(5)

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Berkeley County

Kristi Lea Harrington, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JOSEPH UMPHLETT,

APPELLANT

APPELLATE CASE NO 2015-002121

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

I.

The trial court erred in denying Appellant's motion to suppress the evidence seized during the execution of the search warrant for the hotel room that Appellant was staying in because the search warrant and resulting evidence was the fruit of the poisonous tree of law enforcements' prior unlawful, warrantless search of the hotel room not falling within any of the narrow exceptions to the warrant requirement.

II.

Appellant's right against self-incrimination was violated by the introduction at trial of his statements to police.

A. Appellant's first statement was the product of an interrogation by officers who had conducted an unlawful warrantless search of Appellant's hotel room and who failed to advise Appellant of his *Miranda*[1] rights prior to interrogating him.

B. Appellant's later verbal and written statements to law enforcement were the product of police threats to arrest Appellant's girlfriend, Kory Abdon, if Appellant did not claim total responsibility for all of the drugs and both handguns found in a hotel room rented by Abdon.

[1] *Miranda v. Arizona*, 384 U.S. 426, 86 S.Ct. 1602 (1966).

STATEMENT OF THE CASE

On October 7, 2014, the Berkeley County Grand Jury indicted Appellant Joseph Umphlett for trafficking in methamphetamine, possession of a weapon during the commission of a violent crime, and possession of a firearm by a convicted felon. R. 604-609.

On September 28, 2015 through October 1, 2015, Appellant proceeded to trial before the Honorable Kristi L. Harrington and a jury. Grover "Beau" Seaton represented Appellant, and Assistant Solicitors Jessica Nickles and Wilton McNeely represented the State.

The jury found Appellant guilty as charged. R. 580, l. 2 - 581, l. 15. The trial court sentenced Appellant to life imprisonment pursuant to S.C. Code Ann. § 17-25-45 (1996). R. 584, l. 1 - 860, l. 8.

STATEMENT OF FACTS

The exact sequence of events in this case is unclear as the testimony of the officers involved in Appellant's arrest repeatedly changed over the course of pre-trial hearings and trial.

Child Welfare Call and Initial Police Investigation

At around 9:30 p.m. on May 11, 2014, Summerville Police Officers Hobie Williams, Denis Henderson, and Thomas Oswald were dispatched to the Economy Inn to conduct a child welfare check. R. 14, l. 21 - 16, l. 23. Dispatch notified them that 911 had received a call that two children were living with their mother, Cory Abdon, at the Economy Inn off Interstate 26 and that the mother's boyfriend, Appellant, did drugs with Abdon in the room's bathroom while the children were present. R. 123, l. 8 - 124, l. 13.

Upon arrival, the officers spoke with the hotel manager and learned that Abdon had rented a room at the hotel for several days. R. 45, l. 3 - 46, l. 21. The officers then located Appellant's car outside of the room and knocked on the door. R. 55, ll. 14-22. Through the front window of the hotel room, Appellant and Abdon informed the police that the children were staying with Abdon's mother. R. 373, l. 16 - 375, l. 4. Rather than attempting to contact Abdon's mother to confirm, the officers ordered Appellant and Abdon to open the door.

Warrantless Search of Appellant's Hotel Room and Appellant's verbal statements

Once Appellant "cracked open" the door, Officer Williams claimed that he immediately noticed the "strong odor of raw marijuana emanating from the hotel room." R. 221, l. 8 - 222, l. 22. Williams asked for consent to search the room. Appellant and Abdon denied consent to a search, but opened the hotel room door so that the police could see that children were not present. R. 46, l. 3 - 47, l. 21. Despite not having consent, the police, led by Officer Williams "went ahead and conducted a quick sweep of the room to make sure there were no children." R. 224, ll. 9-25.

Contradicting Williams, Officer Henderson recalled that the officers were already in the apartment, presumably searching for Abdon's children, when he and Williams first smelled marijuana and belatedly asked for consent to search the room. R. 61, ll. 3-18. The purported "overwhelming smell" was caused by a **total of five grams of marijuana** located in two bags; one in the nightstand drawer with the other located in between the mattress and box spring of one of the hotel room beds. R. 126, ll. 1-18. No one was smoking marijuana.

The initial search of the hotel room uncovered neither children nor drugs. Despite the children still being unaccounted for, Officer Williams would recollect at trial **"from that point, the child welfare was okay. We weren't worried about that. We shifted into the fact that we were smelling marijuana**." R. 224, l. 22 - 225, l. 11. Taking advantage of being in the hotel room, Williams began interrogating Appellant about the smell of marijuana and asked again for permission to search the room. R. 16, ll. 3-24; R. 231, l. 9 - 233, l. 10. Consent was denied.

During the pre-trial *Jackson v. Denno*[2] hearing, Williams seemed to admit that he *Mirandized* Appellant after first asking Appellant about the marijuana and for permission to search the hotel room.

> Q. How much time elapsed between the time you requested to search the room, and he denied, to the time you *Mirandized* him?
>
> A. Maybe a couple of minutes. . .

R. 16, ll. 9-23; *see also* R. 397, ll. 5-20. Further prompting by the solicitor helped Williams to change his mind and to recall that he had *Mirandized* Appellant first then asked about the marijuana and for permission to search the room. R. 16, l. 7 - 17, l. 25. Appellant and Abdon again denied consent, but according to Williams, Appellant admitted to having marijuana in the nightstand. *Id.*

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[2] *Jackson v. Denno,* 378 U.S. 368, 84 S.Ct. 1774 (1964).

In contrast with Williams' shifting, inconsistent accounts, Officer Henderson maintained that Appellant was *Mirandized* after Henderson called Detective Matthew Strickland for help in applying for a search warrant. R. 47, ll. 10-25. The warrant affidavit stated that Appellant denied consent to search the hotel room, but had told police that there was marijuana in a dresser. R. 116, l. 8 - 118, l. 23. Curiously, the affidavit did not mention that the police had already searched the hotel room and that no children were present. R. 122, l. 1 - 125, l. 13. Thus, according to Henderson, Appellant was interrogated first and later *Mirandized* only after telling the police about the marijuana in the nightstand.

Williams continued to interrogate Appellant for roughly an hour after *Miranda* warnings were finally administered. R. 23, ll. 3-9. Williams described Appellant as initially "very jittery, very nervous." R. 19, ll. 21-23. Towards the end of his interrogation, Appellant was described as remorseful and sad. R. 23, ll. 16-25.

Interrogation by Detective Thompson and Appellant's Written Statement

Detective Frank Thompson arrived at the Economy Inn several hours after Appellant's arrest. When Thompson arrived Appellant was handcuffed in the back seat of a police car. Thompson did not *Mirandize* Appellant, but instead relied on Williams' previous oral warnings, given several hours earlier. R. 70, l. 1 - 74, l. 4. Incredibly, Thompson claimed he could smell the five grams of packaged and concealed marijuana radiating from the open door of the hotel room when he met with Williams three doors down from the hotel room. R. 69, ll. 7-25.

When asked about his interrogation, Thompson explained that, "I believe Mr. Umphlett did ask us not to arrest her and I told him that if we found that she wasn't involved in it, that we would not" arrest Abdon. When pressed at the *Denno* hearing to explain exactly how he

convinced Appellant to admit ownership of the drugs and handguns found in the hotel room registered to Abdon, Thompson averred that:

> What I'm saying is when we asked him for a statement, he provided the statement saying that everything was his. He asked us not to arrest her and **I told him that if we investigated and find that she's not involved in the drugs, then we wouldn't arrest her.**

R. 89, ll. 14-19. In addition to the five ounces of marijuana, police recovered one hundred ninety three grams of methamphetamine from the hotel room. R. 596 - 601.

Like Williams' earlier inconsistent statements regarding his apparent pre-*Miranda* questioning of Appellant, Thompson was helpfully reminded by the solicitor that, contrary to his earlier testimony, he only promised to not arrest Abdon if Appellant took ownership of the drugs and handguns **after** Appellant wrote his statement assuming ownership of the drugs and handguns. R. 102, l. 3 - 103, l. 1.

First Written Waiver of *Miranda* Rights and Undocumented Police Interrogation

Following his arrest, Appellant was taken to the Summerville Police Station. At two thirty the next afternoon while awaiting a bond hearing, Appellant purportedly offered to contact his supplier. R. 83, l. 14 - 85, l. 1. Appellant then made a phone call to his supplier in Georgia. R. 93, l. 3 - 100, l. 21. After the telephone call Appellant was provided with his first written *Miranda* waiver and signed it. *Id.* He was then interrogated for an unknown length of time. *Id.*

There were no written reports or records of Appellant's statements to police immediately before or after the written waiver. *Id.* At the pre-trial *Denno* hearing, Thompson refused to elaborate on what Appellant had told law enforcement beyond repeatedly stating that the call to the supplier and related interrogation "didn't go anywhere." *Id.*

Appellant's Trial

Pre-trial *Jackson v. Denno* Hearing

Appellant moved pre-trial to suppress his written and verbal statements to law enforcement arguing that Officer Williams employed a question first, *Mirandize* later technique immediately after conducting an unlawful warrantless search of the hotel room. R. 104, l. 2 - 107, l. 23.

With respect to Appellant's later written and verbal statements, defense counsel argued that Thompson had expressly promised Appellant that Abdon would not be arrested if he took ownership of the drugs and handguns. R. 105, ll. 6-22. Defense counsel noted that Appellant's statement mirrored almost perfectly the "magic words" that Thompson advised Appellant that he needed to say in order for Thompson to refrain from arresting Abdon. *Id*; R. 602 - 603.

The State countered that Appellant had been *Mirandized* three times, twice verbally and once in writing some twelve hours after arrest. R. 106, l. 6 - 107, l. 7. The State also stressed that Williams recanted during re-direct examination and denied that he had failed to *Mirandized* Appellant before interrogating him. *Id.* Likewise, Thompson had been reminded by the solicitor that, despite earlier testimony to the contrary, he had actually only promised not arrest Abdon after Appellant had already made statements claiming ownership of the drugs and guns. *Id.*

The trial court ruled all of Appellant's statements were admissible, "[b]ased upon the totality of the circumstances, I do no find that there was any coercive police activity." R. 109, ll. 4-24. The court dismissed defense counsel's arguments regarding Thompson's threats to arrest Abdon, finding that the promise not to arrest Abdon was not actually a promise or threat, but simply an explanation by law enforcement that, **if Appellant took ownership of the drugs, they would not arrest his girlfriend, Abdon**. R. 109, l. 12 - 110, l. 10. Thus, if he did not claim the drugs and handguns, Abdon would be arrested.

Pre-trial Suppression Hearing

Based on the testimony at the *Denno* hearing, defense counsel next moved to suppress the evidence seized during the execution of the search warrant arguing that Officer Henderson testified that he and Williams only smelled the five ounces of marijuana once they were inside the hotel room. R. 112, ll. 12-25. Furthermore, the warrantless search of the hotel room was unlawful as both Appellant and Abdon had denied consent and no exception to the warrant requirement applied. *Id.*

Detective Strickland was called by the State and testified that he was simply wrote down what Officer Henderson told him when drafting the warrant affidavit. R. 116, l. 5 - 129, l. 17. He conceded that the affidavit did not inform the municipal judge that the children were not present in the hotel room nor did it state that the police had already searched the hotel room when they applied for the warrant. *Id.*

The trial court refused to suppress the evidence seized as a result of the search warrant. R. 145, l. 2 - 146, l. 17. In denying the defense's motion, the court specifically noted that searches conducted pursuant to child welfare checks were distinguishable from searches conducted in order to discover evidence of a crime. R. 145, l. 15 - 146, l. 11.

ARGUMENTS

I.

The trial court erred in denying Appellant's motion to suppress the evidence seized during the execution of the search warrant for the hotel room that Appellant was staying in because the search warrant and resulting evidence was the fruit of the poisonous tree of law enforcements' prior unlawful, warrantless search of the hotel room not falling within any of the narrow exceptions to the warrant requirement.

Law enforcement searched Appellant and Abdon's hotel room despite not having a warrant or consent. R. 221, l. 8 - 224, ll. 9-25. The police claimed that they conducted the search to insure that Abdon's children were not in the room. *Id.* However, a request for a child welfare check does not empower police to conduct a warrantless search without some evidence of an emergency.

Moreover, it absolutely does not empower police to use the pre-text of a child welfare check to, over the objections of a hotel room's occupants, conduct a warrantless search for evidence of a crime. Accordingly, the trial court erred in refusing to suppress evidence seized in the execution of the search warrant for the hotel room where material facts law enforcement relied upon when seeking the search warrant were discovered only as a result of their unlawful, warrantless search.

Warrantless Searches are Presumptively Unreasonable

The Fourth Amendment to the United States Constitution, made applicable to the States by way of the Fourteenth Amendment, prohibits unreasonable searches and seizures: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated[.]" U.S. CONST. AMEND. IV., *see Mapp v. Ohio,* 367 U.S. 643, 81 S.Ct. 1684 (1961). The South Carolina Constitution also provides a safeguard against unlawful searches and seizures and "unreasonable invasions of privacy". *See State v. Forrester,* 343 S.C. 637, 541 S.E.2d 837 (2001) (citing S.C. CONST. ART. I. § 10).

The United States Supreme Court has observed time and time again that "searches and

seizures 'conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment – subject only to a few specifically established and well delineated exceptions.'" *Minnesota v. Dickerson*, 508 U.S. 366, 372, 113 S.Ct. 2130, 2135 (1993) (emphasis in original) (internal citations omitted).

The burden is on the State to justify a warrantless search or seizure based upon one of these recognized exceptions. *Coolidge v. New Hampshire,* 403 U.S. 443, 455, 91 S.Ct. 2022, 2032 (1971). More specifically, the burden is on the State to justify a warrantless search or seizure, and the recognized exceptions have included: (1) search incident to a lawful arrest; (2) "hot pursuit;" (3) "stop and frisk;" (4) "automobile exception;" (5) the "plain view" doctrine; and (6) consent. *Id.*

Emergency Exception to the Warrant Requirement

Another exception recognized by courts to excuse a warrantless search is the "emergency doctrine." See *United States v. Moss*, 963 F.2d 673, 678 (4th Cir. 1992); *see also Mincey v. Arizona*, 437 U.S. 385, 392, 98 S.Ct. 2408 (1978) (finding that "the need to protect or preserve life or avoid serious injury" may justify a warrantless search of a home). "To invoke this so-called 'emergency doctrine,' the person making entry must have had an **objectively reasonable belief that an emergency existed that required immediate entry to render assistance or prevent harm** to persons or property within." *Moss*, 963 F.2d at 678 (*emphasis added*).

A warrantless search of a home may be conducted when the "exigencies of the situation make **the needs of law enforcement so compelling that the warrantless search is objectively reasonable under the Fourth Amendment.**" *Mincey,* 437 U.S. at 393–94, 98 S.Ct. at 2408 (*emphasis added*). Exigent circumstances arise where "law enforcement officers confront a compelling necessity for immediate action that would not brook the delay of obtaining a warrant."

United States v. Wiggins, 192 F.Supp.2d 493, 498 (E.D.Va.2002) (quoting *United States v. Tibolt*, 72 F.3d 965, 969 (1st Cir.1995)).

The government bears the burden of demonstrating the existence of exigent circumstances to overcome the presumption of unreasonableness. *Welsh v. Wisconsin*, 466 U.S. 740, 750, 104 S.Ct. 2091 (1984). The Fourth Circuit has emphasized that this "emergency exigency" exception to the warrant requirement justifies "immediate entry as an incident to the service and protective functions of the police as opposed to, or as a complement to, their law enforcement functions." *Moss*, 963 F.2d at 678. Courts must also analyze an officer's decision in light of the objective evidence to make sure that it is in fact reasonable.

Community Caretaker Exception to the Warrant Requirement

Similar to the emergency doctrine, the "community caretaker" exception to the warrant requirement allows officers who are serving as "community caretakers," protecting the safety of persons or property, to make warrantless searches. *See Phillips v. Peddle,* 7 Fed.Appx. 175, 178 (4th Cir.2001). This doctrine has an important limitation.

The Supreme Court has described "community caretaking functions" as those which are **"*totally divorced* from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute."** *Cady v. Dombrowski,* 413 U.S. 433, 441, 93 S.Ct. 2523 (1973) (*emphasis added*). In *United States v. Gwinn*, when recognizing a kind of community care-taking exception, the Fourth Circuit emphasized that an essential premise of its holding "is the fact that nothing in the record suggests that [the officer's] reason for the reentry was pretextual or that he acted in bad faith." 219 F.3d 326, 335 (4th Cir.2000) (finding that officer's reentry into suspect's home to obtain suspect's shoes and shirt was not a Fourth Amendment violation).

Our state Supreme Court has held that an analogous "special needs" exception to the warrant requirement exists where the object of the search is not to discover evidence of a crime, but rather to advance some compelling state interest. *State v. Houey*, 375 S.C. 106, 651 S.E.2d 314 (2007).

In *Houey*, the state secured a court order requiring the defendant to submit to a HIV and STD test pursuant to S.C. Code Ann. § 16-3-740(B), which allows the solicitor to obtain court ordered testing of an individual charged with an offense involving sexual penetration provided that there is "probable cause that during the commission of the criminal offense there was a risk that body fluids were transmitted from one person to another." *Id.* at 109-110, 651 S.E.2d at 315-316.

The defendant argued, among other grounds, that the State was required to establish probable cause that he was infected with a disease before ordering testing. *Id.* The Court disagreed, holding that "the special needs exception allows a search unsupported by probable cause when special needs, beyond the normal need for law enforcement, make the warrant and probable cause requirements of the Fourth Amendment impracticable." *Id.* at 111, 651 S.E.2d at 316-317.

In special needs cases the object of the search cannot be to discover evidence to be used at a criminal trial and the State's need has to be balanced against the privacy interests being invaded. The State's need must outweigh the individual's privacy interest. *Id.* (internal citations omitted).

Suppression of Improperly Seized Evidence

The United States Supreme Court has emphasized its concern with warrantless searches and seizures:

> "The point of the Fourth Amendment, which often is **not grasped by zealous officers**, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. **Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.**

Johnson v. United States, 333 U.S. 10, 14-15 (1948) (emphasis added).

Therefore, the exclusionary rule prohibits the use of evidence obtained directly or indirectly through an unlawful search or seizure under the fruits of the poisonous tree doctrine. *See Wong Sun v. United States*, 371 U.S. 471, 484, 83 S.Ct. 407, 415 (1963); *see also State v. Nelson*, 336 S.C. 186, 519 S.E.2d 786 (1999) (finding if the police exploit an unlawful search to seize evidence that would not have otherwise come to light, that evidence is the "fruit of the poisonous tree," and is not admissible); *Forrester,* 343 S.C. at 643, 541 S.E.2d at 840. The Fourteenth Amendment incorporates the rule of excluding evidence obtained through an illegal search or seizure and makes it applicable to the states. *See Mapp*, 367 U.S. at 655, 81 S.Ct. at1691.

Application to Appellant's Case

In this case, the trial court erred in failing to suppress the evidence seized during the execution of the search warrant. The search warrant and the evidence seized were the "fruit of the poisonous tree" of the unlawful, warrantless search of the hotel room. *Wong Sun* 371 U.S. at 484. 83 S.Ct. at 415. Circumstances did not exist to justify police entry into the hotel room under the exigency emergency exception to the warrant requirement. *Cf. Housey,* 375 S.C. at 111, 651 S.E.2d at 316.

The State did not present any testimony that the officer had an "**objectively reasonable belief that an emergency existed that required immediate entry to render assistance or**

prevent harm" such that the emergency exigency exception would apply. *Moss*, 963 F.2d at 678. The officers themselves did not believe that exigent circumstances required their immediate entry. R. 217, l. 4 - 219, l. 17. Law enforcement never even attempted to confirm the children's whereabouts. R. 280, ll. 4-17; R. 329, l. 11 - 331, l. 23

Nor was entry justified under the community caretaker exception to warrant requirement. *Cf: United States v. Taylor*, 624 F.3d. 626 (4th Cir. 2010) (holding that police did not have to acquire a warrant or have probable cause to enter house to search for abandon four year old girl's parent or guardian). Once Appellant and Abdon explained that the children were staying with Appellant's mother and the police had no evidence to the contrary, the officers should have contacted the mother to confirm the children's location.

Far from being completely divorced from law enforcement purposes, the officers' warrantless search was integral to their goal of detecting and investigating the alleged drug use. The warrantless search of the hotel room without the consent of either Appellant or Abdon was a search for evidence of a crime under the guise of looking for the children. Law enforcement's real objective was to investigate the alleged drug activity.

Even if the police had probable cause based on smelling five grams of packaged marijuana concealed under a mattress and in a drawer (this Court is not required to surrender its common sense), the warrant requirement exists to interject a neutral and detached magistrate between citizens and police engaged in "the often competitive enterprise of ferreting out crime." *State v. Robinson*, 410 S.C. 519, 765 S.E.2d 564 (2014) (holding that even searches conducted under facts unquestionably showing probable cause are unconstitutional absent a warrant as "the Constitution requires that the deliberate, impartial judgment of a judicial officer be interposed between the citizen

and police."). There is nothing so compelling about the smell of marijuana that its presence would not "brook the delay of obtaining a warrant." *Tibolt*, 72 F.3d at 969.

While law enforcement's first search of the hotel room yielded no drugs or paraphilia, it positioned police to smell marijuana and to then detain and interrogate Appellant. This interrogation extracted material facts that law enforcement then relied on when applying for a search warrant. To allow the search warrant and evidence seized therefrom to stand in light of the officers' reliance on an unlawful search ignores "the point of the Fourth Amendment" and would encourage the police to leverage any child welfare call into a kind of general warrant to conduct a unconstrained search of a person's property. *Johnson,* 333 U.S. at 14-15; *see also Robinson*, 410 S.C. 519, 765 S.E.2d 564.

Thus, the trial court reversibly erred in refusing to suppress the evidence seized during the execution of the search warrant on the hotel room where law enforcement relied on evidence gathered during an unlawful, warrantless search of the hotel room not falling within any of the narrow exceptions to the warrant requirement.

II

Appellant's right against self-incrimination was violated by the introduction at trial of his statements to police.

Appellant's first statement to police, admitting that there was marijuana in the hotel room nightstand was the product of law enforcement's unlawful warrantless search of the hotel and extracted during a custodial interrogation without police providing *Miranda* warnings.

Appellant's later verbal and written statements during Detective Thompson's interrogation were compelled by Thompson's improper threat to arrest Appellant's girlfriend if Appellant did not take complete ownership of the drugs and handguns found in the hotel room. *State v. Corns*, 310 S.C. 546, 426 S.E.2d 324 (Ct. App. 1992) (holding that police exerted improper influence on defendant rendering his statement concerning marijuana involuntary).

A. Appellant's first statement was the product of an interrogation by officers who had conducted an unlawful warrantless search of Appellant's hotel room and who failed to advise Appellant of his *Miranda* rights prior to interrogating him.

The Fifth Amendment provides that no person shall be compelled to be a witness against himself in a criminal matter. U.S. Const. amend. V. The Fourteenth Amendment secures against state invasion of the same privilege that the Fifth Amendment guarantees against federal infringement. *Malloy v. Hogan*, 378 U.S. 1, 84 S.Ct. 1489 (1964).

"[A] defendant in a criminal case is deprived of due process of law if his conviction is founded, in whole or in part, upon an involuntary confession, without regard for the truth or falsity of the confession." *Jackson v. Denno*, 378 U.S. 368, 376, 84 S.Ct. 1774, 1780 (1964). Prior to any questioning by law enforcement, "the person must be warned that he has the right to remain silent, that any statement he does make may be used as evidence against him, and that he has the right to the presence of an attorney, either retained or appointed." *Miranda*, 384 U.S. at 444, 86 S.Ct. at 1612.

"Law enforcement must state the *Miranda* warnings 'after a person has been taken into custody or otherwise deprived of his freedom of action in any way.'" *State v. Evans*, 354 S.C. 579, 583, 582 S.E.2d 407, 410 (2003) (quoting *Miranda*, 384 U.S. at 444, 86 S.Ct. at 1612). Custodial interrogation is "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Miranda*, 384 U.S. at 445, 86 S.Ct. at 1612; *see also Stansbury v. California*, 511 U.S. 318, 322, 114 S.Ct. 1526, 1528 (1994).

Determining whether a defendant is in custodial interrogation is an objective assessment of the facts and circumstances surrounding the questioning:

> [W]hat were the circumstances surrounding the interrogation; and . . . given those circumstances, **would a reasonable person have felt he or she was at liberty to terminate the interrogation and leave**. . . . [T]he court must apply an objective test to resolve the ultimate inquiry: was there a formal arrest or restraint on freedom of movement of the degree associated with formal arrest.

Thompson v. Keohane, 516 U.S. 99, 112, 116 S.Ct. 457, 465 (1995)(*emphasis added*); *see Bradley v. State*, 316 S.C. 255, 257, 449 S.E.2d 492, 493-494 (1994). In order to introduce a statement produced during custodial interrogation, the prosecution must prove by a preponderance of the evidence that the statement was made freely and voluntarily, and taken in compliance with *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602; *see also State v. Moses*, 390 S.C. 502, 512, 702 S.E.2d 395, 400 (Ct. App. 2010).

Here, Appellant's statement that marijuana was located in the nightstand was the product of coercive police practices and should have been excluded. His interrogation occurred immediately after Officers Williams, Henderson, and Oswald forced their way into the hotel room without consent or a warrant and searched it. R. 221, l. 8 - 224, ll. 9-25.

Once their fruitless initial search concluded, Williams - without *Mirandizing* Appellant - immediately began interrogating him about the smell of marijuana. R. 16, ll. 9-23; R. 61, l. 3 - 62, l. 21. During the interrogation, Appellant was detained at the foot of the bed, he was not free to leave, and was forced to answer Williams' questions. *Id.*

During the *Denno* hearing, Williams was evasive about his conduct during the early stages of the incident. Initially, Williams admitted that Appellant was not *Mirandized* when he stated that marijuana was in the nightstand. R. 16, ll. 9-23; R. 36, l. 2 - 37, l. 1. Again, by this point in the interrogation police had already conducted a unlawful warrantless search of the hotel room.

In addition to contradicting his own testimony, Williams also tried to claim that Appellant was free to leave up until Appellant purportedly told him about the marijuana in the nightstand. R. 36, ll. 3-23. However, he backtracked and clarified that Appellant never asked to leave, but Williams conceded that he was unsure if he would have allowed Appellant to leave if asked. *Id.*; *see also* R. 17, l. 8 - 18, l. 4.

In contrast with Williams' ever changing stories, Henderson consistently recalled that Appellant was not *Mirandized* until after he called Detective Strickland to draft a search warrant affidavit. R. 47, l. 3 - 48, l. 12. The warrant affidavit, although it omits that the warrantless non-consensual search of the hotel room had already occurred, stated that Appellant had supposedly admitted to having marijuana in the nightstand. R. 589 - 595. Thus, Appellant had to have been *Mirandized* only after being interrogated by Williams about the odor of marijuana.

Appellant did not ask to leave because a reasonable person would not did not feel free to leave; three police officers had searched the hotel room he was staying in without consent. *See State v. Evans*, 354 S.C. 579, 582 S.E.2d 407 (2003) (holding that defendant under custodial interrogation where the police followed him into the bathroom at the police station).

After the warrantless search all three officers remained in the room and separated Appellant from Abdon. At least two officers were positioned between him and the only door to the outside. Officer Williams was, by his own account, standing about three feet away from Appellant during the interrogation.

Appellant was in custody when Williams asked for a second time to search the hotel room. *Cf: State v. Williams*, 405 S.C. 263, 747 S.E.2d 194 (Ct. App. 2013) (holding that defendant was not in custody where he voluntarily met with law enforcement). To the extent law enforcement was ever concerned for child welfare that concern had long since given way to criminal investigation. As the record shows, Henderson and Williams both, albeit Williams only unwittingly, conceded that Appellant was not *Mirdandized* at the time of the second request to search. R. 16, ll. 9-23; R. 47, l. 3 - 48, l. 12.

Accordingly, the court erred in permitting the introduction of any portion of Appellant's pre-*Miranda* statements due to the officer's failure to inform Appellant of his rights prior to subjecting Appellant to a custodial interrogation in the immediate aftermath of an unreasonable warrantless search of the hotel room.

B. Appellant's later verbal and written statements to law enforcement were the product of police threats to arrest Appellant's girlfriend, Kory Abdon, if Appellant did not claim total responsibility for all of the drugs and both handguns found in a hotel room rented by Abdon.

To introduce a statement produced during custodial interrogation, the prosecution must prove by a preponderance of the evidence that the statement was made freely and voluntarily, and taken in compliance with *Miranda v. Arizona*, 384 U.S. 426, 86 S.Ct. 1602; *see also State v. Von Dohlen*, 322 S.C. 234, 243, 471 S.E.2d 689, 694 (1996).

The waiver has two distinct dimensions. It must be "**voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception**," and

it must be "made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it." *Moran v. Burbine*, 475 U.S. 412, 421, 106 S.Ct. 1135, 1140 (1986)(*emphasis added*). It is not enough that the interrogator advised the suspect of his rights and the suspect made an uncoerced statement.

Courts must answer the question: Did totality of the circumstances surrounding the custodial statement defeat the defendant's will? *State v. Moses*, 390 S.C. 502, 513, 702 S.E.2d 395, 401 (Ct. App. 2010). "A statement may not be 'extracted by any sort of threats or violence, [or] obtained by any direct or implied promises, however slight, [or] obtained by the exertion of improper influence.'" *State v. Miller*, 375 S.C. 370, 386, 652 S.E.2d 444, 452 (Ct. App. 2007)(quoting *State v. Rochester*, 301 S.C. 196, 200, 391 S.E.2d 244, 247 (1990)).

For example, in *State v. Corns*, 310 S.C. 546, 426 S.E.2d 546, this Court held that the defendant's statement to law enforcement admitting that marijuana found in his house belonged exclusively to him was inadmissible after police threatened to arrest his wife and have DSS take custody of their children. The Court determined that "[a] reading of the record as a whole . . . leads us to the conclusion that, at the very least, the officers coerced Corns' confession on the marijuana by means of veiled threats against his family. 310 S.C. at 551, 426 S.E.2d at 327.

Moreover, in *State v. Osborne*, 301 S.C. 363, 392 S.E.2d 178 (1990), the Court held that the sheriff's admission that Osborne would be charged with withholding information or giving the police officer a false statement if she was not forthcoming mandated suppression of her confession. Osborne was told "you don't have to say anything, but if you withhold evidence, you can be charged with a crime." *State v. Osborne*, 301 S.C. at 366, 392 S.E.2d at 179.

In *State v. Rochester*, the Supreme Court held that a confession "may not be extracted by any sort of threats or violence, or obtained by any direct or implied promises, however slight, or by

the exertion of improper influence." *Rochester*, 301 S.C. 196, 391 S.E.2d 244 (1990) (internal quotations omitted). There, the Court found that a polygraph examiner telling the defendant it would be in his best interest to tell the truth was neither a threat nor a promise. This was nonetheless a factor to consider when determining whether appellant's statement was a knowing, intelligent, and voluntary tendered confession under the totality of the circumstances.

Finally, in *State v. Hook*, this Court held that the defendant's statement to his probation officer was inadmissible because his agent expressly threatened to revoke the defendant's probationary sentence unless he told the truth. *Hook*, 348 S.C. 401, 559 S.E.2d 856 (Ct. App. 2001). This Court noted that statements given pursuant to threats or under inherently coercive circumstances are not admissible. *See Mincey*, 437 U.S. at 398- 399, 98 S.Ct. at 2416-2417; *Minnesota v. Murphy* 465 U.S. 420, 427, 104 S.Ct. 1136, 1142 (1984).

Here, Detective Thompson's "promise" to not arrest Appellant's girlfriend Kory Abdon if his investigation determined she was unaware of the drugs in the hotel room registered in her name was a threat. R. 87, l. 20 - 89, l. 19. While police officers may inform suspects that news of their cooperation will be relayed to the solicitor, they may not threaten consequences for the refusal to cooperate. *Cf: Rochester*, 301 S.C. 196, 391 S.E.2d 244.

Appellant's case is, in all material respects, identical to *State v. Corns*, 310 S.C. 546, 426 S.E.2d 324 ,Thompson threatened to arrest Appellant's girlfriend, Kory Abdon, if Appellant did not claim ownership of the drugs and guns found in the hotel room registered to Abdon. Obviously, Thompson was attempting to coerce Appellant into admitting ownership of the drugs and guns in exchange for allowing Abdon to avoid charges. *See Moses*, 390 S.C. at 513, 702 S.E.2d at 401 (factors that may be considered in the totality of the circumstances analysis such as: length of

custody or detention; police misrepresentations; threats of violence; direct or indirect promises, however slight); *see also Hook*, 348 S.C. 401, 559 S.E.2d 856.

During the pre-trial *Denno* hearing, the State attempted to rehabilitate Thompson's improperly coercive conduct by asking him:

> Q. Did [Appellant] give you his written statement prior to or after those statements regarding [girlfriend Kory Abdon]?
>
> A. **I would say afterwards.**

R. 102, ll. 3-15 (*emphasis added*). Moreover, Thompson's hand written follow-up questions on the statement sheet confirm the existence of his "promise" to not charge Abdon if Appellant confessed. *Id.* Thompson's first two follow-up questions asked Appellant "[d]oes Kory know that the drugs you stated [*sic*] in the room are there?" and "[h]as Kory ever saw [*sic*] you sell ICE or know you have had ICE?" *Id.* (*emphasis original*).

Appellants' written statement clearly shows that Thompson had threatened to arrest Abdon throughout the interrogation unless Appellant did the "manly" thing and claimed ownership of the drugs. Even if Appellant wrote the first paragraph without asking Thompson to spare Abdon, the written statement should still be suppressed as Thompson traded on Appellant's love for Abdon in order to extract Appellant's later answers to the follow-up questions.

Accordingly, the trial court erred reversibly in admitting Appellant's verbal and written statements extracted as a result of Thompson's threat to arrest, or "promise" not to arrest, Kopry Abdon, Appellant's girlfriend, on the condition that Appellant claim ownership of the guns and drugs found in the hotel room registered to Abdon.

CONCLUSION

For the foregoing reasons, Joseph Umphlett's convictions should be reversed and this case remanded to the Berkeley County Court of General Sessions for a new trial.

Respectfully submitted,

John H. Strom
Appellate Defender

ATTORNEY FOR APPELLANT

This 4th day of November, 2016.

CERTIFICATE OF COUNSEL FOR APPELLANT

The undersigned certifies that to the best of my ability the Final Brief complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

November 4, 2016

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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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SC Court of Appeals

Appeal from Berkeley County

Kristi Lea Harrington, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

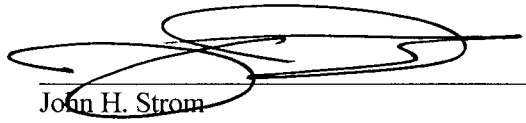
JOSEPH UMPHLETT,

APPELLANT

APPELLATE CASE NO 2015-002121

CERTIFICATE OF SERVICE

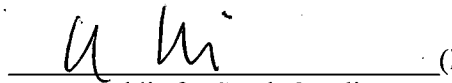
The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon William Blitch, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 4th day of November, 2016.



John H. Strom
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 4th day of November, 2016.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Notary Public for South Carolina

My Commission Expires: May 12, 2025.