

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of General Sessions

Kristi Lea Harrington, Circuit Court Judge

Circuit Court Case No. 2014GS1004379
Appellate Case No. 2016-002470

THE STATE,..... Respondent,
v.
ADRIAN LESSTON,..... Appellant.

INITIAL REPLY BRIEF OF APPELLANT

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SC Court of Appeals

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ARGUMENT IN REPLY

The Appellant Adrian Lesston respectfully submits the following arguments and clarifications in rebuttal to the Brief of Respondent.

I. RESPONDENT'S CONTENTION THAT LESSTON RELINQUISHED HIS PRIVACY INTEREST IN HIS OWN PANTS IS NOT SUPPORTED BY PRECEDENT OR THE FACTS IN THE RECORD.

In various ways, the Respondent's Brief alleges that Lesston either failed to establish a reasonable expectation of privacy in his own pants, or that he had relinquished such expectation of privacy through his conduct. Both of these claims are erroneous. Respondent correctly notes that a legitimate expectation of privacy is established where an individual can show that, "(1) the individual had a subjective expectation the area searched would remain free from intrusion; and (2) the individual's subjective expectation is one society recognizes as reasonable." (Br. of Respondent p. 13)(quoting State v. Missouri, 361 S.C. 107 (2004)). The Respondent goes on to argue that when Lesston removed his pants and placed them on the floor next to the bed while he slept, he relinquished his expectation of privacy in the contents of his pockets. (Br. of Respondent p. 15). Applying the State v. Missouri analysis, the Respondent's argument cannot hold.

The record shows that Lesston was an invited guest, that Ms. Williams had given him permission to take a nap in the apartment, and that Ms. Williams had left

the apartment in Lesston's control. To argue that Lesston would entirely relinquish his privacy interest in his own pants simply by removing them and placing them within reach on the floor runs completely counter to society's expectations, which is the core consideration in the State v. Missouri analysis. Lesston was not sleeping on a park bench or a similar publicly-accessible space, nor did he leave his pants on the seat in a publicly-accessible area and walk away. Lesston was the only adult in an apartment with two children, he was the only person in the bedroom, and he had the apartment owner's permission to take a nap in the bed. Under these circumstances, Lesston was entitled to believe that he could place his personal items in the area immediately surrounding the bed – within reach – and they would not be rifled through without his knowledge or consent.

Respondent concedes that Lesston would have retained his expectation of privacy if he had continued to wear the pants in question. (Br. of Respondent p. 16). The Respondent appears to fault Lesston, then, for simply removing the pants and placing them on the floor next to the bed, in a room where he was alone, with the apartment owner's permission to use the room to take a nap. It appears that in the Respondent's view, the act of removing the pants and placing them on the floor wholly and unequivocally severs Lesston's privacy interest in the pants, even when he remains in the room, alone.¹ One's expectation or privacy is not relinquished in

¹ Of course, it bears noting that the only reason that Lesston ever parted company with his pants is because he was forcefully removed from the bedroom in handcuffs. (Tr. 16-17). Prior

such arbitrary and counterintuitive ways, and therefore the Respondent's argument must fail.

II. MS. WILLIAMS LACKED COMMON AUTHORITY OVER LESSTON'S PANTS, AND THEREFORE SHE COULD NOT PROVIDE VALID CONSENT TO SEARCH THE PANTS. THE CASES RELIED UPON BY THE RESPONDENT TO SUPPORT ITS ARGUMENT THAT MS. WILLIAMS HAD COMMON AUTHORITY OVER LESSTON'S PANTS ARE READILY DISTINGUISHABLE FROM THE PRESENT CASE, AND ARE THEREFORE INAPPOSITE HERE.

Respondent's brief discusses a number of authorities in support of its argument that Williams had the legal capacity to consent to the search of Lesston's pants. (Br. of Respondent pp. 23-25). These cases are materially factually distinguishable from the present case, and therefore they are not controlling. As the Fifth Circuit recognized in United States v. Shelton, 337 F.3d 529 (5th Cir. 2003), regarding third-party consent cases, "the only rule that emerges is that the validity of a search grounded in third-party consent requires an intensely fact-specific inquiry, and that slight variations in the facts may cause the results to vary." *Id.* at 535. The following is a brief discussion of the cases relied upon by the

to Officer Benton's intervention, Lesston was the only person in the room with his pants.

Respondent, with discussion of how each case is distinguishable from the facts presented here.

Moultrie v. State, 271 S.C. 526 (1978) provides no specific guidance in this case, because the character of that search was different than the search at issue in this case.² In Moultrie, the defendant argued that the homeowner's consent to search the residence should not have validly extended to the *bedroom* in which the defendant was living. The Court rejected this claim, finding that the homeowner could supply consent to search the *bedroom* where the defendant was living, based on his common authority over that portion of his house. Here, the scope of Ms. Williams' consent undoubtedly extended to the bedroom itself. The question is whether that consent could also encompass Mr. Lesston's pants – which Ms. Williams had no common authority or joint control over.

Likewise, State v. Bailey, 276 S.C. 32, 274 S.E.2d 913 (1981) does not support the Respondent's arguments, and is easily distinguishable from the present case. In Bailey, a police investigation of a prior break-in and shooting led to the defendant's uncle's house. *Id.* at 915. With the uncle's consent, police searched the uncle's house and rear area of the property, which revealed contraband items and a vehicle matching the description of the one associated with the shooting incident, which was later revealed to be the defendant's car. *Id.* With the uncle's consent,

² Appellant's brief cited Moultrie when discussing the general scope of what constitutes valid third-party consent. (Br. of Appellant p. 10).

officers also searched the vehicle, which was unlocked. *Id.* Moving for suppression of the contraband recovered from the uncle's house and from the vehicle, the defendant argued that his uncle lacked authority to consent to the police search. *Id.* Bailey is readily distinguishable from the present case due to the fact that the defendant in Bailey was not present at the scene and had clearly abandoned his expectation of privacy in the property that he left at his uncle's house and under his uncle's exclusive control. As noted above, the defendant's car was not locked, he was not present when the police arrived, and there was simply no basis for concluding that the defendant had retained any kind of privacy expectation in his property. In the present case, Lesston was alone in the bedroom, and his pants were immediately within reach on the floor. Had Lesston exited the apartment, or even voluntarily exited the room, perhaps the comparison to Bailey would be germane to the present case. But given the record before this court, the obvious relinquishment of privacy that is observed in Bailey is simply not present here, and therefore Bailey is not controlling.

Florida v. Jimeno, 500 U.S. 248 (1991), is readily distinguishable as well. There, the defendant argued that his consent to an officer's search of his vehicle did not authorize the officer to also search a bag contained inside of the vehicle. It was never in dispute whether the defendant had authority to consent to the search of the bag in his vehicle. The Jimeno Court only considered the question of

whether a defendant's consent to search *his own* car also authorized a search of *his own* property that was contained within the car. Thus, Jimeno was a scope-of-consent case; it was not a third-party consent case. This is an entirely different inquiry than the one presented here.

Frazier v. Cupp, 394 U.S. 731 (1969) is also distinguishable from the present case. In Frazier, the defendant and a third party jointly used a duffel bag to store their clothing and other items. *Id.* At 740. When that third party was arrested, he granted the officers consent to search the duffel bag, which still contained the defendant's property. *Id.* “[Defendant], in *allowing [the third party] to use the bag* and in leaving it in his house, must be taken to have assumed the risk that [the third party] would allow someone else to look inside.” *Id.* (emphasis added). Thus, it was clear in Frazier that the third party had common authority over the duffel bag, and that he could therefore provide valid consent to search the bag. Again, that fact is squarely at issue in the present case, and there is no evidence whatsoever that Williams had common authority over Lesston's property.

Venturing further afield into out-of-state and out-of-circuit cases lends no additional support to the Respondent's position. State v. Jones, 589 S.E.2d 374 (N.C. App. 2003), is readily distinguishable from the present case. There, the defendant and several other individuals were approached by a Durham County street interdiction team. *Id.* at 375. As the officers approached, the defendant

entered a red Mustang parked nearby, and despite the freezing winter weather, he removed his jacket and left it in the car, and then exited the vehicle. *Id.* Officers then obtained consent from the vehicle's owner to search the red Mustang, and pursuant to that consent they searched the defendant's jacket and discovered contraband. *Id.* Critical to the disposition of this case was the fact that the defendant intentionally separated himself from the property as the officers approached, presumably to avoid being associated with the jacket's contents. In other words, the defendant relinquished his privacy interest in the jacket by removing it, leaving it in the red Mustang, and then walking away.³ These facts are readily distinguishable from the present case. Here, Lesston remained in the room with his pants, and they were within his reach, and the pants remained on the floor in his immediate vicinity until he was forcibly removed from the room by Officer Benton. Consequently, Lesston never relinquished his privacy interest in his pants.

In Payton v. State, 755 S.E.2d 261 (Ga. Ct. App. 2014), the Georgia Court of Appeals considered whether the trial court erred in denying the defendant's motion to suppress. There, the defendant was staying in his grandfather's house, though it

³ "We also reject defendant's argument that [the car owner] could not consent to a search of defendant's coat after defendant *left it lying on the back seat of his car.*" *Id.* at 376. The North Carolina Court of Appeals likened the defendant's abandonment of the jacket to State v. Garner, 459 S.E.2d 718 (N.C. 1995), where the defendant left his jacket "lying in a pile of clothes," thus relinquishing his expectation of privacy in that article of clothing. *Id.* at 377. Although not discussed at length in Jones, the Garner Court also noted that the pile of clothes in question consisted of both men's and women's clothing, and that the officers who conducted the search did not know who any of the items of clothing belonged to. Garner, 459 S.E.2d at 727-28.

did not appear that he paid rent. *Id.* at 264. After the defendant was arrested and removed from the residence, the defendant's grandfather authorized the police to search the bedroom where the defendant was staying. *Id.* at 263. The search revealed drugs in that bedroom, in an ashtray on the dresser and in a speaker in the room. *Id.* These facts are distinguishable from the present case. In Payton, the grandfather undoubtedly had authority to consent to the search of the bedroom. There was no indication in Payton that the defendant had exclusive control over the areas where the drugs were located, as is the case with Lesston. In Payton, the contraband was found in an ashtray and in a speaker that was located in the bedroom. The defendant in Payton argued that his grandfather lacked authority to consent to the search of the *bedroom*, and further argued that he should have been given the opportunity to object to his grandfather's consent to the search. *Id.* at 265-66. The present case is distinguishable on both of these points. Lesston simply alleges that Williams lacked the authority to consent to the search of his pants. The defendant in Bailey did not raise any comparable arguments, and therefore Bailey provides no guidance to this court's inquiry.

Lastly, the Respondent's reliance on United States v. Shelton, 337 F.3d 529 (5th Cir. 2003) is similarly misplaced. In Shelton, the defendant sought to suppress incriminating items that were taken from his home by his wife and turned over to the police. Prior to his arrest, the defendant and his wife had separated. *Id.* at 530.

In the weeks that followed their separation, the defendant's wife entered the home on several occasions to retrieve her personal items; she did so with the defendant's express permission. *Id.* However, without the defendant's knowledge, she took incriminating items that were left by the defendant in common areas of the home, and she turned those items over to the police. *Id.* at 532. The critical issue in Shelton, therefore, was whether the defendant's estranged wife retained common authority over the items in the their home after she had moved out. *Id.* at 532. The Fifth Circuit resolved this question against the defendant, holding that the defendant's estranged wife had common authority over the items in question. *Id.* at 538. In support of this holding, the Fifth Circuit noted that the defendant had specifically showed these incriminating items to his wife before they separated, and that he had thereby "voluntarily enlisted" his wife in his criminal activity by giving her access to these items. *Id.* at 537. This, combined with the fact that the defendant had knowingly and voluntarily allowed his wife to access the home after she moved out, led inevitably to the conclusion that his wife retained her common authority over the property in the home. *Id.* at 538. Thus, Shelton considered the question of whether an individual retains common authority over items in the home after they have moved out of the home, when they have retained unfettered access to the home despite living elsewhere. This question simply has no bearing on the present case. There is no evidence here that Ms. Williams previously had common

authority over Lesston's pants. It is not the case that Ms. Williams had ongoing joint access to the contents of Lesston's pants. It is not the case that Ms. Williams accessed Lesston's pants and retrieved contraband items that she subsequently turned over to the police. In other words, all of the critical facts in this case are distinguishable from Shelton.

Consequently, the precedents discussed in Respondent's Brief are all factually distinguishable from the present case, and they should not guide this court's analysis.

III. THE ISSUES RAISED IN THIS APPEAL UNDER THE STATE CONSTITUTION ARE PROPERLY PRESERVED FOR APPELLATE REVIEW

Respondent's Brief argues that Lesston's claims under the South Carolina Constitution are not preserved for appellate review. (Br. of Respondent p. 9 n.6). This claim is not supported by the record. Lesston's state constitutional claim was properly raised and argued before the trial court, both in writing and orally during the trial court's suppression hearing. (Tr. 78-80; Motion to Suppress p. 2-3). Further, at the argument phase of the suppression hearing, the trial court asked the State to respond directly to Lesston's arguments regarding the state constitution's right to privacy. (Tr. 80-81). In its order denying Lesston's motion to suppress, the trial court specifically referenced the written motion to suppress, stating "Defendant Lesston filed the instant Motion to Suppress on August 28, 2016," and

the court indicated that the motion was denied. (Order Denying Motion to Suppress, p. 1). Although the trial court did not articulate its rationale for denying the state constitutional arguments, it is clear by implication that the trial court considered those arguments and denied Lesston's motion to suppress in its entirety. These proceedings and filings are sufficient to preserve this issue for appellate review.

IV. ADRIAN LESSTON'S STATEMENTS DURING THE SENTENCING HEARING HAVE NO BEARING ON THIS APPEAL, NOR DO THEY DEPRIVE LESSTON OF HIS RIGHT TO APPELLATE REVIEW OF THE TRIAL COURT'S DENIAL OF HIS MOTION TO SUPPRESS.

Respondent's brief argues that Lesston's statements during his sentencing proceedings "render[] appellate review of the trial judge's ruling on the suppression motion entirely unnecessary." (Br. of Respondent p. 25 n.9). Respondent cites Whetsell v. State, 277 S.E.2d 891 (1981) to support this proposition. Our supreme court has rejected this reading of Whetsell, stating: "Whetsell does not stand for the proposition that a defendant who admits his guilt is barred from collaterally attacking his conviction. Whetsell stands only for the narrow proposition that a PCR applicant who has pled guilty on advice of counsel cannot satisfy the prejudice prong on collateral attack if he states he would have pled guilty in any event." Johnson v. Catoe, 336 S.C. 354, 358-59 (1999).

CONCLUSION

For the reasons stated herein, and previously enumerated in the Brief of Appellant, this Court should reverse the judgment of the circuit court, and vacate Lesston's conviction and sentence.

Respectfully submitted,



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Kristi Lea Harrington, Circuit Court Judge

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THE STATE,..... Respondent,
v.
ADRIAN LESSTON,..... Appellant.

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the enclosed Initial Reply Brief of Appellant in the above-referenced case has been served upon Mark R. Farthing at P.O. Box 11549, Columbia SC 29211-1549.



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**RE: Rule 208 Initial Reply Brief of Appellant
State v. Adrian Lesston (Appellate Case No. 2016-002470)**

Dear Ms. Kitchings:

Enclosed please find our Initial Reply Brief in the above-referenced case. I have served one copy of the enclosed document on all parties by US Mail, as required by Rule 208(a)(3).

Sincerely,



Christopher R. Geel
Attorney for Appellant

cc: Mark R. Farthing, Esq. (w/ Enclosure), Attorney for Respondent



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