contains other data from Officer McNeely's vehicle. Notably, the system includes GPS, stating the car's latitude, longitude, speed, and direction. There is also a data field titled "Radar," with subfields titled "Target," "Patrol," and "Lock." Throughout the recording, all three fields read "0 mph" and appear inactive. (State's Exhibit 1).

ARGUMENT

The trial court properly found Officer McNeely had probable cause to believe Appellant was speeding where McNeely visually estimated Appellant's speed and said estimate was corroborated by a reading on his radar gun

Appellant argues the trial judge erred in finding Officer McNeely had probable cause to initiate the traffic stop. The State disagrees with Appellant's allegation of error. Initially, the State notes Appellant's issue is not preserved for appellate review as his objection was based on a reasonable suspicion analysis, not probable cause. Additionally, a motion to dismiss was an improper motion under South Carolina law as the trial judge did not have the power to dismiss the indictment. On the merits, the trial judge did not err in finding adequate grounds to stop Appellant because Officer McNeely testified he witnessed Appellant speeding and confirmed his observation with a radar unit. Even without the radar unit, Appellant was travelling at such a significant rate of speed that it was plainly obvious he was breaking the law.

In criminal cases, the appellate court sits to review errors of law only. State v. Wilson, 345 S.C. 1, 545 S.E.2d 827 (2001). The appellate standard of review in Fourth Amendment search and seizure cases is limited to determining whether any evidence supports the trial judge's finding. State v. Brockman, 339 S.C. 57, 528 S.E.2d 661 (2000); State v. Adams, 377 S.C. 334, 659 S.E.2d 272 (Ct.App. 2008); State v. Pichardo, 367 S.C. 84, 623 S.E.2d 840 (Ct.App. 2005). "The same standard of review applies to preliminary factual findings in determining the admissibility of certain evidence in criminal cases." State v. Banda, 371 S.C. 245, 251, 639 S.E.2d 36, 39 (2006).

The Fourth Amendment guarantees "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const., amend. IV. "Temporary detention of individuals by the police during an automobile stop constitutes a

'seizure' of an individual within the meaning of the Fourth Amendment." State v. Banda, 371 S.C. 245, 639 S.E.2d 36 (2006); Delaware v. Prouse, 440 U.S. 648 (1979). "Therefore, an automobile stop implicates the Fourth Amendment prohibition against unreasonable searches and seizures, imposing a standard of "reasonableness" upon the exercise of discretion by state law enforcement officials." See id. The decision to stop an automobile is reasonable where the police have probable cause to believe a traffic violation has occurred. Whren v. United States, 517 U.S. 806, 809–810 (1996).

Similar to reasonable suspicion, probable cause is a fluid concept. Probable cause is a "commonsense, nontechnical conception[] that deal[s] with the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." Ornelas v. United States, 517 U.S. 690, 695 (1996).

Probable cause exists if, given the totality of the circumstances, the officer "had reasonably trustworthy information . . . sufficient to warrant a prudent [person] in believing that the petitioner had committed or was committing an offense." Beck v. Ohio, 379 U.S. 89, 91 (1964). The court must examine the events leading up to the stop and decide "whether these historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to probable cause." Maryland v. Pringle, 540 U.S. 366, 371 (2003) (internal quotation marks omitted). Therefore, determining whether an officer has probable cause to conduct a warrantless search depends on the totality of the circumstances. State v. Brannon, 347 S.C. 85, 92, 552 S.E.2d 773, 776 (Ct.App.2001). Of course, the requisite showing is less than that required by a preponderance of the evidence standard, Illinois v. Gates, 462 U.S. 213, 235 (1983), and the probable cause standard does not even "require that the officer's belief be more likely true than false." United States v. Humphries, 372 F.3d 653, 660 (4th Cir.2004).

In U.S. v. Sowards, 690 F.3d 583 (4th Cir. 2012), the Fourth Circuit Court of Appeals found a police officer's uncorroborated visual speed estimate did not provide probable cause to initiate a traffic stop for speeding. Deputy James Elliott stopped Sowards for speeding after visually estimating that Sowards's vehicle was travelling 75 mph in a 70 mph zone. Deputy Elliott was unable to confirm Sowards's speed, as he had positioned his patrol car at an angle that prevented him from obtaining an accurate radar reading. During the traffic stop, a canine trained in drug detection sniffed the outside perimeter of Sowards's vehicle, which led officers to discover approximately ten kilograms of cocaine. Id. at 585.

Sowards moved to suppress the cocaine evidence, arguing Deputy Elliott lacked probable cause to initiate the traffic stop. At the suppression hearing, Deputy Elliott testified he was certified in the use of radar equipment in North Carolina, and as a condition of that certification he was required to estimate the speeds of 12 vehicles, and the sum total of his estimates had to be within 42 mph of the sum speeds of the vehicles. Id.

Over the objection of trial counsel, Deputy Elliott was permitted to testify that he had visually estimated Sowards's vehicle was travelling 75 mph in a 70 mph zone. On cross examination, Deputy Elliott admitted he did not attempt to verify or otherwise corroborate his visual speed estimate by pacing Sowards's car, consulting a radar gun, or utilizing other outside tools. He also stated: (1) he did not use a "technique" for measuring speed; (2) there are 12 feet in a yard;[3] (3) 12 inches in a yardstick; (4) his visual estimation of speed was not dependent on his ability to estimate the distance Sowards's vehicle traveled. Id. at 585–86.

The Fourth Circuit found Deputy Elliott did not have probable cause when he stopped Sowards, noting Deputy Elliott's lack of training and difficulty with measuring distances were

[3] Eventually, Deputy Elliott changed his answer to 4 feet in a yard. Sowards, 690 F.3d at 586.

material to determining whether his observation, by itself, was reliable enough to create probable cause. The court also noted several items which could have corroborated his observation, but were not present in this case. These "indicia of reliability" commonly found in other speeding situations were tools and observations such as: (1) a vehicle travelling in significant excess of the speed limit, so much that it is plainly obvious the vehicle is speeding; (2) use of a radar gun; (3) officers "pacing" a car; (4) other readily apparent observations.[4] Id. at 588–94.

Issue Preservation

Initially, the State notes Appellant's issues regarding probable cause are not preserved for review. As noted by Appellant in his brief, trial counsel's motion to dismiss was based on a lack of **reasonable suspicion** for the traffic stop. (Tr.p.7, lines 1–11). Probable cause is the standard for initiating a traffic stop based on an alleged traffic violation and reasonable suspicion is the standard which applies in situations in which an officer stops a vehicle for investigative purposes when the officer believes the vehicle's occupants are engaged in criminal activity. See Banda, 371 S.C. at 252, 639 S.E.2d at 40; State v. Vinson, 400 S.C. 347, 351–52, 734 S.E.2d 182, `84 (Ct.App. 2012) (stating a traffic stop is reasonable if officers have probable cause to believe a traffic stop occurred or when the officer has a reasonable suspicion the occupants are involved in criminal activity). Trial counsel and the Solicitor argued the motion applying the reasonable suspicion standard. The trial judge ruled on the motion under a reasonable suspicion analysis. Thus, if Appellant truly intended to object to the traffic stop under a probable cause standard, he failed to "correct" the trial judge's application of the incorrect legal standard and his argument is not preserved for appellate review. See State v. Burgess, 391 S.C. 15, 20, 703 S.E.2d 512, 515 (Ct.App. 2010) (finding defendant's argument that the trial judge applied the wrong legal

[4] In its opinion, the cited cases in which: (1) a defendant tapped on his brakes; (2) an officer's patrol car shook as a defendant drove past; (3) the roaring engine of a speeding vehicle. Sowards, 690 F.3d at 592–93.

standard in deciding against removing a juror was not preserved for review as he failed to object incorrect standard at trial); also I'On, LLC v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000) ("The losing party must first try to convince the lower court it was ruled wrongly . . . .").

Accordingly, this issue is not preserved for appellate review.

Motion to Dismiss

Futhermore, Appellant's motion to dismiss the case was improper. The solicitor may choose to dismiss a properly obtained indictment, but the court does not have such power. See State v. Needs, 333 S.C. 134, 146, 508 S.E.2d 857, 863 (1998) ("Furthermore, a trial court generally has no power to dismiss a properly drawn indictment issued by a properly constituted grand jury before trial unless a statute grants that power to the court. The prosecutor may, of course, request the dismissal of an indictment or charge."); State v. Ridge, 269 S.C. 61, 65, 236 S.E.2d 401, 402 (1977) (In the absence of a statute, "a court has no power . . . to dismiss a criminal prosecution except at the instance of the prosecutor."). A motion to suppress evidence is the proper vehicle for challenging evidence collected in violation of the Fourth Amendment. See State v. Williams, 417 S.C. 209, 789 S.E.2d 582 (Ct.App. 2016) (finding the magistrate and circuit court judges erred in granting a defendant's motion to dismiss a case for lack of reasonable suspicion or probable cause as suppression is the proper remedy for evidence obtained in violation of the Fourth Amendment).

Accordingly, the trial judge did not err in refusing to grant Appellant's improper motion to dismiss.

The Trial Judge's Findings Are Supported by the Record

Appellant's argument is without merit. Officer McNeely's observation of Appellant's speed was supported by indicia of reliability. He testified that in addition to visually identifying Appellant as speeding, he confirmed his observations by using his radar gun. As noted in Sowards, the use of a radar gun is a recognized method for confirming that a vehicle is speeding. See Sowards, 690 F.3d at 592. Thus, the trial court did not err in admitting Officer McNeely's testimony. See Banda, 371 S.C. at 251, 639 S.E.2d at 39 (stating appellate courts must affirm a trial court's factual findings in Fourth Amendment search and seizure cases if there is any evidence supporting the trial court's finding).

Appellant argues in his brief the trial court erred in admitting the testimony because Officer McNeely's testimony was unreliable for several reasons: (1) the recording system in his patrol vehicle did not contain any data about the radar, despite the system having the ability to record such data; (2) the wording of Officer McNeely's testimony, because Appellant claims the officer purposely avoided testifying to the exact speed the radar gun provided for Appellant's vehicle; and (3) Officer McNeely failed to reference his use of a radar gun in his incident report. Notably, Appellant's first two arguments were not raised during the pretrial hearing, and as such are not proper items for this Court's consideration. See State v. Freiburger, 365 S.C. 125, 135, 620 S.E.2d 737, 742 (stating issues must be raised to and ruled on by the trial court to be preserved for appellate review). Additionally, Officer McNeely provided specific testimony explaining: (1) the radar system in his patrol car was not hooked up to the recording system;[5] (2)

[5] The State notes that the recording system used a general data format which did not perfectly correspond to the devices in Officer McNeely's patrol car. For example, system has the ability to record video from two different cameras, labelled "Camera 1" and "Camera 2." However, no second camera was present in the car. Additionally, the State also provided copies of the video taken from Officer Harris's patrol car into evidence. Notably, his car's recording system also does not contain data from a second camera or a radar device. (State's Exhibit 1).

that the radar gun indicated Appellant was travelling 10 mph over the speed limit;[6] and (3) he did not reference the radar gun in his report because it only served as confirmation of his initial observation that Appellant was speeding.

Moreover, Appellant's arguments are infirm attempts at challenging the weight of the State's evidence, and it is the sole duty of the jury to weigh the evidence. See State v. Bostick, 392 S.C. 134, 139, 708 S.E.2d 774, 776 (2011) (stating it is the jury's duty, as factfinder, to weigh evidence).

Appellant's Speed was Plainly Obvious

Additionally, Appellant was travelling at such an excessive speed that it was plainly obvious to Officer McNeely. As stated by the Sowards Court, the percentage difference between an estimated speed and the legal speed limit may, by itself, serve as the foundation for an officer's probable cause determination. In Sowards, the court found Deputy Elliott's estimation that the defendant was travelling 75 mph in a 70 mph zone was too minor to serve as sufficient information to establish probable cause. The 5 mph difference constitutes approximately a 7 percent increase in speed over the posted speed limit, an admittedly insubstantial amount. However, in the instant case, Officer McNeely observed Appellant travelling 45 mph in a 35 mph zone. Here, the 10 mph difference constitutes a 29 percent increase in speed, meaning Appellant was travelling at approximately 130% of the posted speed limit. Such a difference in speed is easily discernable by the human eye. See, e.g., State v. Butts, 269 P.3d 862, 873 (Kan.Ct.App. 2013) (finding an estimated speed of 45 mph in a 30 mph zone was significantly

---

[6] Notably, Appellant, in two different portions of his brief, claims Officer McNeely refused to testify to the speed reading on his radar despite specific requests for such while citing to a few lines of the officer's testimony that could support this claim. (Br. of Appellant pp. 6, 15). However, Appellant, either through neglect or willful disregard, fails to cite to the portion of Officer McNeely's testimony directly refuting his allegation even though that testimony immediately follows his selected portion. Officer McNeely specifically stated the radar showed "[Appellant's] vehicle was moving approximately ten miles per hour over the speed limit." (Tr.p.45, lines 1–2).

higher than the posted speed limit and, as a result, easily discernable as speeding to a law enforcement officer). Thus, Officer McNeely's observations alone were sufficient to create probable cause.

CONCLUSION

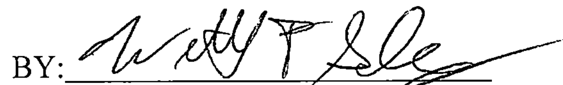
For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

ALAN WILSON
Attorney General

WILLIAM F. SCHUMACHER, IV
Assistant Attorney General

KEVIN S. BRACKETT
Solicitor, Sixteenth Judicial Circuit

BY: 
William F. Schumacher, IV
Bar # 100231
Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3922

ATTORNEYS FOR RESPONDENT

November 21, 2016

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM YORK COUNTY
Court of General Sessions
Daniel D. Hall, Circuit Court Judge

RECEIVED
NOV 21 2016
SC Court of Appeals

Appellate Case No. 2015-002595

THE STATE, ...RESPONDENT,

v.

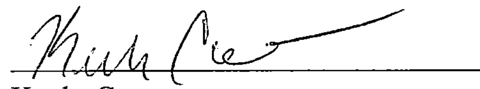
DEVIONNE DEVAIGHN MCCLAIN, ...APPELLANT.

PROOF OF SERVICE

I, Keely Carter, certify that I have served the within Initial Brief of Respondent and Designation of Matter on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

John H. Strom, Esquire
S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, South Carolina 29211-1589

I further certify that all parties required by Rule to be served have been served. This 21st day of November, 2016.



Keely Carter
Legal Assistant

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-7239

ALAN WILSON
ATTORNEY GENERAL

November 21, 2016

RECEIVED
NOV 21 2016
SC Court of Appeals

John H. Strom, Esquire
S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, South Carolina 29211-1589

RE: State v. Devionne D. McClain
Appellate Case No. 2015-002595

Dear Mr. Strom:

I am enclosing two (2) copies of the Initial Brief of Respondent and Designation of Matter in the above-referenced case.

Sincerely,

William F. Schumacher, IV
Assistant Attorney General
S.C. Bar No. 100231

Enclosures

cc: Honorable Jenny A. Kitchings (original and one enclosed)
Victim Services