STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS



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Appeal from Darlington County

Honorable Roger E. Henderson, Circuit Court Judge

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THE STATE,

RESPONDENT,

V.

JOEY LATWAN GIBSON,

APPELLANT

APPELLATE CASE NO 2016-001585



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# FINAL BRIEF OF APPELLANT

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## STATEMENT OF ISSUE ON APPEAL

The trial court erred by denying defense counsel's motion to suppress the results of Appellant's gunshot residue tests where law enforcement had no probable cause to arrest Appellant for murder at the time of the tests and where the trial court erred as a matter of law in concluding that Appellant "implicitly" consented to the search.

## STATEMENT OF THE CASE

The Darlington County Grand Jury indicted Appellant Joey Gibson for murder and possession of a weapon during the commission of a violent crime. R. 465 – 468. On July 18, 2016, Appellant proceeded to trial before the Honorable Roger E. Henderson and a jury.

Jamie Scruggs and Nathan Scales represented Appellant, and Assistant Solicitors Kernard Redmond and Patti Parker represented the State. The jury found Appellant guilty as charged. R. 438, l. 16 – 439, l. 21. The trial court sentenced Appellant to a total of fifty-five years of imprisonment. R. 446, ll. 13-25.

## ARGUMENT

**The trial court erred by denying defense counsel's motion to suppress the results of Appellant's gunshot residue tests where law enforcement had no probable cause to arrest Appellant for murder at the time of the tests and where the trial court erred as a matter of law in concluding that Appellant freely consented to the search.**

**Relevant Facts**

On August 19, 2014, at around 9:45 p.m. Darlington City Police Officer Jovan Cauthen was driving down North Main Street in Darlington when he received a dispatch alert notifying law enforcement that there had been a shooting on Kirvin Steet and that two black males had been seen running away from the incident towards South Main Street. R. 87, ll. 7-25; R. 98, ll. 18-25.

Cauthen responded to the dispatch and arrived at the 100 block of Kirvin Street about forty seconds later. *Id.* Officers Rodriguez and Milton responded shortly after Cauthen. R. 88, ll. 1-23. The officers found Gary Walker dead in the middle of Kirvin Street. *Id.* Cauthen and the others cordoned off the area. Cauthen also located four spent shell casings and marked them. R. 90, l. 4-25.

Witness Harry James spoke with Cauthen and told him that a black man with dreadlocks came out of Appellant's house and ran around the back of the house towards South Main Street after the shooting. James could not identify the man. R. 99, l. 6 – 103 1. 14. James did not testify at trial, but Shelton Ham, who dropped James off at his house just before the shooting did testify at trial. R. 260, l. 5 – 266, l. 14.

James and Ham's descriptions of the men running away from the shooting matched Quinton Gibson and Antonio Gregg. Gibson is Appellant's brother. Gregg is Appellant's cousin. *Id.* Gibson had shoulder length dreadlocks at the time of the incident. James only ever identified two men as being involved in the shooting. He did not see Appellant before or after the shooting. *Id.*

Officer Rodriguez spoke with Cecilia Green. Green lived across the street from Appellant's house. Green had a bullet come through her front window during the shooting. Rodriguez would testify at trial that Green told her she "did not see anything." R. 111, l. 6 – 112, l. 17. However, video from Rodriguez's body camera recorded that Green told Rodriguez that one of the two men seen running from the shooting lived with his mother on South Main Street. R. 124, l. 9 – 126, l. 25.

Rodriguez knocked on Appellant's door. Appellant answered wearing a purple shirt. R. 118, l. 6 – 119, l. 6. Appellant told Rodriguez that he heard three gun shots, looked out the house's front window and saw two black men running towards South Main Street. R. 114, l. 2-14. Appellant stated that he did not know Walker. *Id.* Petitioner's statements to police were consistent throughout their investigation.

Nevertheless, law enforcement settled on Appellant as the primary suspect early on in the investigation. Petitioner was arrested on the night of the shooting immediately after being interrogated by police at the station. R. 173, ll. 2-23.

While Gibson and Gregg were identified by multiple witnesses, only one independent witness placed Appellant outside of his house immediately after the shooting, Cecilia Green. R. 228, l. 10 – 242, l. 22. Even she initially told police that she only saw Appellant in his front yard before the shooting. However, Green would change her story by the time of Appellant's trial and testify that she saw Appellant running from his front yard to the back yard after the shooting. *Id.*

At trial, Green claimed that Appellant went around the left side of his house. *Id.* She further stated that Gibson and Gregg ran out around the right side of Appellant's house and kept running down the street. At the time of Petitioner's trial, Green had several serious pending charges with the Darlington County Solicitor's Office, including strong-armed robbery R. 243, ll. 8-25.

Quinton Gibson was arrested and charged with murder and possession of a weapon during the commission of a violent crime in September, 2014 after samples collected from him tested positive for GSR. R. 324, l. 3 – 327, l. 23. When police placed him under arrest, they urged Gibson to find an alibi. *Id.* He spent fifteen months incarcerated. R. 314, l. 3 – 326, l. 10. Gibson eventually told law enforcement that Gregg could provide an alibi for him. *Id.*

Gibson also agreed to testify against his brother. His charges were dismissed the Monday before Appellant's trial and he was released from custody. At trial, Gibson would claim that he, Appellant, and Gregg were in the front yard of Appellant's house and Gregg had just walked away to make a phone call, when an unknown man approached and started talking to them. R. 299, l. 10 – 300, l. 17.

Gibson claimed that the man made him nervous, but that Appellant shook hands with the man. Gibson stated that he was about to leave when Gregg returned from his phone call and the two went into the backyard to work on a car they were restoring. *Id.* While working on the car, they heard eight to nine gunshots nearby. The two walked around the right side of the house and saw Walker lying dead in the street. R. 302, l. 13 – 306, l. 17. Gregg and Gibson panicked and ran to Gibson's mother's house. *Id*

Gregg's testimony only partially corroborated Gibson's story. Critically, Gregg did not mention the suspicious man who made Gibson so nervous and talked with Appellant. Gregg also stated that – prior to the shooting – Appellant told them he was going inside the house when he and Gibson decided to work on the car. R. 255, l. 2 – 277, l. 6. Like Gibson, Gregg testified that they heard the shooting and went to investigate. When they saw Walker dead in the street, they panicked and ran. *Id.* Gregg was charged with obstruction of justice. R. 282, ll. 9-25.

At trial, the State's theory was that Appellant bought a gun from his cousin, either a 9 mm or a .380 according to the cousin who sold it. R. 172, l. 10 – 176, l. 5. This is the gun that Appellant shot earlier on the day of the incident. *Id.*. Problematically, none of the State's witnesses testified Appellant was seen with a gun around the time of the shooting. This included Gibson and Gregg, who were with Appellant immediately before the shooting. Further, law enforcement executed multiple search warrants on Appellant's house and other properties, but never located a gun.

In addition to Gibson, Gregg, and Green, the State also called a jailhouse informant, Corey Rowell who testified that he was contacted by Investigator Flowers after the police learned that he was Appellant's cell-mate. R. 332, l. 5 – 336, l. 22. Rowell testified that Appellant spontaneously confessed to shooting to Walker and expressed remorse. *Id.* Appellant did not give Rowell a motive for the killing and Rowell's knowledge was limited to the bare facts of the case. According to Rowell, Appellant hid the gun under a doghouse in his backyard. A search of Appellant's backyard did not recover the gun. R. 334, l. 13 - 340, l. 4.

The State had SLED test the GSR kits collected from Appellant and Gibson. Former SLED GSR technician Whitney Berry testified that swabs of Appellant's hands tested positive for GSR. She did not test any of Appellant's clothing. R. 355, l. 7 – 357, l. 15. Gibson's swabs also tested positive for GSR although in smaller amounts than Appellant's swabs. R. 346, l. 3 – 351, l. 1. However, Gibson's clothes were tested and were found to have significant amounts of GSR on them. A GSR kit done on Gregg was not tested. *Id.*

Berry testified, over an objection from trial counsel, that the GSR test results indicated to her that Appellant had fired a gun within a few hours of the tests being administered. R. 355, l. 7 – 357, l. 15. Since Appellant's trial, Berry has resigned from SLED after a routine case audit uncovered serious inaccuracies and flaws in her reports. Andrew Knapp, *SLED's Flawed Evidence Tests in*

*S.C. Shootings, including Walter Scott, may Disrupt Prosecutions*, The Post and Courier, April 1, 2017, *available at* http://www.postandcourier.com/news/sled-s-flawed-evidence-tests-in-s-c-shootings-including/article_addbb05c-1093-11e7-9a44-cbbf7e7465d9.html.

**Pre-Trial Motion to Suppress GSR Evidence**

Defense counsel moved pre-trial to suppress the results of a warrantless GSR test the police administered on Appellant. The defense argued that the GSR test, requiring police to detain Appellant and swab the front and back of both of his hands, constituted a search under the Fourth Amendment and Art. I, § 10 of the South Carolina Constitution. Therefore, police should have sought a warrant. Furthermore, defense counsel argued that law enforcement lacked probable cause to search Appellant at the time of the test.

The State offered lead investigator Maureen Valazack as their first witness. Valazack testified that police were at the scene of the shooting within seconds of receiving the 911 call. R. 14, l. 15 – 16, l. 10. When Valazack arrived she was informed that officers had already spoken with Appellant. Appellant had told them that he was watching TV when he heard the gunshots. Valazack found it strange that all of the lights were off in Appellant's house. *Id.*

Valazack then walked on to Appellant's porch and knocked on the front door. Appellant answered the door and was wiping his hands with a washcloth. Valazack began interrogating him. Consistent with his prior statements to law enforcement, Appellant reiterated that he was watching TV when he heard gunshots very close to his house. R. 17, l. 8 – 18, l. 24.

Appellant told Valazack that he had turned off the house lights because he was afraid of getting shot. *Id.* Appellant stated that he did not know the victim. Valazack told him that the police were now on the scene and ordered him to turn his house lights on. *Id.*

At the pre-trial hearing, Valazack said that Appellant's behavior raised a kind inchoate "red flag" to her. For some reason, she found it odd that someone would turn off their lights immediately after hearing nearby gun shots. She also found is suspicious that he was drying his hands on a washcloth when he answered the door. *Id.* Valazack decided to make Appellant submit to a GSR test. *Id.*

When asked what other information she relied on when she ordered the GSR tests, Valazack repeatedly referenced witness interviews that she conducted **after** the GSR kit was administered to Appellant. For instance, Valazack stated that "some witness or witnesses placed [Appellant] outside in the front yard moments before the crime happened." R. 23, l. 14 – 25, l. 24. She identified Barbara Sparks, Quinton Gibson, Shone Smalls, Harry James, Ivory Stevenson, and Celia Green as witnesses that she relied on when ordering a GSR kit. *Id.*

On cross-examination, Valazack was then forced to admit that she did not meet with these witnesses until hours after ordering the GSR test on Appellant. *Id.* Gibson, Appellant's step-brother, was not taken into police custody and interrogated until midnight, several hours after the GSR test was administered. *Id.* Valazack conceded that she first spoke with Sparks and James the day after the shooting. Valazack further admitted that Ivory Stevenson was not at the crime scene. Valazack was also forced to admit that none of the witnesses interviewed prior to ordering the GSR kit saw Appellant hold a gun. R. 26, ll. 2-6.

Likely realizing that she had just inadvertently admitted to having not interviewed any witnesses until **after** she had Appellant submit to a GSR test, Valazack changed her story on redirect examination. For the first time, she now claimed that Officers Williams and Cauthen spoke with the witnesses prior to Appellant's GSR test and that the officers relayed the witness' accounts to her. Specifically, Valazack claimed that:

> I was advised that there were three subjects standing in the road I was advised that there were three subjects standing in the roadway by one of the witnesses he was driving up to, in that area, who was coming up towards that house, that residence, actually on the other side of the road. But as he was approaching the residents he saw, as he described Petey, that they used to call Joey Gibson. I suppose they still do. He observed him and another subject and the victim.

R. 29, ll. 4-19.

Having now remembered that her information on witnesses' statements was second-hand, Valazack further altered her account of law enforcement's pre-GSR test investigation. Valazack averred that Stevenson, whom only she had said only minutes earlier was not at the crime scene on the night of the shooting, had actually been at the crime scene on the night of the shooting and spoken with police before they forced Appellant to take a GSR test. R. 30, ll. 2-14.

Under this second alternative factual account of the investigation, Valazack claimed that Stevenson informed police she had seen Appellant standing in his front yard with another "subject." Stevenson was driving her cousin, Cecilia Green, home after a funeral. Green lived across the street from Appellant. When Stevenson and Green reached Green's house, they chatted for a few minutes before Stevenson drove away. R. 30, ll. 2-14. After Stevenson drove about three blocks, she heard a gunshot. Stevenson would testify at trial that she did not talk to police on the night of the shooting. R. 255, l. 2 – 258, l. 24.

Valazack then identified Harry James and Cecilia Green as two other witnesses who spoke with police prior to Valazack ordering a GSR test on Appellant. As with Stevenson's involvement, Valazack again changed her recollection of the investigation on re-direct and claimed that she personally spoke with James and Green before ordering the GSR kit. *Id.* at ll. 15-25. Valazack did not elaborate on what James or Green told law enforcement.

After Valazack's inconsistent, contradictory testimony, the State called Investigator Toney Flowers. Flowers stated that he arrived at the incident scene about thirty minutes after the first law enforcement officers. R. 33, l. 4 – 35, l. 14. Flowers involvement in the investigation was limited to having Appellant submit to a GSR test at Valazack's behest. Flowers and another officer, Melton, approached Appellant who was sitting on his porch. *Id.*

Flowers told Appellant that they needed to take a GSR kit and that he needed to come with them to Flower's patrol car. *Id.* While Flowers testified that Appellant was not in custody, Appellant was not given a consent form and was not told that he could refuse the test. *Id.*; *see also* R. 40, l. 15 – 42, l. 21. Flowers and Melton escorted Appellant from him residence to Flower's car where the test was administered. R. 36, l. 13 – 39, l. 24. Flowers asked Appellant when was the last time Appellant had shot a gun, Appellant explained that he had fired a gun earlier that day at his cousin's house in a rural part of the Pee Dee. *Id.*

At Flowers' prompting, Appellant explained that he had not washed his hands since firing the gun and that he regularly worked with steel and scrap metal. *Id.*; R. 42, l. 8 – 45, l. 16. Flowers estimated the test lasted five minutes. Appellant was arrested after undergoing the GSR test and transported to the police station for interrogation. R. 79, ll. 2-23

At the close of the pre-trial hearing, the defense argued that the police had sufficient time to get a warrant for the GSR test. Defense counsel noted that law enforcement secured a warrant for and searched Appellant's house only two hours after the GSR test. R. 46, l. 5 – 48, l. 5.

The defense stated that Appellant did not affirmatively consent to the GSR test. Rather, Appellant merely acquiesced to a show of force by the police that would have left an ordinary man with the impression that he had no choice, but to consent to the search. Under those circumstances, Appellant's – at most – passive consent could not have been given freely and voluntarily. *Id.*

The State countered that GSR evidence rapidly disappears in relatively short amount of time after someone has fired a gun. *Id.* Therefore, administering the GSR test constituted a minimally invasive search justified by exigent circumstances and supported by probable cause. *Id.* In arguing that probable cause existed, the State noted that Valazack found it odd that the lights on Appellant's house were off and that Appellant was not standing outside. *Id.*

The State argued that Valazack's confused and contradictory testimony regarding the witnesses she or other police officers may have spoken to supported a finding of probable cause. Even in the absence of probable cause, the State posited that Appellant freely consented to the search by not actively resisting Investigator Flowers and Officer Melton's demands. *Id.*

The Court denied Appellant's motion to suppress. R. 55, l. 17 – 57, l. 14. The Court ruled that Appellant implicitly consented to the search under "the totality of the circumstances" and that law enforcement was not required to tell him that he could refuse the search. *Id.* Despite the State having the burden to prove Appellant knowingly consented to the search, the court noted that "[t]here's nothing to indicate to me that it was not consented to." *Id.*

The court also concluded that the police had probable cause to conduct the warrantless GSR search. The court found it strange that Appellant claimed to be watching TV at the time of the shooting and that Appellant turned off the lights in his house following the shooting. "If I understood the testimony correctly, the entire house was dark. It just doesn't make a lot of sense. So that raises the question with regards to law enforcement." R. 56, ll. 16-22.

The court further observed that some witnesses had, at some point during the police investigation, told law enforcement that Petitioner was in his front yard before the shooting. *Id.* In the trial court's opinion, these facts coupled with Petitioner drying his hands when he opened the door to law enforcement constituted probable cause to conduct the GSR test. *Id.*

**Discussion**

The Fourth Amendment to the U.S. Constitution protects "against unreasonable searches and seizures" unless "probable cause" exists and requires that evidence seized in violation of the Amendment be excluded from trial. U.S. Const. amend. IV; *see also* S.C. Const. art. I, § 10; *State v. Khingratsaiphon*, 352 S.C. 62, 69, 572 S.E.2d 456, 459 (2002) (*citing Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961).

"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, 11 S.Ct. 1000, 1001, 35 L.Ed. 734, 737 (1891). It has, however, long been recognized that not all personal encounters between policemen and citizens involve "seizures" of persons thereby bringing the Fourth Amendment into play. *State v. Foster,* 269 S.C. 373, 237 S.E.2d 589 (1977); *State v. Blassingame,* 338 S.C. 240, 525 S.E.2d 535 (Ct.App.1999).

"The purpose of the Fourth Amendment is not to eliminate all contact between the police and the citizenry, but 'to prevent arbitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals.' " *United States v. Mendenhall,* 446 U.S. 544, 553–54, 100 S.Ct. 1870, 1877, 64 L.Ed.2d 497, 509 (1980)(quoting *United States v. Martinez–Fuerte,* 428 U.S. 543, 554, 96 S.Ct. 3074, 3081–82, 49 L.Ed.2d 1116, 1126 (1976)).

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

Parallel to the protections of the Fourth Amendment, the South Carolina Constitution also provides safeguards against unlawful searches and seizures. *State v. Forrester,* 343 S.C. 637, 643, 541 S.E.2d 837, 840 (2001); S.C. Const. art. I, § 10. State constitutional provisions may afford citizens more rights and protections than rights conferred by the Federal Constitution. *Id.* at 643, 541 S.E.2d at 840. "Therefore, state courts can develop state law to provide their citizens with a second layer of constitutional rights." *Id.* In short, the Federal Constitution sets the floor for individual rights while the state constitution establishes the ceiling. *State v. Counts*, 413 S.C. 153, 776 S.E.2d 59 (2015).

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

The fundamental question in determining whether a defendant's warrantless arrest or search was lawful is whether there was "probable cause" to make the arrest or conduct the search. *State v. Cuevas,* 365 S.C. 198, 203, 616 S.E.2d 718, 721 (Ct. App. 2005) (*citing Wortman v. City of Spartanburg*, 310 S.C. 1, 4, 425 S.E.2d 18, 20 (1992)). The standard for probable cause to conduct a warrantless search is the same as that for a search with a warrant and for an arrest. *State v. Peters,* 271 S.C. 498, 248 S.E.2d 475 (1978); *see also State v. Gamble*, 405 S.C. 409, 747 S.E.2d 784 (2013).

Probable cause to arrest without a warrant generally exists "where the facts and circumstances within the arresting officer's knowledge are sufficient for a reasonable person to believe that a crime has been or is being committed by the person to be arrested." *State v. Baccus*,

367 S.C. 41, 49, 625 S.E.2d 216, 220 (2006); *State v. Moultrie*, 316 S.C. 547, 552, 451 S.E.2d 34, 37 (Ct. App. 1994) (quoting *U.S. v. Miller*, 925 F.2d 695, 698 (4th Cir. 1991)).

In determining whether probable cause to arrest existed, "all the evidence within the arresting officer's knowledge may be considered, including the details observed while responding to information received." *State v. Manning*, 400 S.C. 257, 267, 734 S.E.2d 314, 319 (Ct. App. 2012) (quoting *State v. Roper*, 274 S.C. 14, 17, 260 S.E.2d 705, 706 (1979)).

Probable cause "turns on . . . whether facts within the officer's knowledge would lead a reasonable person to believe the individual arrested was guilty of a crime." *Manning*, 400 S.C. at 267, 734 S.E.2d at 319. *See Lapp v. South Carolina Dept. of Motor Vehicles*, 387 S.C. 500, 692 S.E.2d 565 (Ct. App. 2010) (finding the officer had probable cause to arrest defendant where the officer arrived at scene of automobile accident and defendant was sitting in her vehicle, smelled strongly of alcohol, admitted to the officer that she hit two vehicles, and refused to perform a field sobriety test); *see also State v. Cuevas*, 365 S.C. 198, 616 S.E.2d 718 (Ct. App. 2005) (finding the officer had probable cause to make an arrest where defendant left the scene of the accident, had a strong smell of alcohol on his breath, had an open beer container in his vehicle, and had a bruise on his chest from deployment of the air bag).

Appellant could find no South Carolina case law directly addressing when probable cause exists to conduct a warrantless GSR test. Jurisdictions that have addressed this issue typically conclude that, a warrantless GSR test is justified when probable cause and exigent circumstances exist or under the exception for searches conducted incident to a lawful arrest made pursuant to probable cause.

The Ohio Court of Appeals decision in *State v. McGee*, is instructive of when police lack probable cause to conduct a GSR test. 996 N.E.2d 409 (Oh. Ct. App. 7th Dist.). In *McGee*, police

ordered the defendant to undergo a GSR test in the aftermath of a fatal shooting in Youngstown. *Id.* at 1049. The police had no suspects at the crime scene, but McGee and his cousin arrived at a local hospital with gunshot wounds shortly after the fatal shooting. *Id.*

McGee claimed he had been shot on the other side of town, but police had no reports of any shootings in that area. *Id.* Unlike Appellant who had no known connection to Walker, police learned that there was an ongoing feud between McGee's cousin and the deceased. *Id.* McGee was taken to the police department after he was released from the hospital, his clothes were seized, and a GSR test was administered before he was interrogated. *Id.* McGee's clothing and shoes tested positive GSR. *Id.* at 1050.

McGee moved to suppress the GSR test results arguing that police lacked probable cause to conduct the GSR test. *Id.* The State did not respond to the motion and the defense's motion was granted by the trial court. *Id.* The State launched an interlocutory appeal claiming that the GSR test was done incident to arrest. *Id.* at 1051. In affirming the trial court's suppression of the GSR test, the Court of Appeals noted that before McGee was taken into custody, "there were limited facts connecting McGee to the shooting." *Id.* at 1056. McGee and his cousin had arrived at a nearby hospital on the same evening as the shooting. They claimed to have been shot in an incident that was not reported to police. McGee's cousin had an ongoing feud with the deceased. *Id.*

The Court of Appeals concluded that police had reasonable suspicion to investigate McGee and his cousin further, but that they lacked probable cause to conduct a warrantless GSR test. Therefore, the Court of Appeals affirmed the trial court's suppression of the GSR test results. *Id.*

In *State v. Gamble*, our Supreme Court reversed a conviction for trafficking in heroin on the grounds that the police officers lacked probable cause to arrest Gamble, rendering the subsequent warrantless search of his person incident to that arrest unlawful. 405 S.C. 409, 747 S.E.2d 784

(2013). Based on information received from a confidential informant, the police arrested Gamble as he pulled his car into a driveway. *Id.* at 412, 747 S.E.2d at 785.

A warrantless search of his vehicle conducted incident to his arrest uncovered heroin. The confidential informant died prior to trial. *Id.* At trial, the arresting officer testified that he "received information regarding a drug dealer" as part of a narcotics investigation. *Id.* at 413-414, 747 S.E.2d at 786. Defense counsel then objected on hearsay grounds to the officer testifying about what the deceased confidential informant told the officer.

The court overruled the objection, but instructed jurors that they could only consider the officer's testimony "to explain why [the officer] acted in the way he did." *Id.* The officer then testified that he and other officer made a "tactical plan" to speak with Gamble at his house "in regards to . . . drugs." *Id.* The officer then testified that when Gamble arrived, he was arrested and searched. *Id.* at 414-415, 747 S.E.2d at 786-787.

On appeal, the Supreme Court reversed the trial court's admission of the drugs seized following Gamble's arrest. *Id.* The Court ruled that:

> The Record in the instant case is devoid of any evidence that police had probable cause to seize the drug evidence presented at trial. Although the arresting officer testified that the drugs were seized pursuant to a search incident to lawful arrest, it is not clear that the police had probable cause for the arrest. Specifically, we can only glean from the officer's testimony that he was present at a location where Petitioner later arrived, and upon Petitioner's arrival, he and another officer searched Petitioner and seized drugs.

*Id.* at 417, 747 S.Ed.2d at 787-788. The Court concluded that "the Record in this case does not demonstrate that probable cause supported Petitioner's arrest. . . . Simply put it is unknown what it was about Petitioner's arrival at the location that supported a good faith belief that Petitioner was guilty of a crime." *Id.* at 418, 747 S.E.2d at 788.

In Appellant's case, the police manifestly lacked probable cause to conduct a warrantless search of Appellant's person by swabbing his hands and seizing his clothes for gunshot residue. Appellant was seized by Officer Melton and Investigator Flowers prior to the GSR test. R. 33, l. 1 – 37, l. 19; *see State v. Williams*, 351 S.C. 591, 571 S.E.2d 703 (Ct. App. 2002) (holding that officer's request that defendant move to rear of his vehicle and subsequent actions after completion of traffic stop constituted "seizure" within meaning of Fourth Amendment, where officer proceeded to ask defendant a series of questions without informing defendant he was free to leave).

Appellant did not implicitly consent to the GSR test following his unlawful seizure by law enforcement. *Id.* He was not told he was free to leave or free to refuse to take the GSR test. South Carolina case law does not recognize implied consent to search, absent a specific statutory scheme. *State v. Forrester*, 343 S.C. 637, 541 S.E.2d 837 (2001) (police did not have consent to tear out stitching during warrantless search of defendant's purse); *Cf.* S.C. Code Ann. § 56-5-2950 *see also Cf.* S.C. Code Ann. § 24-21-430.

Mere acquiesce to a show of authority is not affirmative, voluntary consent. *State v. Harris*, 377 S.C. 274, 286 S.E.2d 137 (1982) (holding that defendant's statement of "that's cool" in response to officer's request to search his car did not constitute consent). Tellingly, after the GSR test was administered, Appellant was arrested, taken to the police station, and his clothes were seized for testing. R. 79, ll. 2-23.

At the time that Valazack ordered the GSR test on Appellant, she had – at most – reasonable suspicion that Appellant may have been involved or have knowledge of the shooting. Like the officer in *Gamble*, Valazack's testimony during the pre-trial suppression hearing was contradictory and confusing.

She could not consistently recall what witnesses, if any, that had she spoken with prior to ordering the GSR test on Appellant. For example, Valazack initially testified that she or other officers spoke with Ivory Stevenson at the crime scene. R. 23, l. 14 – 25, l. 24. However, she later admitted that she did not talk to Stevenson until the next day and that Stevenson was not at the incident scene. *Id.* Stevenson's later testimony confirmed that she was not at the incident scene prior to Appellant's GSR test. R. 255, l. 2 – 258, l. 24.

She also claimed to have spoken with Quinton Gibson, Appellant brother, before ordering the GSR test. R. 24, l. 3 – 27, l. 24. However, again, Valazack later admitted that she first spoke with Gibson several hours after the GSR test was administered to Appellant. *Id.* This was confirmed by Gibson at trial. R. 307, l. 2 – 309, l. 24.

Valazack further claimed that she spoke with Cecelia Green before order the GSR test. R. 24, l. 3 – 27, l. 24. Yet, Green did not tell police that she saw Appellant running out of his yard after the shooting until, at the earliest, the day after the GSR test was taken. R. 242, l. 2 – 248, l. 22. Prior to the GSR test, Green only told police that she had scene Appellant in the front yard of his residence approximately five minutes before the shooting. She stated that Appellant was in his yard alone. *Id.*

Finally, Valazack averred she spoke with Harry James prior to Appellant's GSR test and that James identified Appellant as standing in his front yard with Walker and another person at the time of the shooting. R. 24, l. 3 – 27, l. 24. Yet, according to Officer Cauthen's testimony Valazack's recollection of James' statements was wrong. James stated he only saw two people standing in the yard with Walker. R. 99, l. 6 – 103, l. 14.

After hearing the gun shots, James watched the two black men quickly walked past him towards South Main Street. R. 99, l. 6 – 103 1. 14. James clearly described Gibson and Gregg. *Id.*

Contrary to Valazack's allegations, James never stated that Appellant was with them at the time of the shooting. James never saw Appellant. *Id.*

Taking her testimony in the light most favorable to the State, Valazack had – at best – a vague suspicion that Appellant may have been involved in or know more about the shooting. *See Gamble*, 405 S.C. 409, 747 S.E.2d 784. At the time she ordered the GSR test, she knew that Walker, a man with no discernable connection to Appellant, had been shot in front of Appellant's house and that Appellant had been seen standing in his yard minutes before the shooting. No one identified Appellant as having a gun.

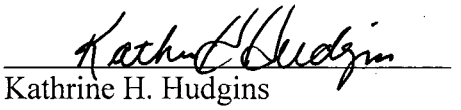
When Appellant answered the door, he was cleaning his hands and explained to that, consistent with other witnesses, he saw two men running away after he heard the gunshots. R. 17, l. 8 – 18, l. 24. Appellant stated that he did not know the deceased and that he turned off the lights at his house so that he would not attract the shooter's attention. *Id.*

To the extent police had any proof of Appellant's involvement in the shooting; it was a level of proof not amounting to probable cause. Given Valazack's inconsistent, contradictory testimony regarding the brief pre-GSR test investigation police conducted, it was impossible to determine with any degree of certainty "what it was about" Appellant's presence at his residence that evening that supported a good faith belief that he was guilty of murder. *Gamble*, 405 S.C. at 418, 747 S.E.2d at 788.

There was simply an insufficient evidentiary basis for Appellant's seizure and the subsequent warrantless GSR test. *Gamble*, 405 S.C. at 417-418, 747 S.E.2d at 787-788; *Cf: State v. Freiburger*, 366 S.C. 125, 620 S.E.2d 737 (2005) (upholding conviction for search incident to lawful arrest for hitchhiking). Accordingly, the trial court reversibly erred in refusing to suppress the GSR test results, where law enforcement lacked probable cause to conduct the warrantless GSR test.

## CONCLUSION

For the reasons argued above, Appellant Joey Gibson respectfully requests this Court to reverse his convictions and sentences and remand to the Darlington County Court of General Sessions for a new trial.



Kathrine H. Hudgins
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ATTORNEY FOR APPELLANT

This 26th day of October, 2017.

CERTIFICATE OF COUNSEL FOR APPELLANT

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

October 26, 2017

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