STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to the Court of Appeals
Appeal from Greenville County
Brian M. Gibbons, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ROBERT DAVIS SMITH,

PETITIONER.

APPELLATE CASE NO. 2016-000576

APPENDIX

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INDEX

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Robert Davis Smith, Jr., Appellant.

Appellate Case No. 2016-000576

Appeal From Greenville County
Brian M. Gibbons, Circuit Court Judge

Unpublished Opinion No. 2018-UP-466
Submitted November 1, 2018 – Filed December 19, 2018

AFFIRMED

Appellate Defender Susan Barber Hackett, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson and Assistant Attorney General Mark Reynolds Farthing, both of Columbia; and Solicitor William Walter Wilkins, III, of Greenville, for Respondent.

PER CURIAM: Affirmed pursuant to Rule 220(b), SCACR, and the following authorities: *State v. Baccus*, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006) ("In criminal cases, the appellate court sits to review errors of law only."); *id.* ("The

trial [court]'s factual findings on whether evidence should be suppressed due to a Fourth Amendment violation are reviewed for clear error."); *State v. Wright*, 391 S.C. 436, 442, 706 S.E.2d 324, 326 (2011) ("When reviewing a Fourth Amendment search and seizure case, an appellate court must affirm if there is any evidence to support the ruling."); *Baccus*, 367 S.C. at 49, 625 S.E.2d at 220 ("Probable cause for a warrantless arrest exists when the circumstances within the arresting officer's knowledge are sufficient to lead a reasonable person to believe that a crime has been committed by the person being arrested."); *id.* ("Whether probable cause exists depends upon the totality of the circumstances surrounding the information at the officer's disposal.").

AFFIRMED.[1]

KONDUROS, MCDONALD, and HILL, JJ., concur.

[1] We decide this case without oral argument pursuant to Rule 215, SCACR.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

THE STATE, RESPONDENT,

V.

ROBERT DAVIS SMITH, APPELLANT

APPELLATE CASE NO. 2016-000576

Appeal from Greenville County

Brian M. Gibbons, Circuit Court Judge

Opinion No. 2018-UP-466

PETITION FOR REHEARING

On December 19, 2018, this Court affirmed Appellant's conviction and sentence in an unpublished per curiam opinion. State v. Smith, 2018-UP-466 (S.C. Ct. App. filed Dec. 19, 2018). Pursuant to Rule 221(a), SCACR, Appellant now files this petition for rehearing to request this Court rehear the matter based upon the significant points overlooked and misapprehended by this Court in arriving at its conclusion.

This Court cited State v. Baccus, 367 S.C. 41, 49, 625 S.E.2d 216, 220 (2006) for the propositions that "[p]robable cause for a warrantless arrest exists when the circumstances within the arresting officer's knowledge are sufficient to lead a reasonable person to believe that a crime

has been committed by the person being arrested" and that "[w]hether probable cause exists depends upon the totality of the circumstances surrounding the information at the officer's disposal." Additionally, this Court cited State v. Wright, 391 S.C. 436, 442, 706 S.E.2d 324, 326 (2011), for the proposition that when examining a Fourth Amendment search and seizure case, "an appellate court must affirm if there is any evidence to support the ruling." Thus, it appears this Court determined the officer had probable cause to arrest Appellant based upon information the officer at the time of the warrantless arrest. Appellant respectfully requests this Court rehear this matter to consider the evidence presented as the state wholly failed to show the officer had probable cause to effectuate the warrantless arrest.

In the briefs, the state and Appellant agreed that Appellant was arrested by the police without a warrant. The only question for this Court was whether the officer had probable cause to arrest Appellant. "'Probable cause turns not on the individual's actual guilt or innocence, but on whether facts within the officer's knowledge would lead a reasonable person to believe the individual arrested was guilty of a crime." Jackson v. City of Abbeville, 366 S.C. 662, 666, 623 S.E.2d 656, 658 (Ct. App. 2005). See also Wortman v. City of Spartanburg, 310 S.C. 1, 4, 425 S.E.2d 18, 20 (1992); State v. Blassingame, 338 S.C. 240, 250, 525 S.E.2d 535, 540 (Ct. App. 1999). "'Probable cause' is defined as a good faith belief that a person is guilty of a crime when this belief rests upon such grounds as would induce an ordinarily prudent and cautious man, under the circumstances, to believe likewise." Jones v. City of Columbia, 301 S.C. 62, 65, 389 S.E.2d 662, 663 (1990). Probable cause for a warrantless arrest exists when the circumstances within the arresting officer's knowledge are sufficient to lead a reasonable person to believe that a crime has been committed by the person being arrested. State v. Manning, 400 S.C. 257, 267, 734 S.E.2d 314, 319 (Ct. App. 2012). In other words, "[p]robable cause is determined as of the time of

the arrest, based on facts and circumstances – objectively measured – known to the arresting officer." Jackson, 366 S.C. at 667, 623 S.E.2d at 659. "In assessing whether an officer has probable cause, the totality of the circumstances surrounding the information at the officer's disposal must be considered." State v. Moultrie, 316 S.C. 547, 552, 451 S.E.2d 34, 37 (Ct. App. 1994).

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

Thus, the only information Conroy had at the time of the arrest was that a phone, which Appellant claimed was his, had been found in a motel room, where a woman alleged she had been assaulted. When Conroy encountered Appellant on the street, Conroy possessed no information that would lead a reasonable person to conclude that Appellant had committed a crime. As Conroy made clear during the interrogation, he was aware of the motel's reputation. State's Exhibit #9 at (2) 19:31. One witness described the motel as "low rate," where drugs and prostitution were

prevalent. R. 103, ll. 16-25. Finding a phone in a motel room, especially one where crime was rampant, would not lead a reasonable person to conclude the owner of that phone had committed a crime. Conroy's arrest of Appellant was illegal because it was not based on probable cause.

To support its argument that Conroy had probable cause to arrest Appellant, the state asserted that prior to arresting Appellant, Conroy was aware (1) the complaining witness was "suffering from bruising to her neck and a laceration to her vagina," (2) the complaining witness "had reported she was attacked and sexually assaulted by a black male wearing a black three-button shirt with a white shirt underneath and jeans," (3) that Appellant "fully matched the physical description of" the complaining witness's assailant "when the detective encountered him," and (4) Conroy's encounter with Appellant was "in close proximity to the scene of the incident just one day after the sexual assault." FBOR at 18. Almost as an afterthought, the state noted "Appellant claimed ownership of a cell phone located on the floor" of the complaining witness's "motel room subsequent to the sexual assault and the cell phone did not belong to" the complaining witness "or any of her family members." FBOR at 19. According to the state, "[u]nder those circumstances, it was entirely reasonable for Detective Conroy to believe a sexual assault had been committed and Appellant was the person who committed it, which meant the arrest of Appellant was legally and constitutionally proper." FBOR at 19.

The record is devoid of any evidence that Conroy was aware the complaining witness was "suffering from bruising to her neck and a laceration to her vagina," as claimed by the state. During the pre-trial hearing, Conroy did not mention even seeing the complaining witness prior to arresting Appellant. On this point, Conroy's testimony during the trial was unclear. He claimed he "probably" arrived at the scene within "thirty minutes of the incident being reported." R. 144, ll. 15-22. He explained that when he arrived "uniformed patrol [was] already taking

statements from witnesses *or* victims." R. 145, ll. 4-6 (emphasis added). Based on the question and answer, it was difficult to determine whether that was what happened in this particular case or if that is his general practice. At any rate, Conroy never mentioned seeing or speaking to the complaining witness on July 17, 2013. Therefore, he would have no way of knowing whether she was suffering from bruising to her neck, and certainly would have no way of knowing if she had a laceration to her vagina prior to arresting Appellant.

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

The only place in the record where a description appears was in the trial testimony. At trial, Conroy claimed he had a description, presumably of the suspect. R. 151, ll. 7-11. Initially, he failed to indicate from whom this alleged description derived. R. 151, ll. 7-11. He said simply, "I had a black male. I had clothing description; black Polo-type shirt with three buttons. A white T-shirt and a book bag and facial hair." R. 151, ll. 7-11. The information from the book bag was not from the complaining witness, but was from "witnesses at the scene, the Regal Inn." R. 151, ll. 12-18. Later, Conroy claimed Appellant was "wearing the same exact thing" the complaining witness "described" when he saw Appellant the following day. R. 152, ll. 17-18. He was wearing a black Polo-type shirt with three buttons and a white t-shirt. There was no indication he had the book bag in a place where Conroy could see it. Rather, Conroy stated the book bag was "inside the business at Labor Smart." R. 152, l. 23 – R. 153, l. 1. Thus, to the extent the trial testimony may be used to analyze this issue, Conroy claimed Appellant "matched" the clothing description because he was wearing a black shirt with a white t-shirt. There was no mention of facial hair or other distinguishing features. The complaining witness

did not even mention an emblem on the black shirt. R. 180, ll. 2-20. In Conroy's view, and the state's view, the two shirts were enough to equal a "match." The complaining witness's description was too vague and generic to provide law enforcement with probable cause to believe anyone matching that description could be the assailant. To the extent there were any specifics – facial hair – Conroy made no mention of whether Appellant also had facial hair during their encounter. It appeared the only "match" was the black Polo-type shirt and white t-shirt, hardly rare clothing items for men in Greenville in the summer.

Concerning geographic proximity, the information revealed during the pre-trial hearing was that Conroy met Appellant at "1014 Wade Hampton Boulevard" "at Labor Place." R. 6, ll. 13-17; R. 15, ll. 7-10. There was no testimony presented regarding the location of the alleged assault during the pre-trial hearing. The only information the judge would have had at the time concerning the location of the alleged assault was the indictment, which made reference to the "Regal Inn, 536 Wade Hampton Blvd. #207." R. 272. Importantly, this address was associated with the burglary count only. There were no other addresses provided for the other charged offenses. The judge would have to infer that the other offenses listed in the indictment occurred at the same address in order to make the logical leap requested by the state in its brief.

The trial testimony indicated the alleged assault occurred at 536 Wade Hampton Boulevard (Regal Inn) and the encounter between Conroy and Appellant occurred at 1014 Wade Hampton Boulevard. Jim Sawyer, an employee of Labor Smart, described Regal Inn motel as "close" to his company. R. 108, ll. 7-11. He provided no greater specifics. To the extent this Court may use the trial testimony to analyze this issue, there were no specifics provided regarding the proximity between the two locations. While they are on the same street in

Greenville and may be "close" as Sawyer claimed, the term "close" is relative and subject to interpretation.

Regarding temporal proximity, the pretrial testimony and evidence revealed only when Conroy spoke to Appellant. This occurred on June 18, 2013, according to Conroy. R. 6, l. 12. The testimony did not reveal when the alleged crimes occurred; however, the indictments indicted the crimes were alleged to have occurred on June 17, 2013. R. 272. No specifics were timing were provided. The advisement of rights was dated "6-18-13" and indicated a time of "09:36 am." R. *(State's Exhibit #12). Thus, the judge would have known the police encounter occurred the day after the alleged offense, but have little information for more specific temporal analysis.

During the trial, Frances Moore with the 911 center testified the 911 call from the complaining witness was made at 11:49 a.m. on June 17. R. 44, ll. 10-17. Conroy never said when the caller called the cell phone or what time he arranged to meet the caller. R. 150, ll. 13-19. He said only that this occurred "the next morning." R. 150, ll. 20-21. Conroy recalled sitting outside Labor Smart for five minutes before deciding to enter. R. 152, ll. 3-7. On his way to Labor Smart, Appellant approached him outside. R. 152, ll. 6-7. Using the evidence available during the trial, to the extent this Court should use such evidence in evaluating the judge's ruling, Conroy's interaction with Appellant occurred just shy of twenty-four hours after the alleged crimes.

During the trial, the complaining witness revealed that the police arrived after she called 911. R. 56, l. 24 – R. 57, l. 1. When the police arrived, the officer asked her "what happened," asked if she were okay, called her "a mess and started to look around the room for anything out of the order or anything like that." R. 57, ll. 7-10. Additionally, the officer took pictures. R. 57,

ll. 11-12. The complaining witness spoke to Mullinax, the uniformed officer who arrived on the scene. R. 68, ll. 5-13. The complaining witness recalled that one of the officers "found the phone that was by the bed that [her] daughter was on." R. 57, ll. 13-17. When testifying before the jury, the complaining witness said she did not recognize the phone, it was not hers, and it did not belong to anyone in the room. R. 58, ll. 14-18. As soon as EMS arrived, the complaining witness was placed in the back of the ambulance and sent to the hospital. R. 59, ll. 1-5; R. 82, ll. 15-22. Days later, on July 19, 2013, the complaining witness met with Conroy to review a photographic line-up. R. 60, l. 20 – R. 60, l. 5. This is the first instance of the complaining witness ever speaking to Conroy.

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

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

The woman told the police her assailant "was a black man with a moustache, about six feet or six feet one inch in height, weighing about 165 or 170 pounds," wearing "blue trousers and a light blue shirt," driving a blue Plymouth Roadrunner with a white interior and a gear-shift stick on the floor." Id. She also saw a gas can with the word "Fry" printed on it, and a pantyhose wrapper with the word "Pennybaker." Id. Eight hours later, an officer was conducting surveillance in another case when he saw a blue Plymouth drive by at an excessive rate of speed. The office chased the car, travelling up to 110 miles per hour. Id. Eventually, the officer stopped the car. Id. The officer saw it had white interior and a gear-shift stick on the floor. Id. at 243-244, 209 S.E.2d at 891. The driver had a moustache as well. Id. at 244, 209 S.E.2d at 891. The police saw the can with "Fry" written on it and a pantyhose wrapper. Id. The Court held the officers had sufficient probable cause to arrest Bell based upon the totality of the circumstances. Id. at 244, 209 S.E.2d at 892.

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

Based upon the foregoing significant points overlooked and misapprehended by this Court, Appellant respectfully requests this Court rehear the matter pursuant to Rule 221(a), SCACR.

Respectfully Submitted,

Susan B. Hackett

SUSAN B. HACKETT
Appellate Defender

This 3rd day of January, 2019.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenville County

Brian M. Gibbons, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ROBERT DAVIS SMITH,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a copy of the Petition for Rehearing in the above-entitled case has been served upon Mark Farthing, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Robert Davis Smith, #285136, at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 3rd day of January, 2019.

Susan B. Hackett
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO BEFORE
ME this 3rd day of January, 2019.

(L.S)
Notary Public for South Carolina
My Commission Expires: September 27, 2024

The South Carolina Court of Appeals

The State, Respondent,

v.

Robert Davis Smith, Jr., Appellant.

Appellate Case No. 2016-000576

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

_____ J.

_____ J.

_____ J.

Columbia, South Carolina

cc: Alan McCrory Wilson, Esquire
Susan Barber Hackett, Esquire
Mark Reynolds Farthing, Esquire
William Walter Wilkins, III, Esquire

FILED
January 17, 2019