STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenville County

Brian M. Gibbons, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ROBERT DAVIS SMITH,

APPELLANT

APPELLATE CASE NO 2016-000576

INITIAL REPLY BRIEF OF APPELLANT

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ARGUMENT IN REPLY

The trial judge erred in admitting Appellant's statements to police and a photographic line-up identification where law enforcement violated Appellant's rights pursuant to the Fourth and Fourteenth Amendments to the United States Constitution by arresting Appellant without probable cause.

Probable cause to arrest

In its brief, the state conceded "Appellant was seized and arrested for constitutional purposes" when "Conroy took Appellant into custody shortly after encountering him, placed him in handcuffs, transported him to the police department in a police vehicle, and interviewed him for several hours." IBOR at 17.[1] Additionally, the state conceded that "[b]ecause Appellant was constitutionally seized in a manner constituting something more than a brief investigative detention, it was necessary for Detective Conroy to possess a probable cause basis to believe Appellant had committed or was committing a crime in order to take the actions he did." IBOR at 18. Thus, the *only* issue in contention is whether the officer had probable cause to arrest Appellant.

Appellant and Respondent appear to agree on the definition of probable cause; therefore, a brief recitation of the law here will suffice. "'Probable cause turns not on the individual's actual guilt or innocence, but on whether facts within the officer's knowledge would lead a reasonable person to believe the individual arrested was guilty of a crime." Jackson v. City of

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[1] See also Florida v. Bostick, 501 U.S. 429, 435 (1991)(explaining that a seizure occurs when a reasonable person would believe that he or she is not "free to leave."); Michigan v. Chesternut, 486 U.S. 567, 573 (1988)(same); United States v. Mendenhall, 446 U.S. 544, 553 (1980)(providing that a person is seized when his freedom of movement is restrained by means of physical force or a show of authority); State v. Williams, 351 S.C. 591, 600, 571 S.E.2d 703, 708 (Ct. App. 2002)(explaining the totality of the circumstances test for determining whether a particular police encounter constitutes a seizure).

Abbeville, 366 S.C. 662, 666, 623 S.E.2d 656, 658 (Ct. App. 2005). See also Wortman v. City of Spartanburg, 310 S.C. 1, 4, 425 S.E.2d 18, 20 (1992); State v. Blassingame, 338 S.C. 240, 250, 525 S.E.2d 535, 540 (Ct. App. 1999). "'Probable cause' is defined as a good faith belief that a person is guilty of a crime when this belief rests upon such grounds as would induce an ordinarily prudent and cautious man, under the circumstances, to believe likewise." Jones v. City of Columbia, 301 S.C. 62, 65, 389 S.E.2d 662, 663 (1990). Probable cause for a warrantless arrest exists when the circumstances within the arresting officer's knowledge are sufficient to lead a reasonable person to believe that a crime has been committed by the person being arrested. State v. Manning, 400 S.C. 257, 267, 734 S.E.2d 314, 319 (Ct. App. 2012). In other words, "[p]robable cause is determined as of the time of the arrest, based on facts and circumstances – objectively measured – known to the arresting officer." Jackson, 366 S.C. at 667, 623 S.E.2d at 659. "In assessing whether an officer has probable cause, the totality of the circumstances surrounding the information at the officer's disposal must be considered." State v. Moultrie, 316 S.C. 547, 552, 451 S.E.2d 34, 37 (Ct. App. 1994).

To support its argument that Conroy had probable cause to arrest Appellant, the state asserted that prior to arresting Appellant, Conroy was aware (1) the complaining witness was "suffering from bruising to her neck and a laceration to her vagina," (2) the complaining witness "had reported she was attacked and sexually assaulted by a black male wearing a black three-button shirt with a white shirt underneath and jeans," (3) that Appellant "fully matched the physical description of" the complaining witness's assailant "when the detective encountered him," and (4) Conroy's encounter with Appellant was "in close proximity to the scene of the incident just one day after the sexual assault." IBOR at 18. Almost as an afterthought, the state noted "Appellant claimed ownership of a cell phone located on the floor" of the complaining

witness's "motel room subsequent to the sexual assault and the cell phone did not belong to" the complaining witness "or any of her family members." IBOR at 19. According to the state, "[u]nder those circumstances, it was entirely reasonable for Detective Conroy to believe a sexual assault had been committed and Appellant was the person who committed it, which meant the arrest of Appellant was legally and constitutionally proper." IBOR at 19.

The record is devoid of any evidence that Conroy was aware the complaining witness was "suffering from bruising to her neck and a laceration to her vagina," as claimed by the state. During the pre-trial hearing, Conroy did not mention even seeing the complaining witness prior to arresting Appellant. On this point, Conroy's testimony during the trial was unclear. He claimed he "probably" arrived at the scene within "thirty minutes of the incident being reported." Tr. II. 30, ll. 15-22. He explained that when he arrived "uniformed patrol [was] already taking statements from witnesses *or* victims." Tr. II. 31, ll. 4-6 (emphasis added). Based on the question and answer, it was difficult to determine whether that was what happened in this particular case or if that is his general practice. At any rate, Conroy never mentioned seeing or speaking to the complaining witness on July 17, 2013. Therefore, he would have no way of knowing whether she was suffering from bruising to her neck, and certainly would have no way of knowing if she had a laceration to her vagina prior to arresting Appellant.

During the pretrial hearing, Conroy never mentioned anything about a description of a suspect. Not once did he claim that he had received information concerning a description of the suspect or that Appellant allegedly matched such a description.

The only place in the record where a description appears was in the trial testimony. At trial, Conroy claimed he had a description, presumably of the suspect. Tr. II. 37, ll. 7-11. Initially, he failed to indicate from whom this alleged description derived. Tr. II. 37, ll. 7-11. He

said simply, "I had a black male. I had clothing description; black Polo-type shirt with three buttons. A white T-shirt and a book bag and facial hair." Tr. II. 37, ll. 7-11. The information from the book bag was not from the complaining witness, but was from "witnesses at the scene, the Regal Inn." Tr. II. 37, ll. 12-18. Later, Conroy claimed Appellant was "wearing the same exact thing" the complaining witness "described" when he saw Appellant the following day. Tr. II. 38, ll. 17-18. He was wearing a black Polo-type shirt with three buttons and a white t-shirt. There was no indication he had the book bag in a place where Conroy could see it. Rather, Conroy stated the book bag was "inside the business at Labor Smart." Tr. II. 38, l. 23 – Tr. II. 39, l. 1. Thus, to the extent the trial testimony may be used to analyze this issue, Conroy claimed Appellant "matched" the clothing description because he was wearing a black shirt with a white t-shirt. There was no mention of facial hair or other distinguishing features. The complaining witness did not even mention an emblem on the black shirt. Tr. II. 66, ll. 2-20. In Conroy's view, and the state's view, the two shirts were enough to equal a "match." The complaining witness's description was too vague and generic to provide law enforcement with probable cause to believe anyone matching that description could be the assailant. To the extent there were any specifics – facial hair – Conroy made no mention of whether Appellant also had facial hair during their encounter. It appeared the only "match" was the black Polo-type shirt and white t-shirt, hardly rare clothing items for men in Greenville in the summer.

Concerning geographic proximity, the information revealed during the pre-trial hearing was that Conroy met Appellant at "1014 Wade Hampton Boulevard" "at Labor Place." Tr. I. 8, ll. 13-17; Tr. I. 17, ll. 7-10. There was no testimony presented regarding the location of the alleged assault during the pre-trial hearing. The only information the judge would have had at the time concerning the location of the alleged assault was the indictment, which made reference

to the "Regal Inn, 536 Wade Hampton Blvd. #207." R. *(indictment). Importantly, this address was associated with the burglary count only. There were no other addresses provided for the other charged offenses. The judge would have to infer that the other offenses listed in the indictment occurred at the same address in order to make the logical leap requested by the state in its brief.

The trial testimony indicated the alleged assault occurred at 536 Wade Hampton Boulevard (Regal Inn) and the encounter between Conroy and Appellant occurred at 1014 Wade Hampton Boulevard. Jim Sawyer, an employee of Labor Smart, described Regal Inn motel as "close" to his company. Tr. 127, ll. 7-11. He provided no greater specifics. To the extent this Court may use the trial testimony to analyze this issue, there were no specifics provided regarding the proximity between the two locations. While they are on the same street in Greenville and may be "close" as Sawyer claimed, the term "close" is relative and subject to interpretation.

Regarding temporal proximity, the pretrial testimony and evidence revealed only when Conroy spoke to Appellant. This occurred on June 18, 2013, according to Conroy. Tr. I. 8, l. 12. The testimony did not reveal when the alleged crimes occurred; however, the indictments indicted the crimes were alleged to have occurred on June 17, 2013. R. *(indictments). No specifics were timing were provided. The advisement of rights was dated "6-18-13" and indicated a time of "09:36 am." R. *(State's Exhibit #12). Thus, the judge would have known the police encounter occurred the day after the alleged offense, but have little information for more specific temporal analysis.

During the trial, Frances Moore with the 911 center testified the 911 call from the complaining witness was made at 11:49 a.m. on June 17. Tr. I. 63, ll. 10-17. Conroy never said

when the caller called the cell phone or what time he arranged to meet the caller. Tr. II. 36, ll. 13-19. He said only that this occurred "the next morning." Tr. II. 36, ll. 20-21. Conroy recalled sitting outside Labor Smart for five minutes before deciding to enter. Tr. II. 38, ll. 3-7. On his way to Labor Smart, Appellant approached him outside. Tr. II. 38, ll. 6-7. Using the evidence available during the trial, to the extent this Court should use such evidence in evaluating the judge's ruling, Conroy's interaction with Appellant occurred just shy of twenty-four hours after the alleged crimes.

During the trial, the complaining witness revealed that the police arrived after she called 911. Tr. I. 75, l. 24 – Tr. I. 76, l. 1. When the police arrived, the officer asked her "what happened," asked if she were okay, called her "a mess and started to look around the room for anything out of the order or anything like that." Tr. I. 76, l. 7-10. Additionally, the officer took pictures. Tr. I. 76, ll. 11-12. The complaining witness spoke to Mullinax, the uniformed officer who arrived on the scene. Tr. I. 87, ll. 5-13. The complaining witness recalled that one of the officers "found the phone that was by the bed that [her] daughter was on." Tr. I. 76, ll. 13-17. When testifying before the jury, the complaining witness said she did not recognize the phone, it was not hers, and it did not belong to anyone in the room. Tr. I. 77, ll. 14-18. As soon as EMS arrived, the complaining witness was placed in the back of the ambulance and sent to the hospital. Tr. I. 78, ll. 1-5; Tr. I. 101, ll. 15-22. Days later, on July 19, 2013, the complaining witness met with Conroy to review a photographic line-up. Tr. I. 79, l. 20 – Tr. I. 79, l. 5. This is the first instance of the complaining witness ever speaking to Conroy.

According to the evidence presented during the pretrial hearing, the *only* information Conroy had at the time of Appellant's arrest was that a phone, which Appellant claimed was his, had been found in a motel room, where a woman alleged she had been assaulted. To some extent,

the judge may have been aware of geographical and temporal proximity, but that information was not obvious or argued by the state below. Further, the temporal proximity of almost twenty-four hours after the alleged crimes negates any probative value derived from the geographic proximity. Although Appellant was found in an area "close" to where the crime occurred, he was found there twenty-four hours later. He was not trying to evade police and cooperated fully and completely. Likewise, the temporal aspect negated the probative value of the clothing description. Not only was the clothing description exceptionally vague and likely applied to most men in the area, the fact that an individual was wearing what Conroy perceived to be the "exact same clothes" almost twenty-four hours later undercuts the value of the alleged clothing "match." A person who committed a crime would change his clothes, particularly with such a large amount of time in which to do it.

In State v. Bell, 263 S.C. 239, 243-244, 209 S.E.2d 890, 891-892 (1974), the South Carolina Supreme Court determined an officer had probable cause to make a warrantless arrest based on the prosecuting witness's very specific description, the police encounter occurring about eight hours after the crime, and the suspect attempt to flee apprehension. The prosecuting witness claimed Bell was at her home on May 3, 1972, at 9:15 p.m. asking for her husband. Id. at 243, 209 S.E.2d at 891. He left when he learned her husband was not home. Id. Fifteen minutes later, a man arrive at her home again – he was wearing the same clothes and had the same physical characteristics as Bell except he was wearing pantyhose over his head. Id. The prosecuting witness claimed she was forced into his car, carried to an isolated spot, and raped. Id. The assailant eventually took her home. Id.

The woman told the police her assailant "was a black man with a moustache, about six feet or six feet one inch in height, weighing about 165 or 170 pounds," wearing "blue trousers and a light blue shirt," driving a blue Plymouth Roadrunner with a white interior and a gear-shift stick on

the floor." Id. She also saw a gas can with the word "Fry" printed on it, and a pantyhose wrapper with the word "Pennybaker." Id. Eight hours later, an officer was conducting surveillance in another case when he saw a blue Plymouth drive by at an excessive rate of speed. The office chased the car, travelling up to 110 miles per hour. Id. Eventually, the officer stopped the car. Id. The officer saw it had white interior and a gear-shift stick on the floor. Id. at 243-244, 209 S.E.2d at 891. The driver had a moustache as well. Id. at 244, 209 S.E.2d at 891. The police saw the can with "Fry" written on it as well as a pantyhose wrapper. Id. The Court held the officers had sufficient probable cause to arrest Bell based upon the totality of the circumstances. Id. at 244, 209 S.E.2d at 892.

In short, when Conroy encountered Appellant on the street and placed him under arrest, Conroy had no information that would lead a reasonable person to conclude that Appellant had committed a crime. The complaining witness's description of her alleged assailant paled in comparison to the description offered by the prosecuting witness in Bell, supra. The vague description and even vaguer "match," the geographic and temporal proximities undermining each other, and the cell phone failed to provide Conroy with a reasonable belief that Appellant had committed the crime of assault. Therefore, the judge should have determined the

Preservation

In a footnote, the state argued the issue on appeal is not preserved for appellate review. IBOR at 11, n. 3. The state contended that "defense counsel did **not** specifically argue Appellant's arrest was not supported by probable cause as Appellant is now arguing on appeal." IBOR at 11, n. 3 (emphasis in original). According to the state, defense counsel contended the arrest was illegal because the officer did not obtain an arrest warrant. IBOR at 11, n. 3. Further, the state remarked that defense counsel "suggest[ed] he mistakenly believed an arrest warrant

was necessary in order for an arrest to be legitimate if an officer did not actually witness a criminal offense." IBOR at 11, n. 3. To the contrary, defense counsel objected to the introduction of the evidence flowing from the illegal arrest based on a lack of probable cause when he "object[ed] to the introduction of the statement because [Appellant] was illegally and without any legal authority ... was essentially without an arrest warrant, taken into custody and taken into a police station." Tr. I. 23, ll. 9-13. Defense counsel acknowledged Conroy's testimony that he "felt like he had probable cause for an arrest," and argued that if Conroy thought he had probable cause, then he should have sought an arrest warrant so that a neutral and detached magistrate could determine whether probable cause existed. Tr. I. 23, ll. 15-18. Noting the police made a "warrantless arrest," defense counsel argued the "seizure" and "apprehension" was "illegal." Tr. I. 23, ll. 22-25. Defense counsel described Appellant's seizure as "an illegal detention" and "blatantly illegal." Tr. I. 24, ll. 8-9. According to defense counsel, the officer made "an illegal arrest," and "illegally detain[ed] him." Tr. I. 25, ll. 6-9.

When the judge questioned defense counsel about investigative detentions, the judge explained that he understood defense counsel's argument as the police "went above and beyond that because they actually removed him from the area and took him down to the law enforcement center." Tr. I. 25, ll. 17-19. Defense counsel responded by telling the judge that the police "placed him under arrest." Tr. I. 25, ll. 20-21.

Contrary to the state's position on appeal, the state argued Appellant was in "investigative detention" during the trial. Tr. I. 26, ll. 10-11. The state never argued at trial that the police had probable cause to arrest Appellant at the time of the arrest. Rather, the state argued that because the officer was investigating "very serious, very violent crimes," it was "general practice to secure the situation and for officer safety they had to have him handcuffed."

Tr. I. 24, ll. 13-23. In sum, the state argued, at trial, Appellant was not in "illegal detention." Tr. I. 24, ll. 23-25.

"After reviewing the law and considering the testimony and evidence presented," the judge denied Appellant's motion to suppress the evidence flowing from his illegal arrest." Tr. I. 27, ll. 16-21.

"It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review." Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998)(citing Creech v. South Carolina Wildlife and Marine Resources Dep't, 328 S.C. 24, 491 S.E.2d 571 (1997)). "Moreover, an objection must be sufficient specific to inform the trial court of the point being urged by the objector." Id. "Error preservation requirements are intended 'to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments.'" Staubes v. City of Folly Beach, 339 S.C. 406, 412, 529 S.E.2d 543, 546 (2000)(quoting I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000)). "Without an initial ruling by the trial court, a reviewing court simply would not be able to evaluate whether the trial court committed error." Id. The rationale of issue preservation is to prevent "a party from keeping an ace card up his sleeve – intentionally or by chance – in hope that an appellate court will accept that ace card and, via a reversal, give him another opportunity to prove his case." I'On, L.L.C., 338 S.C. at 422, 526 S.E.2d at 724.

"Error preservation rules do not require a party to use the exact name of a legal doctrine in order to preserve an issue for appellate review." State v. Brannon, 388 S.C. 498, 502, 697 S.E.2d 593, 595 (2010)(citing State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 694 (2003)). "Instead, a litigant is only required to fairly raise the issue to the trial court, thereby giving it an opportunity to

rule on the issue." Id. at 502, 697 S.E.2d at 595-596 (citing Hubbard v. Rowe, 192 S.C. 12, 19, 5 S.E.2d 187, 189 (1939)).

Certainly, defense counsel noted for the judge that the officer made a warrantless arrest, but that was not the entirety of his argument. Defense counsel's argument was not that the arrest was illegal because the officer failed to secure a warrant. Rather, defense counsel's argument was that Appellant's arrest was illegal because the police lacked probable cause to effectuate the arrest without a warrant. Had the police obtained a warrant, the issue would have been whether the warrant established probable cause for arrest. By noting the police did not obtain an arrest warrant, defense counsel highlighted for the court that no detached and neutral member of the judiciary had previously determined whether the police even had probable cause in this case. While the state argued, at trial, that Appellant was simply in investigative detention, defense counsel countered that Appellant was under arrest, which required a showing of probable cause as opposed to a showing of reasonable suspicion if the police were only detaining him.

Defense counsel preserved his objection that the state failed to show the officer had probable cause at the time of the arrest sufficient for appellate review by moving to suppress the evidence based upon the officer illegally arresting Appellant. The judge indicated he understood the argument in his questioning of defense counsel.

CONCLUSION

Appellant respectfully requests this Court find the issue preserved for appellate review and determine the trial judge erred in finding the arresting officer had probable cause to effect the warrantless arrest.

Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

This 17th day of August, 2017.

STATE OF SOUTH CAROLINA

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APPELLANT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Initial Reply Brief of Appellant in the above referenced case has been served upon Mark Farthing, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Initial Reply Brief of Appellant have been served on Robert Davis Smith, #285136, at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 17th day of August, 2017.

Susan B. Hackett
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 17th day of August, 2017.

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