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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS

APPEAL FROM CHARLESTON COUNTY
In the Court of General Sessions

Thomas L. Hughston, Jr., Circuit Court Judge

Appellate Case No. 2021-001043

The State .....Respondent,

v.

General T. Little.....Petitioner.

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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Pursuant to Rule 242(g), SCACR, Petitioner General T. Little (Dr. Little) submits this reply in support of his petition for the Court to issue a writ of certiorari to review the court of appeals' decision in State v. Little, Op. No. 2021-UP-196 (S.C. Ct. App. filed July 21, 2021). For the reasons that follow, as well as those set forth in the petition, the Court should grant certiorari, reverse the court of appeals, and remand to the court of general sessions for a new trial.

INTRODUCTION

Since the pretrial suppression hearing, the State's defense of the illegal search has been a moving target. Respectfully, the State's latest position fails as a matter of law and logic.

On the one hand, the State prepped its officer to testify that Dr. Little was not a suspect, he did not believe Dr. Little was hiding, he did not believe Dr. Little was armed and dangerous, and he had backup on the scene. Yet on the other hand, the State argues—in conclusory fashion—that the illegal search of Dr. Little's vehicle parked in the curtilage of his home was necessary to ensure officer safety. The State cannot have it both ways. And although officers had spoken with Dr. Little that evening, the State now revives its scurrilous contention that the warrantless search was necessary to ensure his welfare. Officers were not checking vehicles to make sure Dr. Little was okay, and the Court should reject the State's self-defeating argument about officer safety. These are merely post-hoc justifications for Deputy Colburn conducting an illegal search for the objective purpose of obtaining evidence to use against Dr. Little.

Pretext aside, the duration and scope of the search were not reasonable. If Deputy Colburn were truly clearing the vehicles for potential confederates, he could have done so in a matter of seconds with the aid of his flashlight. Instead, he spent upwards of two minutes meticulously searching the vehicles parked within the curtilage of the home. And even though he had already cleared Dr. Little's vehicle once, Deputy Colburn searched it again after snooping in the other

vehicles. These actions only further underscore the fallacy of his justifications for being there. Consider next the fruits of his illegal search: a smudge on the inside of the driver's side door and towels found in the floorboard. 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. The Fourth Amendment, of course, does not countenance such trespasses and intrusions. And to this day, not a single attorney for the State has made an effort to justify Detective Muirhead's subsequent illegal search.

In addition to violating the Fourth Amendment, the State's unlawful searches ran afoul of article I, section 10 of the South Carolina Constitution. Although both parties addressed the merits of this issue in their briefs filed with the court of appeals, the State now tries to escape this Court's review by raising a specious preservation argument. But the issue was raised to and ruled upon by both the circuit court and the court of appeals. It is therefore preserved. Because the State relegated its merits argument to one footnote in its return, Dr. Little will simply rest upon the arguments in his petition on the merits of the state constitutional issue.

As to the motion for a mistrial, the State now seeks to defend the assistant solicitor's misconduct during closing argument, while conceding she was trying to connect Dr. Little to the murder because he wasn't wearing his wedding ring. In other words, the State unwittingly makes Dr. Little's harmless error argument for him. The circuit court suppressed this evidence prior to trial because officers unlawfully obtained it following a textbook Miranda violation. It never should have been mentioned. Yet the State did so anyway in the waning hours of trial. The Court should not condone such tactics, particularly where, as here, the improper mention of the ring only doubled down on the initial constitutional violation.

Turning last to the outsole footwear impressions testimony, the State curiously makes no effort to analyze its reliability. Instead of wrestling with the Council factors, the State simply points to a sampling of cases from other jurisdictions—none of which were presented to the circuit court—to argue this evidence is "widely accepted" and, thus, admissible. Return at 24. In doing so, the State continues to believe it was entitled to a pass on showing reliability. It was not. The State failed to meet its burden, the circuit court abused its discretion in admitting this prejudicial testimony, and the court of appeals erred in affirming.

Dr. Little deserves a fair trial cleansed of these prejudicial errors. The Court should therefore grant certiorari to address the "novel questions of law" and "substantial constitutional issues" raised in his petition, reverse, and remand. Rule 242(b)(1) & (b)(4), SCACR.

ARGUMENT

I. The State's ever-evolving arguments cannot justify officers' unlawful trespass into the curtilage of Dr. Little's home to conduct an unreasonable search of his vehicle.

A. No exigent circumstances justified the search, and the scope and duration of the search were not reasonable.

"The prosecution bears the burden of establishing probable cause as well as the existence of circumstances constituting an exception to the general prohibition against warrantless searches and seizures." State v. Gamble, 405 S.C. 409, 416, 747 S.E.2d 784, 787 (2013). 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 Deputy Colburn was not conducting a safety sweep. Nor was he conducting a welfare check on Dr. Little. Instead, when taking all of the circumstances into account, Deputy Colburn's behavior objectively reveals a purpose to conduct a search, "which is not what anyone would think he had license to do." Florida v. Jardines, 569 U.S. 1, 10 (2013).

In support of its shifting argument, the State almost exclusively relies upon the circuit court's comments during the suppression hearing. See Return at 12. For one, that's not evidence. Cf. Evidence, BLACK'S LAW DICTIONARY (10th ed. 2014) (defining evidence as "[s]omething (including testimony, documents, and tangible objects) that tends to prove or disprove the existence or nonexistence of a fact"); James B. Thayer, Presumptions and the Law of Evidence, 3 HARV. L. REV. 141, 142 (1889) (stating, in relevant part, that "[e]vidence is any matter of fact which is furnished to a legal tribunal" (emphasis added)). The State did not proffer any of the matters in the long block quote of the judge's remarks. For another, that's important because the circuit court also noted—just prior to that sua sponte finding—that Deputy Colburn never explained why he found certain things odd about Dr. Little's property. (R. pp. 160–61).

This is fatal to the State's case. As noted above, the State had the burden of proof. Yet the State can only point to the circuit court's statements, details of the crime scene,[1] and Deputy Colburn's testimony that "you do not know." (R. p. 550). Interestingly, the State seeks to revive the previously abandoned argument that "there was plenty of room to park within the driveway." Return at 15. The pictures prove that is simply not true. (R. pp. 1265, 1286–87). Further, the State's new spin on the case—that Dr. Little's house was a "strange scene"—finds no support in the record. Return at 15. Nothing is "strange" about a Toyota Sequoia having one tire barely off the driveway at a two-story colonial home in an upper-middle-class neighborhood in West Ashley. (R. pp. 1265, 1286–87, 547, 161). And Deputy Colburn did not see the window down until his second lap around the vehicle after it had already been cleared. (R. pp. 516–17).

[1] But see State v. Herring, 387 S.C. 201, 218–19, 692 S.E.2d 490, 499 (2009) (Kittredge, J., concurring) ("disagree[ing] that, from an objective standard, exigent circumstances existed upon the arrival of law enforcement at Herring's residence two hours after the shooting of John Johnson at Chastity's strip club" and stating that the peek into the garage was "an unwarranted trespass and warrantless search" but finding this search yielded no evidence (emphasis added)).

With all due respect, no ordinarily prudent and cautious person, under these 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. 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. 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 tantamount to probable cause.

The State seeks to muddy the water with a straw man argument that Deputy Colburn was entitled to "approach[] the front door" for a knock and talk. Return at 15. No one disputes that. But that's not what happened here. Rather, Deputy Colburn scrupulously searched Dr. Little's vehicle twice over at least a 90-second period. The vehicles, which were parked in the curtilage, were not near the front door, and Deputy Colburn had to stray beyond the path a visitor would normally traverse to go knock on the front door. Further, the alleged reason for this intrusion—to search for persons who may be hiding—could have been ascertained in a few seconds with the aid of his flashlight. Thus, the warrantless search was not reasonably "limited in scope and duration" when measured against the purported exigent circumstances Deputy Colburn said justified his presence in the first instance. State v. Robinson, 410 S.C. 519, 530, 765 S.E.2d 564, 570 (2014).

In Jardines, "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 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." Herring, 387 S.C. at 210, 692 S.E.2d at 494 (quoting Scott v. United States, 436 U.S. 128, 138 (1978)).

Last, the State tries to rescue the illegal search by arguing "one can infer reasonableness from law enforcement's subsequent decision to obtain a search warrant for the car." Return at 16 (citing State v. Johnson, 410 S.C. 10, 20, 763 S.E.2d 36, 42 (Ct. App. 2014); State v. Abdullah, 357 S.C. 344, 351 n.3, 592 S.E.2d 344, 348 n.3 (Ct. App. 2004)). The State, however, overlooks an important distinguishing fact. Here, the "subsequent decision" was for Detective Muirhead to conduct another illegal search of the vehicle. Only after he confirmed Deputy Colburn's findings did officers bother to trying to obtain a warrant. And that warrant application was tainted by the findings of the two illegal searches. The State does not and cannot argue to the contrary. Indeed, to this day, the State has yet to explain or defend this second search. It was plainly illegal. Under these circumstances, the State finds no refuge in Johnson or Abdullah.

In sum, the State's post-hoc justifications for exigent circumstances do not pass the smell test. Deputy Colburn was not concerned with Dr. Little's welfare. And the scope and duration of his search demonstrate he was not concerned with officer safety. He was looking for evidence. That does not satisfy the Fourth Amendment's touchstone of reasonableness. Consequently, all evidence obtained from the unlawful searches should have been suppressed.

B. Dr. Little's state constitutional argument is preserved and requires reversal.

The State seeks to recycle its preservation argument to avoid this Court's review, arguing Dr. Little somehow abandoned the state constitutional issue on appeal. Not so.

A review of the record reveals that (1) Dr. Little argued to the circuit court that the State's illegal search violated article I, section 10 of the South Carolina Constitution; (2) the circuit court ruled on it and 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 argument in its brief[2] (Br. Resp. at 14, 20); (5) Dr. Little's counsel addressed the issue during oral arguments on January 12, 2021; (6) Dr. Little argued in his petition for rehearing that the panel failed to address the state constitutional issue in its initial opinion; (7) the court of appeals granted Dr. Little's petition for rehearing and addressed the issue in a substituted opinion; and (8) Dr. Little argued the insufficiency and incorrectness of the court of appeals' holding in a petition for rehearing of the substituted opinion, which was denied.

Nothing else was required to preserve the issue for this Court's review. See Atl. Coast Builders & Contractors, LLC v. Lewis, 398 S.C. 323, 329, 730 S.E.2d 282, 284 (2012) (stating error preservation "is not a 'gotcha' game aimed at embarrassing attorneys or harming litigants"). If the state constitutional issue were truly abandoned, the court of appeals would not have granted rehearing and issued a substituted opinion solely to address it. The State's argument is specious.

In its one footnote addressing the merits, the State whistles past Dr. Little's arguments about the applicability and continued validity of State v. Weaver, 374 S.C. 313, 649 S.E.2d 479 (2007). The 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

[2] Ironically, the State did not raise this issue in its Brief of Respondent. Instead, the State waited until its return in opposition to Dr. Little's petition for rehearing. That was too late. See I'On, LLC v. Town of Mt. Pleasant, 338 S.C. 406, 420, 526 S.E.2d 716, 723 (2000) ("Of course, a respondent may abandon an additional sustaining ground under the present rules—just as a respondent could under the former rules—by failing to raise it in the appellate brief.").

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. Here, on the other hand, the State is arguing exigent circumstances justified its unlawful search of Dr. Little's vehicle parked within the curtilage. As explained above, they did not.

Thus, for the reasons outlined in Dr. Little's petition, the State's trespass into the curtilage of Dr. Little's home to conduct an unlawful search constituted an unreasonable invasion of privacy in violation of article I, section 10 of the South Carolina Constitution.

II. The State cannot rewrite history on its prejudicial reference to the suppressed ring during closing argument.

Although the State previously focused on the prejudice prong, it now seeks to resurrect its justification of the assistant solicitor's actions. It cannot defend the indefensible.

Before trial, 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 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). Curiously, the State removed the flippant question marks when quoting the PowerPoint slide in its return. Resp. Return at 19. The slide presented to the jury, of course, was not similarly scrubbed.

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 was not. 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. Taking down the slide down did nothing—the cat was out of the bag. To that

end, the State makes Dr. Little's prejudice argument for him, noting "[o]ne could reasonably draw the inference that [Dr. Little] was cleaning up after the murder and had removed his ring." Return at 21. But that's the problem: the jury likely did make that inference. The State further concedes the prosecutor'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 therefore "dictated by . . . the ends of public justice." State v. Prince, 279 S.C. 30, 33, 301 S.E.2d 471, 472 (1983).

III. The State does not and cannot meet its burden of proving outsole footwear impressions testimony is admissible by citing cases from other jurisdictions for the first time on appeal.

Finally, the State does not even attempt to wrestle with the reliability analysis for outsole footwear impressions testimony. See State v. Council, 335 S.C. 1, 19, 515 S.E.2d 508, 517 (1999) (stating when "considering the admissibility of scientific evidence," an appellate court generally looks at "(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").

Nor could it. As for the first factor, the court of appeals 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 or the court of appeals. Turning to the fourth factor, the court of appeals 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. And it has failed to articulate any on appeal.

In support of reliability, the State simply cites cases from other jurisdictions to summarily argue the court of appeals properly found the evidence reliable. That argument fails for at least two reasons. First, the State did not mention any of those cases to the circuit court below. Second, the State is not entitled to a pass on reliability just because other jurisdictions have recognized the admissibility of outsole footwear impressions testimony. To date, this Court has not. In fact, in the only related case on the subject, the 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, the Court there 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.

At bottom, 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; see also Council, 335 S.C. at 19–20, 515 S.E.2d at 517 (stating scientific evidence, of course, "is also subject to attack for relevancy and prejudice").

Because this evidence directly linked Dr. Little to the scene of the crime, he was prejudiced, and the error was not harmless. See State v. Ellis, 345 S.C. 175, 178, 547 S.E.2d 490, 491 (2001)

(holding reversal is required 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").

CONCLUSION

These are not mere technicalities. Without the State's unconstitutional and prejudicial tactics, the case presented to the jury would have been fundamentally different. The Court should therefore grant certiorari, reverse, and remand for a new trial with instructions to exclude the fruits of the illegal search and the outsole footwear impressions testimony. An admonishment and reminder that suppressed evidence is, in fact, off limits would also be appropriate.

Respectfully submitted,

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