

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.

RECEIVED FINAL BRIEF OF APPELLANT

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SC Court of Appeals

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STATEMENT OF ISSUES ON APPEAL

- I. DID THE SEARCH OF LESSTON'S CLOTHING CONSTITUTE A VIOLATION OF HIS FOURTH AMENDMENT RIGHTS?

- II. DID THE SEARCH OF LESSTON'S CLOTHING CONSTITUTE A VIOLATION OF HIS RIGHT TO PRIVACY PURSUANT TO THE CONSTITUTION OF THE STATE OF SOUTH CAROLINA?

STATEMENT OF THE CASE

The Appellant Adrian Lesston was indicted on August 5, 2014 for one count of Possession With Intent to Distribute Cocaine Base. On August 29, 2016, Lesson filed a motion to suppress the alleged cocaine, arguing that the search that gave rise to his arrest constituted a violation of his Fourth Amendment rights, as well as his corresponding rights under the South Carolina Constitution. The trial court conducted a hearing on that motion on August 30, 2016, and issued an order denying Lesston's motion to suppress on September 16, 2016. Lesston was convicted after a bench trial on the same day, September 16, 2016. At the conclusion of the bench trial, the court deferred sentencing until a later date. On December 5, 2016, the circuit court sentenced Lesston to five years' incarceration. Lesston filed a notice of appeal on December 7, 2016. Lesston now appeals his conviction and sentence.

FACTS

On March 14, 2014, (R. p. 53) North Charleston Police Department Detective Charles Benton responded to a request for assistance at an apartment complex in Charleston County. (R. p. 29). Officer Tom Bilancione, who was at the complex investigating a complaint involving damaged property, made the request. (R. p. 29, 52). Bilancione requested that Benton conduct a welfare check at an apartment in the complex where Bilancione believed there were unsupervised children. (R. p. 52). Benton proceeded to the apartment along with employees of the apartment complex. (R. p. 30).

When they arrived at the apartment, one of the employees of the apartment complex knocked on the apartment door and turned the handle. (R. p. 30). She informed Benton that the door was unlocked. (R. p. 30). Soon after, an eight-year-old boy answered the door. (R. p. 31). Benton asked the boy if there was anyone else in the apartment, and he responded that there was nobody there other than his six-year-old sister. (R. p. 31). Benton then entered the apartment and observed a young girl sitting on the couch inside. (R. p. 33). Benton announced his presence in the apartment, and received no response. (R. p. 33).

Benton then left the children with the apartment complex employees, and drew his weapon and proceeded further into the apartment. (R. p. 34). Benton looked in a bedroom, a storage closet, and a utility closet, and did not locate any other individuals. (R. p. 34). Benton then entered the master bedroom, and saw that there was someone in the bed underneath the covers. (R. p. 35). Benton walked over to the bed and pulled the covers off, and observed the Appellant Adrian

Lesston lying on the bed. (R. p. 35). Benton loudly announced that he was a police officer, and demanded to see Lesston's hands. (R. p. 35). Lesston was wearing a pair of boxer-brief underwear, and no other clothing. (R. p. 36). Lesston did not immediately comply with Benton's orders, and Benton could not see Lesston's hands underneath the pillows, so Benton grabbed Lesston's ankle and pulled him towards the bottom of the bed. (R. p. 35). At that point, Benton observed that there was nothing in Lesston's hands. (R. p. 35). Benton then holstered his weapon and rolled Lesston over and handcuffed his arms behind his back. (R. pp. 35-36). Benton then removed Lesston from the bedroom and escorted him to the kitchen area of the apartment, where Lesston remained for the duration of the encounter. (R. p. 36). Besides Lesston and the two children, no other individuals were located inside of the apartment at that time. (R. p. 65).

Once in the kitchen, Lesston gave Benton his name and date of birth. (R. p. 36). While Benton was in the process of running Lesston's information for warrants, the owner of the apartment arrived on scene. (R. p. 36). The owner, Kimberly Williams, informed Benton that Lesston was the father of one of her children, and that she had left her children under Lesston's supervision. (R. p. 38). Williams stated that Lesston had her permission to be in the apartment, and that she was aware that Lesston was in her apartment taking a nap while she was gone. (R. p. 64).

At that time, Bilancione requested Williams' consent to search the bedroom area, which Williams granted. (R. p. 39). Bilancione then entered the bedroom and located Lesston's pants, which were lying on the floor next to the bed where

Benton had encountered Lesston minutes earlier. (R. p. 58). Bilancione conducted the search of Lesston's pants while in the bedroom. (R. p. 49). At that time, Lesston was still detained by Benton in kitchen area of the apartment, from which Bilancione could not be observed. (R. p. 49; p. 59). Inside of the pockets of the pants, Bilancione discovered the cocaine base that Lesston was subsequently charged with possessing. (R. p. 58; p. 68).

At the hearing on Lesston's motion to suppress, Bilancione described the pants that he located in the bedroom as "a pair of male pants," with "a belt on them that was a pretty thick belt." (R. p. 65). Bilancione acknowledged that he was aware Lesston had been found in the bed near the pants, and admitted that he believed that the pants belonged to Lesston when he picked them up and searched the pockets. (R. p. 68). Bilancione further acknowledged that he did not receive Lesston's consent to search the pants, and that he searched them anyway. (R. p. 69).

At the conclusion of the suppression hearing, the State argued that Lesston lacked standing to challenge the search of his own pants, because he was a "casual guest" in Williams' apartment. (R. p. 73). The State reasoned that issue of consent was therefore "a moot issue." (R. p. 74). The State went on to argue that even if the trial court found that Lesston had an expectation of privacy in own pants, that the search is still valid due to Williams' consent to search the bedroom. (R. pp. 74-75).

The trial court issued a written order denying Lesston's motion to suppress, ruling that Lesston "failed to meet his burden of proving he had a reasonable expectation of privacy in the house." (R. p. 4). The trial court further ruled that

“Williams had valid authority to consent to the search of her own bedroom and the items within it.” (R. p. 5). In conclusion, the trial court ruled that Lesston lacked standing to challenge the search, and even if that were not the case, the search was valid due to Williams’ authority to consent. (R. pp. 3-4).

Lesston proceeded to a bench trial and was convicted on the sole count of the indictment. (R. p. 115). He was sentenced to five years’ incarceration. (R. p. 7). This appeal followed.

ARGUMENT

I. THE SEARCH OF LESSTON’S PANTS WAS CONDUCTED IN VIOLATION OF HIS FOURTH AMENDMENT RIGHTS, AND THE TRIAL COURT ERRED IN FAILING TO SUPPRESS THE EVIDENCE REVEALED.

Warrantless searches are unreasonable *per se* unless they fall within one of the established exceptions to the Fourth Amendment’s warrant requirement. U.S. CONST. AMEND. IV; State v. Peters, 271 S.C. 498, 501 (1978). The trial court denied Lesston’s motion to suppress on two alternative grounds: (1) that Lesston lacked “standing”¹ to challenge the search, and (2) even if Lesston had standing to

¹ Our Supreme Court has stated as follows regarding the use of “standing” in the context of Fourth Amendment analysis:

“The United States Supreme Court has expressly rejected the application of an analysis based on the standing doctrine; instead, the analysis is based on substantive Fourth Amendment law. Rakas v. Illinois, 439 U.S. 128, 140, 99 S.Ct. 421, 429, 58 L.Ed.2d 387 (1978). The use of the term ‘standing’ has created confusion in this context, and therefore ‘standing’ is no longer appropriate to ‘connote the legitimate expectation of privacy in the evidence seized or the premises searched.’ United States v. Bouffard, 917 F.2d 673, 675 (1st Cir. 1990).”

challenge the search, his challenge would fail because Williams had the authority to grant the Officers consent to conduct the search in question. Both of these conclusions are predicated on an erroneous reading and application of the law, and are unsupported by the facts in the record. First, Lesston had standing under the Fourth Amendment to challenge the search of his pants, and the trial court erred by concluding otherwise. Second, Williams did not have authority to grant the officers consent to search Lesston's pants; Williams lacked common authority over the pants, which is required in circumstances where a third party gives consent to search an item or area. This Brief will consider these two issues in sequence.

a. Lesston has “standing” to challenge the search of his pants - which is to say, he has a reasonable expectation of privacy in his own article of clothing.

In order to challenge a search successfully under the Fourth Amendment, a defendant must have “a reasonable expectation of privacy” in the place that was searched. Rakas v. Illinois, 439 U.S. 128, 143 (1978). A legitimate expectation of privacy is both subjective and objective in nature: the defendant must show (1) he had a subjective expectation of not being discovered, and (2) the expectation is one that society recognizes as reasonable. Oliver v. United States, 466 U.S. 170, 177 (1984)(citing Katz v. United States, 389 U.S. 347, 361 (1967)(Harlan, J., concurring)). By its plain language, the Fourth Amendment is intended to protect and secure a person's “houses, papers and effects” from unreasonable searches and

State v. Missouri, 361 S.C. 107, 111 n.2 (2004).

seizures. It is self-evident that this protection applies to movable personal items such as one's clothing.²

In this case, it is undisputed that the item searched was a pair of pants that belonged to Lesston. The officer believed this to be the case, as would any reasonable person presented with the facts that the officers encountered at the scene. Lesston was found by the officer lying under the covers of the bed, dressed only in underwear, and the pants were lying on the floor next to the bed, with a belt inserted through the belt loops. Additionally, the officer testified that they appeared to be men's pants, and that there were no other adult men in the apartment at the time the search took place. The only reasonable conclusion that any person could reach is that the pants belonged to Lesston, and that he had removed them before getting into the bed. Indeed, when the search was conducted, the officer subjectively believed that the pants belonged to Lesston, and he subsequently arrested Lesston for possessing the narcotics that he found in the pants. This Court need look no further than the officer's own testimony to conclude what was objectively reasonable to believe in this situation: the pants belonged to Adrian Lesston.

Turning to the analysis under Oliver and Katz, there is no question that an individual has a reasonable expectation of privacy in the contents of their own pants-pockets. Indeed, the whole purpose of pockets on an article of clothing is so that an individual can keep personal items close at hand, while also protecting

² "Effects" *plural* : movable property : goods <personal effects>. Merriam-Webster.com. Merriam-Webster, 2017.

them from theft or unwanted inspection. The Supreme Court has recognized the Fourth Amendment expectation of privacy in the contents of a person's pockets, and even invalidated searches that were conducted by manipulating an object through the exterior of the pants *without reaching into the pocket*. Minnesota v. Dickerson, 508 U.S. 366 (1993)(holding that the seizure of narcotics from the defendant's pocket was invalid, because the officer determined that the lump was contraband only after "squeezing, sliding and otherwise manipulating the contents of the defendant's pocket").

Therefore, it is clear that Lesston enjoys an expectation of privacy in the contents of his own pants-pockets, and that the privacy interest in those items is clearly one that society is prepared to recognize, as set forth in Oliver and Katz. Consequently, the trial court's determination that Lesston lacked a reasonable expectation of privacy in his own article of clothing was erroneous, and this Court should reject the trial court's reasoning on this point.

b. Williams lacked authority to grant the officers consent to search Lesston's pants.

Third party consent may validly be given by one who has common authority over or some other sufficient relationship to the premises *or effects searched*. State v. Moultrie, 271 S.C. 526 (1978)(citing United States v. Matlock, 415 U.S. 164 (1974))(emphasis added). Common authority does not require common ownership, but merely "mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable for the searching officers to

believe that the person granting consent had the authority to do so.” Moultrie, 271 S.C. at 528 (quoting Matlock, 415 U.S. at 171 n. 7).

There is nothing in the record before this Court to support the trial court’s conclusion that Williams had authority to consent to the search of Lesston’s pants. As noted above, it is undisputed that the pants in question belonged to Lesston. At the suppression hearing, the State did not present any evidence whatsoever that Williams had any possessory interest in Lesston’s pants that would substantiate her authority to consent to the search. Further, there is no evidence in the record of mutual use or joint access. Consequently, the trial court’s holding is clearly erroneous, because it is wholly unsupported by the facts in the record.

Appellate Counsel’s review of this state’s precedent did not reveal cases that were squarely on-point with respect to the consent search in this case. However, other jurisdictions have addressed nearly identical issues, and resolved them in favor of the defendant, and Counsel notes these non-binding authorities for this Court’s consideration. In People v. Daniels, 16 Cal.App.3d 36 (1971), officers were granted consent to search the defendant’s bedroom by his mother, who owned the house where the defendant was staying. *Id.* at 42. The search of the bedroom, its dressers, and a suitcase belonging to the defendant revealed evidence that the defendant later sought to suppress at trial. *Id.* On appeal, the court affirmed the search of the room and the dressers, because the mother had common authority over those areas. *Id.* at 43-44. However, the court held that the search of the defendant’s suitcase was not authorized by the mother’s consent, because the mother “had no actual control [over the suitcase], and the evidence [did] not

support a conclusion the officers in good faith, although mistakenly, believed she had such control.” *Id.* at 45. Consequently, the court held that the search was invalid under the Fourth Amendment.³

In Kennebrew v. State, 299 Ga. 864 (2016), the police removed two backpacks belonging to the defendant from the dorm room of his girlfriend, based on the girlfriend’s consent. *Id.* at 869. The police then searched the backpacks, which revealed evidence that the prosecution sought to use against the defendant at trial. *Id.* The appellate court deemed that this search was invalid, stating: “The seizure of the backpacks may have been lawful based on the consent that Appellant’s girlfriend apparently gave the police to search her dorm room and take items that were identified as belonging to Appellant, but her consent could not authorize the police to search a closed container that the police knew belonged to someone else.” *Id.* at 869 n.3.

Both Daniels and Kennebrew provide important guidance for how this Court should consider this issue. Williams was authorized to give the officers consent to search the bedroom, and other areas over which she had authority. However, like in Daniels and Kennebrew, Williams’ authority to consent cannot extend to items that belonged solely to Lesston. Accordingly, the trial court’s failure to suppress

³ See also People v. Cruz, 61 Cal.2d 861 (1964)(holding that general consent given by the apartment residents did not authorize the officer to open and search suitcases that he had been informed were the property of third persons); People v. Stage, 7 Cal.App.3d 681 (1970)(holding that car owner’s consent to search the car did not authorize a search of the passenger’s jacket that was inside of the car – “This is particularly so where the officer knew the jacket belonged to [the passenger] rather than [the driver].”).

the drugs seized from Lesston's pants was error in this case, and Lesston's conviction must be reversed.

II. THE SEARCH OF LESSTON'S CLOTHING CONSTITUTED A VIOLATION OF LESSTON'S RIGHT TO PRIVACY PURSUANT TO THE CONSTITUTION OF THE STATE OF SOUTH CAROLINA.

The South Carolina Constitution, unlike the United States Constitution, has an express privacy provision, stating: "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures *and unreasonable invasions of privacy* shall not be violated . . ." S.C. CONST. ART 1, § 10 (emphasis added).

As this Court has previously noted, it is "firmly established that state courts may interpret their own constitutions in such a way as to expand rights conferred by the Federal Constitution." State v. Austin, 306 S.C. 9, 16 (1991)(citing PruneYard Shopping Center v. Robins, 447 U.S. 74 (1980)). And, indeed, South Carolina appellate courts have expanded our citizens' protection from unreasonable search and seizure beyond the baseline required under the Fourth Amendment. State v. Counts, 413 S.C. 153 (2015)(holding that South Carolina's heightened constitutional privacy protection requires that officers have reasonable suspicion of illegal activity before conducting a "knock and talk"). In Counts, the Supreme Court said that "[o]ur state constitution's provision protecting unreasonable invasions of privacy necessarily requires some analysis of the privacy interests involved when a warrantless seizure is made on private property."

Id. at 172 (quoting State v. Weaver, 374 S.C. 313, 326 (2007)(Pleicones, J., concurring)).

In the present case, the seizure and search of Lesston's pants took place inside of a bedroom where Lesston had been asleep moments before. The officer made a warrantless entry into the apartment, and forcefully removed Lesston – clad only his underwear – from the bedroom at gunpoint, and then detained him for questioning in the kitchen. All of this was conducted without a shred of evidence that Lesston was engaging in any kind of criminal wrongdoing. Then, officers obtained consent to search the bedroom from the owner of the apartment, not from Lesston. The officers then searched Lesston's pants knowing full well that they belonged to Lesston, claiming that their right to do so was based on the girlfriend's consent to search the bedroom. If there is to be any meaningful right to privacy for our citizens under our state's constitution, such police conduct must be curtailed. Consequently, Lesston respectfully urges this Court to hold that our state constitution mandates as follows:

(1) It is an unreasonable invasion of an individual's privacy under the state constitution when an officer makes warrantless entry into a residence and forcefully detains an individual therein without probable cause and/or reasonable suspicion of criminal wrongdoing. All evidence derived from such an unreasonable invasion of an individual's privacy must be suppressed.

Or, alternatively:

(2) It is an unreasonable invasion of an individual's privacy under the state constitution when an officer conducts a warrantless search of the personal

belongings or effects of an individual based on a third-party's consent, where the officer knows that the item(s) in question belong only to the individual and not the third party who granted the purported consent. All evidence derived from such an unreasonable invasion of an individual's privacy must be suppressed.

Either of these proposed holdings would warrant reversal of Lesston's conviction and sentence, and would be adequate to protect Lesston's right to privacy under our state's constitution. Further, such a holding would curtail future invasions of privacy on the part of police. Lesston respectfully urges this court to issue such a decision.

CONCLUSION

For the reasons stated, this Court should reverse the judgment of the circuit court, and vacate Lesston's conviction and sentence.

Respectfully submitted,



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CERTIFICATE OF COUNSEL

Pursuant to Rule 211(a), the Appellant hereby certifies that the Final Brief of Appellant complies with Rule 211(b).

August 15, 2017.



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