STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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

Opinion No. 2018-UP-466 (S.C. Ct. App. filed Dec. 19, 2018)

2013-GS-23-07305

THE STATE,

RESPONDENT,

V.

ROBERT DAVIS SMITH,

PETITIONER

APPELLATE CASE NO. 2016-000576

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

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CERTIFICATE OF COUNSEL

Counsel for petitioner certifies that the petition for rehearing was made and finally ruled on by the Court of Appeals on January 17, 2019. App. 14.

QUESTION PRESENTED

Did the trial judge err in admitting Petitioner's statements to police and a photographic line-up identification where law enforcement violated Petitioner's rights pursuant to the Fourth and Fourteenth Amendments to the United States Constitution by arresting Petitioner without probable cause?

STATEMENT OF THE CASE

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

Pre-trial hearing & ruling

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

Conroy explained he believed "[t]here was enough probable cause to ... effect an arrest at that point." R. 17, ll. 17-20. However, he did not obtain an arrest warrant. R. 17, ll. 121-22. According to Conroy he was not arresting Petitioner; rather, he was taking Petitioner "into investigative detention to speak with him." R. 18, ll. 1-2. Although Conroy believed he had probable cause to arrest Petitioner at that point, he "wanted to interview him prior to getting that arrest warrant." R. 18, ll. 8-11. Conroy persisted that he thought "the elements of the crime would have enabled [him] to make an arrest at that point," but he asserted he "did not have time to go get a search [*sic*] warrant." R. 19, ll. 2-4. Conroy noted that he was familiar with the procedure to obtain an arrest warrant and of the requirement to obtain such a warrant upon sufficient information to support an arrest. R. 19, ll. 5-8. Despite earlier protestations, Conroy appeared to concede the illegality of the seizure during cross-examination. R. 19, ll. 9-11.

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

Conroy then pulled out a form with the advisement of rights written on it. Conroy gathered some personal information from Petitioner, which he wrote onto the form. R. 7, ll. 6-10; R. 269. He then asked Petitioner to read the first line of the form to confirm he could read. R. 7, ll. 10-12. Conroy asked Petitioner if he wanted Conroy to read the rest of the form to him or if he wanted to read the form without Conway's assistance. R. 7, ll. 11-14. According to

Conroy, Petitioner elected to read the form to himself. R. 7, ll. 14-16; R. 19, ll. 19-21. During the pre-trial hearing, Conroy knew the form "was a waiver of his rights," but he did not "know exactly verbatim what it said." R. 7, ll. 17-19. Thereafter, Conroy interrogated Petitioner for approximately three hours, which was captured on video. R. 10, ll. 7-9; R. 11, ll. 19-22; State's Exhibit #9.[1] In addition, Conroy obtained a written statement from Petitioner, which Conroy typed. R. 13, ll. 8-9; R. 14, ll. 3-5 R. 267.

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

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

The solicitor argued Petitioner was not illegally seized because "at no time did [Petitioner] say he would not go with them, put up any kind of [f]ight or struggle," which the solicitor admitted was not required. R. 22, ll. 13-16. Nevertheless, the solicitor continued with this argument – "through the entire exchange ... he expressed no desire to not go with them, to not be a part of that investigation, and to cease it." R. 22, ll. 16-19; R. 24, ll. 12-19 (the solicitor reiterating that Petitioner "did not ask to stop the conversation" and that during the interrogation Petitioner never said he did not want to speak to police or wanted a lawyer). According to the solicitor it was "general practice to secure the situation and for officer safety they had to have him handcuffed." R. 22, ll. 20-23. The solicitor argued that "investigative detention is firm in case law, it is allowed, it is a practice that is used by law enforcement." R. 24, ll. 10-12.

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

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

R. 25, ll. 16-23.

Trial

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

Shortly thereafter, the man re-appeared, but this time in her room. R. 51, ll. 1-5. Also, she claimed the man had a box cutter in his left hand. R. 51, ll. 6-7; R. 71, ll. 14-17. According to the complaining witness, the man told her "to be quiet," closed the door, put the box cutter closer to her, and told her "to get on the bed." R. 51, ll. 8-11.[2] She was "pushed onto the bed" and began fighting the man "from about the middle of the bed" until the pair fell onto the floor. R. 51, ll. 17-21. She was unable to say if he had the box cutter when the two fell to the floor. R. 74, ll. 9-14; R. 75, ll. 3-12. However, she claimed she continued to fight until she was choked to the point of barely able to breathe. R. 51, ll. 22-23. During the fight, she was "kicking" waving her arms, and "probably" yelling. R. 73, ll. 7-22.

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

Conroy told the jurors that police found a cell phone located in between the two beds in the hotel room that did not belong to the complaining witness or her fiancé. R. 148, ll. 8-12. The forensics team swabbed the phone for DNA. R. 149, ll. 12-14. Then, the phone was turned over to Conroy. R. 149, ll. 14-15. Ultimately, the police recovered no fingerprints or DNA from

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

the phone. R. 149, ll. 16-18. Conroy gave the phone to the police analyst, but the analyst could not "break the password and download it from the data." R. 149, l. 19 – R. 150, l. 3. In light of this setback, Conroy used the phone to call 911 "to get the phone number." R. 150, ll. 4-6. He then determined the phone service was provided by Verizon. R. 150, l. 8. Conroy prepared a search warrant for Verizon "and emailed [it] to them to find out if the phone had a subscriber." R. 150, ll. 9-10. He was unable to find out the subscriber information, however. R. 150, ll. 11-12.

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

Conroy agreed with defense counsel that a police officer must "have a purpose to detain somebody." R. 169, ll. 18-23. He agreed he would need "some sort of legal authority to physically detain somebody." R. 170, ll. 18-20. He agreed that an individual does not have to cooperate with police questioning, including giving an officer the individual's name. R. 169, l.

24 – R. 170, l. 5. Conroy agreed that a person has the right to refuse to go to the police station with an officer. R. 170, ll. 6-8. However, Conroy stated he did not "believe" an officer was required to tell a person why the person was being detained. R. 170, ll. 9-11. Conroy explained that the police can arrest someone without a warrant when the police "actually witnessed" the commission of a crime. R. 171, ll. 2-7. While Conroy agreed that if the police do not witness a crime, then the police must obtain an arrest warrant, he maintained that the police may detain someone if the person is "a danger to society." R. 171, ll. 8-10. This was called "investigative detention" and was temporary in nature. R. 171, ll. 11-16.

Defense counsel continued to prod:

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

R. 171, l. 23 – R. 172, l. 12. Conroy persisted that he did not place Petitioner under arrest during their encounter on the street; rather, he placed Petitioner in "[i]nvestigative detention." R. 175, ll. 18-20. Conroy claimed that when he placed Petitioner in handcuffs, Petitioner asked "what it was for." R. 176, ll. 8-13. Conroy "advised" he wanted to speak with Petitioner "about something that occurred yesterday." R. 176, ll. 13-16. However, Conroy "never told [Petitioner]

until almost an hour or so into [the interrogation] what it was [Conroy} suspected him of doing." R. 177, l. 25 – R. 178, l. 2; R. 179, ll. 17-23.

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

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

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

The following day, the jury reached its verdicts, finding Petitioner guilty of criminal sexual conduct, and not guilty of burglary in the first degree and possession of a weapon during

the commission of a violent crime. R. 258; R. 259 10-21. The judge sentenced Petitioner to twenty-three years' imprisonment. R. 266, ll. 8-10; R. 275.

Appeal

On March 14, 2016, Petitioner served his notice of appeal. On December 19, 2018, the Court of Appeals affirmed Petitioner's conviction and sentence in an unpublished per curiam opinion. State v. Smith, 2018-UP-466 (S.C. Ct. App. filed Dec. 19, 2018); App. 1-2. Based upon the cases cited and the quotations used, it appeared the Court of Appeals determined the officer had probable cause to arrest Petitioner based upon information the officer had at the time of the warrantless arrest. App. 1-2. Petitioner requested rehearing and the Court of Appeals denied the request. App. 3-14. This petition for writ of certiorari follows.

ARGUMENT

The trial judge erred in admitting Petitioner's statements to police and a photographic line-up identification where law enforcement violated Petitioner's rights pursuant to the Fourth and Fourteenth Amendments to the United States Constitution by arresting Petitioner without probable cause.

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

Arrest

"A person has been 'seized' within the meaning of the Fourth Amendment 'whenever a police officer accosts [the] individual and restrains his freedom to walk away.'" Rodriquez, 323 S.C. at 491, 476 S.E.2d at 165 (quoting Terry, 392 U.S. at 16). "Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred." Terry, 392 U.S. at 19 n. 16; see also United States v. Mendenhall, 446 U.S. 544, 553 (1980).

"In determining whether an encounter between a law enforcement official and a citizen constitutes a seizure, and thereby implicates Fourth Amendment protection, the correct inquiry is whether, considering all of the circumstances surrounding the encounter, a reasonable person would have believed he was not free to leave." Rodriquez, 323 S.C. at 491, 476 S.E.2d at 165; see also State v. Woodruff, 344 S.C. 537, 545, 544 S.E.2d 290, 294 (Ct. App. 2001).

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

United States v. Sullivan, 138 F.3d 126, 132 (4th Cir. 1998) (quoting Florida v. Bostick, 501 U.S. 429, 438 (1991)). "To constitute an arrest, there must be an actual or constructive seizure or detention of the person, performed with the intention to effect an arrest and so understood by the person detained." State v. Williams, 237 S.C. 252, 257, 116 S.E.2d 858, 860 (1960) (internal citation omitted). "It is not necessary that there be an application of actual force, or manual touching of the body, or physical restraint which may be visible to the eye, or a formal declaration of arrest; it is sufficient if the person arrested understands that he is in the power of the one arresting and submits in consequence." Id.

In Dunaway v. New York, 442 U.S. 200, 212 (1979), the United States Supreme Court contrasted an investigative detention with "a traditional arrest."[3] The Court described the detention of Dunaway as "indistinguishable from a traditional arrest" where he was "not questioned briefly where he was found," but "was taken from a neighbor's home to a police car, transported to a police station, and placed in an interrogation room." Id. Dunaway "was never informed that he was 'free to go.'" Id. Although Dunaway was not physically restrained, the

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

evidence in the record established that he would have been "if he had refused to accompany the officers or had tried to escape their custody." Id. According to the Court,

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

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

"A person has been 'seized' within the meaning of the Fourth Amendment 'whenever a police officer accosts [the] individual and restrains his freedom to walk away.'" Rodriquez, 323 S.C. at 491, 476 S.E.2d at 165 (quoting Terry, 392 U.S. at 16). "Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred." Terry, 392 U.S. at 19 n. 16; see also United States v. Mendenhall, 446 U.S. 544, 553 (1980).

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

The moment Conroy encountered Petitioner on the street, placed him in handcuffs, and transported him to the police department, Conroy illegally seized Petitioner. In fact, on appeal, the state changed its position from the trial and conceded that "Petitioner was seized and arrested for constitutional purposes" when "Conroy took Petitioner into custody shortly after encountering him, placed him in handcuffs, transported him to the police department in a police vehicle, and interviewed him for several hours." FBOR at 17. Additionally, the state conceded that "[b]ecause Petitioner was constitutionally seized in a manner constituting something more than a brief investigative detention, it was necessary for Detective Conroy to possess a probable cause basis to believe Petitioner had committed or was committing a crime in order to take the actions he did." FBOR at 18. Thus, the issue in contention is whether the officer had probable cause to arrest Petitioner.

Probable cause

Probable cause for a warrantless arrest exists when the circumstances within the arresting officer's knowledge are sufficient to lead a reasonable person to believe that a crime has been committed by the person being arrested. State v. Manning, 400 S.C. 257, 267, 734 S.E.2d 314, 319 (Ct. App. 2012). "'Probable cause turns not on the individual's actual guilt or innocence, but on whether facts within the officer's knowledge would lead a reasonable person to believe

the individual arrested was guilty of a crime." Id. (quoting Jackson v. City of Abbeville, 366 S.C. 662, 666, 623 S.E.2d 656, 658 (Ct. App. 2005)). "In assessing whether an officer has probable cause, the totality of the circumstances surrounding the information at the officer's disposal must be considered." State v. Moultrie, 316 S.C. 547, 552, 451 S.E.2d 34, 37 (Ct. App. 1994). Probable cause is a good faith belief that an individual is guilty of a crime. The good faith belief must rest upon such grounds as would induce an ordinarily prudent and cautious person, under the circumstances, to believe likewise. Wortman v. City of Spartanburg, 310 S.C. 1, 4, 425 S.E.2d 18, 20 (1992); State v. Blassingame, 338 S.C. 240, 250, 525 S.E.2d 535, 540 (Ct. App. 1999).

The only information Conroy had at the time of Petitioner's illegal arrest was that a phone, which Petitioner claimed was his, had been found in a motel room, where a woman alleged she had been assaulted. When Conroy encountered Petitioner on the street, Conroy possessed no information that would lead a reasonable person to conclude that Petitioner 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 Petitioner was illegal because it was not based on probable cause.

To support its argument that Conroy had probable cause to arrest Petitioner, the state asserted that prior to arresting Petitioner, 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 Petitioner "fully matched the physical description of" the complaining witness's assailant "when the detective encountered him," and (4) Conroy's encounter with Petitioner 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 "Petitioner 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 Petitioner was the person who committed it, which meant the arrest of Petitioner 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 Petitioner. 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 Petitioner.

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 Petitioner allegedly matched such a description.[4]

Concerning geographic proximity, the information revealed during the pre-trial hearing was that Conroy met Petitioner 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.

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[4] 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 Petitioner was "wearing the same exact thing" the complaining witness "described" when he saw Petitioner 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 Petitioner "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 Petitioner 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.

Regarding temporal proximity, the pretrial testimony and evidence revealed only when Conroy spoke to Petitioner. 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. 269. 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.[5]

According to the evidence presented during the pretrial hearing, the *only* information Conroy had at the time of Petitioner's arrest was that a phone, which Petitioner 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, 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 Petitioner 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.

[5] 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.

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 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 arrive 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 as well as 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 Petitioner on the street and placed him under arrest, Conroy had no information that would lead a reasonable person to conclude that Petitioner 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 Petitioner had committed the crime of assault. Therefore, the judge should have determined the arrest was illegal.

Effect of illegal arrest

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

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

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

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

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

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

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

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

CONCLUSION

Petitioner respectfully requests this Court grant the petition for writ of certiorari and order full briefing on the issue presented.

Respectfully Submitted,

Susan B. Hackett
Appellate Defender

ATTORNEY FOR PETITIONER

This 4th day of February, 2019.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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

Opinion No. 2018-UP-466 (S.C. Ct. App. filed Dec. 19, 2018)
2013-GS-23-07305

THE STATE,

RESPONDENT,

V.

ROBERT DAVIS SMITH,

PETITIONER

CERTIFICATE OF SERVICE

I certify that a copy of the Petition for Writ of Certiorari to the Court of Appeals and a copy of the Appendix in this case has been served on 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 30th day of January, 2019.

Susan B. Hackett
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO BEFORE
ME this 4th day of February, 2019.

Courtney Powers (L.S)
Notary Public for South Carolina
My Commission Expires: May 2, 2027.