THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

APPEAL FROM CHARLESTON COUNTY
In the Court of General Sessions

Thomas L. Hughston, Jr., Circuit Court Judge

Appellate Case No. 2018-000561
Lower Court Case No. 2016-GS-10-02883

The State .....Respondent,

v.

General T. Little.....Appellant.

INITIAL REPLY BRIEF OF APPELLANT

Vordman Carlisle Traywick, III
SC Bar No. 102123
ROBINSON GRAY STEPP & LAFFITTE, LLC
1310 Gadsden Street
Post Office Box 11449
Columbia, South Carolina 29211
(803) 929-1400
ltraywick@robinsongray.com

Robert M. Dudek
Chief Appellate Defender
SC Bar No. 1767
COMMISSION ON INDIGENT DEFENSE
Post Office Box 11589
Columbia, South Carolina 29211
(803) 734-1330
rdudek@sccid.sc.gov

Attorneys for Appellant General T. Little

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ARGUMENT

Appellant General T. Little (Dr. Little) writes this Reply only to clarify a few points raised by the State in its brief. For the reasons set forth below, as well as those raised in Dr. Little's Brief of Appellant, the Court should reverse and remand for a new trial because (1) no exigent circumstances justified the State's illegal search of Dr. Little's vehicle parked within the curtilage of his home, and all blood evidence obtained following the illegal search should have been suppressed as fruit of the poisonous tree; (2) the State's improper reference during closing argument to a ring that the circuit court suppressed prior to trial prejudiced Dr. Little; and (3) the testimony of the State's unqualified footwear impressions expert was unreliable and prejudicial.

I. No exigent circumstances justified the illegal search of Dr. Little's vehicle.

No exigent circumstances justified the State's warrantless searches of Dr. Little's vehicle, which was located within the curtilage of his home, and all evidence obtained in this illegal search should have been suppressed as fruit of the poisonous tree.

Here, by failing to address the issues, the State has conceded (1) the vehicle in the driveway was within the curtilage of Dr. Little's home and entitled to heightened constitutional protection, (2) a search within the meaning of the Fourth Amendment occurred, and (3) the plain view doctrine is inapplicable. The State does not even contest Dr. Little's fruit of the poisonous tree analysis—nor could it. Indeed, if the Court agrees the search violated Dr. Little's constitutional rights, it is beyond dispute that any evidence obtained pursuant to the search warrants was tainted as fruit of the poisonous tree because the search warrant affidavits presented to the magistrate solely relied upon information obtained during the illegal searches. Accordingly, the State's case rises and falls on the exigent circumstances exception to the warrant requirement. As explained below, however, the exception is inapplicable to the present case.

While the appellate court "applies a deferential standard of review" in Fourth Amendment cases, "this deference does not bar th[e] Court from conducting its own review of the record to determine whether the [circuit court]'s decision is supported by the evidence." State v. Tindall, 388 S.C. 518, 521, 698 S.E.2d 203, 205 (2010).

The exigent circumstances doctrine only applies when, "from an objective standard, a compelling need for official action and no time to secure a warrant exists." State v. Abdullah, 357 S.C. 344, 351, 592 S.E.2d 344, 348 (Ct. App. 2004). "[A]bsent hot pursuit, there must be at least probable cause to believe the exigent circumstances were present." State v. Dobbins, 420 S.C. 583, 592, 803 S.E.2d 876, 880 (Ct. App. 2017). "The principal components of a determination of . . . probable cause will be the events which occurred leading up to the stop or search, and then the decision whether these historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to . . . probable cause." Ornelas v. United States, 517 U.S. 690, 696 (1996).

At the outset, Deputy Colburn conceded he had no probable cause during trial and the State conceded the protective sweep doctrine was inapplicable during the pre-trial hearing. Trial Tr. at 272; Pre-Trial Hr'g Tr. at 156. Therefore, the State cannot rely upon these arguments on appeal. See I'On, LLC v. Town of Mount Pleasant, 338 S.C. 406, 421 n.11, 526 S.E.2d 716, 724 n.11 (2000) (asserting that "the failure to present an additional sustaining ground to the lower court reduces the likelihood that an appellate court will rely on it to affirm a judgment"); State v. Gilmore, 396 S.C. 72, 84, 719 S.E.2d 688, 694 (Ct. App. 2011) (asserting that an issue conceded in the circuit court cannot be argued on appeal (citing State v. Bryant, 372 S.C. 305, 315–16, 642 S.E.2d 582, 588 (2007))).

Indeed, the protective sweep doctrine is inapplicable because the search of the premises was not even conducted "incident to an arrest" and Dr. Little's property was not an "arrest scene."

Maryland v. Buie, 494 U.S. 325, 327 (1990) (noting that "[a] 'protective sweep' is a quick and limited search of the premises incident to an arrest and conducted to protect the safety of police officers or others" (emphasis added)); id. at 334 (asserting "there must be articulable facts which, taken together with the rational inferences from those facts, would warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger to those on the arrest scene" (emphasis added)).

Even when putting aside the "incident to an arrest" requirement, no exigent circumstances justified a security sweep. The State offers two justifications for its warrantless search. According to the State, it was necessary to conduct a welfare check on Dr. Little and to protect officer safety. As to the "welfare check" argument, the testimony in the record reveals Kimberly had already been in contact with her father for some time before officers visited his home. The State dedicated very little ink to this argument for good reason—it is without merit. From an objective standpoint, Deputy Colburn hardly could have been concerned for Dr. Little's safety based upon the totality of the circumstances.

Nor did anything pose a risk of danger to the police or others at Dr. Little's property. Deputy Colburn notably testified he had no reason to believe Dr. Little was hiding. Trial Tr. at 274. Seeing a vehicle's passenger side window down and its right rear tire parked slightly off the driveway could not have given an officer a good faith belief Dr. Little or any other person posed a danger to those on his premises.[1] And Deputy Colburn's testimony that he could not see the floorboard of the passenger side during the initial search of the vehicles is simply not credible.

[1] The photographs in the record, see State's Ex. 3; Def.'s Ex. 33–34; Trial Tr. at 277, plainly refute the State's claim that Dr. Little had "plenty of room to park completely within the driveway," Resp. Br. at 15–16, given the position of the car on the left.

See Trial Tr. at 278. In any event, the State failed to address the argument that it is difficult to believe someone could have fit into such an area to hide.

The State also failed to address what "compelling need" existed "for official action" or why it had "no time to secure a warrant." Abdullah, 357 S.C. at 351, 592 S.E.2d at 348. And the reason is obvious. The State had no grounds for a warrant until it created the need for one by performing an illegal search within the curtilage of Dr. Little's home. At most, the State had a hunch that something was off that evening. But a hunch is not the same as probable cause. Deputy Colburn conceded he had no probable cause to conduct the search, and the Court should reverse and remand for a new trial on this ground alone.

Respectfully, no ordinarily prudent and cautious person, under the circumstances, would believe a search was justified to protect the safety of officers or others. Deputy Colburn had backup on the scene, and Dr. Little was not a suspect. Trial Tr. at 237, 267. Although the State seeks to distract the Court with a detailed description of the murder scene, a review of the record reveals that "nothing occurred at the residence to create an exigency to justify a warrantless search." State v. Herring, 387 S.C. 201, 218, 692 S.E.2d 490, 499 (2009) (Kittredge, J., concurring) (emphasis added).

To that end, the State's reliance upon the Herring case is misplaced. The State ignores the critical fact that the officer's "peek into the garage yielded no evidence against Herring" because "[p]olice already had knowledge of the make, model, and license plate number of the vehicle the suspect drove." Id. at 211, 692 S.E.2d at 495. Because the officer's "observation of the vehicle in the garage yielded no evidence which further inculpated Herring," the court found "the de minimis intrusion to secure the officers' safety did not necessitate suppression." Id. Deputy Colburn, however, performed an intrusive search of Dr. Little's vehicle with a flashlight, and

Detective Muirhead later followed up with another unlawful search to confirm his findings, all without a warrant. Trial Tr. at 278, 387–88. As a result of these unlawful searches, the State obtained physical evidence that did inculpate Dr. Little. This was not a de minimis intrusion. Accordingly, Herring did not justify the State's actions in this case.

In short, the circuit court's ruling is not supported by any evidence. A window being down in an upper-middle-class neighborhood during September in Charleston is not objectively suspicious. Because Deputy Colburn had no probable cause to believe exigent circumstances were present to justify a warrantless search of the vehicle, the unreasonable search violated Dr. Little's rights under the Fourth Amendment and the South Carolina Constitution. Accordingly, the Court should reverse and remand for a new trial with instructions to suppress the unlawfully obtained blood evidence from the vehicle, the towel, the bloody shoes found in the home, and any and all evidence obtained pursuant to these two search warrants. See State v. Adams, 409 S.C. 641, 648, 763 S.E.2d 341, 345 (2014) ("Generally, evidence derived from an illegal search or arrest is deemed fruit of the poisonous tree and is inadmissible." (quoting United States v. Najjar, 300 F.3d 466, 477 (4th Cir. 2002))).

II. The circuit court erred in denying Dr. Little's motion for a mistrial when the State improperly referenced the suppressed ring during its closing argument.

"[T]o receive a mistrial, the defendant must show error and resulting prejudice." State v. Council, 335 S.C. 1, 13, 515 S.E.2d 508, 514 (1999).

It is well-settled that closing "[a]rguments must be confined to evidence in the record." By mentioning the ring, the State "convey[ed] the impression to the jury" it had "evidence not presented to the jury but known by the prosecution which supports conviction." Matthews v. State, 350 S.C. 272, 276, 565 S.E.2d 766, 768 (2002). The fundamental unfairness of the State's inappropriate reference to the ring during closing argument is underscored by the fact that the

circuit court had already suppressed the ring due to the unconstitutional means by which it was obtained in the first instance. Referencing the suppressed ring only added insult to injury, creating two layers of a constitutional violation.

Unfortunately, the State now appears to have created a third layer of a constitutional violation by destroying or altering the objectionable PowerPoint slide that gave rise to Dr. Little's motion for mistrial. The circuit court did not give the State license to destroy the objectionable slide it published to the jury. And Dr. Little's mistrial argument centers on both the slide and the comments made by the State in connection with it. Accordingly, the Court should take an adverse inference from the State's destruction of relevant matter that was designated and should be included in the Record on Appeal, see Rule 210(c), SCACR, and find this amounted to a due process violation. See State v. Cheeseboro, 346 S.C. 526, 538–39, 552 S.E.2d 300, 307 (2001) ("To establish a due process violation, a defendant must demonstrate (1) that the State destroyed the evidence in bad faith, or (2) that the evidence possessed an exculpatory value apparent before the evidence was destroyed and the defendant cannot obtain other evidence of comparable value by other means.").

The State's closing argument and PowerPoint slide focused on the ring and were some of the last things the jury heard and saw prior to deliberations. Trial Tr. at 885–86. And the circuit court failed to exhaust other methods to cure possible prejudice to alleviate the need for a mistrial. Cf. State v. Bantan, 387 S.C. 412, 417, 692 S.E.2d 201, 203–04 (Ct. App. 2010) (asserting that "[a]n instruction to disregard the objectionable evidence is usually deemed to cure the error in its admission"). Instructing the State—outside the jury's presence—to take down the PowerPoint slide that referenced the ring was insufficient to cure the taint of the State bringing up a symbolic piece of evidence that was excluded from the record due to the State's illegal investigative tactics.

The Court should reverse and remand for a new trial based upon the State's reference to evidence outside the record. Although the State maintains Dr. Little was not prejudiced by its underhanded tactics, the State cannot even produce the objectionable slide referencing the ring to support its argument. As to the prejudice prong, the Court need look no further than the State's concession in its brief that the solicitor's statement "went to the heart of the State's case: connecting the victim's blood to [Dr. Little]." Resp. Br. at 23. That is not harmless error.

III. The circuit court erred in admitting prejudicial testimony from the State's purported footwear examination expert.

Here, the circuit court's error cannot be harmless because Dr. Little was necessarily prejudiced by Dawn Claycomb—a SLED agent—being imbued with the imprimatur of an expert and confusingly testifying that Dr. Little's shoes were very similar to the prints found at the murder scene. See State v. Ellis, 345 S.C. 175, 178, 547 S.E.2d 490, 491 (2001) (holding that a reversal is mandated when a solicitor exploits "the [circuit] court's imprimatur of [an officer] as an 'expert' . . . to the prejudice of' the defendant" because a police "officer's opinion [that] goes to the heart of the case is not harmless").

Turning to the substance of Claycomb's footwear testimony, the State claims this is not scientific evidence while simultaneously citing cases from other jurisdictions recognizing that footwear examination evidence is, in fact, scientific. See Resp. Br. at 27. Regardless of whether the Council factors for determining reliability apply, this evidence was still inadmissible. After all, scientific evidence "is also subject to attack for relevancy and prejudice." 335 S.C. at 19–20, 515 S.E.2d at 517. Claycomb created an ink impression from a shoe, placed it onto a clear transparency, and then had another department enlarge and print a photograph of the unknown footprint to compare footwear impressions. This is not reliable scientific testimony, and the circuit court erred in permitting the State to publish this prejudicial and confusing testimony to the jury.

See Rule 403, SCRE (providing "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury").

To the extent the State argues the circuit court could skip over its gatekeeping role because this evidence is "uncontroversial," it notably failed to cite a single South Carolina case in support of that proposition. Until this Court or our supreme court has ruled upon the issue, the State is not entitled to any such pass. In light of the basic questions Claycomb was unable to answer regarding the impressions, her opinion was unreliable as a matter of law. And the highly prejudicial nature of her testimony substantially outweighed whatever probative value this "scientific" evidence offered. See Rule 403, SCRE. Because her testimony was introduced solely for the purpose of linking Dr. Little to the scene of the crime, it cannot be harmless. See Ellis, 345 S.C. at 178, 547 S.E.2d at 491.

CONCLUSION

Based upon the foregoing, the Court should reverse and remand for a new trial. The State finds no solace in the exigent circumstances exception to the warrant requirement, and Dr. Little was prejudiced by the State's reference to the suppressed ring and the circuit court's admission of Claycomb's footwear impressions testimony.

(Signature page to follow)

Respectfully submitted,

ROBINSON GRAY STEPP & LAFFITTE, LLC

By: 

Vordman Carlisle Traywick, III
SC Bar No. 102123
1310 Gadsden Street
Post Office Box 11449
Columbia, South Carolina 29211
(803) 929-1400
ltraywick@robinsongray.com

COMMISSION ON INDIGENT DEFENSE

Robert M. Dudek
Chief Appellate Defender
SC Bar No. 1767
Post Office Box 11589
Columbia, South Carolina 29211
(803) 734-1330
rdudek@sccid.sc.gov

Attorneys for Appellant General T. Little

Columbia, South Carolina

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CERTIFICATE OF SERVICE

I, the undersigned, of the law offices of Robinson Gray Stepp & Laffitte, LLC, attorneys for Appellant, General T. Little, do hereby certify that I have served Respondent and all counsel in this action with a copy of the document/pleadings shown below by mailing a copy of same to counsel via United States Mail, postage prepaid, at the following address(es):

Document Served: Initial Reply Brief of Appellant

Counsel Served:

Alan McCrory Wilson, Esquire
Melody Jane Brown, Esquire
South Carolina Attorney General's Office
Post Office Box 11549
Columbia, SC 29211-1549

Robert Michael Dudek, Esquire
S.C. Commission on Indigent Defense
Post Office Box 11589
Columbia, South Carolina 29211

BY: _____

Vordman Carlisle Traywick, III
SC Bar No. 102123
ROBINSON GRAY STEPP & LAFFITTE, LLC
1310 Gadsden Street
Post Office Box 11449
Columbia, South Carolina 29211
(803) 929-1400
ltraywick@robinsongray.com

Columbia, South Carolina

April 15, 2019

ROBINSON GRAY
Litigation + Business

VORDMAN CARLISLE TRAYWICK, III
DIRECT 803 231.7810 DIRECT FAX 803 231.7873
ltraywick@robinsongray.com

April 15, 2019

VIA HAND DELIVERY

Honorable Jenny Abbott Kitchings, Clerk
South Carolina Court of Appeals
1220 Senate Street
Columbia, SC 29201

RE: The State v. General T. Little
Appellate Case No. 2018-000561
Our File No. 998-1759

Dear Ms. Kitchings:

I enclose for filing the original and one copy of the Initial Reply Brief of Appellant, with Proof of Service upon counsel for Respondent. Please return clocked-in copies of these documents to me for my file. Thank you for your assistance.

With warmest regards, I am,

Very truly yours,

VC Traywick III

Vordman Carlisle Traywick, III

VCT:rco
Enclosures

cc: Robert M. Dudek, Esquire
Alan McCrory Wilson, Esquire
Melody Jane Brown, Esquire