STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

ORIGINAL

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Appeal from Greenville County

Brian M. Gibbons, Circuit Court Judge

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THE STATE,

RESPONDENT,

V.

RECEIVED
OCT 05 2017
SC Court of Appeals

ROBERT DAVIS SMITH,

APPELLANT

APPELLATE CASE NO 2016-000576

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# FINAL BRIEF OF APPELLANT

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SUSAN B. HACKETT
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR APPELLANT

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## STATEMENT OF ISSUE ON APPEAL

Did the trial judge err 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?

## STATEMENT OF THE CASE

On April 22, 2014, a Greenville County grand jury indicted Appellant for criminal sexual conduct in the first degree, three (3) counts of kidnapping, first degree burglary, first degree assault and battery, and possession of a weapon during the commission of a violent crime in a single indictment (2013-GS-23-7305). R. 272. On March 2, 2016, the state called Appellant's case to trial before the Honorable Brian M. Gibbons and a jury. R. 1. The state, represented by Kimberly Howard and Kathryn McCall, elected to proceed only as to three charges: criminal sexual conduct, burglary in the first degree, and possession of a weapon. R. 1; R. 2, ll. 4-9. Randy Chambers represented Appellant. R. 1.

The jury began its deliberations at 4:10 p.m. on March 3, 2016. R. 119; R. 253, ll. 12-13. Shortly thereafter, the jury asked a question pertaining to the testimony of a witness who had testified on March 2, 2016. R. 253, ll. 20-24; R. 271 When the prosecutor suggested that the testimony of the witness be played for the jury, the judge stated the testimony could not be played because he had a different court reporter on March 3, 2016, than he had on March 2, 2016. R. 254, ll. 4-14. In response to the jurors' question, the judge stated:

> [L]adies and gentlemen, you have heard the testimony. You have seen the evidence. I know that you are deliberating right now. Your verdict must be based solely upon the evidence received in this courtroom and from the testimony given on that witness stand.
>
> Now, statements said by the attorneys, either in closing or - - in closing statements or opening statements, remember I charged you yesterday, are not evidence. Only what's from the witness stand.
>
> So your duty - - do you remember, that's why I told you to listen very carefully because you are not allowed to take notes, so you have to go by your recollections of the trial and discuss it that way in your deliberations, okay? So go on back to deliberate.

R. 255, l. 24 – R. 256, l. 13. At 6:16 p.m., the judge informed the jurors that the hour was "getting late," and he had "to drive back to Chester." R. 256, l. 22 – R. 257, l. 2. He stated, "rather than just keep [the jury] here late late into the evening," he was going to excuse them for the evening. R. 257, ll. 2-6. He instructed the jurors to return the following morning at 9:30 a.m. R. 257, ll. 7-16.

The following day, the jury reached its verdicts, finding Appellant guilty of criminal sexual conduct, and not guilty of burglary in the first degree and possession of a weapon during the commission of a violent crime. R. 258; R. 259 10-21. The judge sentenced Appellant to twenty-three years' imprisonment. R. 266, ll. 8-10; R. 275.

## ARGUMENT

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.

**Relevant facts**

*Pre-trial hearing & ruling*

In a motel room where the complaining witness claimed she was sexually assaulted, the police collected a cell phone. R. 15, ll. 23-25. On June 18, 2013, Investigator Timothy Conroy had the recovered phone in his possession. R. 16, ll. 3-5. Someone called the phone, and Conroy answered it. R. 16, ll. 1-7. The person who called the phone claimed ownership of the phone in Conroy's possession. R. 16, ll. 1-2. Conroy set up a meeting ostensibly to return the phone. R. 16, ll. 8-9. Shortly after the phone call, Conroy arrived at Labor Place, Appellant's place of employment. R. 6, ll. 11-17; R. 15, ll. 7-10; R. 16, ll. 10-13. Conroy handcuffed Appellant while Appellant was still on the street, placed Appellant in a patrol car, and transported Appellant to the interrogation room in the Greenville Police Department. R. 6, ll. 13-17; R. 16, ll. 18-22 (Conroy explaining that he took Appellant into custody); R. 17, ll. 2-5. Conroy did not tell Appellant that he was the subject of an investigation. R. 16, ll. 14-17; R. 17, ll. 6-11. Conroy only told Appellant he "was investigating a crime." R. 17, ll. 6-7.

Conroy explained he believed "[t]here was enough probable cause to ... effect an arrest at that point." R. 17, ll. 17-20. However, he did not obtain an arrest warrant. R. 17, ll. 121-22. According to Conroy he was not arresting Appellant; rather, he was taking Appellant "into investigative detention to speak with him." R. 18, ll. 1-2. Although Conroy believed he had

probable cause to arrest Appellant at that point, he "wanted to interview him prior to getting that arrest warrant." R. 18, ll. 8-11. Conroy persisted that he thought "the elements of the crime would have enabled [him] to make an arrest at that point," but he asserted he "did not have time to go get a search [*sic*] warrant." R. 19, ll. 2-4. Conroy noted that he was familiar with the procedure to obtain an arrest warrant and of the requirement to obtain such a warrant upon sufficient information to support an arrest. R. 19, ll. 5-8. Despite earlier protestations, Conroy appeared to concede the illegality of the seizure during cross-examination. R. 19, ll. 9-11.

In the interrogation room, Conroy handcuffed Appellant to the chair. R. 6, ll. 22-24; R. 19, ll. 12-14; State's Exhibit #9. However, Conroy claimed that Appellant was not under arrest; rather, "[h]e was not free to go, he was in investigative detention." R. 6, l. 25 – R. 7, l. 2. Conroy still did not tell Appellant why he had "detained" him because he "wanted the element of surprise to see what [Appellant] would tell" Conroy. R. 19, ll. 15-18. Conroy told Appellant he wanted to talk about "something" and at a later point said he wanted to talk about "stuff." State's Exhibit #9 at 00:14; 4:14; 4:35.

Conroy then pulled out a form with the advisement of rights written on it. Conroy gathered some personal information from Appellant, which he wrote onto the form. R. 7, ll. 6-10; R. 269. He then asked Appellant to read the first line of the form to confirm he could read. R. 7, ll. 10-12. Conroy asked Appellant if he wanted Conroy to read the rest of the form to him or if he wanted to read the form without Conway's assistance. R. 7, ll. 11-14. According to Conroy, Appellant elected to read the form to himself. R. 7, ll. 14-16; R. 19, ll. 19-21. During the pre-trial hearing, Conroy knew the form "was a waiver of his rights," but he did not "know exactly verbatim what it said." R. 7, ll. 17-19. Thereafter, Conroy interrogated Appellant for approximately three hours, which was captured on video. R. 10, ll. 7-9; R. 11, ll. 19-22; State's

Exhibit #9.[1] In addition, Conroy obtained a written statement from Appellant, which Conroy typed. R. 13, ll. 8-9; R. 14, ll. 3-5 R. 267.

Defense counsel objected to the introduction of the statement as the fruit of an illegal arrest. R. 21, ll. 9-13. He noted the police never informed Appellant why the police wanted to talk to him, why he was being placed in handcuffs, or why he was being transported to the police department. R. 21, ll. 13-15. Defense counsel explained that if the officer believed he had sufficient evidence for probable cause for an arrest, as he claimed, then the proper course of action was to obtain an arrest warrant. R. 21, ll. 15-18. The police made "a warrantless arrest without advising" Appellant as to why he was being placed into custody, transferred to the police station, and handcuffed to a chair. R. 21, ll. 19-22. Appellant was seized – illegally. R. 21, ll. 22-23. This was not a matter of investigative detention, particularly when the police removed him from the area and took him to the law enforcement center. R. 23, ll. 17-21. Defense counsel argued for the suppression of all evidence flowing from that illegal seizure, including Appellant's statement to law enforcement and the photo line-up. R. 21, ll. 22-25; R. 22, ll. 8-11; R. 24, l. 24 – R. 25, l. 4.

The solicitor argued Appellant was not illegally seized because "at no time did [Appellant] say he would not go with them, put up any kind of [f]ight or struggle," which the solicitor admitted was not required. R. 22, ll. 13-16. Nevertheless, the solicitor continued with this argument – "through the entire exchange … he expressed no desire to not go with them, to not be a part of that investigation, and to cease it." R. 22, ll. 16-19; R. 24, ll. 12-19 (the solicitor

[1] The DVD contains two files. The first file shows the first 1.5 hours of the interrogation, and the second file shows the second 1.5 hours of the interrogation. In light of the fact that there are two files, the times on the video start over at 00:00 for the second 1.5 hours. To denote the second portion of the video Appellant will use the following: State's Exhibit #9 at (2) followed by the time.

reiterating that Appellant "did not ask to stop the conversation" and that during the interrogation Appellant never said he did not want to speak to police or wanted a lawyer). According to the solicitor it was "general practice to secure the situation and for officer safety they had to have him handcuffed." R. 22, ll. 20-23. The solicitor argued that "investigative detention is firm in case law, it is allowed, it is a practice that is used by law enforcement." R. 24, ll. 10-12.

The judge denied Appellant's motion to suppress the statement and photo line-up as flowing from an illegal arrest:

> After reviewing the law and considering the testimony and evidence presented the defendant's motion to suppress is denied. I find the statement, it was voluntarily, knowingly, and intelligently made and therefore is admissible. I also deny the motion to suppress concerning the photo [line-up].

R. 25, ll. 16-23.

*Trial*

On July 17, 2013, Melissa Fortner Pope, her boyfriend, Walter Pope, and their two children were living in a motel room at the Regal Inn. R. 48, l. 8 – R. 49, l. 21. During the morning, she was "[s]tripping the beds, putting stuff outside, getting ready for the maid to come pick up the stuff and then waiting on her to come back." R. 49, l. 17 – R. 50, l. 6. A man stopped by her room and asked for someone named Mike Mike or Mookie. R. 50, ll. 10-14; R. 68, l. 17 – R. 69, l. 20. When she informed the man that she did not know who that was, the man walked away. R. 50, ll. 14-15. She returned to her cleaning. R. 50, ll. 20-22.

Shortly thereafter, the man re-appeared, but this time in her room. R. 51, ll. 1-5. Also, she claimed the man had a box cutter in his left hand. R. 51, ll. 6-7; R. 71, ll. 14-17. According to the complaining witness, the man told her "to be quiet," closed the door, put the box cutter

closer to her, and told her "to get on the bed." R. 51, ll. 8-11.[2] She was "pushed onto the bed" and began fighting the man "from about the middle of the bed" until the pair fell onto the floor. R. 51, ll. 17-21. She was unable to say if he had the box cutter when the two fell to the floor. R. 74, ll. 9-14; R. 75, ll. 3-12. However, she claimed she continued to fight until she was choked to the point of barely able to breathe. R. 51, ll. 22-23. During the fight, she was "kicking" waving her arms, and "probably" yelling. R. 73, ll. 7-22.

Somehow, the man managed to pull his pants down, and move "her panties and stuff" to the side. R. 74, l. 21 – R. 75, l. 2. The complaining witness alleged the man penetrated her with his penis on the floor in her "vaginal area." R. 52, ll. 9-24; R. 63, ll. 1-3. This lasted "[m]oments." R. 52, ll. 15-16. The man did not ejaculate and did not wear a condom. R. 52, ll. 17-20. Oddly, the man did not get an erection, but somehow managed to penetrate her. R. 75, ll. 13-21. When she saw the man leave, she locked the motel door. R. 53, ll. 2-5. She claimed she later realized the man took money, which was on top of the television. R. 54, l. 23 – R. 55, l. 7. The complaining witness then called 911. R. 55, ll. 23-24. Next, she called Jim Sawyer, the manager at Labor Smart, where her boyfriend worked. R. 56, ll. 4-13.

Conroy told the jurors that police found a cell phone located in between the two beds in the hotel room that did not belong to the complaining witness or her fiancé. R. 148, ll. 8-12. The forensics team swabbed the phone for DNA. R. 149, ll. 12-14. Then, the phone was turned over to Conroy. R. 149, ll. 14-15. Ultimately, the police recovered no fingerprints or DNA from the phone. R. 149, ll. 16-18. Conroy gave the phone to the police analyst, but the analyst could not "break the password and download it from the data." R. 149, l. 19 – R. 150, l. 3. In light of this setback, Conroy used the phone to call 911 "to get the phone number." R. 150, ll. 4-6. He

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[2] The complaining witness also testified that the man shut the door prior to producing the box cutter. R. 70, ll. 21-25.

then determined the phone service was provided by Verizon. R. 150, l. 8. Conroy prepared a search warrant for Verizon "and emailed [it] to them to find out if the phone had a subscriber." R. 150, ll. 9-10. He was unable to find out the subscriber information, however. R. 150, ll. 11-12.

Conroy told the jurors how the phone rang and he answered it. R. 150, ll. 15-16. He told the caller that he had found the phone, and the caller stated he had lost his phone. R. 150, ll. 16-18. The two arranged to meet so that Conroy could return to phone to the caller. R. 150, ll. 18-19. Conroy and another detective drove to the designated meeting spot, where they watched the location "for about five minutes." R. 152, ll. 3-4. As Conroy and the other detective approached the location, Appellant met them outside. R. 152, ll. 6-7. Conroy immediately called for a uniform officer to assist because he had decided to "detain" Appellant. R. 152, ll. 15-20. Conroy handcuffed Appellant and put him in the patrol car. R. 152, ll. 20-22. Appellant was transported to the police department and placed in an interrogation room. R. 154, ll. 9-12. When the solicitor offered evidence of the interrogation, defense counsel renewed his objection, which was overruled. R. 159, ll. 9-12. Additionally, when the solicitor offered evidence of the photo line-up, defense counsel renewed his earlier objection, which was overruled. R. 161, ll. 16-21.

Conroy agreed with defense counsel that a police officer must "have a purpose to detain somebody." R. 169, ll. 18-23. He agreed he would need "some sort of legal authority to physically detain somebody." R. 170, ll. 18-20. He agreed that an individual does not have to cooperate with police questioning, including giving an officer the individual's name. R. 169, l. 24 – R. 170, l. 5. Conroy agreed that a person has the right to refuse to go to the police station with an officer. R. 170, ll. 6-8. However, Conroy stated he did not "believe" an officer was required to tell a person why the person was being detained. R. 170, ll. 9-11. Conroy explained

that the police can arrest someone without a warrant when the police "actually witnessed" the commission of a crime. R. 171, ll. 2-7. While Conroy agreed that if the police do not witness a crime, then the police must obtain an arrest warrant, he maintained that the police may detain someone if the person is "a danger to society." R. 171, ll. 8-10. This was called "investigative detention" and was temporary in nature. R. 171, ll. 11-16.

Defense counsel continued to prod:

> Q. But you can't just take them into custody and carry them off and hold them for some long period of time. That's not an investigative detention?
>
> A. If you are continuously speaking with them and they never object.
>
> Q. So, in other words, in your mind they have to raise - - they have to know enough to raise some sort of objection?
>
> A. An objection, as well as if the investigator officer had no evidence of any sort and not enough probable cause to sign a warrant.
>
> Q. So it's your position then that just having probable - - what you view as probable cause without presenting it to a neutral and detached magistrate gives you authority to just indefinitely detain someone?
>
> A. Not indefinitely, no, sir.

R. 171, l. 23 – R. 172, l. 12. Conroy persisted that he did not place Appellant under arrest during their encounter on the street; rather, he placed Appellant in "[i]nvestigative detention." R. 175, ll. 18-20. Conroy claimed that when he placed Appellant in handcuffs, Appellant asked "what it was for." R. 176, ll. 8-13. Conroy "advised" he wanted to speak with Appellant "about something that occurred yesterday." R. 176, ll. 13-16. However, Conroy "never told [Appellant] until almost an hour or so into [the interrogation] what it was [Conroy} suspected him of doing." R. 177, l. 25 – R. 178, l. 2; R. 179, ll. 17-23.

**Discussion**

The Fourth Amendment guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend IV. "No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law." Union Pacific Ry. Co. v. Botsford, 141 U.S. 250, 251 (1891). "Generally, police seizures are *per se* unreasonable within the meaning of the Fourth Amendment unless such seizures are accomplished pursuant to judicial warrants issued upon probable cause." State v. Rodriquez, 323 S.C. 484, 490, 476 S.E.2d 161, 165 (Ct. App. 1996). "[T]he police must, whenever practicable, obtain advance judicial approval of searches and seizures through the warrant procedure." Terry v. Ohio, 392 U.S. 1, 20 (1968).

"The Fourth Amendment applies to all seizures of a person, including only a brief detention." State v. Anderson, 415 S.C. 441, 447, 786 S.E.2d 51, 54 (2016); see also Reid v. Georgia, 448 U.S. 438, 440 (1980). "A person has been 'seized' within the meaning of the Fourth Amendment 'whenever a police officer accosts [the] individual and restrains his freedom to walk away.'" Rodriquez, 323 S.C. at 491, 476 S.E.2d at 165 (quoting Terry, 392 U.S. at 16). "Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred." Terry, 392 U.S. at 19 n. 16; see also United States v. Mendenhall, 446 U.S. 544, 553 (1980).

"In determining whether an encounter between a law enforcement official and a citizen constitutes a seizure, and thereby implicates Fourth Amendment protection, the correct inquiry is whether, considering all of the circumstances surrounding the encounter, a reasonable person

would have believed he was not free to leave." Rodriquez, 323 S.C. at 491, 476 S.E.2d at 165; see also State v. Woodruff, 344 S.C. 537, 545, 544 S.E.2d 290, 294 (Ct. App. 2001).

> The test we apply in determining whether a person has been seized for purposes of the Fourth Amendment is whether, under the totality of the circumstances surrounding the encounter, a reasonable person in the suspect's position "would have felt free to decline the officers' requests or otherwise terminate the encounter."

United States v. Sullivan, 138 F.3d 126, 132 (4th Cir. 1998)(quoting Florida v. Bostick, 501 U.S. 429, 438 (1991)). In Mendenhall, the Court provided some "[e]xamples of circumstances that might indicate a seizure, even where the person did not attempt to leave": "the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled." Mendenhall, 446 U.S. at 554.

*Investigative detention*

"Pursuant to Terry, a police officer with a reasonable suspicion based on articulable facts that a person is involved in criminal activity may stop, briefly detain, and question that person for investigative purpose, without treading upon his Fourth Amendment rights." Anderson. 415 S.C. at 447, 786 S.E.2d at 54. Investigative detention is constitutional if supported "by a reasonable and articulable suspicion that the person seized is engaged in criminal activity." Reid, 448 U.S. at 440; see also, State v. Taylor, 401 S.C. 104, 108, 736 S.E.2d 663, 665 (2013). When an officer stops and detains a person for investigative questioning, the officer "must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." Terry, 392 U.S. at 21. An investigative detention does not require probable cause, but it does require something more than an "inchoate and unparticularized suspicion or 'hunch.'" Id. at 27.

"The predicate permitting seizures on suspicion short of probable cause is that law enforcement interests warrant a limited intrusion on the personal security of the suspect." Florida v. Royer, 460 U.S. 491, 500 (1983). "The scope of the intrusion permitted will vary to some extent with the particular facts and circumstances of each case." Id. "The scope and duration of a Terry detention must be strictly tied to and justified by the circumstances that rendered its initiation proper." State v. Corley, 383 S.C. 232, 241, 679 S.E.2d 187, 192 (Ct. App. 2009), aff'd as modified, State v. Corley, 392 S.C. 125, 708 S.E.2d 217 (2011). "'Typically, this means that the officer may ask the detainee a moderate number of questions to determine his identity and to try to obtain information confirming or dispelling the officer's suspicions.'" Id. (quoting Berkemer v. McCarty, 468 U.S. 420, 439 (1984)). Importantly, "the detainee is not obliged to respond and unless his answers provide probable cause to arrest him, he must then be released." Id. "[T]he investigative methods employed should be the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time." Royer, 460 U.S. at 500.

"The reasonableness of an 'on-the-scene' warrantless seizure depends on the balance between the public interest and the individual's right to personal security free from arbitrary interference by law officers." Rodriquez, 323 S.C. at 493, 476 S.E.2d at 166.

> The applicable balancing test employs judicial review of all of the circumstances including but not limited to: (1) the seriousness of the offense; (2) the degree of likelihood that the person detained may have witnessed or been involved in the offense; (3) the proximity in time and space from the scene of the crime; (4) the urgency of the occasion; (5) the nature of the detention and its extent; (6) the means and procedures employed by the officer; and (7) the presence of any circumstances suggesting harassment or a deliberate effort to avoid the necessity of securing a warrant.

Id. Also, the United States Supreme Court stated that "[i]n assessing whether a detention is too long in duration to be justified as an investigative stop, [it is] appropriate to examine whether the

police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly, during which time it was necessary to detain the defendant." United States v. Sharpe, 470 U.S. 675, 686 (1985). Importantly, it is the state's burden to prove the seizure is based on reasonable suspicion and sufficiently limited in scope and duration to satisfy the conditions of an investigative seizure. Rodriquez, 323 S.C. at 493, 476 S.E.2d at 166 (citing Royer, 460 U.S. at 500).

This Court held "a thirty minute detention while the officers attempted to elicit incriminating evidence" from an individual stopped at a train station was "the type of fishing expedition" denounced by the South Carolina Supreme Court as exceeding the scope and duration of an investigative detention. Rodriquez, 323 S.C. at 494, 476 S.E.2d at 166. Further, the Supreme Court held a "twenty minute detention while the officers 'went fishing' for evidence of some crime was not brief" such that it would qualify as a Terry stop. Sikes v. State, 323 S.C. 28, 31-32, 448 S.E.2d, 560, 562-563 (1994). In Woodruff, this Court held an officer's second search of a suspect was outside the parameters of Terry because the officer had searched the suspect previously and found nothing and instigated the second more thorough search because he feared he may have missed something. Woodruff, 344 S.C. at 552, 544 S.E.2d at 298. This Court concluded the officer conducted "the very type of evidentiary search" the United States Supreme Court had condemned. Id.

There can be little question that Conroy's seizure of Appellant was not an investigative detention pursuant to Terry. Conroy immediately handcuffed Appellant, placed him in the back of a patrol car, which he had summoned to the location for the specific purpose of transporting Appellant, and had Appellant escorted to the police department. There Appellant remained handcuffed to a chair for a minimum of three hours during which Conroy interrogated Appellant.

Conroy made no effort to diligently pursue the investigation to confirm or dispel his suspicions quickly. Conroy favored the opposite course of action – withholding information to prolong the interrogation. The length of Appellant's detention alone – over three hours – removes the police encounter outside the realm of an investigative detention. If the length of the detention alone is insufficient, certainly the removal of Appellant from the street, his handcuffing, his transport in a patrol car, and the interrogation render the detention beyond an investigative detention.

Conroy's control over Appellant cannot be in doubt. During the interrogation, Conroy repeatedly tells Appellant that he wants to talk about "something" or "stuff," even when Appellant specifically asks why he is being held. State's Exhibit #9 at 00:14; 4:14; 4:35. During the interrogation, Conroy controls Appellant's phone refusing to permit Appellant to look at it to check his calls. State's Exhibit #9 at 7:24. Appellant provided Conroy with the passcode, which Conroy used to access the phone. State's Exhibit #9 at 7:37. During the interrogation, Conroy removed Appellant's identification card from Conroy's pocket, which he used to complete paperwork. State's Exhibit #9 at 16:00. Thus, Conroy was in control of Appellant's photo identification and Appellant's phone. Later during the interrogation, it was revealed the police had Appellant's wallet in their possession. State's Exhibit #9 at (2) 41:20; 1:31:24. Appellant's backpack is in the room during the interrogation. Conroy requested consent to search the backpack, and Appellant agreed. State's Exhibit #9 at 19:00. Conroy started searching the bag on the spot, and Appellant answered Conroy's questions about items found therein. State's Exhibit #9 at 19:24.

During the interrogation, Appellant's understanding of the situation is clear – he is under Conroy's control. He asked if he were going to be "locked up," and Conroy asked "for what?" State's Exhibit #9 at 35:18. Appellant explained he thought he was going to be locked up

because he was cuffed to a chair. State's Exhibit #9 at 35:42. Disingenuously, Conroy responded, "We're talking to you man." State's Exhibit #9 at 35:44. Appellant asked if he would be permitted to leave if he gave a statement; Conroy responded he could not make any promises. State's Exhibit #9 at (2) 10:01. Two hours into the interrogation, Appellant still asked if he would be let go State's Exhibit #9 at (2) 41:51.

Additionally, Conroy repeatedly insisted that Appellant must prove that he was not in the hotel room. State's Exhibit #9 at 35:42; 36:16; 38:40; 39:12; 1:19:01; State's Exhibit #2 at (2) 6:45.[3] Conroy misled Appellant to believe the police had collected a lot of fingerprints from the motel room, which were being processed at the lab at the very moment of the interrogation. State's Exhibit #9 at 39:20. When Conroy insisted the police were going to find DNA in the motel room, Appellant consented to a buccal swab. State's Exhibit #9 at 40:50. When Conroy left the room to retrieve the items necessary for the buccal swab, he took Appellant's backpack, Appellant's phone, and Appellant's identification card. State's Exhibit #9 at 40:50. There could be little doubt that Conroy was in complete control of every aspect of Appellant's life at that point. When Conroy returned, he did not have Appellant's bag. State's Exhibit #9 at 43:27. When it was clear that Conroy believed Appellant had sexually assaulted the complaining witness and that his DNA would be found, Appellant remarked that he was not going to get mad, he was going to call his lawyer. State's Exhibit #9 at 1:08:48. Conroy ignored this declaration and made no attempt to ensure Appellant wanted to continue with the interrogation, despite a clear invocation of Appellant's right to counsel.

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[3] State v. Brewer, 411 S.C. 401, 408, 768 S.E.2d 656, 659 (2015)(explaining the officer's insistence that Brewer prove his innocence during the interrogation video had "*no* place before the jury" and finding it "chilling" to have "to remind the state that an accused is presumed innocent and that the state has the burden to prove guilt beyond a reasonable doubt")(emphasis in original).

Conroy's seizure of Appellant exceeded any reasonable construct of an investigative detention based on the length of the detention, the movement of Appellant from the street to the law enforcement center, the handcuffing of Appellant when he immediately encountered Appellant and the maintenance of those handcuffs throughout the three-hour interrogation. Conroy maintained complete control over Appellant for the duration of their interaction.

*Arrest*

"To constitute an arrest, there must be an actual or constructive seizure or detention of the person, performed with the intention to effect an arrest and so understood by the person detained." State v. Williams, 237 S.C. 252, 257, 116 S.E.2d 858, 860 (1960)(internal citation omitted). "It is not necessary that there be an application of actual force, or manual touching of the body, or physical restraint which may be visible to the eye, or a formal declaration of arrest; it is sufficient if the person arrested understands that he is in the power of the one arresting and submits in consequence." Id.

In Dunaway v. New York, 442 U.S. 200, 212 (1979), the United States Supreme Court contrasted an investigative detention with "a traditional arrest."[4] The Court described the detention of Dunaway as "indistinguishable from a traditional arrest" where he was "not questioned briefly where he was found," but "was taken from a neighbor's home to a police car, transported to a police station, and placed in an interrogation room." Id. Dunaway "was never informed that he was 'free to go.'" Id. Although Dunaway was not physically restrained, the evidence in the record established that he would have been "if he had refused to accompany the officers or had tried to escape their custody." Id. According to the Court,

[4] See also Terry v. Ohio, 392 U.S. 1, 16 (1968)(describing arrest "in traditional terminology" as "eventuat[ing] in a trip to the station house and prosecution for crime").

> The mere facts that [Dunaway] was not told he was under arrest, was not 'booked,' and would not have had an arrest record if the interrogation had proved fruitless, while not insignificant for all purposes, ... obviously do not make [Dunaway]'s seizure even roughly analogous to the narrowly defined intrusions involved in Terry and its progeny.

Id. at 212-213 (internal citation omitted). "Indeed, any 'exception' that could cover a seizure as intrusive as that in this case would threaten to swallow the general rule that Fourth Amendment seizures are 'reasonable' only if based on probable cause." Id. at 213.

While not dispositive on the issue of arrest, the United States Supreme Court's opinion in Miranda v. Arizona, 384 U.S. 436 (1966), and its progeny provide assistance. The United States Supreme Court held "the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." Id. at 444. The Court explained that "custodial interrogation" meant "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." Id.

Subsequently, the Court made clear "the Miranda safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent." Rhode Island v. Innis, 446 U.S. 291, 300-301 (1980). According to the Court, "[t]he latter portion of this definition focuses primarily upon the perceptions of the suspect, rather than the intent of the police." Id. at 301. "[T]he definition of interrogation can extend only to words or actions on the part of police officers that they *should have known* were reasonably likely to elicit an incriminating response." Id. at 302 (emphasis in original). The determination of whether a person is "in custody" for Miranda purposes requires "[t]wo discrete inquiries": "first, what were the circumstances surrounding the interrogation; and second, given those circumstances, would a

reasonable person have felt he or she was not at liberty to terminate the interrogation and leave." Thompson v. Keohane, 516 U.S. 99, 112 (1995). "In determining whether an individual was in custody, a court must examine all of the circumstances surrounding the interrogation, but the ultimate inquiry is simply whether there [was] a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest." Stansbury v. California, 511 U.S. 318, 322 (1994)(internal quotations omitted).

"To determine whether a suspect is in custody, the trial court must examine the totality of the circumstances, which include factors such as the place, purpose, and length of interrogation, as well as whether the suspect was free to leave the place of questioning." State v. Evans, 354 S.C. 579, 583, 582 S.E.2d 407, 410 (2003). "The custodial determination is an objective analysis based on whether a reasonable person would have concluded that he was in police custody." Id.

In Evans, the defendant went to the police station accompanied by her family. Id. at 581, 582 S.E.2d at 408. Two police officers took the defendant "into a back office to take her statement." The officers never advised the defendant of her Miranda rights. Id. at 581, 582 S.E.2d at 409. The police knew that the deadly fire they were investigating started with an accelerant. Id. at 581 n.2, 582 S.E.2d at 408 n.2. The police told the defendant they did not believe her explanations for the fire. Id. at 581, 582 S.E.2d at 409. The two policemen left the room and sent in a female SLED agent, who used a sympathy tactic. Id. The two women were in the room for at least forty-five minutes. Id. at 582, 582 S.E.2d at 409. The SLED agent followed the defendant to the bathroom and waited outside the door. Id.

The Evans Court found that the defendant was in custody even though she was not formally arrested until shortly after making the statement. Id. at 584, 582 S.E.2d at 410. When analyzing whether the defendant was free to leave, the Court emphasized that the SLED agent accompanied

her to the restroom and waited outside the door. Id. The Court was also persuaded that the defendant was "in custody" because she was interviewed in a back office in the police station, her cousin was not allowed to go into the interview room, and the interview lasted three hours. Finally, the officers' purpose of the interview changed from a routine inquiry to questioning of a suspect when the female officer entered the interrogation room. Id.

The United States Supreme Court refused to compromise the "central importance of the probable-cause requirement to the protection of a citizen's privacy afforded by the Fourth Amendment's guarantees." Dunaway, 442 U.S. at 213. The Founding Fathers created the Fourth Amendment to prohibit seizures based on "common rumor or report, suspicion, or even strong reason to suspect." Id. (internal citations omitted). The Court's "standard of probable cause" reflected "the benefit of extensive experience accommodating the factors relevant to the reasonableness requirement of the Fourth Amendment, and provide[d] the relative simplicity and clarity necessary to the implementation of a workable rule." Id.

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). "'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." Id. (quoting Jackson v. City of Abbeville, 366 S.C. 662, 666, 623 S.E.2d 656, 658 (Ct. App. 2005)). "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). Probable cause is a good faith belief that an individual is guilty of a crime. The good faith

belief must rest upon such grounds as would induce an ordinarily prudent and cautious person, under the circumstances, to believe likewise. 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).

The moment Conroy encountered Appellant on the street, placed him in handcuffs, and transported him to the police department, Conroy illegally seized Appellant. Conroy engaged in an illegal arrest. The video of the interrogation demonstrates that Appellant believed he was not free to go, he voiced this belief to Conroy, and Conroy confirmed his belief. Appellant was in the custody and control of the police, specifically, Conroy. During the pre-trial hearing, Conroy explained the purpose of his interaction with Appellant, beginning with his agreement to meet for the phone, was to investigate and gather evidence. Also, Conroy's flagrant disregard for Appellant's constitutional rights was exemplified during the interrogation when he ignored Appellant's statement that he was going to call his lawyer. State's Exhibit #9 at 1:08:48.[5]

The question left to be answered was whether Conroy had probable cause to arrest Appellant. The only information Conroy had at the time was that a phone, which Appellant claimed was his, had been found in a motel room, where a woman alleged she had been assaulted. When Conroy encountered Appellant on the street, Conroy possessed no information that would lead a

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[5] See Miranda v. Arizona, 384 U.S. 426, 469-470 (explaining "the right to have counsel present at [an] interrogation is indispensable to the protection of the Fifth Amendment privilege" and includes "not merely a right to consult with counsel prior to questioning, but to have counsel present during any questioning"); id. at 444-445 (stating that if a suspect "indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning" and the "mere fact that he may have answered some questions or volunteered some statements on his own does not deprive him of the right to refrain from answering any further inquiries until he has consulted with an attorney and thereafter consents to be questioned"); Edwards v. Arizona, 451 U.S. 477 (1981)(declaring the Fifth Amendment guarantees the right to speak with counsel upon request in a custodial setting and that if a suspect invokes his right to counsel, police interrogation ***must*** cease unless the suspect himself initiates further communication with police); Davis v. United States, 512 U.S. 452, 458 (1994)(same).

reasonable person to conclude that Appellant had committed a crime. As Conroy made clear during the interrogation, he was aware of the motel's reputation. State's Exhibit #9 at (2) 19:31. One witness described the motel as "low rate," where drugs and prostitution were prevalent. R. 103, ll. 16-25. Finding a phone in a motel room, especially one where crime was rampant, would not lead a reasonable person to conclude the owner of that phone had committed a crime. Conroy's arrest of Appellant was illegal because it was not based on probable cause.

*Effect of illegal arrest*

In Wong Sun v. United States, 371 U.S. 471, 485 (1963), the United States Supreme Court explained that the exclusionary rule "traditionally barred from trial physical, tangible materials obtained either during or as a direct result of an unlawful invasion." Additionally, the Fourth Amendment protects against "the overhearing of verbal statements as well as against the more traditional seizure of 'papers and effects.'" Id. "Similarly, testimony as to matters observed during an unlawful invasion has been excluded in order to enforce the basic constitutional polices." Id. Using these principles as guideposts, the Court concluded that "verbal evidence which derives so immediately from an unlawful entry and an unauthorized arrest ... is no less the 'fruit' of official illegality than the more common tangible fruits of the unwarranted intrusion." Id. According to the Court, one of the questions to ask is "whether, granting establishment of the primary illegality, the evidence ... has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." Id. at 417 (internal quotation omitted); see also Davis v. Mississippi, 394 U.S. 721, 724 (1969)(explaining "[t]he exclusionary rule was fashioned as a sanction to redress and deter overreaching governmental conduct prohibited by the Fourth Amendment").

"The exclusionary rule, ... when utilized to effectuate the Fourth Amendment, serves interests and policies that are distinct from those it serves under the Fifth." Brown v. Illinois, 422 U.S. 590, 601 (1975). In the context of the Fourth Amendment, the exclusionary rule "is directed at all unlawful searches and seizures, and not merely those that happen to produce incriminating material or testimony as fruits." Id. Therefore, "Miranda warnings, and the exclusion of a confession made without them, do not alone sufficient deter a Fourth Amendment violation." Id. The United States Supreme Court explained that if Miranda warnings alone could cure the taint of an unconstitutional arrest "regardless of how wanton and purposeful the Fourth Amendment violation," the exclusionary rule's purpose would evaporate. Id. at 602. Put another way, "[a]rrests made without warrant or without probable cause, for questioning or 'investigation,' would be encouraged by the knowledge that evidence derived thereform could well be made admissible at trial by the simple expedient of giving Miranda warnings." Id. at 602.

"The question whether a confession is the product of a free will ... must be answered on the facts of each case." Id. at 603. "In order for the causal chain, between the illegal arrest and the statements made subsequent thereto, to be broken, ... the statement [must meet] the Fifth Amendment standard of voluntariness" and "be sufficiently an act of free will to purge the primary taint." Id. at 602 (internal quotations omitted). Although "[n]o single fact is dispositive," the "Miranda warnings are an important factor, to be sure, in determining whether the confession is obtained by exploitation of an illegal arrest." Id. at 603. Additionally, a reviewing court must consider "[t]he temporal proximity of the arrest and the confession, the presence of intervening circumstances, ... and, particularly, the purpose and flagrancy of the official misconduct." Id. at 603-604. The burden of showing the voluntariness of the statement,

not simply in the Fifth Amendment context, but also in the Fourth Amendment, context rests on the state. Id.

The Supreme Court suppressed Dunaway's statements to police because he was "seized without probable cause in the hope that something might turn up, and confessed without any intervening event of significance." Dunaway, 442 U.S. at 218.

Likewise, the Supreme Court suppressed Brown's statements to police where the "first statement was separated from his illegal arrest by less than two hours, and there was no intervening event of significance whatsoever." Brown, 422 U.S. at 604. Additionally, the Court determined Brown's second statement "was clearly the result and the fruit of the first." Id. at 605. The Court noted the "quality of purposefulness" to the illegality of Brown's arrest, explaining the officers' awareness of the illegality "was virtually conceded" where the officers testified the purpose of their conduct was to investigate and question. Id. The Court concluded "[t]he arrest, both in design and in execution, was investigatory. The detectives embarked upon this expedition for evidence in the hope that something might turn up. The manner in which Brown's arrest was affected gives the appearance of having been calculated to cause surprise, fright, and confusion." Id.

In Wong Sun, 371 U.S. at 416-417, the Court excluded statements to officers made by an individual in his bedroom as the product of an unlawful entry into the home and illegal seizure of the individual. Officers broke the door and followed the individual into his bedroom where he was "almost immediately handcuffed and arrest." Id. at 416. The Court concluded the individual's subsequent statements to police were not sufficiently an act of free will to purge the primary taint of the unlawful invasion. Id. at 416-417. Additionally, the Court excluded narcotics that were discovered only as a result of the individual's statements. Id. at 417.

Appellant's statements to police during the three-hour interrogation were the direct result of his illegal arrest. There was no intervening act of any significance that could render the statements the product of free will untainted by the illegal arrest. Conroy illegally arrested Appellant on the street. Appellant was handcuffed to a chair and interrogated for three hours. During that time, Appellant expressed his understanding that he was under the control of Conroy, and Conroy demonstrated his control over Appellant by keeping Appellant's phone, removing Appellant's backpack from the room, and maintaining Appellant's photo identification card in Conroy's pocket. When Appellant asked to use the phone, Conroy told him he would allow it, but "in a little while." State's Exhibit #9 at 48:57. Although Conroy advised Appellant of his Miranda rights, the warnings alone were insufficient to remove the taint of the illegal arrest. Conroy admitted that he withheld information from Appellant to maintain the element of surprise. Further, Conroy admitted the purpose of his detention of Appellant was to question and investigate. The interrogation was an exploitation of Conroy's illegal arrest of Appellant. In light of the illegal arrest and no intervening event, Appellant's statements to police and the subsequent photo line-up identification must be suppressed as violations of Appellant's Fourth and Fourteenth Amendment rights.

## CONCLUSION

Appellant respectfully requests this Court reverse his conviction and remand for a new trial.

Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

This 5th day of October, 2017.

## CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant 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."

October 5, 2017

Susan B. Hackett

Susan B. Hackett
Appellate Defender

S.C. Commission on Indigent Defense
Division of Appellate Defense
1330 Lady Street, Suite 401
Post Office Box 11589
Columbia, South Carolina 29211-1589

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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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Appeal from Greenville County

Brian M. Gibbons, Circuit Court Judge

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SC Court of Appeals

THE STATE,

RESPONDENT,

V.

ROBERT DAVIS SMITH,

APPELLANT

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CERTIFICATE OF SERVICE

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The undersigned hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Mark R. Farthing, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; this 5th day of October, 2017.

Susan B. Hackett
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me this 5th day of October, 2017.

______________________ (L.S)
Notary Public for South Carolina
My Commission Expires: May 12, 2027.