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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

THE STATE,

RESPONDENT,

V.

KELVIN JONES,

APPELLANT

APPELLATE CASE NO. 2020-000653

Appeal from Aiken County

Honorable R. Lawton McIntosh, Circuit Court Judge

Opinion No. 28074

RETURN TO PETITION FOR REHEARING

On December 8, 2021, this Court affirmed Appellant/Petitioner's convictions finding that the challenge to the denial of a motion to suppress based on a search warrant lacking probable cause in violation of the Fourth Amendment was preserved for appellate review but found that the motion to suppress was properly denied because the magistrate's issuance of the search warrant was supported by probable cause. On December 22, 2021, counsel for Appellant/Petitioner filed a petition for rehearing. Counsel for Appellant/Petitioner submitted that this Court correctly found that the pretrial denial of the motion to suppress drugs seized as a violation of the Fourth Amendment was a final ruling and the issue was preserved for appellate review. Counsel

respectfully submitted, however, that when making the probable cause determination, based on the totality of the circumstances, this Court overlooked the facts that anonymous complaints of "short-term traffic" lacked reliability and required an assumption that complaints of "short-term traffic" were indicative of drug transactions rather than innocent behavior. Additionally, counsel respectfully submitted that this Court overlooked the suspect nature of a single trash pull as well as the fact that the items and small amount of contraband found as a result of the trash pull failed to indicate that drug transactions were taking place inside the house or that drugs would be found inside the house. Instead, the items found as a result of the trash pull simply indicated that marijuana had been smoked and discarded at some point in time.

On December 23, 2021, the State/Respondent filed a petition for rehearing challenging this Court's ruling on the preservation issue. This Court requested a return from both sides. In this case the Court refined the preservation rules and held that a pretrial ruling on a constitutional issue is a final ruling unless something changes that may reasonably cause the trial judge to alter the pretrial ruling. As a final ruling under these circumstances, no further objection is required to preserve the issue for appellate review. The refined preservation rule is consistent with long established precedent that appellate courts only review issues considered by the trial courts. The refined rule is clear for both the trial bench and bar and prevents "a game of 'gotcha,' where form is elevated over substance." As this Court wrote, "Their [preservation rules] purpose is not to sabotage attorneys' efforts to bring issues before the appellate courts, particularly where, as here, it was clear to all concerned that Jones's counsel continued to object to the denial of his motion to suppress. Therefore, we hold that Jones's objection to the denial of his motion to suppress was preserved for appellate review." State v. Jones, No. 2020-000653, 2021 WL 5823847, at *3 (S.C. Dec. 8, 2021).

Under the facts of this case, where Judge Dickson, pretrial, heard and finally ruled on the motion to suppress items seized based on a search warrant lacking probable cause in violation of the Fourth Amendment and nothing changed during the trial that would have caused the trial judge to alter the pretrial ruling, this Court correctly found that no further objection was required and the issue was preserved for appellate review. While trial counsel did not object when items seized pursuant to the execution of the search warrant lacking probable cause were admitted at trial, counsel renewed the objection to the order denying the motion to suppress at the start of the trial. (R. p. 37, lines 11-15). Counsel again renewed the objection to the evidence and the denial of the motion to suppress prior to opening statements. (R. p. 82, line 16 – p. 83, lines 1-7). The judge ruled, "All right. Very Good. I note that objection. The ruling will stand as is." (R. p. 83, lines 8-9). Counsel renewed the objection at the close of the State's case. (R. p. 344, lines 12-17). Counsel did not waive or forfeit the suppression issue.

Respondent argues, "It is incredulous that the circuit court believed and understood that Petitioner was continuing his objection, because if he had, he would not have said 'admitted without objection' and, instead, would have noted the prior objection as has been done in many records which have appeared before this Court." (Respondent's petition for rehearing p. 5). The trial judge understood that Petitioner was continuing his objection based on the renewal of the objection twice before trial and again and the end of the trial. The trial judge's statement that the evidence was admitted without objection does not waive or forfeit the issue when nothing changed during the course of the trial to cause the judge to alter the previous ruling. The pretrial ruling was a final ruling on a constitutional issue and no further objection was required.

The present case is distinguished from Burke v. AnMed Health, 393 S.C. 48, 710 S.E.2d 84 (Ct. App. 2011), because the objection in the present case was to the admission of evidence based on the violation of the Fourth Amendment, a constitutional issue. Additionally, the record as a whole supports the fact that the pre-trial ruling was a final ruling. In contrast, the objection in Burke was to the admission of medical bills on relevancy grounds and the pretrial ruling was a preliminary ruling, with no objection to the pretrial ruling prior to trial or after trial. In Burke v. AnMed Health, the South Carolina Court of Appeals wrote:

> In this case, AnMed not only failed to renew its objection when evidence of the medical bills was offered, AnMed affirmatively stated that it had no objection to the introduction of this evidence. In State v. Dicapua, the defendant objected in limine to the admission of a videotape. 373 S.C. 452, 646 S.E.2d 150 (Ct.App.2007), *aff'd,* 383 S.C. 394, 680 S.E.2d 292 (2009). When the State later offered the video into evidence the defendant said, "no objection." 373 S.C. at 454, 646 S.E.2d at 151. This court held that the statement "no objection" constituted "a waiver of any issue [the defendant] had with the videotape." 373 S.C. at 455, 646 S.E.2d at 152. We find Dicapua controlling. When a party states to the trial court that it has no objection to the introduction of evidence, even though the party previously made a motion to exclude the evidence, the issue raised in the previous motion is not preserved for appellate review.

393 S.C. at 55, 710 S.E.2d at 88. There was no waiver of the constitutional issue raised pretrial in the present case because the pretrial ruling was a final ruling on a constitutional issue. While trial counsel stated no objection when items seized as a result of the search warrant lacking probable cause were admitted in evidence, trial counsel renewed the objection to the pre-trial ruling twice prior to trial and again at the end of the trial. This Court correctly found that the issue was preserved for appellate review.

In State v. Dicapua, 373 S.C. 452, 46 S.E.2d 150 (Ct. App. 2007), aff'd, 383 S.C. 394, 680 S.E.2d 292 (2009), the defendant moved pretrial, before the trial judge, to suppress the video of an undercover sting operation of a drug deal because the audio failed to record. The judge denied the motion. When the State moved to admit the video at trial, defense counsel stated, "We have no

objection, Your Honor." 373 S.C. at 454, 646 S.E.2d at 151. (Ct. App. 2007), aff'd, 383 S.C. 394, 680 S.E.2d 292 (2009). After the jury returned a verdict of guilty, Dicapua did not renew his pre-trial motion to suppress the video but instead, " 'renew[ed] all of [his] prior Motions ... made during the course of the trial, as well, as at the end of the State's case.'Dicapua also moved for a new trial 'on the basis of what else was set out before the Court, the objections and request going back to the CI, the chain, and all those things.' " 373 S.C. at 454, 646 S.E.2d at 151 (Ct. App. 2007), aff'd, 383 S.C. 394, 680 S.E.2d 292 (2009). As noted by the South Carolina Supreme Court in affirming the finding by the Court of Appeals, "Following the State's case, Dicapua made multiple motions: for a dismissal and a mistrial due to the lack of a link between the drugs found on the informant and Dicapua, for a directed verdict due to the "totality" of the State's case, and for dismissal due to entrapment. **Notably, these motions did not refer to the admission of the videotape**." 680 S.E.2d at 293 (emphasis added). The trial judge denied the motions but then the next day *sua sponte* vacated the conviction based on the admission of the video. The South Carolina Court of Appeals reversed the decision by the trial court and reinstated the conviction and sentence.

In affirming the decision by the Court of Appeals, the South Carolina Supreme Court wrote, "By **consenting** to the admission of the videotape evidence, Dicapua waived any direct challenge to the admission of the evidence. Concomitantly, the trial court lacked authority to grant relief on the basis of a ground not raised by Dicapua. We hold the granting of a new trial *sua sponte* on a ground waived by a party is an error of law." State v. Dicapua, 383 S.C. 394, 399, 680 S.E.2d 292, 294 (2009)(emphasis added). The fact that none of the post-trial motions involved the previously challenged video supports the finding that the defendant in Dicapua consented to the admission of the video and waived the right to challenge the admission of the video on appeal. In

contrast, in the present case, Petitioner renewed the motion to suppress the drugs at the close of the State's case, supporting the fact that Petitioner did not consent to the admission of the drugs at trial. The issue was not waived.

The present case is distinguished from Livingston v. Greyhound Lines Inc., 2019 PA Super 134, 208 A.3d 1122, 1136 (2019), cited by Respondent. (Respondent's petition for rehearing p. 6). In Livingston the trial judge initially ruled that a witness, Corporal Schmit, could not testify about the pre-collision speed of a truck and could not testify as to causation. The defendant filed a pre-trial motion to reconsider the ruling. During the pre-trial motion to reconsider the defendant "repeatedly represented to the trial court that they were no longer seeking to call Corporal Schmit to testify as to his opinions on causation." A lengthy colloquy took place between defense counsel and the trial court clearly reflecting that the defense no longer sought to have Corporal Schmit to testify as to causation. As a result, the court ruled, "Because the Greyhound defendants unequivocally stated to the trial court that they no longer sought to have Corporal Schmit testify as to any opinions other than the speed of the truck, they waived any claim of error with respect to exclusion of his testimony as an expert witness on other issues [causation] and are barred from seeking reversal of the trial court's judgments on this basis." Livingston v. Greyhound Lines Inc., 2019 PA Super 134, 208 A.3d 1122, 1136 (2019). In the present case there was not a lengthy colloquy to indicate that counsel changed his mind in regard to suppression of the drugs and defense counsel never unequivocally told the trial judge that he no longer sought suppression of the drugs based on a search warrant lacking probable cause. The issue was not waived.

Burns v. Taylor, 589 S.W.3d 614 (Mo. Ct. App. 2019), also cited in support of waiver by Respondent, (Respondent's petition for rehearing pp. 6-7), involved the defense waiving the objection to an exhibit by agreeing to the admission of a redacted version of the exhibit. It appears

that defense counsel was satisfied with the redacted exhibit and made no further objection at the close of the case. In the present case Petitioner never agreed to the admission of the drugs and renewed the objection at the close of the case. Petitioner did not waive the challenge to admission of the drugs seized pursuant to a search warrant lacking probable cause.

Respondent's reliance on Thomas v. State, 408 S.W.3d 877, 887–88 (Tex. Crim. App. 2013), (Respondent's petition for rehearing p. 7), is misplaced. In Thomas the court held that:

> Given the record as a whole, the court of appeals erred to conclude that, by stating that she had "no objection" to the introduction of certain evidence during the punishment portion of the proceedings in this case, the appellant "waived" appellate review of the propriety of the trial court's ruling on her pretrial motion to suppress. Accordingly, we reverse the judgment of the court of appeals and remand the cause to that court for further appellate consideration of her points of error consistent with this opinion.

In Thomas the defendant moved pre-trial to suppress marijuana found in her car after a prolonged traffic stop and canine alert. The trial judge denied the motion to suppress. The defendant then pled guilty[1] and during the punishment stage of the guilty plea the State moved to admit evidence that was the subject of the motion to suppress. Defense counsel stated, " 'I don't have any objection to that, Your Honor. [The State] has been kind enough to let me see them before this afternoon and we have no objections.' Exhibit 1 was a laboratory analysis establishing the substance to be marijuana, and Exhibits 2 through 9 were photographs of the marijuana." 408 S.W.3d at 880. Thomas appealed and the court of appeals did not address the merits of the suppression motion, finding that counsel waived the issue. The higher court reversed writing:

> We see no principled reason why appellate courts should not apply the "no objection" waiver rule with comparable flexibility. Particularly when a defendant has taken pains to file a pretrial motion to suppress, develop testimony at a hearing, and secure an appealable adverse ruling, it is unrealistic to presume that he would lightly forego the opportunity to vindicate his interests on appeal. Moreover, the policies that undergird error preservation have already been satisfied during the

[1] In this jurisdiction the suppression ruling could still be appealed following the guilty plea.

> litigation on the motion to suppress. The trial court was given every opportunity to grant the motion, if appropriate, and the State was notified that it need not seek out alternative evidence in support of a conviction. No purpose is served by insisting that earlier-preserved error is abandoned by a later statement of "no objection" when the record otherwise establishes that no waiver was either intended or understood.
>
> None of this is to say, of course, that a defendant's bare statement of "no objection" when the evidence that was the subject of the motion to suppress is subsequently offered at trial could never signal an intention to abandon earlier-preserved error for appeal, or at least mislead a trial judge into believing so. Perhaps upon reflection the defendant has assessed his chances of success on appeal to be negligible given the evidence produced during the evidentiary hearing; or perhaps, as the State argues, he is satisfied with the punishment he has negotiated with the prosecutor or that he anticipates the judge or jury will impose. But neither contingency is likely enough to justify the absolute and unforgiving application of a rule that any subsequent statement of "no objection" will operate to forfeit a claim of error that has already been assiduously preserved—regardless of the attendant circumstances.
>
> We therefore hold that, as with error preservation in general, the rule that a later statement of "no objection" will forfeit earlier-preserved error is context-dependent. By that we mean that an appellate court should not focus exclusively on the statement itself, in isolation, but should consider it in the context of the entirety of the record. If the record as a whole plainly demonstrates that the defendant did not intend, nor did the trial court construe, his "no objection" statement to constitute an abandonment of a claim of error that he had earlier preserved for appeal, then the appellate court should not regard the claim as "waived," but should resolve it on the merits. On the other hand, if from the record as a whole the appellate court simply cannot tell whether an abandonment was intended or understood, then, consistent with prior case law, it should regard the "no objection" statement to be a waiver of the earlier-preserved error. Under the latter circumstances, the affirmative "no objection" statement will, by itself, serve as an unequivocal indication that a waiver was both intended and understood.

Thomas v. State, 408 S.W.3d 877, 885–86 (Tex. Crim. App. 2013)(n. 38 omitted). Given the facts of this case where it is clear that counsel was not abandoning the challenge to the search warrant lacking probable cause, this Court correctly applied the flexible approach used by the Texas court in Thomas. Considering the context of the entire record, including the pre-trial hearing on the motion to suppress, the renewed objections prior to trial and post- trial, and the critical importance of the motion to suppress, it is clear that Petitioner's defense counsel did not intend for his

statement, "no objection," to constitute an abandonment of the suppression issue. The claim was not waived.

In Maness v. State, 285 S.E.2d 193 (Ga. Ct.App. 1981), also cited by Respondent (Respondent's petition for rehearing p. 7), there was not a pre-trial ruling so no renewed objection prior to trial as in the present case. Instead, in Maness the defense moved during the presentation of the State's case, not pre-trial, to suppress drugs and other evidence found during a search of the defendant's car. The trial judge refused to rule on the motion because it was not made pre-trial. The court of appeals did not rule on the timeliness of the motion. Instead, the court found that the issue was waived because when the State moved to admit the drugs and other evidence defense counsel "specifically stated that he had no objection to their admission." 285 S.E.2d at 194. There is no evidence that the objection to the admission of the drugs was renewed at the close of the case, as in the present case. Maness is distinguished from the present case.

Jones v. Ott, 191 A.3d 782 (Pa. 2018), (Respondent's petition for rehearing p. 7), involved a proposed jury instruction upon which the trial judge never ruled. "[A]fter charging the jury, the trial court specifically asked the lawyers whether they wished to raise any issues with the charge. Jones' counsel expressly replied, 'I have no issues with the charge, Your Honor.'" 191 A.3d at 79. The Supreme Court of Pennsylvania found trial counsel waived the issue. While counsel filed a post-trial motion in Jones, counsel failed to obtain an initial ruling on the record with regard to the proposed instruction. Jones is distinguished from the present case.

In Osbey v. State, 425 S.C. 615, 619–20, 825 S.E.2d 48, 50 (2019), this Court, addressing the waiver of the right to counsel, wrote, "By definition, 'A waiver is a voluntary and intentional abandonment or relinquishment of a known right.' Sanford v. S.C. State Ethics Comm'n, 385 S.C. 483, 496, 685 S.E.2d 600, 607 (citing Eason v. Eason, 384 S.C. 473, 480, 682 S.E.2d 804, 807

(2009)), *opinion clarified on other grounds*, 386 S.C. 274, 688 S.E.2d 120 (2009). 'Waiver requires a party to have known of a right and known that right was being abandoned.' 385 S.C. at 496-97, 685 S.E.2d at 607." In the context of a civil case the South Carolina Court of Appeals defined waiver as, "Waiver is a voluntary and intentional abandonment or relinquishment of a known right. Strickl and v. Strickland, 375 S.C. 76, 85, 650 S.E.2d 465, 470 (2007). It may be expressed or implied by a party's conduct. Parker v. Parker, 313 S.C. 482, 487, 443 S.E.2d 388, 391 (1994)." Skipper v. Perrone, 382 S.C. 53, 62, 674 S.E.2d 510, 514 (Ct. App. 2009). The record does not support an intentional abandonment of the challenge to the search warrant as lacking probable cause.

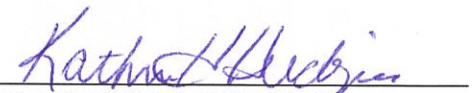
The Fourth Circuit Court of Appeals defined waiver as, "A 'waiver is the intentional relinquishment or abandonment of a known right.' Wood v. Milyard , 566 U.S. 463, 132 S.Ct. 1826, 1835, 182 L.Ed.2d 733 (2012) (quotation marks omitted). United States v. Robinson, 744 F.3d 293, 298 (4th Cir. 2014). There is no evidence that Petitioner intentionally relinquished or abandoned the challenge to the search warrant lacking probable cause. This Court correctly found that the issue was not waived.

This Court correctly found that the issue was preserved for appellate review. The State/Respondent argues that, "The logical conclusion of the Court's opinion is that counsel does not even have to make the trial court aware of the prior suppression hearing or other hearing and its ruling. Requiring a contemporaneous objection allows the current judge the opportunity to review the evidence presented and determine whether the judge agrees with the ruling of the first judge." (Respondent's petition for rehearing p. 10). The conclusion argued by the State is not supported by the facts of this case or the opinion of this Court. The trial judge in the present case was made aware of the previous pretrial ruling and order signed by Judge Dickson with regard to

the motion to suppress. (R. p. 37, lines 1-8; p. 82, line 16 – p. 83, lines 1-7). The trial judge ruled, "All right. Very Good. I note that objection. The ruling will stand as is." (R. p. 83, lines 8-9). The trial judge was given the opportunity to review the evidence and determine if he agreed with pretrial ruling. The judge ruled that the pretrial ruling would stand. After hearing the evidence at trial, the trial judge elected not to alter the pretrial ruling. If, after the presentation of evidence at trial, the trial judge became concerned about the pretrial ruling, he could have issued an alternative ruling. If something changed during trial that that would cause the trial judge to alter the pretrial ruling, it would have been incumbent upon counsel to bring that to the attention of the trial judge. In the present case, however, nothing changed. The pretrial ruling on the constitutional issue was a final ruling, nothing changed at trial and the trial judge had no intention of altering the pretrial ruling. Viewing the record as a whole, including the pretrial hearing on the motion to suppress, the final ruling on a constitutional issue, and the renewed objections prior to trial and post- trial, the pretrial ruling was a final ruling and no further objection was required. The issue was preserved for appellate review.

Counsel respectfully submits that this Court should deny the State's petition for rehearing, grant Petitioner's petition for rehearing and reverse the convictions.

Respectfully Submitted,



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This 10th day of January, 2022.