THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
DeAndrea Gist Benjamin, Circuit Court Judge

Appellate Case No. 2017-001734
Case No. 2010-CP-40-5214

Demetrius Mack, ... Respondent,

v.

Leon Lott, in his Official Capacity as
Sheriff of Richland County, ... Appellant.

INITIAL REPLY BRIEF OF APPELLANT

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I. The trial court erred in its analysis of probable cause by failing to consider the evidence supporting probable cause from the perspective of an objectively reasonable officer on the scene.

In his response brief, the Respondent Demetrius Mack concedes that the appropriate probable cause analysis is the "two-step process" articulated by the United States Supreme Court in *Ornelas v. United States*, 517 U.S. 690 (1996). However, in then applying that analysis, Mack takes the position that probable cause was lacking for his arrest simply because Circuit Court Judge DeAndrea Benjamin concluded that Deputy James Gore's description of the incident was not credible. Mack argues that Judge Benjamin determined that Gore did not see Mack's detention of McKenzie Williamson, and as a result, "[t]here is no further inquiry" and hence there was not probable cause supporting Gore's arrest of Mack. *See*, Respondent's Brief, p. 10.

That is a misapplication of the *Ornelas* test in that it fails to consider the "historical facts" that were nonetheless available to the arresting officers. The *Ornelas* test was re-affirmed in *Maryland v. Pringle*, 540 U.S. 366 (2003), where the United States Supreme Court further explained: "To determine whether an officer has probable cause to arrest an individual, *we examine the events leading up to the arrest*, and then decide whether these historical facts, viewed from the

standpoint of an objectively reasonable officer, amount to probable cause." 540 U.S. at 371. (Emphasis added). Similarly, in *State v. George*, 323 S.C. 496, 476 S.E.2d 903 (1996), the South Carolina Supreme Court explained that "[w]hether probable cause exists *depends on the totality of the circumstances surrounding the information at the officer's disposal.*" 476 S.E.2d at 911. (Emphasis added). *See also*, *Beck v. Ohio*, 379 U.S. 89, 96 (1964) ("[w]hen the constitutional validity of an arrest is challenged, it is the function of a court to determine whether *the facts available to the officers at the moment of arrest* would warrant a man of reasonable caution in the belief that an offense has been committed") (Emphasis added). Therefore, in determining the "historical facts" as part of the "two-step process" established in *Ornelas* and *Pringle*, a court must look at the "facts available to the officer."

Contrary to Mack's position, the "historical facts" are based on the totality of the information available to the officer or at his disposal and are not limited to what the officer actually perceived. Therefore, in cases where the arresting officer's testimony is disbelieved in whole or in part, that does not relieve the court of determining the "historical facts" and applying both prongs of the *Ornelas* test, which is well established as being an objective rather than subjective test. The court is still required to determine those facts that were available to the arresting officer or, put another way, the facts within the officer's knowledge. The court may determine those facts by considering the competing versions of the witnesses.

Because the probable cause test is an objective one based upon an analysis of the "historical facts," probable cause is not deemed absent simply because the court chooses to believe the arrestee instead of the arresting officer. If the arrestee's version of the facts supports a finding of probable cause, then the arrest is still lawful. In short, the court must determine what facts were reasonably available to the officer at the time of arrest, those being the "historical facts," which may be based on the arrestee's version or account of the facts. It is then those facts that must be viewed from the standpoint of an objectively reasonable police officer to determine whether those facts give rise to probable cause.

In sum, the simple fact that Judge Benjamin did not find Deputy Gore's explanation of the events to be credible does not excuse her failure to apply the second prong of the *Ornelas* test. Mack states in his brief that "[t]he trial court found the evidence supported Mack's version of events." *See*, Respondent's Brief, p. 10. Thus, if Mack's version supplies the "historical facts," Judge Benjamin was still required to make findings and conclusions on the second prong. She was required to take the "historical facts" of what occurred leading up to the arrest and to then view those facts from the perspective of an objectively reasonable officer to determine whether those facts give rise to probable cause. Judge Benjamin failed to engage in that analysis, and in so doing, committed reversible error.

II. The trial court erred in failing to rule as a matter of law that an objectively reasonable police officer in Deputy James Gore's position could have perceived and concluded that the Respondent Demetrius Mack committed an unwanted touching resulting in injuries sustained in the public roadway.

Sheriff Lott made a motion for an involuntary nonsuit at the close of Mack's case-in-chief and again at the close of the evidence as well as after remand.[1] With those motions, Sheriff Lott has explained that the existence of probable cause may be determined as a matter of law based on the undisputed evidence contained in the record including the concessions Mack made in his trial testimony, the positions Mack took at trial, and what is reflected on the dashcam video.

In his response brief, Mack argues that "the trial judge was bound to accept Mack's version of events in deciding a directed verdict" and that "[t]he testimony of Mack alone precluded the trial judge from granting a directed verdict." *See*, Respondent's Brief, p. 12. However, contrary to Mack's arguments, Sheriff Lott is relying only on Mack's version of events together with what is reflected on the dashcam video in demonstrate to this Court that probable cause existed as a matter of law.

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[1] In his response brief, Mack refers to the motions as "directed verdict" motions, and he is correct that that is how Sheriff Lott's counsel described the motions at trial. (Tr. 251, 302). However, the motions should be properly deemed to be motions for involuntary nonsuit. *See*, *Gordon v. Lancaster*, 419 S.C. 48, 795 S.E.2d 857, 861, n.3 (Ct. App. 2016). In *Gordon*, this Court determined under the same circumstances as present in the care at bar that "[appellant's] incorrect terminology does not warrant a refusal on the part of this court to address the merits of his motion." *Id.*

As the parties agree, the critical fact in this case is Williamson's location when Mack admittedly "grabbed" and "pulled" Williamson from beneath a parked white vehicle at which point Mack immediately restrained Williamson by handcuffing him. Deputy Stacy Parish was responding to a call for backup at a Weir Avenue location past Club Essence where other deputies were working a narcotics arrest. With her dashcam video activated, Deputy Parish turned from Two Notch Road onto Weir Avenue and passed the location of Williamson, which is depicted in the video. (R. 227, 347). The video reflects that Williamson was supine in front of a white vehicle with his legs located in the roadway extending beyond the vehicle itself. At this point in time, Williamson had already been pulled from underneath the vehicle and was handcuffed. (R. 228, 347). One of Mack's fellow security guards can be seen attempting to stop Deputy Parish as she drove by. (R. 145, 187, 192, 347).

The video evidence is important because it shows the position of the vehicles on the roadway including the position of the white vehicle from underneath which Williamson was "grabbed" and pulled by Mack. The video further shows that Williamson was at least partially in the roadway when he was detained by Mack and handcuffed. Mack complains of the "video's lack of clarity," but the video evidence is in the appellate record, and the Court may itself judge the clarity of the video and the significance of the evidence. (R. 347).

As indicated, the video evidence from Deputy Parish's dashboard camera reflects that Williamson is in the roadway after he was detained by Mack. His feet clearly extend past the row of vehicles. In addition, the video shows the position of the vehicles lining Weir Avenue, including the white vehicle at issue. The daytime photographs of that location on Weir Avenue, which are in evidence, may also be used as reference points when examining the video on this issue. (R. 344, 348). Weir Avenue is a two-lane road; yet the parked vehicles lining the street reduced the street to one lane – as evidenced by the limited space that Deputy Parish had to maneuver her vehicle. That alone demonstrates that the vehicles, including the white vehicle, were parked at least partially in the roadway. (R. 347, 348).

In addition, Mack took the position at trial that the white vehicle was "half on the roadway" which is demonstrated by a series of questions posed by Mack's counsel. In his opening brief, Sheriff Lott pointed out the citations to the trial transcript where Mack took that position. (Tr. 206, 209, 233). Mack does not refute that in his response brief. But he now claims that the vehicle is "primarily parked in grass." *See*, Respondent's Brief, p. 13. Nonetheless, the Court is referred to an additional question from Mack's counsel in his re-direct examination of Deputy Parrish, where he asks: "Would you agree with me that that video depicts it half on the grass and a half on the side of the road?" (Tr. 227). Moreover, in contrast to his current claim that the dashcam video is unreliable,

Mack's counsel also asked Deputy Parrish as follows: "But you would agree with me the video would depict how it was?" (Tr. 228). Thus, Mack's current position is disingenuous when compared to his position at trial.

Finally, Mack's argument regarding the evidence of "road rash" deserves further comment. The Sheriff has explained that the injuries to Williamson as observed by the officers, which appeared to be consistent with "road rash," provided further information that would allow an objectively reasonable officer on the scene to conclude that the injuries were sustained in the public roadway which was outside of Mack's jurisdiction rather than on the grassy side of the road which was within his jurisdiction. In response, Mack writes that the "road rash" "is also entirely consistent with Mack's observation of Williamson *sliding on the grass* under the car." *See*, Respondent's Brief, p. 13. (Emphasis added). This should be compared with Mack's brief in the earlier appeal where he wrote that "road rash" "is also entirely consistent with Mack's observation of Williamson *slipping* under the car." *See*, Respondent's Brief in Prior Appeal, p. 13. (Emphasis added). The italicized language notes the significant change in the verbiage. This change in position by Mack should not be permitted and frankly makes no sense.[2] "Road rash" is not evidence of slipping on grass – it is evidence of coming into contact with the pavement of the roadway. At any rate, as the Sheriff maintains, the

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[2] In *Gurganious v. City of* Beaufort, 317 S.C. 481, 454 S.E.2d 912 (Ct. App. 1995), this Court held it to be "well settled that one cannot present and try his case on one theory and then change his theory on appeal." 454 S.E.2d at 916.

existence of the "road rash" – which is not denied by Mack -- allows an objectively reasonable officer to have concluded that Williamson, when he was "grabbed" and "pulled" by Mack from beneath the white car, had been located on the pavement of the public roadway.

In sum, the video provides indisputable evidence that the vehicles were parked partially in the roadway, including the white vehicle from underneath which Mack claims to have "grabbed" and pulled Williamson. (Tr. 221). That video also provides indisputable evidence that Williamson was handcuffed and detained for police while he was lying partially in the roadway. (Tr. 222). This is true given Mack's testimony that Williamson was not moved after his arrest. (Tr. 139). In short, as a matter of law, these facts would lead an objectively reasonable officer on the scene to believe Mack's actions occurred, at least in part, in the public roadway, and as a result, outside of Mack's jurisdiction. Stated differently, in light of the "historical facts," an objectively reasonable police officer in Deputy Gore's position could have perceived and concluded that Mack committed an unwanted touching resulting in injuries sustained in the public roadway. Thus, based on the undisputed evidence contained in the record and concessions Mack made in his sworn testimony, there can be no question that probable cause existed for Mack's arrest. As a result, judgment in Mack's favor should be reversed, and the Court should conclude that Mack failed to prove his cause of action for false arrest/imprisonment.

CONCLUSION

Based on the foregoing discussion and analysis, the Appellant Leon Lott respectfully renews his request that this Court reverse the orders of Circuit Court Judge DeAndrea G. Benjamin and remand with instructions that judgment be entered in favor of Sheriff Lott.

Respectfully submitted,

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February 16, 2018

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CERTIFICATE OF SERVICE

The undersigned employee of Lindemann, Davis & Hughes, P.A., counsel for the Appellant, does hereby certify that service of the **Initial Reply Brief of Appellant** and **Appellant's Designation of Matter to be Included in the Record on Appeal** in the above-captioned matter was made upon all counsel of record by placing copies in the United States Mail, first class postage prepaid, at the below listed addresses clearly indicated on said envelopes this the 16th day of February 2018:

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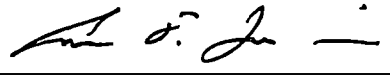

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February 16, 2018

The Honorable Jenny Abbott Kitchings
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RE: Demetrius Mack v. Leon Lott, in his Official Capacity as Sheriff of Richland County
Appellate Case Number: 2017-001734
Civil Action Number: 2010-CP-40-5214
Our File Number: 314.8515

Dear Ms. Kitchings:

Please find enclosed for filing the originals and one copy each of the **Initial Reply Brief of Appellant** and **Appellant's Designation of Matter to be Included in the Record on Appeal** in the above referenced matter. Please file the originals and return a clocked-in copy of each document to me in the enclosed envelope.

By copy of this letter, I am serving copies on all counsel of record. Thank you for your assistance in this matter.

Sincerely,

LINDEMANN, DAVIS & HUGHES, P.A.

Andrew F. Lindemann

AFL/
Enclosures

cc: Neal M. Lourie, Esquire *(w/ Enclosures)*
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