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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Spartanburg County
Honorable J. Derham Cole, Circuit Court Judge
Appellate Case Tracking No. 2013-000685

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SC Court of Appeals

The State, Respondent,

vs.

Jon Roseboro, Appellant.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

I. The trial court properly denied Appellant's motion to dismiss because the arrest was lawful and reasonable and Appellant's subsequent actions supported the charges against him.

STATEMENT OF THE CASE

The State agrees with Appellant's procedural Statement of the Case.

ARGUMENT

I. The trial court properly denied Appellant's motion to dismiss because the arrest was lawful and reasonable and Appellant's subsequent actions supported the charges against him.

Appellant contends the trial court erred in denying his motion to dismiss the charges against him because they arose from an unlawful arrest. Appellant's arrest was lawful and reasonable. Further, an issue related to the timing of the presentment of the warrant does not affect the lawfulness of the arrest. Finally, his actions of throwing bodily fluid constitute a separate crime for which he could be arrested even if the initial arrest was unlawful

Preservation

First, the issue as raised on appeal by Appellant is not preserved for review. Appellant contends the arrest was unreasonable under the Fourth Amendment to the United States Constitution, and therefore, unconstitutional. The trial court issued a written order in this case in which he never addresses or discusses the Fourth Amendment. The court's entire order revolves around South Carolina statutory and case law and their interpretations Further, Appellant never asked the trial court to specifically address an argument that the arrest was unreasonable under the Fourth Amendment. Finally, prior to trial and several months after the court issued its order, Appellant never raised the motion to dismiss nor did he ask for any further ruling regarding the constitutionality or the reasonableness of the arrest (3/21T.6; R. 52). As a result, the issue is not preserved for review on appeal. See State v. Langford, 400 S.C. 421, 446, 735 S.E.2d 471, 484 (2012) ("Constitutional issues are not exempt from issue

preservation requirements."); State v. Freiburger, 366 S.C. 125, 134, 620 S.E.2d 737, 741 (2005) (holding an issue not preserved when one ground is raised to the trial court and another ground is raised on appeal); State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 693-94 (2003) (providing that in order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial court).

Merits

Appellant's contention he was unlawfully arrested because Officer Hilton did not have a physical copy of the bench warrant for Appellant is without merit. Further, Officer Hilton did not unreasonably handle Appellant's arrest. In addition, Appellant received a copy of the bench warrant and has never challenged its validity. Finally, even if the arrest were unlawful for any reason, Appellant committed the second offense of throwing bodily fluids which would constitute a separate and distinct crime for which he could be prosecuted.

Lawful Arrest

Officer Hilton's arrest of Appellant was entirely constitutional regardless of whether he had a copy of the warrant in his hand. Further, the arrest was valid and lawful under South Carolina law even though Officer Hilton did not have a copy of the warrant in his actual possession.

The Fourth Amendment provides.

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized

U.S. Const amend IV. As the United States Supreme Court has stated:

> Unreasonable searches or seizures conducted **without any warrant** at all are condemned by the plain language of the first clause of the Amendment. . . .[I]t is sufficient to note that the **warrantless arrest** of a person is a species of seizure required by the Amendment to be reasonable.

Payton v. New York, 445 U.S. 573, 585 (1980) (emphasis added). It is clear the Fourth Amendment is concerned with a warrantless arrest.

Appellant seems to presume this case involves a warrantless arrest and, therefore, a consideration of the reasonableness of the seizure is required. In the instant case, however, it is uncontested that a bench warrant based on Appellant's conviction for possession of drug paraphernalia in the City of Duncan existed.[1] (State's Exhibits 1[2] and 2; R. 148-149). In State v. Sims, 304 S.C. 409, 405 S.E.2d 377 (1991), the South Carolina Supreme Court considered a situation in which the officer did not have actual possession of the warrant, but instead had knowledge of the existence of outstanding warrants for the defendant. The Court specifically found: "The arresting officer did not make a warrantless arrest." Id. at 418-419; 405 S.E.2d at 383. Accordingly, the issue in the case *sub judice* is not whether there was an unreasonable warrantless arrest because a warrant clearly existed and, as the trial court found, the arrest was made pursuant to the outstanding bench warrant

Further, Appellant complains Officer Hilton was required to have the warrant in hand at the arrest. Nothing in the Fourth Amendment requires the warrant be present at the time of the arrest, only that the arrest be pursuant to a warrant obtained from an

[1] Appellant has not challenged the validity of the underlying bench warrant or the reasonableness of the officer in relying on the warrant He has simply articulated an argument based on the lack of actual possession of the warrant

[2] State's Exhibit 1, the bench warrant for Appellant which was admitted during trial, is the same document as Court's Exhibit 1, which was entered during the October 4 hearing regarding the dismissal of the charges In referring to the bench warrant for Appellant, the State will refer to the Exhibit throughout this brief as State's Exhibit 1

appropriate neutral source such as a magistrate or judge. Many federal Courts of Appeal have considered the question and found that an arrest without the warrant present is appropriate and lawful. See U.S. v. Leftwich, 461 F.2d 586, 592 (3rd Cir. 1972) ("While it is true that the arresting agents did not have the warrant with them at the time of arrest, they were not required to have it in their possession if it was outstanding at that time."); United States v. Salliey, 360 F.2d 699, 704 (4th Cir. 1966) ("The arrest by officers not in possession of the outstanding warrant was legal."); Gill v. United States, 421 F.2d 1353, 1355 (5th Cir. 1970) ("Under the circumstances the arrest was proper even though the arresting officer did not have the actual written warrant in hand."); United States v Holland, 438 F.2d 887, 888 (6th Cir. 1971) ("The fact that the officers did not have physical possession of the warrant at the time of the arrest is of no consequence to the validity of the arrest."); United States v. Turcotte, 558 F.2d 893, 896 (8th Cir. 1977) ("We find no merit to appellant's contention that his arrest was unlawful due to the failure of the arresting officer to serve him with a copy of the arrest warrant.").

Appellant even acknowledges federal law does not require possession of the warrant. In United States v. Bembry, 321 Fed. Appx. 892 (11th Cir. 2009), the Court, after discussing the Fourth Amendment, specifically held:

> There is no federal requirement that an officer have a warrant in hand or nearby when he is arresting a suspect. Instead, when an officer is arresting a suspect, pursuant to a warrant, and "the officer does not possess the warrant, the officer must inform the defendant of the warrant's existence and of the offense charged and, at the defendant's request, must show the warrant to the defendant as soon as possible."

Id. at 894 (quoting Rule 4(c)(3)(A), FRCrimP).

Additionally, South Carolina has considered the propriety of an arrest when it is conducted by an officer not in actual possession of the warrant upon which the arrest is based. In State v. Sims, the defendant alleged evidence seized during his arrest should be suppressed because it was seized during an unlawful warrantless arrest. State v. Sims, 304 S.C. 409, 418-419, 405 S.E.2d 377, 382-383 (1991). The South Carolina Supreme Court found the arrest was not a warrantless arrest. Id. at 419, 405 S.E.2d at 383. Specifically, the Court explained:

> The arresting officer **did not make a warrantless arrest**; the officer testified that he was aware of the Federal Bureau of Investigation warrant, and of a warrant in California that had been issued for Sims' arrest. In addition, there were warrants for Sims' arrest in South Carolina. Since the officers were **acting pursuant to valid arrest warrants** which had been issued for Sims, they were authorized to enter the motel room to make the arrest.

Id. (emphasis added).

Further, the Court considered the issue again in State v. Grate, 310 S.C. 240, 423 S.E.2d 119 (1992). The defendant maintained his arrest was unlawful and, therefore, he had a right to resist the arrest. He moved for a directed verdict arguing the State failed to prove the arrest was lawful because the officer did not have the warrant in his possession. The South Carolina Supreme Court found the arresting officer was not required to have in his possession a warrant for assault with a deadly weapon, a misdemeanor, at the time of the defendant's arrest pursuant to the warrant. The Supreme Court concluded the trial court properly denied Grate's motion for a directed verdict on his resisting arrest charge where he had argued he had a right to resist the unlawful arrest. Id. at 241-242, 423 S.E.2d at 119-120.

The South Carolina Supreme Court again found evidence should not be suppressed as a result of an unlawful search solely because an officer does not have a copy of the warrant in his actual possession. See State v Holmes, 320 S.C. 259, 464 S E.2d 334 (1995). The Court found: "The record indicates a warrant had been issued prior to appellant's arrest and that the arresting officer, while not in possession of the warrant itself, was acting pursuant to the warrant when the arrest was made." Id. at 267, 464 S E.2d at 338. Accordingly, the South Carolina Supreme Court has made it clear an officer is not acting unlawfully, and an arrest does not become unlawful, merely because the officer does not have actual possession of the warrant being executed.

Appellant filed a supplemental authority citing to State v. Shaw, 104 S.C. 359, 89 S.E. 322 (1916) In Shaw, the Court analyzed an arrest made based on an outstanding warrant and whether resistance to that arrest was lawful or unlawful. In that case, the Court explained the common law requirement that an officer cannot arrest an individual for a misdemeanor not committed in his presence unless he has the warrant in his possession. The Court noted the question of the arrest implicates the liberty of the individual versus the necessity to yield to proper authority. The Court explained the purpose of having the warrant is to enable the officer to explain to the individual "by what authority and for what cause he is deprived of his liberty." Id at 322. The Court then articulated:

> It was not necessary that he should have had the warrant in his hand or in his pocket at the time of making the arrest. Actual possession of it does not mean that. The rule is satisfied if the officer has such possession of the warrant that he can produce it with reasonable promptness on demand.

Id at 323. The Court explained as long as the officer can provide the information in a reasonable time, the policy behind the common law rule is satisfied.

In today's practice, the same policy is properly considered by the holdings in Sims, Grate, and Holmes. The officer now has access to cell phones, computers, and other communication abilities unheard of even twenty years ago. As in this case, the authority and verification of the warrant can take place in front of the individual over a cell phone or computer and accomplish the exact same policy goals which required possession of the warrant on or near the officer in 1916. Accordingly, the trial court properly concluded the arrest was not unlawful because the officer did not have a physical copy of the warrant with him when it was otherwise properly verified through today's communications.

Reasonableness of Arrest

Appellant contends Officer Hilton's actions were unreasonable during the arrest. The facts as testified to during the hearing paint a completely different picture, especially in light of the law above.

First, the reasonableness of the seizure is considered when no warrant exists. In this case, as discussed above, a warrant existed and Officer Hilton could proceed to act on that warrant even though he did not have it in his possession. Several of the cases cited by Appellant to try and argue Officer Hilton acted unreasonably by failing to provide the warrant are cases in which no warrant existed. These cases are inapposite to the case at hand. See Camara v. Municipal Court of City and County of San Francisco, 387 U.S. 523 (1967) (addressing **warrantless** administrative searches); Michigan v.

Tyler, 436 U.S. 499 (1978) (addressing **warrantless** search of burned building hours after fire extinguished and initial investigation complete).

In the instant case, Appellant had a valid bench warrant for his arrest from the City of Duncan for possession of drug paraphernalia (10/4T.10; State's Exhibit 1 and 2; R. 10; 148-149) Officer Hilton verified the warrant on his computer[3] as well as by calling the warrant officer to ensure a copy was in the hand of the officer. He made this communication in front of Appellant and with Appellant's knowledge. (10/4T.11-13; 15-17; 19; R. 11-13; 15-17; 19). Officer Hilton testified:

> I was constantly berated by [Appellant's mother] and [Appellant], from the point of contact with him, outside of his residence in his yard. They verbally berated me and accosted me the entire time that I was trying to use the cell phone to confirm that there was a warrant in hand.
>
> I advised [Appellant] that per my computer, there was an active warrant and that I would confirm it by a fellow officer via cell phone. I accommodated him with that.
>
> And, when it was confirmed, I told him that he was under arrest.

(10/4T.20; R. 20). Further, at trial, Officer Hilton testified similarly. (3/21T.36; 38; R. 63; 65).

Sergeant Beaty testified the Sheriff's office uses a duplicate process to verify the validity of an outstanding warrant. He stated officers "check on the computer, see if [the warrant] is on the computer. If so, then you call the warrant office still to, I guess, kind of

[3] Appellant's arguments seem designed to eliminate the current system used by officers of determining the existence of outstanding warrants on their in-car computer systems Public policy alone would run counter to any attempt to reduce the information available to officers whose primary function is the safety of the public As Officer Hilton explained "As a means of regular patrol, it's oftentimes not feasible to obtain warrants and put them in hand and, at the same time, be diligent in serving them" (10/4T 16, R 16) Public policy alone should dictate the diligent service of the warrants especially in light of the fact there are no constitutional or other grounds for requiring otherwise Additionally, as the trial court found, section 23-15-50 of the South Carolina Code mandates arrest of any person for which the officer knows the existence of a valid warrant

eliminate error. And they get it in-hand so you confirm that the officer does have the physical—the warrant physically in his possession" (3/21T. 60; R. 87). Sergeant Beaty continued: "if the warrant is physically in [the] possession of an officer in the warrant office, it's always been policy we could make the arrest." (3/21T.62; R. 89). Officer Hilton followed this process in executing the warrant against Appellant.

The officer's actions in executing a valid arrest warrant, and confirming its existence in the presence of the defendant despite being constantly berated by multiple individuals, were entirely reasonable.

Appellant makes significance of the fact he and his mother told Officer Hilton to leave his property unless he had the warrant in hand. First, as discussed above, there is no requirement the officer be in actual possession of the warrant. Further, the existence of the warrant justified the officer entering the property to arrest Appellant. See Payton, 445 U.S. at 603 ("Thus, for Fourth Amendment purposes, an arrest warrant founded on probable cause implicitly carries with it the limited authority to enter a dwelling in which the suspect lives when there is reason to believe the suspect is within."); State v. Loftin, 276 S.C. 48, 51, 275 S.E.2d 575, 576 (1981) ("A valid arrest warrant implicitly grants police the limited authority to enter a suspect's residence when there is reason to believe the suspect is within.") (internal quotation removed).

Testimony from Appellant indicated him and his mother both told Officer Hilton to leave before he made the arrest. Appellant testified he refused to go anywhere with Officer Hilton unless he left and came back with the warrant in hand. (10/4T.24, R. 24). Additionally, Officer Hilton explained that as soon as he got Appellant handcuffed to arrest him, Appellant "instructed [the officer] he had tuberculosis and that he was going

to cough all over [the officer]. He then, turned his head and he - - he was trying to cough all over [the officer]." (10/4T.14; R. 14).

Also, as discussed above, Appellant has relied on the case of State v. Shaw, 104 S.C. 359, 89 S.E. 322 (1916). In Shaw, the South Carolina Supreme Court explained: "it is equally well settled that, where the officer is known, the production of the warrant cannot be required before the person to be arrested has actually submitted to his authority, though it may be demanded immediately after the arrest is made." Id. The Court continued:

> It is considered that the arrest, the explanation, and the reading of the warrant when demanded are obviously successive steps They cannot all occur at the same instant of time. And in case of a known officer the accused must first submit to his authority, and then he can demand explanation of the cause of the arrest and the production and perusal of the warrant therefor.

Id.

Appellant knew Officer Hilton was a sheriff's deputy, the two knew each other's first names, and Appellant admitted he knew the officer and that the officer had been to his property previously for other individuals. (10/4T.24; 26-27; R. 24; 26-27). As Officer Hilton was a known officer, the law requires Appellant submit to the officer's authority first and then he is entitled to demand the warrant. Based on his own testimony, Appellant never submitted to the authority of a known officer, and in fact specifically stated: "Well, then, I don't have to go anywhere with you." (10/4T.24; R. 24). Appellant had no right to resist the arrest, and Officer Hilton acted reasonably in placing Appellant under arrest pursuant to the warrant he verified was valid.

Failure to Immediately Provide Warrant and Section 17-13-50

Further, Officer Hilton's actions subsequent to Appellant being placed in handcuffs were entirely reasonable when Appellant claimed to have tuberculosis and was coughing and sending bodily fluids toward the officer. Appellant did not calmly submit to the arrest and then ask for the warrant. Instead, he refused to cooperate prior to Officer Hilton even entering the property. Once placed in handcuffs, Appellant then began coughing and spitting fluid in the direction of Officer Hilton while claiming he had tuberculosis. (10/4T.14; R. 14).

At this point, whether Officer Hilton had the warrant in hand or not became irrelevant. Appellant was actively committing a crime by coughing and sending his saliva toward Officer Hilton while claiming he had tuberculosis. He had to take the necessary precautions to protect himself and to prevent Appellant from causing any more harm. This included placing a "spit hoodie" over Appellant and using germ killer spray and gel. (10/4T.14-15; R.14-15).

Officer Hilton transported Appellant directly to the jail and placed him in a holding cell. He notified the jail booking officers that Appellant had tried to infect him with tuberculosis and that he had continually coughed on the officer all the way to the jail. (3/21T 44; R. 71) Appellant was served with a copy of the bench warrant against him while he was in his holding cell (10/4T. 11; 24; 3/21T.44; R. 11; 24; 71).[4]

Section 17-13-50 states:

[4] Appellant complains it was fourteen hours that he was in the holding cell before the warrant was delivered to him This is uncorroborated testimony, but any delay could be because Appellant tried to spit and cough on an officer while claiming to have tuberculosis and indicated he had a problem with tuberculosis in filling out admission medical paperwork for the jail (3/21T 65-66, State's Exhibit 3, R 91-92, 150-156) This concern is amply supported by Appellant's own statement describing what took place when he was removed from the holding cell "But the first thing that guard asked me was you're not going to spit on me, are you?" (3/21T 87, R 107)

> (A) A person arrested by virtue of process or taken into custody by an officer in this State has a right to know from the officer who arrests or claims to detain him the true ground on which the arrest is made. It is unlawful for an officer to:
> (1) refuse to answer a question relative to the reason for the arrest;
> (2) answer the question untruly;
> (3) assign to the person arrested an untrue reason for the arrest; or
> (4) neglect on request to exhibit to the person arrested or any other person acting in his behalf the precept by virtue of which the arrest is made.

S.C. Code Ann § 17-13-50 (Supp. 2013). First, Officer Hilton provided Appellant with ample information regarding the basis for his arrest, including verifying the existence and validity of the warrant on the phone in front of Appellant. Next, the statute does not proscribe a time requirement for when the officer must "exhibit to the person arrested or any other person acting in his behalf the precept by virtue of which the arrest is made." A reasonable time requirement should be read into this statute, especially in light of the holdings of Sims, Grate, and Holmes which do not require the officer to have the warrant present at arrest.

Additionally, the requirement to exhibit the warrant upon which a person is arrested, as well as the reasonableness requirement necessarily included in the statute, should be viewed in light of the totality of the circumstances of the particular case. As discussed above, Appellant thwarted and resisted Officer Hilton starting before the officer even set foot on the property to arrest Appellant. Appellant then claimed to have a highly infectious disease and began coughing on Officer Hilton while maintaining he was trying to infect him. He acknowledged on paperwork at the jail that he had an issue

related to tuberculosis. It is entirely reasonable that there was some delay in Appellant receiving a copy of the warrant in this case.

Even if Officer Hilton failed to technically conform to the requirements of section 17-13-50, that failure did not justify Appellant resisting arrest or throwing bodily fluids and did not render the arrest unlawful. See e.g., State v. Chandler, 267 S.C. 138, 143, 226 S.E.2d 553, 555 (1976) ("[E]xclusion of evidence should be limited to violations of constitutional rights and not to statutory violations...."). Any violation of the statute would not convert a lawful arrest into an unlawful one, nor would it in any way implicated Appellant's Fourth Amendment rights so as to require exclusion or dismissal.

Further, the remedy for a violation of this statute is specified in subsection (B):

> (B) An officer who violates the provisions of this section is guilty of a felony and, upon conviction, must be fined in the discretion of the court or imprisoned not more than ten years, or both.

S.C. Code Ann. § 17-13-50(B) (Supp. 2013). The statute specifies the remedy for its violation, and so the court is not free to craft other remedies including exclusion or dismissal when they are not provided for by the legislature. As a result, any violation of this statute could result in the officer being subjected to penalty, but not the exclusion or dismissal of any charges against Appellant.[5]

Throwing Bodily Fluids

Further, even if the initial arrest of Appellant could be classified as unlawful, the commission of the subsequent crime of throwing bodily fluids would not be impacted. The new and distinct crime, even if connected to the unlawful arrest, would still be valid

[5] The State, of course, does not believe any violation of the statute has occurred as Officer Hilton went out of his way to properly inform Appellant of the basis of his arrest and Appellant's own behavior likely contributed to any delay in providing him with the warrant

and would provide an independent ground to justify Appellant's arrest. See e.g., State v. Nelson, 336 S.C. 186, 519 S E.2d 786 (1993) (finding even if the police officer's initial attempt to stop defendant motorist had been unlawful, defendant's subsequent acts of running stop sign and speeding were new and distinct crimes for which the officer had probable cause to stop defendant).

This case is similar to the case of In re Jeremiah W., 361 S.C. 620, 606 S.E.2d 766 (2004). In Jeremiah W., the defendant was unlawfully arrested on the charge of breach of the peace. He was also charged with threatening a public official for threats to take the officer's life or to cause bodily harm to the officer made after he was in patrol car. The South Carolina Supreme Court found the threats constituted a new and distinct crime, separate from resisting the original arrest. Id. at 625, 606 S.E.2d at 768-769.

A similar holding should apply here when the actions of coughing and spitting on Officer Hilton constituted a new and distinct crime, separate from Appellant's initial resistance to the arrest. The actions continued while in the patrol car, similar to the threats to do bodily injury in Jeremiah W. As a result, even if the trial court erred in finding the arrest lawful, it would not require dismissal of Appellant's charge for throwing bodily fluids which was on its own a proper basis for Appellant's arrest.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

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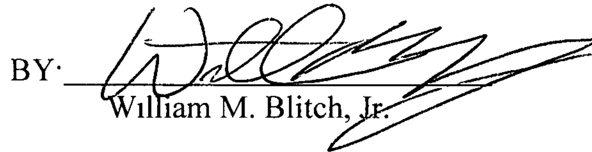
BY: 
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