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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the 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 StateRespondent,

v.

General T. Little.....Appellant.

**APPELLANT’S REPLY IN SUPPORT OF PETITION FOR REHEARING
AND SUGGESTION FOR REHEARING EN BANC**

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Pursuant to Rule 240(f), SCACR, Appellant General T. Little (Dr. Little) submits this reply in support of his petition for rehearing and suggestion that the Court rehear en banc the panel's decision in State v. Little, Op. No. 2021-UP-196 (S.C. Ct. App. filed June 9, 2021). For the reasons that follow, as well as those set forth in his petition, the panel should grant rehearing, issue a substituted opinion, reverse Dr. Little's murder conviction, and remand to the circuit court for a new trial. Alternatively, the Court rehear the case en banc and do the same.

ARGUMENT

Dr. Little writes this reply only to address four points. First, the State's skewed analysis of the exigent-circumstances doctrine is unavailing, and the search was not reasonable. Second, although the State seeks to run from Dr. Little's argument under article I, section 10 of the South Carolina Constitution, it is both preserved and meritorious. Third, the State's misconduct—mentioning a suppressed piece of evidence during closing arguments—did prejudice Dr. Little and was grounds for a mistrial. Fourth, while the State continues to argue other jurisdictions accept shoeprint identification evidence, our supreme court has not blessed outsole footwear impressions expert testimony in South Carolina, and the State thus was not entitled to a pass on its admissibility.

I. The State failed to establish exigent circumstances, and even if such circumstances existed, Deputy Colburn's illegal search unreasonably exceeded the scope and duration of those circumstances that purportedly demanded his warrantless entry into the curtilage of Dr. Little's home to conduct a search.

The State argues Dr. Little has confused the analysis for Fourth Amendment cases. Not so. In determining whether a search is reasonable, one must analyze the purpose for which the officer was there in the first instance.

Here, the State seeks to invoke the exigent circumstances doctrine to argue it was reasonable for Deputy Colburn to perform a safety sweep of the vehicles parked in the curtilage of the home. But when objectively looking at the totality of the circumstances, Deputy Colburn was

not conducting a safety sweep. Instead, viewing Deputy Colburn's testimony from an objective standpoint, it is clear he was conducting an illegal search. The justification manufactured by the State after the fact—that Deputy Colburn was looking for individuals in Dr. Little's vehicle—does not hold water in light of what was presented during the suppression hearing and trial.

Take the illegal fruits of his search: a smudge on the inside of the driver's side door and towels found in the floorboard. One does not find such infinitesimal matters when looking to see if a person is hiding in a car. It is unrealistic to claim that an officer searching for a missing person or dangerous person would notice such an infinitesimal detail as the smudge found here. Similarly, a review of the pictures confirms no one could have possibly fit into the tight space where the towels were found. Consider next the duration of the search. Deputy Colburn testified that he searched the vehicle twice over a 90-second period. The alleged reason for this intrusion onto Dr. Little's property—to search for persons who could have been hiding in vehicles—could have been ascertained in a few seconds. By the time he walked around Dr. Little's vehicle the second time, Deputy Colburn undoubtedly had already ascertained nobody was hiding in the vehicle.

The exigent circumstances justification is therefore a façade. Deputy Colburn was there to conduct a warrantless search to discover evidence to use against Dr. Little. Plain and simple. Such a search was not reasonable under the Fourth Amendment. If that was not enough, Detective Muirhead later came along and did the same thing. It is beyond dispute that officers had zero justification at that point to conduct an illegal search. The State does not and cannot argue to the contrary. In short, the State failed to show “the warrantless entry was limited in scope and duration in accordance with the exigent circumstances which required its presence.” State v. Robinson, 410 S.C. 519, 530, 765 S.E.2d 564, 570 (2014). Again, Dr. Little does not concede that the State met its burden of demonstrating exigent circumstances to avail itself of the exception in the first

place. See State v. Dobbins, 420 S.C. 583, 592, 803 S.E.2d 876, 880 (Ct. App. 2017) (“[A]bsent hot pursuit, there must be at least probable cause to believe the exigent circumstances were present.”). After all, Deputy Colburn testified that Dr. Little was not a suspect, he did not believe Dr. Little was hiding, and he did not believe Dr. Little was armed and dangerous. Further, Deputy Colburn had backup on the scene. But even if the Court moves past that step, the State’s argument necessarily must fail because the search was not reasonable in scope or duration. This is where Florida v. Jardines, 569 U.S. 1 (2013), comes into play.

In Jardines, contrary to the State’s representations, “the question” was “precisely whether the officer’s conduct was an objectively reasonable search.” Id. at 10. As the Court recognized, “that depends upon whether the officers had an implied license to enter the porch, which in turn depends upon the purpose for which they entered.” Id. And “their behavior objectively reveal[ed] a purpose to conduct a search, which is not what anyone would think he had license to do.” Id. A review of Deputy Colburn’s actions—making multiple laps around Dr. Little’s vehicle with a flashlight for over 90 seconds, paying such close attention to the interior of the vehicle that he was able to notice a smudge on the inside of a door and towels in the floorboard—demonstrates he was not clearing the vehicles to eliminate potential danger. Instead, he was plainly conducting a search for evidence. And that violates the Fourth Amendment because “the circumstances, viewed objectively,” did not “justify [the] action.” State v. Herring, 387 S.C. 201, 210, 692 S.E.2d 490, 494 (2009) (quoting Scott v. United States, 436 U.S. 128, 138 (1978)).

The State, in its return, argues Dr. Little believes any warrantless intrusion into the curtilage of the home is unlawful. This is a straw man. Dr. Little never made such an argument. To be sure, the exceptions to the warrant requirement are well-defined in the law. But the State bears the burden of proving an exception applies. And here, the State wholly failed to meet its burden

in light of Deputy Colburn's inconsistent and puzzling testimony on the initial unlawful search. Notably, the State does not even attempt to grapple with the subsequent illegal searches of the vehicle. As much as Deputy Colburn's testimony was insufficient to invoke an exception to the warrant requirement, the State had absolutely no justification for illegally searching Dr. Little's vehicle while he was in custody. To date, the State still has not argued to the contrary.

As for the State's argument that Dr. Little's Herring distinctions "fall[] short," Resp. Return at 3, the State notably only addressed one of them. Importantly, in Herring, 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 a thorough 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. (R. pp. 554, 663–64). As a result of these unlawful searches, the State obtained physical evidence that did inculpate Dr. Little.

Nor was this a de minimis intrusion. The State, for instance, was not simply trying to determine the make and model of Dr. Little's vehicle to determine whether he was home. Cf. Herring, 387 S.C. at 211, 692 S.E.2d at 495. Officers ascertained this information from the street. Instead, Deputy Colburn performed a scrupulous search of the vehicle for the objective purpose of finding evidence. This post-hoc justification of exigent circumstances is simply not credible or reasonable. 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. Perhaps that is why the circuit court noted Deputy

Colburn never explained why it did. (R. pp. 160–61). Further, the State failed to address what “compelling need” existed “for official action” or why it had “no time to secure a warrant.” State v. Abdullah, 357 S.C. 344, 351, 592 S.E.2d 344, 348 (Ct. App. 2004). The historical facts preceding the search do not support that argument. And a conclusory assertion of officer safety, standing alone, is insufficient to show probable cause for exigent circumstances. But that is all the circuit court had, and this Court affirmed in summary fashion. Respectfully, the Court erred.

When taking all of the circumstances into account, Deputy Colburn’s behavior objectively reveals a purpose to conduct a search—not a welfare check or a safety sweep—“which is not what anyone would think he had license to do.” Jardines, 569 U.S. at 10. At most, the State had a hunch that something was off that evening. But an “inchoate and unparticularized suspicion or hunch” will not do. Maryland v. Buie, 494 U.S. 325, 332 (1990) (quoting Terry v. Ohio, 392 U.S. 1, 27 (1968)). That is not the same as probable cause. With all due respect, no ordinarily prudent and cautious person, under the circumstances, would believe an invasive 90-second search in the curtilage of someone’s home was justified to protect the safety of officers or others. This is particularly true in light of Deputy Colburn’s testimony that he had backup on the scene, and Dr. Little was not a suspect. (R. pp. 513, 543).

In light of these repeated Fourth Amendment violations, all evidence obtained from the unlawful searches should have been suppressed as fruit of the poisonous tree. The circuit court abused its discretion by failing to exclude the evidence, and the panel erred in affirming.

II. The State’s late-breaking preservation argument is manifestly without merit, and the Court should reverse and remand on state constitutional grounds.

In its return in opposition to Dr. Little’s petition for rehearing, the State—for the first time in this case—argues “it is unclear” Dr. Little “even raised” the state constitutional argument. Resp. Return at 4. Not so.

A review of the record and briefs reveals that (1) Dr. Little raised the issue to the circuit court; (2) the circuit court ruled on it and even said, “I’m glad to see that y’all have raised the South Carolina Constitution issue,” (R. p. 159); (3) Dr. Little raised the argument in his brief, (Br. App. at 9–10, 15, 27); (4) the State responded to the state constitutional argument in its brief (Br. Resp. at 14, 20); and (5) Dr. Little’s counsel addressed the issue during oral arguments on January 12, 2021. Put simply, the defense raised this issue at every level.

The State notably fails to cite any case law supporting its blinkered view of preservation in South Carolina. But see Atl. Coast Builders & Contractors, LLC v. Lewis, 398 S.C. 323, 329, 730 S.E.2d 282, 284 (2012) (recognizing error preservation “is not a ‘gotcha’ game aimed at embarrassing attorneys or harming litigants”). None exists. Instead, the State relies upon an inapposite case holding that an issue is abandoned on appeal when a party merely makes passing reference to it without citing any authority. See Resp. Return at 4 (citing S. Glass & Plastics Co., Inc. v. Kemper, 399 S.C. 483, 498, 732 S.E.2d 205, 213 (Ct. App. 2012)). Dr. Little cited almost a full page worth of authority on the article I, section 10 issue, and those cases speak for themselves. See App. Br. at 9–10. If the Court disagrees with the federal issue, it can still find—under the facts and circumstances extensively outlined in Dr. Little’s brief—that the state constitutional issue requires reversal. No additional argument was necessary. Accordingly, the issue was not abandoned on appeal.

Procedural technicalities aside, the State is simply trying to run from this argument. In his brief, Dr. Little argued “searches and seizures that do not offend the federal Constitution may still offend the South Carolina Constitution. Br. App. at 10 (quoting State v. Weaver, 374 S.C. 313, 322, 649 S.E.2d 479, 483 (2007)). He then continued to argue that the State’s illegal investigative tactics violated both the Fourth Amendment to the U.S. Constitution and the South Carolina

Constitution. Id. at 15, 27. As argued earlier, if the Court was not persuaded on the federal question—as was the case here—then our state constitution can “provide greater protection.” Id. at 10 (quoting State v. Counts, 413 S.C. 153, 164, 776 S.E.2d 59, 65 (2015)).

The analyses necessarily overlap, and Dr. Little was not required to redundantly argue both separately. Simply put, the argument is that if the Court finds the search was reasonable under our Fourth Amendment jurisprudence, then it should nevertheless find it ran afoul of our state constitution that provides greater protection. See Counts, 413 S.C. at 168, 776 S.E.2d at 68 (quoting State v. Forrester, 343 S.C. 637, 645, 541 S.E.2d 837, 841 (2001)). As Dr. Little noted in the petition for rehearing, it is up to “the state judiciary to construct a precise meaning of this phrase” “unreasonable invasions of privacy” in article I, section 10 of the South Carolina Constitution. Jaclyn L. McAndrew, Who Has More Privacy?: State v. Brown and Its Effect on South Carolina Criminal Defendants, 62 S.C. L. REV. 671, 694 (2011). The panel, however, overlooked this argument and failed to address it. This was error.

Turning to the merits, the State seeks to compare apples to oranges. Our supreme court’s analysis in Weaver hinged on the fact that, as of 2007, “there ha[d] never been a clear statement by the United States Supreme Court that a warrant is required before a vehicle is searched in a private place.” 374 S.C. at 322 n.2, 649 S.E.2d at 483 n.2. As the State well knows, that is no longer the case. E.g., Collins v. Virginia, 138 S. Ct. 1663, 1672 (2018) (holding that “searching a vehicle parked in the curtilage involves not only the invasion of the Fourth Amendment interest in the vehicle but also an invasion of the sanctity of the curtilage”). Further, Weaver was decided under the automobile exception to the warrant requirement. The U.S. Supreme Court made clear in Collins that approach was no longer valid. Here, on the other hand, the State is arguing exigent circumstances justified its unlawful search of Dr. Little’s vehicle parked within the curtilage.

Although Dr. Little is cognizant this Court cannot overrule precedent from our supreme court, the Court need not go so far here. Rather, it can merely distinguish Weaver on the grounds set forth above and leave the question regarding the continued viability of Weaver for another day when that issue makes its way to the Supreme Court of South Carolina. Because the State's actions here did not fit into an exception to the warrant requirement, even if the panel found they satisfied the Fourth Amendment's touchstone of reasonableness, they do not pass muster under article I, section 10 of the South Carolina Constitution. The State's trespass into the curtilage of Dr. Little's home to objectively conduct a search for evidence to use against him constituted an unreasonable invasion of privacy. See S.C. CONST. art. I, § 10.

III. The State's improper reference to the suppressed ring prejudiced Dr. Little.

While the State believes Matthews v. State provides an escape hatch for its improper conduct during closing arguments, that case actually cuts the other way. 350 S.C. 272, 565 S.E.2d 766 (2002). A review of that case shows what happened here was worse. In Matthews, the solicitor sought to vouch for another witness who actually testified, stating in general terms that he had corroborated the witness's testimony. 350 S.C. at 275, 565 S.E.2d at 767. Here, on the other hand, the circuit court forbade the State from mentioning the suppressed ring due to the unconstitutional means by which it was unlawfully seized from Dr. Little following a blatant Miranda violation. The State did so anyway and highlighted the never-before-seen-evidence on a PowerPoint slide that incredulously said "(no ring???)". (R. pp. 1161, 1306).

Thus, it does not matter whether the State said the ring had blood on it. Under South Carolina law, closing "[a]rguments must be confined to evidence in the record." State v. Huggins, 325 S.C. 103, 107, 481 S.E.2d 114, 116 (1997). Here, the State's closing argument wasn't. The State instead gave "the impression to the jury" it had "evidence not presented to the jury but known

by the prosecution which supports conviction.” Matthews, 350 S.C. at 276, 565 S.E.2d at 768. And the State conceded 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. Reversal is thus required. Dr. Little deserves a new trial that is not tainted by such improper conduct in the waning hours of trial.

IV. Outsole footwear impressions testimony is not yet recognized in South Carolina, and the State was not entitled to a pass for failing to establish its admissibility.

When “considering the admissibility of scientific evidence,” an appellate court generally looks at the following factors: “(1) the publications and peer review of the technique; (2) prior application of the method to the type of evidence involved in the case; (3) the quality control procedures used to ensure reliability; and (4) the consistency of the method with recognized scientific laws and procedures.” State v. Council, 335 S.C. 1, 19, 515 S.E.2d 508, 517 (1999). Scientific evidence, of course, “is also subject to attack for relevancy and prejudice.” Id. at 19–20, 515 S.E.2d at 517.

In support of reliability, the State simply cites cases from other jurisdictions and summarily argues the Court properly found the evidence reliable. But the State ignores that the Court did not apply all the Council factors. Dr. Little will focus on two in particular. As for the first factor, the Court simply found “Claycomb testified she read publications on the subject and explained she was familiar with others experts’ research on fundamental footwear patterns.” Little, Op. No. 2021-UP-196, at 4. Which ones? The State never told the circuit court. Turning to the fourth factor, the Court concluded Claycomb “explained the procedures and steps she used when comparing footprint impressions.” Id. But that is not the same as showing the method was consistent “with recognized scientific laws and procedures.” Council, 335 S.C. at 19, 515 S.E.2d

at 517. Again, the State did not elicit testimony from Claycomb to establish consistency with any identifiable scientific laws and procedures.

While the State believes it was entitled to a pass on reliability because other jurisdictions have recognized the admissibility of outsole footwear impressions testimony,¹ the Supreme Court of South Carolina has not done so to date. In fact, in the only related case on the subject, our supreme court found footwear impressions evidence inadmissible in South Carolina. See State v. Jones, 343 S.C. 562, 572, 541 S.E.2d 813, 818 (2001) (Jones I); State v. Jones, 383 S.C. 535, 557–58, 681 S.E.2d 580, 592 (2009) (Jones II). Interestingly, in that case, our supreme court rejected the publications and testimony of William Bodziak—the very individual under whom Claycomb trained—as unreliable. See id.; (R. p. 952). And the same holds true here.

In sum, 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. Following this process, Claycomb found in her report a “corresponding tread design,” but due to the quality of the photographs, she was unable to “conduct a further examination.” (Id. at 950). Although she found the “outsole design [was] similar,” she could not say it was the same shoe. (Id. at 976). Claycomb could not even say whether this was a left or right shoe. (Id. at 979). She also could not determine the shoe size. (Id. at 983). That 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.

Because this evidence directly linked Dr. Little to the scene of the crime, this purported expert testimony from one of the State’s investigating officers prejudiced Dr. Little, and the error was not harmless. See State v. Ellis, 345 S.C. 175, 178, 547 S.E.2d 490, 491 (2001) (holding that

¹ Notably, those cases were not presented to the circuit court.

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 improper opinion [that] goes to the heart of the case is not harmless”). Thus, the Court should reverse and remand.

CONCLUSION

Deputy Colburn was not conducting a sweep to ensure officer safety. Rather, when objectively viewing the totality of the circumstances, Deputy Colburn was indisputably searching the vehicles parked in the curtilage of Dr. Little’s home to obtain evidence. That is illegal. And so the conviction cannot stand. The circuit court also abused its discretion in excusing the State’s misconduct and admitting prejudicial and unreliable expert testimony. The panel should therefore grant rehearing, issue a substituted opinion, and reverse and remand to the court of general sessions for a new trial. Alternatively, the Court should rehear the case en banc and do the same.

Respectfully submitted,

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PROOF OF SERVICE

I certify that I have served Appellant General T. Little's Reply in Support of the Petition for Rehearing and Suggestion for Rehearing En Banc on the following counsel by email on July 13, 2021.

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All,

Pursuant to In re Operation of the Appellate Courts During the Coronavirus Emergency, App. No. 2020-000447, Am. Order No. 2020-05-29-02, ¶ (g)(3) (S.C. Sup. Ct. filed May 29, 2020), attached for service upon you is Appellant General T. Little's Reply in Support of the Petition for Rehearing and Suggestion for Rehearing En Banc, as well as a Proof of Service, being filed in the Court of Appeals today.

Should you have any questions or concerns, please don't hesitate to contact us. Thanks and have a great afternoon.

Best,

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