

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

 ORIGINAL

Appeal from Dorchester County

Honorable Doyet A. Early, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

EDWARD PRIMO BONILLA,

APPELLANT

APPELLATE CASE NO. 2016-001725

FINAL BRIEF OF APPELLANT

**RECEIVED**  
JAN 04 2018  
SC Court of Appeals

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## STATEMENT OF ISSUE ON APPEAL

1.

Whether the court erred by ruling appellant gave defense counsel his “informed consent” to reveal the location where the decedent’s body was located, since the testimony during the suppression hearing revealed defense counsel thought there was “no reasonable alternative” to his “strategy” to reveal the location of the body under the circumstances, and that appellant acquiesced in that strategy because he felt he had no alternative?

2.

Whether the court erred by ruling that the Dorchester County search warrant for the Hyundai Sonata was not legal defective, and that fruits of the search of it were admissible, where the vehicle was seized in Charleston County, a jurisdiction violation of S.C. Code § 17-13-140, and the affidavit did not provide probable cause to search pursuant to the Fourth Amendment?

3.

Whether the court erred by ruling that the Dorchester County search warrant for appellant’s Ford work van was not legal defective, and that fruits of the search of the van were admissible, where the vehicle was seized in Charleston County, a jurisdiction violation of S.C. Code § 17-13-140, and the seizure for the van for processing in Dorchester County exceeded the scope of any consent given in Charleston County to search through the van?

4.

Whether the court erred by refusing to grant the defense an in camera hearing on the qualifications of Investigator Jeff Scott to testify as a crime scene processing expert that the swabs he took from the automobile and the work van contained blood, since the court abdicated

its gatekeeping function where appellant was entitled to a hearing on Scott's qualifications and the reliability of his opinion evidence?

### STATEMENT OF THE CASE

Appellant was indicted at the Dorchester County Grand Jury for the offense of murder. R. 621 – 622. His case was called to trial on Monday, August 8, 2016, before the Honorable Doyet A. Early, III. Assistant solicitors Donald Sorenson and Ryan Templeton represented the state. Russell D. Hilton and Mandy Kimmons represented appellant. R. 1.

On Thursday, August 11, 2016, the jury found appellant guilty. R. 616, l. 23 – 617, l. 3. Judge Early sentenced appellant to life imprisonment. R. 620, ll. 14-16.

This appeal follows.

## ARGUMENT

1.

The court erred by ruling appellant gave defense counsel his “informed consent” to reveal the location where the decedent’s body was located, since the testimony during the suppression hearing revealed defense counsel thought there was “no reasonable alternative” to his “strategy” to reveal the location of the body under the circumstances, and that appellant acquiesced in that strategy because he reasonably felt he had no alternative under the circumstances.

### **Introduction**

Appellant met the decedent on an internet dating site. They went to a party and bonfire at the home of appellant’s brother on April 4, 2015. A couple of days later a missing person’s case was opened on the decedent. Appellant was later arrested for obstruction of justice, apparently because the police thought he was not forthcoming about his explanation of how the date with the decedent ended that evening. First Circuit public defender Mark Leindecker was appointed to represent appellant on the obstruction of justice charge. R. 8, l. 10 – 9, l. 9.

On April 15, 2015, a Dorchester County magistrate issued two search warrants, that appellant’s trial attorney argued were illegal. One for the 2005 Hyundai Sonata appellant was driving on the night of the date. The Sonata was located in Charleston County. In addition, the search warrant, which admittedly provided incorrect times regarding appellant’s whereabouts in the early morning hours of April 4, 2015, alleged that appellant was seen on videotape at a Sunoco gas station in Ladson with the decedent in the early morning hours, and that appellant was no longer “cooperating in the investigation. It is the affiant’s belief that something harmful has happened to Ms. Peagram.” R. 628.

The Dorchester County magistrate also issued a search warrant for appellant's Ford work van. Appellant worked the RW Cauble flooring company in North Charleston, South Carolina where the van was located. This search warrant alleged that the business owner gave consent to search the van and that substances in the back of the van tested "presumptive for human blood." R. 629 – 635. The search warrants were executed in Charleston County on the Hyundai and the van. Both returns showed the warrants were executed on April 16, 2015. R. 626 – 627; r. 632 – 635.

Defense counsel would later argue that the search warrants were illegal pursuant to S.C. Code § 17-13-140 because they were issued in Dorchester County and executed in Charleston County. The trial judge at one point agreed this was improper under S.C. Code § 17-13-140 but later ruled the searches were legal under the automobile exception, and State v. Weaver, 374 S.C. 313, 649 S.E.2d 479 (2007). R. 82, l. 18 – 83, l. 10.

### **Relevant Facts**

A pre-trial hearing was held on the issue of whether appellant gave "informed consent" to his prior attorney, Mark Leiendecker, on May 8, 2015 to tell the police where the decedent's body was located. Defense counsel Hilton argued under Rule 1.6 -- on attorney-client confidentiality, Rule 407, SCACR, that a hearing was required on the "informed consent" issue, and the voluntariness of that consent. Defense counsel also noted it was obvious that prior counsel Leiendecker could no longer represent appellant because he was a key witness who would have to testify. Rule 1.6(a) states: "A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent . . ." There was no allegation in the present case that any of the exceptions contained in Rule 1.6(b) of Rule 407, SCACR applied in this case. R. 2, l. 12 – 4, l. 3.

Counsel Leiendecker testified during the suppression hearing that he was a former part-time magistrate in Dorchester County before he became the Circuit Public Defender in 2008. R. 8, l. 10 – 9, l. 15. Appellant was first arrested for obstruction of justice, and then the charges were upgraded to murder. On **May 8, 2015**, twenty-four days after the search warrants were executed in Charleston County -- that present defense counsel argued were illegal -- on the Hyundai Sonata and the work van, Counsel Leiendecker revealed to the police where appellant told him he had hidden the decedent's body. R. 9, ll. 16-19.

Defense counsel testified that he could not recall whether he discussed with appellant disclosing the location of the decedent's body to the police on May 8, 2015, or before that date. R. 9, l. 16 – 10, l. 23. Defense counsel offered that he thought appellant should have understood the purpose of their meeting that day at the criminal investigative division located in a trailer behind the sheriff's office. They met in a small conference room privately. R. 10, l. 14 – 11, l. 21.

Counsel Leiendecker importantly clarified “before Edward and I met that day, *I did not have the information I provided to the Dorchester County sheriff's office.*” R. 11, ll. 16-21. (emphasis added). Defense counsel said as a matter of “strategy” it was decided to reveal to the police where the decedent's body was buried in a wooded area. R. 12, ll. 7-11.

Leiendecker said that appellant showed him on his iPad, a map, where the decedent's body could be found. R. 12, ll. 15-25.

Apparently counsel Leiendecker did all the talking with law enforcement on May 8, 2015, appellant “did not speak to anybody in the sheriff's office that I remember.” R. 13, ll. 1-4. Counsel met with appellant in the sheriff's office conference room for twenty to forty minutes,

and they “talked about the reasons that may be helpful or beneficial to his defense [to reveal the location of the body].” R. 13, l. 12 – 14, l. 7.

When defense counsel Hilton asked Leiendecker if there was any reasonable alternatives that he could have conveyed to appellant other than revealing the location of the decedent’s body, defense counsel answered: “I don’t remember that. I remember that the discussion of **my strategy** for [and] the reason that it might be **beneficial** to his case if that’s what you’re talking about. **And there was no reasonable alternative to that purpose.**” R. 14, ll. 2-14 (emphasis added). Leiendecker made the disclosure to Captain Phinney. He said he felt appellant was “on board with this disclosure and the reasons why it was beneficial to him.” R. 14, ll. 8-21.

The judge then questioned Leiendecker:

Q. What were those beneficial strategies that you anticipated receiving if you made the disclosure?

A. Your Honor, the only reason or purpose for this disclosure was so that an autopsy could be performed on the body, and without the location of the body that would’ve been impossible. Without going further into any legal discussions or strategy, that was the purpose. Now, if Your Honor wants further detail and you direct me to answer that, I guess I would have to.

Q. Did you discuss with him the potential harm of disclosing the location of the body? I.e. what he would be faced with, charged with? What was he charged with at that time?

A. At that point, Your Honor, he was already charged with murder. And we did discuss how he had been charged with murder without the victim's body having been found. And as Edward and I discussed, it related to evidentiary issues provided in discovery from the Dorchester County Sheriff and/or Solicitor's office that included DNA locations that were solely under the control of Edward.

Q. So, specifically, what harmful consequences did you discuss with him of the disclosure, if any?

- A. The obvious fact that it would be difficult or impossible for him to deny that he knew what happened to Ms. Pegram following their separation on the night in question when they had been together; that it would put him at the scene of what was alleged to be a murder; and that it would open him up even in a best case scenario to other charges including possible charge of desecration of human remains.

R. 15, l. 4 – 16, l. 7. (emphasis added).

On cross-examination by Counsel Leindecker's attorney, Mr. Murphy, counsel offered "I was confident and felt firmly convinced that Edward was not only giving me truthful information, but that he understood I was going to reveal that to Captain Phinney, and that I had his consent to do it." R. 17, l. 19 – 18, l. 6. Leindecker said he continued to represent appellant until the first of the year, when it became clear he had a conflict because he was a witness. R. 18, ll. 12-22.

Appellant also testified during the suppression hearing. Appellant said he was arrested on the night of April 15, 2015, the day the search warrant was issued in Dorchester County. R. 20, ll. 14-22. Appellant testified that he told Leindecker "my story of what happened. That was in our first meeting. Appellant said his second meeting was at the courthouse after he was charged with murder, and the third meeting was at the CID office at the jail the day the location of the body was disclosed. R. 21, l. 3 – 22, l. 8. The following occurred on direct examination of appellant:

Q. And did that conversation, was it regarding the disclosure of the body?

A. It was -- from what I remember from that phone call conversation is I remember just giving my cell -- after I disclosed to him, told him the story of everything that happened, I really was not aware that he was actually going to do go to the detectives and tell them, you know, I have this information.

Q. All right. Well, pause a second because I want to focus on that telephone conversation, okay. We're gonna get to the other part.

A. Yes, sir.

Q. But tell me about the telephone conversation. What was the discussion there regarding disclosure of the body?

A. Okay. I remember coming out of my cell and going up to the front where the booking area is. Mr. Leiendecker made a very -- to the CO's there, made it clear that he wanted a private line; one that was not, you know, was not recorded, and he wanted me to speak to him in privacy. So they took me from the booking area to -- I would assume it was someone's office. So I talked to him on that line. *And basically told me the detectives were on their way to come pick me up to take me to the CID unit to disclose the location of the body.* During that conversation, I, you know, I was kind of distraught, you know, a little confused that this was already happening. **Because, honestly, I believe I did not give him permission to do this or was under the impression that he was going to do this. It was through that conversation that I found out that this was happening. And, you know, that's when -- I can understand through the conversation that we had that it was not something that I really had knowledge that was going to happen.**

R. 22, l. 1 – 23, l. 8 (emphasis added).

The following also occurred between defense counsel Hilton and appellant:

Q. Okay. Did he talk about the ramifications of disclosing the body?

A. He just told me the benefits. You know, when I think back, there were these benefits of what this was and, you know, pretty much I don't want to say he backed me into a corner to do this *because I already felt as if this was already in motion.* And for him to go there and tell him this and then me to say, "I didn't do this," or, you know, it just didn't seem -- it just didn't seem like the right thing that was going on, or ---

THE COURT: What was not the right thing?

THE WITNESS: For me just to back out and say, "I don't know where the body is." *If he's already gone to them and told them, you know, "I do know where the location is," and, you know, I felt like I had no choice to be honest, Your Honor.*

R. 24, l. 24 – 25, l. 14. (emphasis added).

Appellant said he thought he had been backed into a corner because he told his attorney "If I can't make you believe what happened with this situation then how am I going to be able to convince a jury." R. 25, l. 16 – 26, l. 1. The following also occurred on direct examination of appellant:

Q. And the question that I had for you was at any point in time did you agree with him that it was the best course of action?

A. *If I did agree with it, I was not aware that that came out of my mouth. Because like I said, I gave him the information of what everything happened because at the time he was my attorney. And, you know, just with you as well, I told my story, said everything that happened. And then after that, you know, it was probably maybe a week or so after that meeting, that's when I was getting called downstairs with the telephone conversation with him. And that's when, you know, he basically told me that the detectives were on their way to come get me.*

R. 26, ll. 2-14. (emphasis added).

On cross-examination, appellant said he did not remember Leiendecker telling him the possible detriments to revealing the location of the body to the police. Appellant repeated he felt like he had been backed into a corner by the defense counsel, and "I just felt like if he had already went to them and told them this, that it would just be bad for me to deny any of it after he's already spoken to the detectives about this." Appellant also said by the time of his meeting where the location of the body would be disclosed, appellant said: "I didn't have many questions

at that point.” Appellant said under the circumstances described above, he was “on board” with disclosing the information. R. 28, l. 6 – 29, l. 15.

Judge Early then ruled that the issues were whether appellant consented to the disclosure, and whether his consent was informed consent. R. 30, ll. 2-11. The judge cited McClure v. Thompson, 323 F.3d. 1233 (9th Cir. 2003) as instructive on the issue of “informed consent.” The judge said this case was a roadmap for his ruling. The judge ruled appellant gave informed consent and that defense counsel Leiendecker did not violate Rule 1.6(a), of the Rules of Professional Responsibility. The judge suggested, given his ruling that the parties stipulate to the fact that the location of the body was disclosed to the prosecution by the defense. This would prevent the necessity of counsel Leiendecker testifying. R. 30, l. 2 – 31, l. 5.

Once the judge ruled that appellant agreed to disclosure of the locations of the decedent’s body after giving “informed consent” the court correctly assured defense counsel that he was “protected” in entering into the stipulation, R. 83, l. 24 – 84, l. 25:

AST. SOL. SORENSON: The stipulation is that attorney Mark Leiendecker is the Chief Public Defender in Dorchester County. Originally, Mr. Leiendecker was appointed to represent Mr. Bonilla in this case. On May the 8th of 2015, attorney Mark Leiendecker contacted Captain Tony Phinney and informed Captain Phinney that his client may have information about the location of the remains of Ashley Pegram. The defendant was transported to the Criminal Investigations Office so that he could meet with Mr. Leiendecker. After Mr. Leiendecker and Mr. Bonilla met for approximately 20 minutes, Mr. Leiendecker met with Captain Phinney with an electronic notebook displaying a map. Mr. Leiendecker gave a general location of where they would discover the body of Ashley Pegram near Brown Town Road and Seven Mile Road in Harleyville, South Carolina. This disclosure

was made by Mr. Leiendecker with the consent of Mr. Bonilla.

R. 259, l. 19 – 260, l. 10.

### **The Autopsy Report**

Dr. Nicholas Batalis, the pathologist, testified that the decedent was found “nude from the abdomen down.” She had black electrical tape “on the body that was out of the ordinary. One was around the right wrist. There was some black electrical tape that was wrapped around the wrist. R. 373, ll. 2-25.

There was tape “that was wrapped around the neck of the decedent when I examined the body.” “To remove the tape, I then made a cut through it . . .” R. 377, ll. 9-13. Doing a sexual assault protocol was “[n]ot possible to do in this case because all of the tissue, the anus, the vagina, all of that tissue around there was absent.” R. 380, ll. 3-20.

The body was badly decomposed but Dr. Batalis said “there were fractures on both sides of the thyroid cartilage. And that is an injury that we will see somewhat commonly in manual strangulation or if there was some sort of severe blunt force trauma to the neck.” The body was “suspicious for injuries in the scalp.” R. 382, ll. 2-23. Dr. Batalis opined the decedent was killed by “homicidal violence.” Dr. Batalis said the decedent’s death was the result of violence against her, he again noted the electrical tape, blunt force injuries, bleeding into the scalp, suspicions of asphyxia, “and the scalp defect.” R. 387, l. 5 – 390, l. 7.

### **How the Disclosure Further Played**

In his closing argument, the solicitor told the jury that that the defense had an ulterior motive in having appellant’s prior lawyer, Mark Leiendecker, tell the police where the decedent’s body could be located. “This is through the lawyer not Mr. Bonilla telling law enforcement this. And I can only kind of guess that, you know, a little bit of the story his former

lawyer had involved, you know, I hit her with a car [accidentally]. I mean, if we help you find the body, *hopefully we'll find evidence when they do the autopsy that's going to support that; that's going to support your story* and then we can maybe try to work this thing out. Well, I can't even imagine the surprise when, you know, *the autopsy reports come back and she's not clothed. She's got multiple injuries to her head. She's got black electrical tape wrapped around her neck and around her wrist.*" The solicitor said appellant and the defense put the family through five weeks of "absolute hell," with appellant's lies. R. 604, l. 8 – 605, l. 6. (emphasis added).

Addressing the jury after the verdict, the judge said: "I commend the jury for their courage in seeing through the fabricated story, in my opinion, that was presented by the defendant. I found his testimony to be highly incredible, void of any truth." R. 619, ll. 16-22.

### **Other Trial Evidence**

Appellant's cell phone was seized from the company van pursuant to the search warrant. Dorchester investigator Adam Smith testified that appellant sent a text message to his boss on April 4, 2015 at 4:53 a.m. -- after his date with the decedent -- stating that he was sick, and that he would not be in that day. Smith also testified that appellant sent his employer another text message at 6:38 a.m. on Monday, April 6, 2015, saying he was still sick but that he would be in to work the next day. R. 305, ll. 6-24.

Smith further testified that appellant's brother apparently sent him a message on April 3, 2015 at 7:37 in the evening -- before the bonfire party -- that he had marijuana. R. 306, l. 8 – 307, l. 11. The cell phone seized from the work truck also revealed on April 3, 2015 at 9:23 p.m. that appellant was near the decedent's residence. R. 313, ll. 9-16.

Smith also testified that on the morning of April 4, 2015, between 6:42 a.m. and 7:12 a.m., that appellant's cell phone was pinging in the general area of Harleyville, South Carolina,

near Brown Town Road where the decedent's body was located after appellant disclosed its location. R. 315, ll. 11-22.

Appellant testified that he met the decedent on a dating site. R. 460, ll. 1-11. They had a date on the night of April 3, 2015, for his brother's bonfire party. The decedent drank at the bonfire party. R. 462, l. 15 – 479, l. 6. Appellant said the decedent was intoxicated after the party, and they stopped at the Sunoco gas station so she could use the restroom. This was captured on a security camera, and was contained in the search warrant application for the car. R. 623 – 635.

Once they got back on the road, the decedent told appellant to stop somewhere along the road so that she could go to the bathroom again. When the decedent got out of the car to go to the bathroom near a wooded area, appellant said he locked the doors because he could not control the decedent because she was drunk. R. 462, l. 15 – 479, l. 6. Appellant's sister, Brandy Chance, admitted that the decedent sometimes acted as if she were bipolar when she drank alcohol. Chance said she did not know if the decedent was ever formally diagnosed as bipolar. R. 115, l. 11 – 116, l. 1.

Appellant said when he backed his car up to leave after locking the decedent out. He accidentally "bumped" her with his car while backing up to drive away. Appellant got out of the vehicle to investigate, and the angry decedent tried to hit him repeatedly. Appellant said he restrained the decedent by grabbing her in a "bear hug," and that she finally stopped trying to hit him. Appellant then let her go, and was surprised when she went limply to the ground. R. 475, l. 18 – 490, l. 16

Appellant testified that he panicked, he did not know what to do, and he put the decedent in the trunk of the Hyundai. He drove away thinking about what to do. R. 475, l. 18 – 490, l. 16.

The decedent's body was ultimately transferred into his work van, and appellant dumped the body off in secluded location. However, appellant went back, and picked up her body, and put in the back of the van. Appellant admitted that he drove the van to a wooded area, dug a shallow grave with assistance of a board in the back of the work van, and he buried the decedent there. R. 460, l. 1 – 491, l. 13. Appellant admitted he tried to “cover his tracks,” which included a fake text message to the decedent saying he was sorry he left her, and drove away but that she was drunk and out of control. R. 486, l. 10 – 488, l. 3.

Appellant said disclosed the “location where Ashley was located, and . . . [with the assistance of his prior lawyer] “[h]e was able to kind of get in the general location of where I was at. And then I used his iPad to kind of retrace my steps and go back to that place.” R. 488, l. 1 – 489, l. 19.

#### **Closing argument – on appellant’s testimony**

The solicitor told the jury that appellant’s testimony was totally fabricated. “The lies started at 3:29 in the morning, April 4, when he texted her phone and said I’m sorry I left you at that gas station; you were too drunk to handle. His lies continued through that Saturday, April 4th; Sunday, April 5th; the sixth, the seventh; statement on the eighth.” The solicitor said appellant also lied on April 15th, 2015, which was also the day the search warrant was issued. R. 606, ll. 12-25.

#### **Discussion**

Appellant submits that the testimony of counsel Leiendecker that he had “no other alternative” than to advise appellant to accept his “strategy” of informing the police where the decedent’s body was located highlights the lack of “informed consent” in this case. Appellant said he felt “backed into a corner,” and he thought he had no choice but to acquiesce in counsel

Leiendoecker's strategy for counsel to reveal where appellant had told him in confidence the decedent's body was located. Counsel acknowledged that the "autopsy" was everything to his strategy. The solicitor, as seen, said the defense had an ulterior motive to reveal the location of the body, and he ridiculed the strategic disclosure given the autopsy results. There was no evidence defense counsel told appellant that if the autopsy results – everything his strategy depended on – were in conflict with what appellant said occurred, that the consequences would be devastating.

In McClure v. Thompson, 323 F.3d. 1233 (9<sup>th</sup>. Cir. 2003), the court held that the fact defense counsel did not advise McClure of the potential harmful consequences of disclosure invalidated the consent. However, in McClure v. Thompson, the court found that disclosure was necessary to prevent future criminal acts by McClure.

In this case, the only issue is whether appellant gave informed consent pursuant to Rule 1.6(a), Rule 407, SCACR. It was undisputed that none of the exceptions in Rule 1.6(b), Rule 407, SCACR, were applicable in this case.

The court in McClure v. Thompson noted that consent is not enough under Rule 1.6(a). Defense counsel has to consult with the client and advise of the harmful consequences of disclosure. The court noted that the district court had found that the attorney admitted he did not advise McClure of **all** potential consequences. The court further noted that even in cases in which negative ramifications seem obvious, the courts require that a criminal defendant's decision be made on the basis of legal guidance with a fully cautionary explanation. McClure v. Thompson, 323 Fd.3d. at 1244–1245.

The court noted that in a case, such as this one, where the stakes are so high on disclosure, that defense counsel has an obligation to “consult carefully with his client.” McClure v. Thompson, 323 Fd.3d. at 1245.

McClure v. Thompson was a federal habeas case under a very restrictive standard of review. The court concluded “the choices made by McClure’s counsel give us significant pause, and, were we deciding this case as an original matter, we might decide it differently.” The court further noted that ascertaining whether defense counsel fully consulted with the defendant, and whether the defendant was fully informed of the options, the benefits, and the adverse consequences, was very important.

Appellant submits that the testimony of counsel Leiendecker that he had “no other alternative” than to advise appellant to accept his “strategy” of informing the police where the decedent’s body was located highlights the lack of “informed consent” in this case. Appellant said he felt “backed into a corner,” and he thought he had no choice but to acquiesce in counsel Leiendecker’s strategy for counsel to reveal where appellant had told him in confidence the decedent’s body was located.

The record in this case was lacking in support for the judge’s ruling that appellant gave “informed consent” to the location of the body. The judge ruled immediately after hearing the evidence but what is most apparent is the lack of explanation about the disastrous consequences that would follow if the autopsy results conflicted with what appellant said actually occurred early that morning. The disclosure of the location of the body so an autopsy could be conducted -- the results of which would match appellant’s testimony was a bold roll of the dice. Appellant was entitled to “informed consent” on the adverse consequences of that bold strategy if the autopsy results did not match his testimony. Appellant felt backed into a corner, and defense

counsel thought there “was no other alternative” than his disclosure for autopsy results strategy. Most respectfully, there was not informed consent for the disclosure in this case. See Rule 1.6(a), Rule 407, SCACR; McClure v. Thompson, 323 F.3d. 1233 (9<sup>th</sup>. Cir. 2003).

The court erred by ruling that the Dorchester County search warrant for the Hyundai Sonata was not legal defective, and that fruits of the search of it were admissible, where the vehicle was seized in Charleston County, a jurisdiction violation of S.C. Code § 17-13-140, and the affidavit did not provide probable cause to search pursuant to the Fourth Amendment

### **Relevant Facts**

Detective Andy Martin of the Dorchester Sheriff's Department was assigned to this missing person's case on April 7, 2015. R. 40, ll. 7-25. Harris remembered a missing persons report had been filed on the decedent and he "felt like he needed to talk to" appellant. R. 41, l. 5-21.

Appellant spoke with Martin on the telephone and appellant agreed to come in to talk to Martin. R. 42, ll. 6-21. Appellant met with Martin the next day on April 8 at six o'clock in the evening. Appellant gave Martin a statement. R. 43, l. 12 – 44, l. 12.

On April 15, 2015, Martin interviewed appellant again and Martin said appellant told him he was unemployed. R. 48, ll. 19-25. Martin said he later learned that appellant was working at Cauble Flooring in North Charleston. R. 49, ll. 1-11.

Martin said appellant then told him he only started working at Cauble Flooring the previous day, April 14, 2015, and Martin said he did not believe that statement. R. 50, ll. 5-12. Martin had appellant arrested for obstruction of justice on April 15, 2015, that same day. R. 55, ll. 13-16.

Defense counsel moved to suppress the evidence seized from the Hyundai Sonata. R. 58, ll. 13-22. The Sonata belonged to appellant's mother and appellant was driving it the night of his date with the decedent. Defense counsel told the judge that the warrant was issued by Judge

Katrina Patton in Dorchester County and no other warrant had been issued by a Charleston County magistrate “with jurisdiction to actually issue that warrant” even though it was undisputed that the Sonata was in Charleston County. R. 58, l. 24 – 59, l. 15. Defense counsel therefore argued the search warrant was legally insufficient pursuant to S.C. Code § 17-13-140. R. 58, l. 13 – 60, l. 25.

Defense counsel also argued the affidavit was insufficient to establish probable cause. Defense counsel noted the times listed in the affidavit were incorrect. It stated that the decedent was observed entering into the Sonata at 1:12 AM, which was incorrect. R. 61, ll. 2-23. The judge said the time should have been 12:12 AM, so the affidavit was either incorrect or contained a scrivener’s error. The affidavit also stated that records indicated appellant was not in the Winter Drive area of Summerville at the time he stated he dropped off the decedent. Counsel noted the “records indicate the only time that he was in the area, which is around 12:30 AM, which is before Ms. Pegram was observed at the Sunoco gas station.” Counsel noted the affidavit also stated appellant provided untruthful information to the police. R. 62, l. 3 – 63, l. 8.

The judge observed that the car was located in Charleston County and that law enforcement towed it to Dorchester County. The judge said “*the warrant should have come from Charleston County?*” *The solicitor responded, “I guess so.”* The solicitor argued that despite the incorrect information in the affidavit, the rest of the affidavit provided probable cause to issue the search warrant. The judge agreed, “it gives you an overall feeling that something has happened, probable cause.” R. 65, l. 4 – 67, l. 8.

The solicitor argued that the affidavit would make someone conclude “that something has happened and that evidence of that may be found in that vehicle. And I think that’s, I mean, enough at that point in time.” R. 67, ll. 9-12. The judge also noted that appellant was the last

person seen with the decedent and that the decedent was now missing. The solicitor argued the affidavit overall showed probable cause. R. 67, l. 4 – 68, l. 17.

Defense counsel argued the police had absolutely no authority to seize the car in Charleston County. “Your Honor, the statute is very clear that a magistrate can only issue a warrant within their territory of jurisdiction.” The judge responded, “**Well, that’s true.**” R. 68, l. 22 – 70, l. 8. (emphasis added). Defense counsel continued to argue that the police did not have a warrant to seize the vehicle in Charleston County and that the seizure was illegal. R. 70, l. 9 – 71, l. 21.

The solicitor said his office was doing some research on the automobile exception trying to put an argument forth to the court. R. 71, l. 23 – 72, l. 7.

Defense counsel Hilton also argued as to the Ford Econoline, which was appellant’s work van owned by Mr. Cauble, that the warrant was also defective. R. 72, l. 12 – 73, l. 3. Defense counsel reasoned the warrant was still defective because once they found presumptive blood upon the consent to search by Cauble, they got a Dorchester County search warrant and towed the van to Dorchester County. Counsel argued, “They didn’t have authority to then seize that van and take it at that point in time; but they did. They did get a search warrant. But again, we got a Dorchester County magistrate issuing a search warrant for property that’s located in Charleston County. There’s no cosigning on this-warrant, no anything. And they tow this van whereby they then process it pursuant to the search warrant. And we would respectfully request that the evidence seized from the van be suppressed on the basis that it exceeded the scope of Mr. Cauble’s consent. He consented to a search of that van. He did consent to a seizure of that van.” Counsel continued his jurisdictional argument that the search warrant was jurisdictionally defective pursuant to S.C. Code § 17-13-140. R. 72, l. 8 – 75, l. 25.

The judge took the matter under advisement. The solicitor later stated that based upon State v. Weaver, 374 S.C. 313, 649 S.E.2d 479 (2007), that a warrant was not required because the police had probable cause to search the Sonata and the van. Defense counsel argued the facts of Weaver, given the short time frame involved in that case between the crime and search and seizure distinguished it from the facts of this case. The warrantless vehicle exception did not apply.

No one had touched the Sonata in this case. There was no evidence of anyone attempting to destroy evidence as there clearly was in State v. Weaver, 374 S.C. 313, 649 S.E.2d 479 (2007). The police could have secured a properly executed warrant in Charleston County or a Dorchester County warrant that was cosigned in Charleston County by a magistrate, assuming they could show probable cause. Defense counsel continued to argue law enforcement obtained the search warrants in Dorchester County, and that they had no authority to seize a vehicle located in Charleston County. R. 78, l. 8 – 82, l. 10.

The judge then ruled that “I don’t find that the fact that they went and got the warrant in Dorchester County violates any statutory requirements.” The judge said despite the timing errors in the search warrant, he also found probable cause overall in the search warrant affidavits to justify their issuance. R. 82, l. 11 – 83, l. 12.

### **Discussion**

South Carolina Code § 17-13-140 provides “any magistrate or recorder or city judge having the powers of magistrates, or any judge of any court of record of the State having jurisdiction **over the area where the property sought is located may issue a search warrant to search and seize . . .** (4) Property constituting evidence of crime or tending to show that a particular person committed a criminal offense.” (emphasis added).

Appellant submits that while the statute also states the property may be seized “from any place where such property may be located” that that provision modifies the first sentence of the statute that a magistrate only has jurisdiction “over the area where the property is located . . .”

Thus, a Dorchester County search warrant for property located and seized in Charleston County was legally defective pursuant to South Carolina Code § 17-13-140. Further, probable cause did not exist for the Hyundai Sonata because the search warrant only raised a suspicion of appellant’s guilt because appellant was the last person seen with the decedent and because he had provided false information to the police. The affidavit to the search warrant, Defendant’s Exhibit 1, R. 623 – 627, shows that the warrant was issued upon suspicion of guilt which was far short of probable cause.

Moreover, as to the van, the affidavit stated that the owner gave voluntary consent to search the van and that there was swabs showing human blood in the rear of the van. This affidavit also noted that appellant had given false statements to the police. In addition to the magistrate in Dorchester County not having jurisdiction to issue this search warrant pursuant to South Carolina Code § 17-13-140, the court also did not have probable cause by way of the Hyundai Sonata affidavit or the van affidavit to establish probable cause for the search.

The reliance of the judge, respectfully, on State v. Weaver, 374 S.C. 313, 649 S.E.2d 479 (2007) was misplaced. In Weaver, the decedent was shot thirteen times outside a club and died at the scene. An investigator talked to witnesses and this led him to search for Weaver. The investigator had information Weaver was at the home of his cousin. The investigator and other law enforcement officials arrived at the cousin’s house and found the Jeep in question, which Weaver was driving that night, in the back yard. The cousin told law enforcement that Weaver

had been at the house, asked for some change, some bleach, and a garbage bag, and left the cousin's house less than an hour before.

The investigator opened the door of the Jeep and found that the inside was wet and it smelled of bleach. The investigators found a "bag of wash" that smelled like bleach on a pump house near the Jeep. The Jeep was impounded and a SLED agent processed the Jeep. Blood was found inside the Jeep in several areas. The blood matched that of the decedent. A return was never made to the search warrant as required by S.C. Code § 17-13-140.

Our Supreme Court in State v. Weaver, 374 S.C. 313, 320, 649 S.E.2d 479, 482, wrote that "pursuant to the automobile exception, if there is probable cause to search a vehicle, a warrant is not necessary so long as the search is based on facts that would justify the issuance of a warrant, even though a warrant has not actually been obtained. Maryland v. Dyson, 527 U.S. 465 (1999)."

The Court in Weaver also noted "In the instant case, there was probable cause to conduct a warrantless search of the Jeep. Investigators knew that petitioner, a suspect in McKnight's murder, had been seen driving the Jeep around the time of the murder. Upon finding the Jeep, it seemed apparent there had been an attempt to destroy evidence given the Jeep's interior was wet and smelled of bleach. Therefore, upon finding the Jeep, the investigators could have conducted a search at that time; however, they chose to impound the vehicle." The court therefore found that the facts of Weaver showed a warrantless search met the automobile exception to the Fourth Amendment. State v. Weaver, 374 S.C. 313, 320-321, 649 S.E.2d 479, 480 (2007).

The facts of this case are much different. The affidavit to the search warrant for the Hyundai Sonata only revealed that appellant was the last person seen with the decedent, and that appellant had not been totally truthful with the police. The affidavit was issued upon suspicion

that was far short of probable cause. That evidence “may” be found in the car -- a possibility evidence may be found -- was far short of a “fair probability” or that it was “probable” that evidence that evidence related to the crime would be found in the car.

The task of a magistrate when determining whether to issue a search warrant is to make a practical, common sense decision as to whether, under the totality of the circumstances set forth in the affidavit, there is a fair probability that evidence of a crime will be found in a particular case. State v. Philpot, 317 S.C. 458, 454 S.E.2d 905 (Ct. App. 1995). Mere conclusory statements which give the magistrate no basis to make a judgment regarding probable cause are insufficient. State v. Smith, 301 S.C. 371, 392 S.E.2d 182 (1990).

The affidavit as to the Sonata gave incorrect information as to appellant’s whereabouts in the early morning hours of April 4, 2015. The essence of the affidavit was that appellant was the last person seen with the decedent and that there was suspicion or hope that evidence possibly could be located within the Sonata.

As in State v. Smith, 301 S.C. 371, 392 S.E.2d 182 (1990), the affidavit lacked the concrete information necessary to establish that the Sonata may contain evidence of the murder of the decedent. The overall affidavit, when also considering the incorrect information as to the times of appellant’s whereabouts included, did not contain probable cause for the search warrant to be issued. See State v. Weston, 329 S.C. 287, 494 S.E.2d 801 (1997).

State v. Weaver does not lead to the conclusion in this case that law enforcement could have gone to Charleston and searched the Hyundai Sonata based on probable cause without a warrant. In fact, a visual inspection of the Hyundai would have revealed nothing. There was no indication that the vehicle itself contained evidence of a crime, and, in fact, the blood that was

later swabbed was from **the trunk** of the automobile. A warrant was required for a search of the Hyundai Sonata.

Further, the search warrant in this case violated S.C. Code § 17-13-140 because it was issued by a Dorchester County magistrate and executed in Charleston County, where the Hyundai was found at an Enterprise Rent-A-Car lot.

### **The Error Was Not Harmless**

Investigator Jeff Scott testified pursuant to the search warrants that swabs taken on the Hyundai Sonata and the work van revealed that some of the swabs indicated “a presumptive positive of blood present. Other swabs, obviously, revealed the liquid substance was not blood. R. 206, l. 12 – 209, l. 8. As will be seen *infra*, defense counsel was denied a hearing to challenge Scott’s qualifications to give opinion evidence pertaining the crime scene processing this case, specifically the forensic swabs.

Scott testified that the van was secured from Cauble Flooring in Charleston County and “I actually followed the County wrecker from Cauble Flooring all the way to Dorchester County Sheriff’s Office and secured the van in our garage.” R. 209, ll. 9-13. Appellant’s cell phone was also removed from the center console of the van. R. 209, ll. 7-14. As seen, the cell phone was used to create a time line the state maintained corroborated its theory that appellant picked up the decedent, took her to the bonfire party, to the Sonoco station to use the restroom, and to the site where the body was later found.

As for the Hyundai Sonata, Scott said the swabs showed presumptive positives for blood in the trunk of that vehicle. R. 215, l. 18 – 219, l. 15. Scott testified that blood was located in the trunk of the Hyundai and in the back of the work van. R. 230, l. 1 – 231, l. 17; r. 232, l. 14 – 234, l. 21; r. 249, ll. 5-8.

From Scott's "presumptive" blood testimony in the car, and appellant's work van, the state then presented the SLED DNA testimony. SLED DNA expert Paul Meech testified that the presumptive blood in both the car and the van were DNA matches to the decedent's blood. R. 352, l. 19 – 364, l. 13. The fruits of legally defective search warrant should have been suppressed. See State v. McKnight, 291 S.C. 110, 352 S.E.2d 471 (1987). The error was not harmless. See State v. Vice, 259 S.C. 30, 190 S.E.2d 510 (1972).

The court erred by ruling that the Dorchester County search warrant for appellant's Ford work van was not legal defective, and that fruits of the search of the van were admissible, where the vehicle was seized in Charleston County, a jurisdiction violation of S.C. Code § 17-13-140, and the seizure for the van for processing in Dorchester County exceeded the scope of any consent given in Charleston County to search through the van

As seen, the search warrant of the van was also jurisdictionally defective pursuant to S.C. Code § 17-13-140, since it was a Dorchester County search warrant for a van located in Charleston County. South Carolina Code § 17-13-140 states that a magistrate can issue a search warrant where he or she has "jurisdiction over the area in which the property sought is located." In this case, the property was located in Charleston County and this was a Dorchester County search warrant. The authorities in Dorchester County should have sought a Charleston County magistrate to cosign or issue a Charleston County search warrant, as defense counsel properly argued. The judge's ruling that there was no jurisdictional defect in the property being seized so it could be searched pursuant to a Dorchester County search warrant, where the property was located in Charleston County, was error.

Appellant understands, as to the van, Mr. Cauble gave consent to search the van at his shop in Charleston County. However, as defense counsel argued, the search warrant remained legally defective in that it did not **legally** authorize law enforcement to seize the van, and take it back to Dorchester County for more intensive searching and processing. If the converse were true, a magistrate in York County could issue a search warrant for a car located in Charleston, not involve a Charleston County Magistrate and have the car seized in Charleston County and towed to York County to be searched.

As with the car search warrant, there was no countersigned or Charleston Magistrate involvement in the van search warrant either. The fruits of the van search -- the blood evidence in the van and the cell phone evidence -- should have been suppressed.

To be clear, Mr. Cauble did not have the authority to consent to the search of appellant's cell phone, and the search of that cell phone led to the state's timeline the state claimed corroborated appellant whereabouts from him picking the decedent up at her house, going to the bonfire party, going to the Sonoco gas station, and finally to the area where appellant's attorney disclosed appellant buried the body.

Further, it is impossible to know from this record what DNA matches involving the van came from the Dorchester County processing, rather than the initial work done in Mr. Cauble's shop in Charleston County. There can be no doubt that the DNA evidence from the van, and the cell phone evidence were exceedingly prejudicial. The admission of this illegally seized evidence was not harmless error. See State v. Vice, 259 S.C. 30, 190 S.E.2d 510 (1972).

As argued above, State v. Weaver, 329 S.C. 287, 494 S.E.2d 801 (1997) was distinguishable from this case for the reasons listed in issue two *supra*. There was absolutely no evidence appellant was destroying evidence located in the van. In fact, the van was obviously not even in appellant's possession or in his control at the point the legally defective search warrant was issued. There appeared to be nothing apparent to the naked eye that looked like inculpatory evidence as to the van which would have provided probable cause for its search absent a warrant.<sup>1</sup>

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<sup>1</sup> It is true that appellant wanted his cell phone back, as would anyone, in present society.

Since the search warrant was jurisdictionally defective pursuant to S.C. Code § 17-13-140 as to the work van also, the fruits of that search and seizures should have been suppressed. State v. McKnight, 291 S.C. 110, 352 S.E.2d 471 (1987).

The court erred by refusing to grant the defense an in camera hearing on the qualifications of Investigator Jeff Scott to testify as a crime scene processing expert that the swabs he took from the automobile and the work van contained blood, since the court abdicated its gatekeeping function where appellant was entitled to a hearing on Scott's qualifications and the reliability of his opinion evidence.

### **Relevant Facts**

Defense counsel Hilton told the judge prior to the testimony of Investigator Jeff Scott that Scott was going to testify that swabs were taken from the van, and that some of the swabs contained blood. The judge responded that Scott would not be allowed to say it was the decedent's blood, "he's not qualified to do that." R. 193, ll. 7-25.

Defense counsel Hilton further stated that he expected the SLED expert would ultimately say the blood evidence was the DNA of the decedent in this case. "And I don't think he's -- Detective Scott, *without an evidentiary hearing on the scientific reliability of this evidence, is going to say with any degree of scientific certainty that this is even blood.*" The judge responded "I don't know what he's going to say." Defense counsel renewed his objection to Scott being allowed to give opinion evidence on the blood without evidentiary hearing on his qualifications to give those opinions about the swabs. R. 193, l. 7 – 195, l. 6. (emphasis added).

The judge stated that he would not rule until he heard from Scott, which obviously was going to be in the presence of the jury over the defense objection. R. 193, l. 7 – 196, l. 2. Scott testified in the presence of the jury that he has been in the crime scene division since October of 2014, which was about six months at the time the search warrant was issued in April of 2015. R. 196, l. 10 – 197, l. 20. Scott said he had on the job training, and he had blood stain pattern

analysis classes on this subject as well. R. 197, l. 21 – 200, l. 6. Defense counsel repeated his objection to offering scientific evidence without a proper foundation when the state started to introduce seven photographs. The judge overruled that objection. R. 200, ll. 5-24.

Scott testified that he used a blood reagent kit with “O-Tolidine” to find if a stain was a presumptive positive for blood. R. 203, l. 13 – 204, l. 18. Scott then testified in particular about four stains found in the van, one of which was positive for human blood. R. 204, l. 19 – 210, l. 14. Scott also said he removed appellant’s cell phone from the van. R. 210, ll. 11-15. Scott then testified about various stains testing positive for blood in the van. Defense counsel again renewed his objection to improper opinion testimony and a lack of a foundation under State v. Council, 335 S.C. 1, 515 S.E.2d 508 (1999). The judge again overruled the objection. R. 221, ll. 1. 7 – 222, l. 18; r. 223, l. 1 – 238, l. 17; r. 241, l. 4 – 242, l. 13. Scott said the swabs he took were then sent to SLED for further DNA testing. R. 248, ll. 6-8. Scott was never qualified as an expert in crime scene processing or otherwise, and appellant was never given the hearing he requested.

### **Discussion**

In State v. White, 382 S.C. 265, 676 S.E.2d 684 (2009), the Supreme Court noted that the trial court must serve a gatekeeping function in assuring the reliability of expert testimony in both scientific evidence and non-scientific evidence cases. In State v. White, defense conceded the dog handler met the Rule 702, SCRE qualifications to testify due to his experience and training. However, the Supreme Court agreed that the trial judge failed in his gatekeeping role to vet the reliability of the testimony, thus leaving the jury to speculate about the accuracy of the testimony.

The Court noted that the familiar tenet of evidence law that a continuing challenge of evidence goes to its “weight not admissibility” was never intended to supplant the gatekeeping role of the trial court in assessing the admissibility of expert and non-expert testimony as to its reliability. Both expert and non-expert scientific evidence must satisfy Rule 702, SCRE, both in terms of expert qualifications and reliability of the subject matter. State v. White, 382 S.C. 265, 273, 676 S.E.2d 684, 688 (2009).

Here, defense counsel correctly argued he was entitled to an evidentiary hearing on Scott’s qualifications to testify that certain stains were blood, and to have the judge find the evidence was reliable before it was admitted before the jury, pursuant to State v. Council, 335 S.C. 1, 515 S.E.2d 508 (1999), and the scientific rules of evidence.

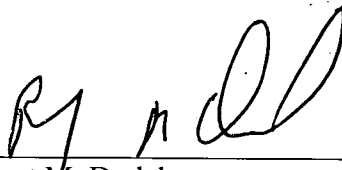
Respectfully, the judge’s pre-State v. White and State v. Council ruling that he would only hear the evidence before the jury a single time, and rule on objections when they were made in the presence of the jury was erroneous. Scott testified that the swabs he opined contained blood were forwarded to SLED for DNA analysis.

It was admitted that DNA evidence can become contaminated, and qualifications in crime scene processing and the handling of blood are important areas of gatekeeping concerns for the trial court. Further, if an unqualified Scott selectively submitted certain swabs to the SLED laboratory which he opined contained blood, it called into question the reliability of the blood evidence as a whole.

Appellant should have been granted an in camera hearing on Scott’s qualifications prior to his blood evidence being admitted before the jury as reliable scientific evidence, and where the solicitor never even attempted to qualify Scott as an expert. State v. Council, 335 S.C. 1, 515 S.E.2d 508 (1999); State v. White, 382 S.C. 265, 273, 676 S.E.2d 684, 688 (2009).

CONCLUSION

By reason of the foregoing arguments, appellant's convictions should be reversed, and this case remanded to the Dorchester County Court of General Sessions for a new trial.

A handwritten signature in black ink, appearing to read 'R. M. Dudek', written over a horizontal line.

Robert M. Dudek  
Chief Appellate Defender

ATTORNEY FOR APPELLANT

This 3rd day of January, 2018.

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, 20014, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

January 3, 2018



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