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SC Court of Appeals

STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from Charleston County

The Honorable Thomas L. Hughston, Jr., Circuit Court Judge

THE STATE,

Respondent,

v.

GENERAL T. LITTLE,

Appellant.

Appellate Case No. 2018-000561

STATE'S RETURN TO APPELLANT'S PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

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Appellant has not provided sufficient grounds to warrant either a rehearing from the panel or a rehearing en banc. The Court's opinion did not overlook or misapprehend any of the issues. See Rule 221(a), SCACR. Additionally, the case neither presents "a question of exceptional importance," nor is the opinion inconsistent with the Court's precedent. See Rule 219(a), SCACR. For the reasons discussed below, appellant's Petition for Rehearing and Suggestion for Rehearing En Banc should be denied.

I. THE COURT CORRECTLY HELD THAT DEPUTY COLBRUN ACTED REASONABLY IN LIGHT OF THE EXIGENT CIRCUMSTANCES FOLLOWING BARBARA LITTLE'S MURDER.

The exigent circumstances following Barbara Little's murder have already been fully presented to the Court. (Resp. Br. 14-20). Nothing has been overlooked or misapprehended. See Rule 221(a), SCACR. Recall that a killer was on the loose. Barbara Little had just been beaten to death in a manner that shocked even the veteran pathologist who performed the autopsy. (R. 1014, l. 11-12). With no signs of any forced entry, her home had been turned into a violent, bloody crime scene. (R. 49, l. 23-25, 89, l. 14-15; 662, l. 12; 511-12). And now Barbara's ex-husband (appellant) was unaccounted for. (R. 89, l. 18-24). Although he initially informed detectives that he was on his way to the crime scene, almost an hour had passed without any word from him. (R. 89, l. 17-18; 542, l. 22; 662, l. 1-4). Appellant only lived five minutes away. (R. 89, l. 24).

At that point, law enforcement rightfully took action. A welfare check was in order. Appellant discounts the decision as "nonsense," but police have to respond as if the worst case scenario is happening. (Pet. 12). From their vantage point, there was the possibility of a murder/suicide in progress, the killer could be targeting family members, or appellant could be evading the police. Law enforcement did not have the luxury to wait and see what was happening. The clock was ticking. They could not allow a worst case scenario to occur while personnel are

only a few minutes away. Had something like that happened in this case, then we would be asking why the police did not think to conduct a welfare check. In sending an officer to make contact with appellant, law enforcement was acting responsibly.

When Deputy Colbrun arrived at appellant's house, he believed he was walking into a dangerous situation. (R. 76, l. 7). That belief was reasonable. Not only was he aware of the violence that had just taken place at Barbara's house, but also the scene at appellant's residence was unusual. Appellant's Toyota Sequoia was parked partially in the driveway and partially in the mulch surrounding the home. (R. 51, l. 15, 16; 1286-87). The front passenger window was also rolled down. (R. 51, l. 11-12). In other words, it appeared that the driver parked the car in a hurry. Before approaching the house, Deputy Colbrun looked in the car's windows to ensure no one was inside the vehicle. (R. 51, l. 1-2). He did not open the door, or even touch the car. (R. 53, l. 21-24). Given the totality of the circumstances, the Court correctly recognized that Deputy Colbrun was justified in taking this small, precautionary measure before knocking on the front door.

Nevertheless, appellant raises several objections to the Court's analysis. None have merit. For example, he believes the Court "failed to account for the significance of the location" of the search. (Pet. 9). According to appellant, the "error colored the panel's conclusion that Deputy Colbrun's minimally intrusive search was reasonable." (Pet. 9)(internal citations omitted). Appellant argues that looking through the window of a car parked in the driveway is the same as looking through a window of the house. (Pet. 10).

The argument fails to recognize that there are two steps to the analysis: (1) determining whether a search occurred, and (2) if so, assessing if it was reasonable under the circumstances. See e.g. State v. Edwards, 415 S.C. 401, 407-08, 782 S.E.2d 124, 128 (Ct. App. 2016)(holding that although an officer's actions constituted a search under the Fourth Amendment, the search was

reasonable). Appellant's argument ignores the second step. By his logic, any intrusion on the curtilage—no matter how slight or under what circumstances—would require a search warrant. Such an interpretation is inconsistent with settled, black letter law. See e.g. Brigham City, Utah v. Stuart, 547 U.S. 398, 403 (2006); State v. Dobbins, 420 S.C. 583, 803 S.E.2d 876 (Ct. App. 2017). This Court correctly proceeded to step two in the analysis and evaluated whether the intrusion was reasonable in scope. See State v. Robinson, 410 S.C. 519, 530, 765 S.E.2d 564, 570 (2014)(noting the State must show "the warrantless entry was limited in scope and duration in accordance with the exigent circumstances which required its presence."). Rather than misapprehending the law, this Court followed it.

Appellant's reliance on Florida v. Jardines, 569 U.S. 1 (2013) is unpersuasive for the same reason. (Pet. 11-12). In Jardines, the issue was whether a search occurred, not if the search was reasonable. To answer that question, the Court assessed whether the officer had an implied license to approach the front door. Id. at 8. Here, the issue is not whether a search occurred, but if it was reasonable. Contrary to appellant's suggestions, that inquiry is a purely objective one. See State v. Herring, 387 S.C. 201, 210, 692 S.E.2d 490, 494 (2009)("An action is 'reasonable' under the Fourth Amendment, regardless of the individual officer's state of mind, 'as long as the circumstances, viewed objectively, justify [the] action.'")(quoting Scott v. United States, 436 U.S. 128, 138 (1978); State v. Abdullah, 357 S.C. 344, 351, 592 S.E.2d 344, 348 (Ct. App. 2004)("The exigent circumstances doctrine provides an exception to the Fourth Amendment's protection against warrantless searches, but only where, from an objective standard, a compelling need for official action and no time to secure a warrant exist.").

Furthermore, appellant's attempt to distinguish this case from Herring falls short. He notes that unlike the officer in Herring, Deputy Colbrun did not consider him a "suspect" when he

approached the house. (Pet. 15). But the situation was no less dangerous for Deputy Colbrun. Regardless of whether appellant was a potential suspect or a potential victim, approaching his house carried the risk of coming face to face with whoever murdered Barbara Little. The subtle distinction with Herring does not affect the analysis of exigent circumstances. In both cases, law enforcement needed to act. In both cases, such action carried a substantial risk of danger. And in both cases, the officer took the minimally intrusive step of looking through a window to ensure no one was either inside a car or a garage.

Finally, appellant believes the Court overlooked an argument that the search was impermissible under the state constitution. (Pet. 16). According to appellant, the absence of controlling authority gives the Court "a blank canvas" upon which to create new law. (Pet. 16). But the Supreme Court of South Carolina has already put its mark on this canvas. In State v. Weaver, 374 S.C. 313, 649 S.E.2d 479 (2007), the court rejected the argument that the state constitution creates enhanced privacy protections in a vehicle parked in the backyard of a private residence. Id. at 322, 649 S.E.2d at 483.

Moreover, it is unclear that appellant even raised this argument in his initial brief. Although he made a passing reference that state courts can interpret their own constitutional provisions more broadly than the Fourth Amendment, he never argued that the South Carolina Constitution imposes upon law enforcement additional restrictions on top of the Fourth Amendment while acting in the context of exigent circumstances. (App. Br. 9-10). To the contrary, he argued that "[u]nder both constitutions," warrantless searches are impermissible absent a recognized exception. (App. Br. 10). The Court was under no obligation to address an issue that was not clearly presented in the initial brief. See Southern Glass & Plastics Co., Inc. v. Kemper, 399 S.C. 483, 498, 732 S.E.2d 205, 213 (Ct. App. 2012)(holding that an argument was

abandoned because a litigant only made a passing reference without supporting case law). Accordingly, a rehearing on this issue is unwarranted.

II. THE COURT CORRECTLY FOUND THAT APPELLANT SUSTAINED NO PREJUDICE WARRANTING A MISTRIAL BECAUSE THE JURY NEVER HEARD ANY OF THE SUPPRESSED EVIDENCE.

Declaring a mistrial is "an extreme measure" that should be taken only when "absolutely necessary." State v. Stanley, 365 S.C. 24, 34, 615 S.E.2d 455, 460 (Ct. App. 2005). The reasons for doing so must be "very plain and obvious." Id. Appellant's grounds simply do not meet this standard. As this Court recognized, the jury never heard any of the evidence that had been previously ruled inadmissible. It was unaware that law enforcement recovered appellant's wedding ring from his back pocket. And it was also unware that the ring had the victim's blood on it. Without that context, appellant sustained no prejudice, much less prejudice justifying the extreme remedy of a mistrial. The trial court did not abuse its discretion in refusing to grant one. In directing the solicitor to remove the power point slide and move on, the trial court prevented any prejudice from developing in the first place.

Appellant cites Matthews v. State, 350 S.C. 272, 565 S.E.2d 766 (2002) in arguing that the solicitor implied that there was additional incriminating evidence. That case provides a useful comparison to this one. The prosecutor in Matthews was addressing the credibility of a State's witness at a drug trial. During closing arguments, he told the jury that:

> I don't trust any of these people **until I corroborate their testimony**. And **once I corroborate their testimony**, yes, I put them on the witness stand because they were the ones that were there, they were the ones that can tell it.

Id. at 275, 565 S.E.2d at 767 (emphasis in original). The prosecutor did not identify any evidence that corroborated the witness, such as witness testimony or physical evidence. Id. at 277, 565

S.E.2d at 768. The state supreme court held the comment was improper because it implied that the prosecutor had done so.

The same reasoning does not apply here. The solicitor simply repeated the detective's testimony that appellant was not wearing any jewelry during his interview. (R. 1161, l. 13-16). Neither her words, nor the power point slide, imply that law enforcement found appellant's ring in his back pocket. They do not imply that the ring had the victim's blood on it. Unlike the situation in Matthews, the jury could not draw any of these inferences from the solicitor's closing argument. As such, the Court's ruling on this issue need not be revisited.

III. THE COURT CORRECTLY FOUND THAT THE SLED AGENT WAS QUALIFIED UNDER RULE 702 AND THAT HER TESTIMONY WAS RELIABLE.

Appellant argues that the SLED Agent was not qualified to provide expert testimony and that the testimony was unreliable. (Pet. 20-22). The argument is unpersuasive in both regards. The trial judge explored the agent's credentials prior to qualifying her as an expert. (R. 946-48; 957-63). As this Court correctly held, any perceived "defects in the amount or quality of education or experience go to the weight of the expert's testimony and not its admissibility." State v. Robinson, 396 S.C. 577, 586, 722 S.E.2d 820, 825 (Ct. App. 2012). As for the reliability of the evidence, this Court's opinion is in accordance with other jurisdictions that have addressed the issue. See e.g. United States v. Ford, 481 F.3d 215 (3d Cir. 2007); United States v. Allen, 390 F.3d 944 (7th Cir. 2004); State v. Gay, 145 A.3d 1066 (N.H. 2016); Berks v. State, 427 S.W.3d 98 (Ark. Ct. App. 2013); Jennings v. State, 123 So. 3d 1101 (Fla. 2013); Rodriguez v. State, 30 A.3d 764 (Del. 2011); Castellon v. State, 302 S.W.3d 568 (Tex. Ct. App. 2009); State v. Reid, 91 S.W.3d 247 (Tenn. 2002); West v. State, 755 N.E.2d 173 (Ind. 2001). As the Second Circuit Court of Appeals observed, "[c]ourts have admitted shoeprint identification evidence for a long time." Ford, 481 F.3d at 218 n.4.

Furthermore, even if appellant could establish the trial court abused its discretion, any error would be harmless. The agent's testimony that appellant's shoes had a similar tread design as the print at the crime scene was cumulative to other evidence. (R. 979, l. 18-19). Law enforcement discovered the victim's blood on the same pair of shoes. (R. 994, l. 12-14). Additionally, the victim's blood was on the driver's door and passenger seat of appellant's car. (R. 994, l. 12-14). During closing arguments, appellant's counsel even conceded that the presence of the victim's blood on these items was "the elephant in the room." (R. 1183, l. 4-5). Given the abundance of other evidence linking appellant to the crime scene, any error surrounding this witness was harmless. See State v. Tapp, 398 S.C. 376, 391 728 S.E.2d 468, 476 (2012).

CONCLUSION

For the foregoing reasons, the Petition for Rehearing and Suggestion for Rehearing En Banc should be denied.

Respectfully submitted,

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July 8, 2021

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PROOF OF SERVICE

I, Michael D. Ross, counsel for the Respondent, certify that I have served the within Return to Petition for Rehearing by email and by depositing two (2) copies of the same in the United States mail, addressed to Appellant's attorneys of record: ltraywick@robinsongray.com and Vordman Carlisle Traywick, III, Robinson Gray Stepp & Laffitte, LLC, Post Office Box 11449, Columbia, South Carolina 29211 and to rdudek@sccid.sc.gov and Robert M. Dudek, S.C. Commission on Indigent Defense, Division of Appellate Defense, P. O. Box 11589, Columbia, South Carolina 29211.

I further certify that all parties required by Rule to be served have been served.

This 8th day of July 2021.

s/Michael D. Ross
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Brandy Rankin

To:	ltraywick@robinsongray.com; Dudek, Robert
Cc:	Mike Ross; Kellner, Haley
Subject:	General T. Little - Return to Petition for Rehearing, Appellate Case No. 2018-000561
Attachments:	Return to Petition for Rehearing, 7-8-21 (ADOBE VERSION) approved MDR (02635794xD2C78).pdf

Dear Sirs,

Please find attached the Respondent's Return to Petition for Rehearing. This document will be filed today July 8, 2021with the South Carolina Court of Appeals along with a copy of this email.

Sincerely,

Brandy Rankin
Legal Assistant to:
Michael D. Ross