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SC Court of Appeals

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHESTERFIELD COUNTY
Court of General Sessions
The Honorable Paul M. Burch, Circuit Court Judge

Appellate Case No. 2019-001274

THE STATE, ...RESPONDENT,

v.

JAMES DAVID BUSBY,.....APPELLANT.

INITIAL BRIEF OF RESPONDENT

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ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

STATEMENT OF ISSUE ON APPEAL

The trial judge properly allowed the State to introduce evidence collected from Appellant's truck because the evidence was obtained from a consensual search of the vehicle. Further, even if the search had been improper, the evidence obtained from the search was admissible pursuant to the doctrine of inevitable discovery.

STATEMENT OF THE CASE

Appellant was indicted by the Chesterfield County Grand Jury for murder, armed robbery, and possession of a weapon during the commission of a violent crime. On July 15–19, 2019, Appellant proceeded to a jury trial before the Honorable Paul M. Burch. Assistant Solicitors Mary Thomas Johnson-Lee, Esquire and Kernard E. Redmond, Esquire, represented the State; Tonya Copeland-Little, Esquire, represented Appellant. The jury found Appellant guilty of voluntary manslaughter, armed robbery, and possession of a weapon during the commission of a violent crime, and he was sentenced to thirty years' incarceration, fifteen years' incarceration, and five years' incarceration, respectively

Appellant timely filed a notice of appeal and brief. This brief of Respondent now follows.

STATEMENT OF FACTS

Trial Evidence

At approximately 7:30 a.m. on June 19, 2017, Bryan Rivers was about to leave his home on Hurst Cemetery Lane in Chesterfield, South Carolina when a woman drove up to his home and pulled in the driveway. She told Rivers that she saw a man on top of the nearby hill, "laying down taking a nap or something." Rivers went to check on the man and found Victim's corpse, at which point he contacted law enforcement and waited for officers to arrive. (Tr.p.169, line 20–Tr.p.173, line 15)

Sergeant Grant Polson of the Chesterfield County Sheriff's Office arrived at the scene and observed the corpse was lying next to a red truck. Victim was on his back and missing part of his face as a result of an apparent gunshot wound, and it appeared his pants had been tampered with because the belt had been removed and the pockets were inside-out. Additionally, there was a baseball bat and a small bag near his head. The inside of the truck contained blood spatter and other body tissue throughout. Near the truck, Polson found tire track for a mud terrain tire. The tire track appeared fresh and, due to the remote location of the crime scene and the recently-planted soybean field nearby, he immediately suspected the tire track belonged to the vehicle of someone associated with the crime. (Tr.p.174, line 4–Tr.p.182, line 24)

Jordan arrived at the scene shortly after, and Polson showed him everything he had observed. Jordan also recognized brain matter and fragments of Victim's head and face in the cab of the red truck. Victim was quickly identified and Jordan tasked other officers with interviewing Victim's known friends and family. Rachel Hammond Gulledge provided officers with several persons of interest, including Appellant due to a recent conflict between the men regarding Appellant's failure to deliver a shotgun purchased by Victim. She also provided officers with a possible location for Appellant, the home of Nicole Deese on Plyler Road. When

detective arrived, they found a white Chevy pickup truck with tires consistent with the tire tracks found at the crime scene. (Tr.p.186, line 25–Tr.p.192, line 10)

Deese was not home at that time, but officers were able to contact her later, also finding Appellant at the home. Jordan sought Appellant's permission to search[1] the truck, which was given, and during the search officers found a set of boots with Victim's driver's license, debit card, and social security card within. At that point, Jordan halted the search and ordered the truck transported to the Chesterfield County Sheriff's Office. Before proceeding further, Jordan obtained a search warrant for the truck's tire impressions as well as for an extensive search inside for items including a shotgun, which officers had learned was the murder weapon. (Tr.p.192, line 11–Tr.p.197, line 7)

Officers interviewed Appellant on multiple occasions, during which Appellant went from claiming he had no knowledge of the murder to later providing officers with information confirming officers' suspicions that he was responsible for Victim's death. Appellant led officers to a wooded area approximately a quarter of a mile from Deese's home where he led them to a spot where a shotgun was buried. On a separate occasion, Appellant led officers to Lake Terry, where divers located a white plastic bag containing a glove, shotgun shell, spent shotgun shell, and a wrench. (Tr.p.204, line 17–Tr.p.212, line 16; Tr.p.214, line 1–Tr.p.215, line 7; Tr.p.396, line 22–Tr.p.403, line 14; State's Exhibit 1)

SLED Agent Anna Tankersley was one of the crime scene investigators involved in the case. In addition to collecting evidence at the crime scene, she later met Appellant and received his permission to collect his DNA. Dawn Claycomb, Tankersley's partner at that time, recalled

[1] In front of the jury, Jordan omitted reference to Appellant's other charged offenses from Lancaster County, instead explaining he asked to search the vehicle for "a particular item." (Tr.p.193, lines 1–14)

her participation in the investigation, including her collection of evidence from Appellant's vehicle. In the front seat of Appellant's truck, Claycomb discovered a pair of jeans and a Maglite flashlight, both of which appeared covered in blood. She also found the I.D. cards found in the initial search of Appellant's truck. After comparing the tire impressions found at the crime scene with the tires on Appellant's truck, finding the tires could have created the tire marks but she did not find any unique wear patterns or other marks which excluded other tires of the same type from leaving the impressions. (Tr.p.220, line 20–Tr.p.226, line 6; Tr.p.233, line 14–Tr.p.248, line 4)

SLED agent Chris Johnson, an expert in cellular (phone) analysis, testified about his analysis of call histories and location data for Victim, Appellant, and several other individuals officers treated as persons of interest in their murder investigation. Appellant's phone signal bounced off the same towers Victim's phone was using during the late night/early morning Victim was murdered. Further, while Appellant's phone stopped calling Victim's phone around the time investigators believed Victim was murdered, other individuals associated with the case called Victim's phone throughout the night and morning after Victim's death and, in some cases, hours after the body was discovered. (Tr.292, line 8–Tr.p.323, line 20)

David Eddins, a friend of Victim's for many years, recalled seeing him on the night of June 18, 2017. Victim arrived at Eddins's home sometime between 10:30 and 11:00 p.m. that day with an electrical box he needed Eddins to modify. Victim, however, was not alone: a white Chevrolet truck pulled in behind him. Curious, Eddins asked Victim who the person in the truck was but the latter brushed aside the question and claimed the person was with him and nobody to worry about. Eddins also observed that the white truck had a loud muffler. Victim and the unknown man soon left, but around 12:30 a.m. Eddins heard a vehicle with a loud muffler

approaching his home. Eddins looked outside and noticed it was the same white truck he had seen earlier that night. The man in the truck asked Eddins whether he had seen Victim, claiming the men were separated after they left. The man also claimed he could not call Victim because his phone had died and told Eddins that if Victim returned to give him the message that the man was staying the night with his grandmother in Jefferson. As the man was leaving, he got out of his vehicle to inspect a bag in the driveway. He left the bag and departed the premises. (Tr.p.335, line 5–Tr.p.343, line 5)

Clint Gulledge, Victim's friend and cousin, hosted Victim at his home the weekend he disappeared. Victim and slept at the home both Friday and Saturday nights and had spent most of Sunday there as well until going to dinner with his daughter for Father's Day. Victim briefly returned after dinner before leaving again. Victim never returned to the house and failed to answer any of the calls Gulledge made trying to contact him. (Tr.p.344, line 21–Tr.p.349, line 1)

When officers contacted Gulledge after finding Victim's body, Gulledge provided police with all relevant information he could recall. Gulledge informed officers about an ongoing dispute between Victim and Appellant over a shotgun the former purchased from the latter. Appellant claimed he left the shotgun behind Gulledge's barn, but it was never found. He also told law enforcement about Nicole Deese, with whom Victim was very close. Shortly after Gulledge was informed of Victim's passing, he called Appellant who acted strangely on the call, including aggressive behavior towards Deese who was audibly distraught in the background. (Tr.p.349, line 2–Tr.p.355, line 10)

Rachel Hammond,[2] Gulledge's wife, confirmed Gulledge's testimony regarding the days leading up to Victim's death and the ongoing dispute between Appellant and Victim over a shotgun purchase. Hammond also explained that Hurst Cemetery Road was first explored by herself, a friend of hers, and Appellant a few weeks before Victim's death when the three of them went for coffee. (Tr.p.361, line 5–Tr.p.368, line 22)

Nicole Deese was a good friend of Victim's who regularly hung out with him around the time of his death. Appellant, however, was a relatively new acquaintance of hers around that time; she had only known him a few days. (Tr.p.369, line 21–Tr.p.372, line 4)

On June 18, 2017, Victim called Deese asking if she would accompany him on a trip to buy obtain drugs. Appellant, who was with Deese at the time, forced her to hang up the phone. Shortly after the call, Appellant informed Deese he was leaving to meet Victim to obtain dope. Hours passed, but Deese never heard from Victim despite expecting a call from him later that evening. Worried, Deese contacted others and asked them to also call Victim and Appellant. Appellant eventually returned to the home at a late hour, which seemed odd to Deese given a drug pick-up should not have taken a long time. Deese also observed Appellant wearing clothing different from what he had left the home in and in possession of a "longer gun." Deese pressed Appellant for answers, but he refused to say what occurred during his time with Victim. Between the night of June 19 and the morning of June 20, Appellant finally cracked and told Deese he killed Victim. (Tr.p.372, line 5–Tr.p.379, line 3)

Kenneth Parker met up with Victim around 9:15 p.m. on June 18 in Pageland, South Carolina to obtain drugs. Victim told Parker he was meeting up with Appellant afterwards for a

[2] Although Hammond is referred to as "Rachel Hammond Gulledge" throughout the transcript, her last name is still legally Hammond.

separate drug transaction. Later that night, Deese contacted Parker and told him she was concerned because she had been unable to reach Appellant and Victim. Parker attempted to contact both men but was only able to reach Appellant who claimed he never met up with Victim. (Tr.p.407, line 3–Tr.p.426, line 18)

Later, Parker was arrested for Victim's murder after Appellant told law enforcement that Parker committed the murder. While incarcerated, he ran into Appellant on a few occasions. During one such interaction, Appellant told Parker that "somebody else" would hurt Parker and his family if Parker did not admit to shooting Victim. (Tr.p.430, line 21–Tr.p.433, line 2)

Maryann Boehm, the SLED DNA analyst who reviewed the items collected in the case. Her tests conclusively established the blood found on the Maglite was Victim's while the bloody jeans found in Appellants truck contained Victim's DNA in the bloodstains while Appellant's DNA was the major contributor to the DNA found in the interior waistband of those same jeans. (Tr.p.446, line 4–Tr.p.456, line 15)

STANDARD OF REVIEW

In criminal cases, appellate courts sit to review errors of law only. State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). In Fourth Amendment search and seizure cases, the appellate court is limited to determining if there is any evidence to support the trial court's findings and can only reverse due to clear error. State v. Flowers, 360 S.C. 1, 5, 598 S.E.2d 725, 727 (Ct. App. 2004); see State v. Brockman, 339 S.C. 57, 66, 528 S.E.2d 661, 666 (2000) ("[W]e will review the trial court's ruling like any other factual finding and reverse if there is clear error. We will affirm if there is any evidence to support the ruling."). The reviewing court may conduct its own review of the record to determine whether the trial judge's ruling is supported by the evidence. State v. Khingratsaiphon, 352 S.C. 62, 70, 572 S.E.2d 456, 460 (2002). However, the appellate court must affirm the trial court if there is any evidence supporting the ruling. See State v. Moore, 415 S.C. 245, 251, 781 S.E.2d 897, 900 (2016) ("[A]ppellate courts must affirm if there is any evidence to support the trial court's ruling."); State v. Morris, 411 S.C. 571, 578, 769 S.E.2d 854, 858 (2015) ("'When reviewing a Fourth Amendment search and seizure case, an appellate court must affirm if there is any evidence to support the ruling.' "(citation omitted)). The appellate court will not reverse merely because it would have reached a different conclusion than the trial judge. State v. Rivera, 384 S.C. 356, 361, 682 S.E.2d 307, 310 (Ct. App. 2009); see Khingratsaiphon, 352 S.C. at 70, 572 S.E.2d at 459 ("In State v. Brockman, . . . [w]e concluded the appellate court would not review the trial judge's ultimate determination de novo but, rather, would apply a deferential standard of review.").

ARGUMENT

The trial judge properly allowed the State to introduce evidence collected from Appellant's truck because the evidence was obtained from a consensual search of the vehicle. Further, even if the search had been improper, the evidence obtained from the search was admissible pursuant to the doctrine of inevitable discovery.

Appellant argues the trial judge erred in allowing the State to introduce evidence discovered during the search of Appellant's vehicle, and the evidence obtained as a result of that search, because the search violated Appellant's rights under the Fourth Amendment and Article I, Section 10 of the South Carolina Constitution. The State disagrees with this allegation of error. Notably, the items were obtained pursuant to a consensual search and, even if the search was improper, the contested items would have inevitably been discovered during the course of law enforcement's investigation into Victim's death.

Suppression Hearing

Prior to trial, Appellant's trial counsel moved to suppress evidence obtained from his truck during a preliminary search by officers. Trial counsel claimed the search was made without Appellant's consent and without probable cause. Notably, the search was made pursuant to warrants from Lancaster County relating to Appellant's theft of a gun, but the weapon was already in possession of the Lancaster County Sheriff's Office when officers search the vehicle. Expecting trial counsel's motion, the State presented witnesses explaining the facts which led to the search. (Tr.p.58, line 4–Tr.p.59, line 5)

Jason Catoe, a criminal investigator with the Lancaster County Sheriff's Office, testified he was contacted by Wayne Jordan of the Chesterfield County Sheriff's Office on June 21, 2017. Jordan asked Catoe whether he knew Appellant, and Catoe informed Jordan they were investigating him for a robbery and a stolen gun, and that they had enough probable cause to

obtain warrants[3] for Appellant's arrest. Jordan asked Appellant to get the warrant and Catoe agreed to get the process started. Catoe, however, was not in the office at that moment because he was attending a class. He contacted his lieutenant, who he had emailed the night prior for approval of the warrants after meeting with the victim who had purchased the stolen weapon from Appellant. The victim gave Catoe the gun during their meeting and Catoe told his lieutenant as much when seeking approval to obtain the warrants. After Catoe contacted his supervisor about his conversation with Jordan, the arrest warrants were approved and then presented to a magistrate judge by a different officer. As soon as the warrants were signed, Catoe contacted Jordan to let him know they were in NCIC. However, Catoe never relayed to Jordan that he had already recovered the gun. (Tr.p.59, line 11–Tr.p.65, line 1)

Jordan also testified, explaining he contacted Catoe after their initial investigation into Victim's death led officers to identify Appellant as a person of interest in the case. After the Lancaster County Sheriff's Office obtained the warrants, Jordan and other officers went to the home of Nicole Deese, where officers believed Appellant to be staying. At the home, officers noticed Appellant's truck had special mud grip tires which appeared to match the tire impressions. After officers knocked on the door, Deese answered and told officers that Appellant was in a back bedroom of the home. Jordan, alone, walked to the bedroom and found Appellant. After confirming his identity, Jordan informed him he had arrest warrants from Lancaster County. Jordan described the remainder of the conversation between the two men as:

> Where's the pistol? He said I don't have a pistol. I said, man, I need to search your car for a pistol. He said, okay, no problem, I don't have a pistol. I said where's your keys. He said they're in my pocket. I said I need your keys. He took – he reached in his pants pocket, pulled his keys out to his truck, and handed

[3] The arrest warrants were for receiving stolen goods less than $2,000 and obtain goods by false pretense. (Tr.p.62, lines 16–21)

them to me. I handcuffed him. We walked outside. We started our search. I physically unlocked the car and then myself and Sgt. Burns started our search.

(Tr.p.68, line 11–Tr.p.71, line 9; Tr.p.72, lines 9–25; Tr.p.73, lines 12–18)

Before long, the men discovered a boot with a black-in-color t-shirt inside of it. Sgt. Burns pulled the t-shirt out and found two ID cards belonging to Victim. Jordan immediately ended the search, put the shirt, boots, and ID cards back as they were found, and immediately called for the transport of the vehicle to the Sheriff's Office where it could be secured. (Tr.p.71, line 10–Tr.p.72, line 8; Tr.p.75, line 11–Tr.p.76, line 2)

Jordan testified that, had Appellant refused the search of the vehicle, officers would still have ultimately seized the vehicle due to the evidence of Appellant's involvement in Victim's death. Officers were already aware from another witness, Rachel Hammond, that Appellant and Victim were in an ongoing dispute over a shotgun the former was supposed to sell to the latter but was never delivered; notably, Victim had been killed with a shotgun. Hammond had informed officers Victim was very upset he never received the weapon. Further, the fact that Appellant's truck tires matched the unique impression found at the crime scene mean officers had probable cause supporting a search warrant for the vehicle. Later, after the car was towed, Jordan obtained search warrants to collect tire impressions and search the interior of Appellant's vehicle. (Tr.p.73, line 1–Tr.p.75, line 10; Tr.p.76, lines 10–14; Tr.p.78, line 11–Tr.p.79, line 4)

After hearing the witnesses; testimony, the trial judge found he did not hear "any evidence to the contrary" that Jordan was not given permission to search the vehicle, so he denied the motion to suppress the evidence obtained from the car. To protect itself on the record, the State also indicated that it believed the challenged evidence was also subject to inevitable discovery based on the information known by officers at that time. The trial judge

acknowledged the argument, and trial counsel did not make any further arguments on the issue. (Tr.p.80, line 6–Tr.p.81, line 2)

Analysis

Consent to Search

Warrantless searches and seizures are reasonable within the meaning of the Fourth Amendment when conducted under the authority of voluntary consent. Palacio v. State, 333 S.C. 506, 514, 511 S.E.2d 62, 66 (1999). "Undoubtedly, a law enforcement officer may request permission to search at any time." State v. Pichardo, 367 S.C. 84, 105, 623 S.E.2d 840, 851 (Ct. App. 2005). Whether consent to search was voluntary or the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of the circumstances. State v. Wallace, 269 S.C. 547, 550, 238 S.E.2d 675, 676 (1977); State v. Mattison, 352 S.C. 577, 584, 575 S.E.2d 852, 855 (Ct. App. 2003). The State bears the burden of establishing the voluntariness of the consent. Schneckloth v. Bustamonte, 412 U.S. 218 (1973); Mattison, 352 S.C. at 584, 575 S.E.2d at 855. In a custodial situation, the custodial setting is a factor to be considered in determining whether consent was voluntarily given; however, custody is not, by itself, enough to demonstrate a coerced consent to search. Mattison, 352 S.C. at 584, 575 S.E.2d at 855. "The issue of voluntary consent, when contested by contradicting testimony, is an issue of credibility to be determined by the trial judge." Mattison, 352 S.C. at 584-85, 575 S.E.2d at 856; State v. Dorce, 320 S.C. 480, 482, 465 S.E.2d 772, 773 (Ct. App. 1995). A trial judge's conclusions on issues of fact regarding voluntariness will not be disturbed on appeal unless so manifestly erroneous as to be an abuse of discretion. Mattison, 352 S.C. at 585, 575 S.E.2d at 856.

Under our state constitution suspects are free to limit the scope of the searches to which they consent. State v. Forrester, 343 S.C. 637, 648, 541 S.E.2d 837, 843 (2001); State v. Funderburk, 367 S.C. 236, 240, 625 S.E.2d 248, 250 (Ct. App. 2006); Mattison, 352 S.C. at 585, 575 S.E.2d at 856. When relying on the consent of a suspect, a search must not exceed the scope of the consent granted or the search becomes unreasonable. Forrester, 343 S.C. at 648, 541 S.E.2d at 843; Funderburk, 367 S.C. at 240, 625 S.E.2d at 250; Mattison, 352 S.C. at 585, 575 S.E.2d at 856. Even in a situation where police have received a general and unqualified consent, "'the police do not have carte blanche to do whatever they please.'" Forrester, 343 S.C. at 648-49, 541 S.E.2d at 843 (quoting 3 Wayne R. LaFave, *Search and Seizure* § 8.1(c), at 612 (3d ed. 1996)). The scope of the consent is measured by a test of "'objective' reasonableness - what would the typical reasonable person have understood by the exchange between the officer and the suspect?" Florida v. Jimeno, 500 U.S. 248, 251 (1991); Mattison, 352 S.C. at 585-86, 575 S.E.2d at 856. Conduct falling short of "an unequivocal act or statement of withdrawal" is not sufficiently indicative of an intent to withdraw consent. Mattison, 352 S.C. at 587, 575 S.E.2d at 858; United States v. Alfaro, 935 F.2d 64, 67 (5th Cir. 1991). Effective withdrawal of consent to search requires unequivocal conduct, in the form of either an act, statement or some combination of the two that is inconsistent with consent previously given. Mattison, 352 S.C. at 585, 575 S.E.2d at 858; Burton v. United States, 657 A.2d 741 (D.C. 1994).

As an initial matter, the State notes Appellant's concern over the presence of probable cause demonstrates his fundamental misunderstanding of the requirements of a consensual search: Jordan did not need a reason or probable cause to initiate a consensual search of Appellant's vehicle. Although Jordan believed he was looking for the stolen pistol due to Catoe's failure to inform him that the Lancaster County Sheriff's Office already obtained the

weapon, he could have requested the search even without believing he would find evidence specifically related to the Lancaster County charges. See Palacio, 333 S.C. at 514, 511 S.E.2d at 66. Appellant was arrested pursuant to a lawful warrant and officers were free to ask for his consent to search after that arrest. Cf. Pichardo, 367 S.C. at 105, 659 S.E.2d at 851 ("Undoubtedly, a law enforcement officer may request permission to search at any time. However, when an officer asks for consent to search after an unconstitutional detention, the consent procured is per se invalid unless it is both voluntary and not an exploitation of the unlawful detention." (emphasis added)) Further, even if Jordan had known the weapon was recovered, he still could have requested to search that vehicle. Thus, the fact that question of whether Lancaster County had possession of the stolen firearm and Jordan's knowledge of that fact is irrelevant to the determination of the constitutionality of the search.

The constitutionality of the search boils down to a single issue: whether Appellant willingly gave consent to the search. While Appellant was arrested immediately before officers requested to search his vehicle, the totality of the circumstances demonstrate Appellant voluntarily gave his consent for the search. The fact Appellant was placed under arrest immediately before he gave consent does not, by itself, render the consent involuntary. See Mattison, 352 S.C. at 584, 575 S.E.2d at 855. In Mattison, this Court found that the defendant's presence among four police officers, squad cars with flashing blue lights, and a drug dog did not, as a matter of law, render his consent involuntary. Id. at 585, 575 S.E.2d at 585. Notably, Appellant's arrest occurred in a much more relaxed and even less "coercive" situation than Mattison's: Appellant was arrested by a single officer, in a bedroom of a home where he had been staying, and was not placed in handcuffs until after he had already pulled his keys from his pocket and given them to Jordan. When Jordan requested the search, Appellant said "okay, no

problem." Further, Appellant never placed any limits on the scope of the search nor did the record reveal any overt act, threat, or other method of coercion. Appellant failed to present any testimony or other evidence contradicting the State's evidence that his consent was willing. See Mattison, 352 S.C. at 584-85, 575 S.E.2d at 856 ("The issue of voluntary consent, when contested by contradicting testimony, is an issue of credibility to be determined by the trial judge.") Accordingly, the trial judge did not abuse his discretion in finding Appellant willingly gave his consent to the search of his vehicle.

Inevitable Discovery

The "fruit of the poisonous tree" doctrine provides that evidence may be excluded if it is the product of unconstitutional police conduct. See Wong Sun v. United States, 371 U.S. 471 (1963). But more is required than simple but-for causation. As explained in Wong Sun:

> We need not hold that all evidence is 'fruit of the poisonous tree' simply because it would not have come to light but for the illegal actions of the police. Rather, the more apt question in such a case is 'whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.'

Id. at 487–88 (internal citation omitted).

Any evidence seized as the result of an unreasonable search and seizure typically must be excluded from trial. State v. Weaver, 374 S.C. 313, 319, 649 S.E.2d 479, 482 (2007). The inevitable discovery doctrine is an exception to the exclusionary rule which requires the State to establish by a preponderance of the evidence the same evidence seized unlawfully would have been discovered inevitably by lawful means. See State v. Jenkins, 398 S.C. 215, 227, 727 S.E.2d 761, 767 (Ct. App. 2012) (citing State v. Brown, 389 S.C. 473, 483, 698 S.E.2d 811, 816 (Ct. App. 2010); Nix v. Williams, 467 U.S. 431, 447, 104 S.Ct. 2501, 81 L.Ed.2d 377 (1984) (holding evidence may be admitted despite a violation of the Fourth Amendment "if the

government can prove that the evidence would have been obtained inevitably and, therefore, would have been admitted regardless of any overreaching by the police")). When the doctrine applies, the evidence will not be suppressed despite the fact it was obtained pursuant to an illegal search. Brown, 389 S.C. at 483, 698 S.E.2d at 816.

In Nix, officers violated the defendant's Sixth Amendment right to counsel by speaking with him after agreeing with his lawyer not to communicate with the defendant. As a result of the communications, the defendant led the officers to the location of a missing child's body. The United States Supreme Court acknowledged the violation of the Sixth Amendment, but found because individuals were already canvassing the area, the body would have been inevitably discovered. The Court explained its reasons for not excluding the evidence based on the constitutional violation saying:

> Exclusion of physical evidence that would inevitably have been discovered adds nothing to either the integrity or fairness of a criminal trial. . . . Suppression, in these circumstances, would do nothing whatever to promote the integrity of the trial process, but would inflict a wholly unacceptable burden on the administration of criminal justice.

Nix, 467 U.S. at 446. The Court continued that exclusion was not necessary to cure an ill or to ensure fairness, finding:

> Fairness can be assured by placing the State and the accused in the same positions they would have been in had the impermissible conduct not taken place. However, if the government can prove that the evidence would have been obtained inevitably and, therefore, would have been admitted regardless of any overreaching by the police, there is no rational basis to keep that evidence from the jury in order to ensure the fairness of the trial proceedings. In that situation, the State has gained no advantage at trial and the defendant has suffered no prejudice. Indeed, suppression of the evidence would operate to undermine the adversary system by putting the State in a worse position than it would have occupied without any police misconduct. Williams' argument that inevitable discovery constitutes impermissible balancing of values is without merit.

Id. at 447.

Even if this Court finds the search of Appellant's vehicle was non-consensual, the evidence was still properly admitted at trial because it inevitably would have been discovered at a later point in time. Unquestionably, in Appellant's case, the law enforcement officers that investigated the murder had probable cause to procure a search warrant for the vehicle based on the numerous pieces of evidence they had obtained up to that point, especially the fact that Appellant's tires matched the impressions found at the crime scene. Additionally, officers had already learned about the dispute between Appellant and Victim over a shotgun transaction, and a shotgun also happened to be the murder weapon. In fact, Jordan testified officers were already prepared to obtain a warrant to search the vehicle based on the information in their possession and only proceeded without the warrant because of Appellant's consent. Other evidence obtained by law enforcement in the subsequent days and weeks only supports the inevitability of the search warrant; Victim's phone records placed Appellant and Victim in contact with each other the night of the murder and that contact led to the discovery that cell tower data also placed the men in proximity of each other during that period. Eddins and Parker both observed a white truck consistent with Appellant's following or driving near Victim before the latter disappeared, and Appellant even informed Parker that he had attempted to meet up with Victim. Notably, none of this evidence was obtained from the contents of Appellant's vehicle. These facts, taken together, readily establish the search warrant would have been obtained independent of the alleged constitutional violation. See Nix, 467 U.S. at 443

Appellant's argument that the Chesterfield County Sheriff's Office contacted the Lancaster County Sheriff's Office because it lacked probable cause to obtain its own warrant ignores the record presented by the State. The State, within the first day or two of its investigation, established Appellant as a person of interest and, shortly before his arrest,

discovered that his tire tread matched that found at the crime scene. This, along with the evidence subsequently uncovered by law enforcement supported a **search** warrant of the vehicle. However, the Chesterfield County Sheriff's Office discovered the Lancaster County Sheriff's Office already had enough evidence to obtain an **arrest** warrant for Appellant, preventing him from fleeing or destroying potential evidence while it took the time to obtain warrants based on its own investigation of Victim's death. Utilizing the Lancaster County arrest warrant was merely a matter of convenience for the Chesterfield County Sheriff's Office.

CONCLUSION

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

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PROOF OF SERVICE

I, Shana Montgomery, certify that I have served the within Initial Brief of Respondent and Designation of Matter on Appellant by email to the address listed in AIS and with a copy of the same to follow in the United States mail, postage prepaid, addressed to:

Elizabeth Franklin-Best
Elizabeth Franklin-Best, P.C.
2725 Devine Street
Columbia, South Carolina 29205

I further certify that all parties required by Rule to be served have been served this 8th day of March, 2021.

Shana Montgomery
Legal Assistant
Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3723

Shana Montgomery

From: Shana Montgomery
Sent: Monday, March 8, 2021 2:10 PM
To: elizabeth@franklinbestlaw.com
Cc: Shana Montgomery; Bill Schumacher; William Blitch
Subject: BUSBY James D ; Appellate Case No. 2019-001274; IBOR (02509261.PDF;1).PDF
Attachments: 02509261.PDF

Good Afternoon,

Attached please find a copy of the Initial Brief of Respondent and Designation of Matter along with the proof of service for State v. James D. Busby (20199-001274). Please confirm receipt. This Initial Brief will be submitted to the South Carolina Court of Appeals today via the AIS One Drive System. In addition to the email, a hard copy will be placed in today's mail.

Thank You.

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