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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Horry County

Honorable Letitia H. Verdin, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

GARY M. WIRTZ,

APPELLANT.

APPELLATE CASE NO 2020-001388

INITIAL REPLY BRIEF OF APPELLANT

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ARGUMENT IN REPLY

The issue raised below challenging the pretextual inventory search of Appellant's car is preserved for review.

Respondent argued that the issue and arguments Appellant presented to this Court are not preserved for appellate review. Specifically, Respondent asserted that Appellant (1) mischaracterized the nature of the suppression motion, (2) challenged the basis for the encounter for the first time on appeal; (3) argued a narrow interpretation of the South Carolina Constitution for the first time on appeal; and (4) argued Pelfrey did not conduct the inventory pursuant to the applicable policies and procedures for the first time on appeal. These arguments are specious. The issue presented on appeal, that Pelfrey acted pretextually, with a clear investigatory motive in searching Appellant's car, is preserved for review as are the arguments Appellant made in support of his position.

Issue Preservation

In addressing the nature of the suppression motion Respondent intimates that Appellant's characterization of the matter as a pre-trial hearing instead of a motion *in limine* is an attempt to obfuscate an alleged issue preservation problem. Respondent stated "[n]otably, there is a telling and critical reason Appellant has elected to frame the issue on appeal as alleging error in the trial judge's denial of a "pre-trial" suppression motion." IBOR pg. 16, n. 14. Respectfully, regardless of how one chooses to characterize the suppression motion, be it "pre-trial" or "*in limine*," the matter is properly preserved for review by this Court.

"The general rule of issue preservation states that if an issue was not raised and ruled upon below, it will not be considered for the first time on appeal." State v. Passmore, 363 S.C. 568, 583, 611 S.E.2d 273, 281 (Ct. App. 2005). The rules of issue preservation are based on the

premise that the lower court must be given a fair opportunity to rule on the issue and thus provide the appellate courts with a record for meaningful appellate review. Herron v. Century BMW, 395 S.C. 461, 465, 719 S.E.2d 640, 642 (2011). However, certain exceptions to the general rule of issue preservation have been developed.

Respondent has characterized Appellant's pre-trial motion to suppress as a motion *in limine*. Assuming for arguments sake that the motion was *in limine*, the exception stated in State v. Forrester, 343 S.C. 637, 541 S.E.2d 837 (2001), would apply. As the South Carolina Supreme Court stated in Forrester,

> In most cases, "[m]aking a motion in limine to exclude evidence at the beginning of trial does not preserve an issue for review because a motion in limine is not a final determination. The moving party, therefore, must make a contemporaneous objection when the evidence is introduced." See State v. Simpson, 325 S.C. 37, 479 S.E.2d 57 (1996). *However, where a judge makes a ruling on the admission of evidence on the record immediately prior to the introduction of the evidence in question, the aggrieved party does not need to renew the objection.*

Id. at 642, 541 S.E.2d at 840 (emphasis added).

In the case *sub judice*, Appellant made a written pre-trial motion to suppress the contraband discovered during the alleged inventory of his car. The motion was made pursuant to the Fourth Amendment of the United States Constitution *and* to Article I, Section 10 of the South Carolina Constitution. R (Motion). After jury selection was completed the trial judge heard argument from Counsel Byford and the State on the written motion to suppress. R. 24-27. The court also reviewed the body worn camera footage in its entirety prior to the hearing on the motion to suppress. R. 27, ll. 24-25; R. 30, ll. 15-23. The court issued its ruling finding that the deputy in this case acted in full accordance with the written policy, that the policy was compliant with both state and federal case law, that the decision to tow was in compliance with the policy,

and that the deputy did not act in a pretextual manner in inventorying Appellant's vehicle. R. 28, l. 7-R. 29, l. 9.

The trial commenced and the State called Pelfrey to the stand *as its first witness*. R. 47, ll. 16-22. Pelfrey testified to the encounter with Appellant in detail and during his testimony the State offered into evidence the gun recovered from the car, photographs[1] from the encounter, and Pelfrey's body worn camera footage. R. 58, l. 24-R. 61, l. 9; R. 65, l. 9-R. 66, l. 15.

As in Forrester, *supra*, no evidence was presented between the judge's ruling on the motion to suppress and the testimony of Pelfrey that would have given the court a basis on which to change its ruling. Because there was not an opportunity for the court to change its ruling, Appellant did not need to object a second time to the introduction of the evidence for the issue to be properly preserved for review. See Forrester at 642-643, 541 S.E.2d at 840. Therefore, under controlling precedent, the motion made by Counsel Byford was *not* a motion *in limine* as the court's ruling was a final ruling. See State v. Mueller, 319 S.C. 266. 268-69, 460 S.E.2d 490, 410 (Ct. App. 1995) (Holding that because no evidence was presented between the ruling and the testimony, there was no basis for the trial court to change its ruling. Thus, the motion was not a motion *in limine* but a final ruling and the defendant was therefore not required to renew her objection to the admission of testimony in order to preserve the issue for appeal).

Additionally, Appellant's pretrial motion to suppress was based on a violation of his constitutional rights under the Fourth Amendment of the United States Constitution and Article I, Section 10 of the South Carolina Constitution. As the Supreme Court held in its recent decision in State v. Jones, 435 S.C. 138, 866 S.E.2d 558 (2021) where a court makes a pretrial evidentiary

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1 The photographs consisted of still shots from Pelfrey's body worn camera as well as various pictures taken by Pelfrey of the narcotics, digital scale, money and other items discovered in the black bag. R. 62, l. 23-R. 65, l. 9

ruling after a hearing on a constitutional issue, the ruling is final and, unless something changes during trial that may reasonably cause the trial judge to alter the pretrial ruling, no further objection is required to preserve the issue for appellate review. As Appellant's case is still pending on direct review, he is entitled to the benefit of the rule articulated in Jones to cure any alleged issue preservation error. See Griffith v. Kentucky, 479 U.S. 314, 327 (1987) (holding that a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a "clear break" with the past). Accordingly, under both the rule articulated in Forrester and the rule articulated in Jones, the matter raised on appeal is properly preserved for review by this Court.

Factual Arguments

Respondent next contends that Appellant made arguments for the first time on appeal that were not argued below. IBOR pg. 21-22, n. 15; Pg. 25, n. 17; Pg. 26-27, n. 18. The record on appeal reflects that Counsel Byford argued below that Pelfrey's *words and actions* as captured on the body worn camera show that Pelfrey's motivation in searching Appellant's car was to find evidence of a crime. Counsel Byford argued

> But what I want to point out is that I believe the intention of those cases remains the same. And the reason the Supreme Court came to the conclusion that it did is because they didn't want the police to use the inventory search as the ability to have this *cart blanche to just tear apart a car, look for evidence of a crime, instead of actually inventorying the vehicle. And I would still argue to the Court that that is what happened in this case. I know you have reviewed the video, you have heard the exchange between the officer and my client.* And he asks the defendant several times, "What are we going to find in the car, what are we going to find in the car." And, again, it is not until Mr. Wirtz says, "You can't search that car, I don't consent to a search of that car," that he switches to use the term "inventory." *And I think that's very telling of the motivation of the officers.*
>
> Yes, they did eventually do an inventory. And they have a policy governing it, *but their intention before they did it was to find evidence of a crime in that car. A lot*

> *of the conversation that is contained on the video prior to the search indicates that that is what the officer is thinking.*
>
> I would just ask the Court to find that *this search -- the inventory -- it was pretext. This was a not-consented-to search of the vehicle.* And the drugs that were found as a result should be suppressed.

R. 25, l. 7-R. 26, l. 8 (emphasis added). Further, Counsel Byford clearly stated in her written motion to suppress that Appellant was moving "pursuant to Amendment IV of the United States Constitution and Article I, Section 10 of the South Carolina Constitution" for the court to "suppress the evidence discovered pursuant to an unlawful search by the Oconee County Sheriff's Office." R. (Motion).

Appellant has not challenged the basis of the encounter as it was not, and arguably could not, have been challenged below. Despite defense counsel's written characterization of the encounter as a traffic stop, it is apparent from the body worn camera footage and trial testimony that Pelfrey at no point activated his blue lights or attempted pulled Appellant over. Pelfrey merely "caught up" with Appellant, who was already parked, and initiated an encounter. R. 49, ll. 2-21. As the United States Supreme Court stated in U.S. v. Mendenhall, 446 U.S. 544, 553 (1980), prior precedent has "indicated that not every encounter between a police officer and a citizen is an intrusion requiring an objective justification." Thus, Pelfrey was entitled to initiate the encounter with Appellant and that has not been challenged.

What has been challenged is Pelfrey's motivation and conduct in the alleged inventory he performed of Appellant's vehicle. In the initial brief Appellant noted that Pelfrey can be heard on the body worn camera offering different reasons to approached Appellant. While Pelfrey tells back up officers that he initiated the encounter due to a cracked windshield, he does not ever question Appellant about the cracked windshield. In the eighteen minutes prior to discovering that Appellant has a suspended license, Pelfrey only tells Appellant that he is speaking with him

because Appellant "took off" after passing his parked patrol car in a church parking lot. Pelfrey's trial testimony similarly focused on Appellant "speeding up" while passing his parked patrol vehicle which he testified he found "odd." These contradicting statements, and the fact that Pelfrey never articulated to Appellant that he has committed some traffic violation, are merely, as counsel argued below, part of the "conversation that is contained on the video prior to the search" that is indicative of what Pelfrey is thinking.

Appellant is not, for the first time, arguing on appeal that Pelfrey did not conduct the inventory pursuant to the applicable policies and procedures as this was the main basis for the suppression motion below. Counsel Byford specifically argued that the policies and procedures required by case law existed so that police cannot have "this cart blanche to just tear apart a car, look for evidence of a crime, instead of actually inventorying the vehicle. And I would still argue to the Court that *that is what happened in this case*." R. 25, ll. 10-15.

Counsel Byford argued that Pelfrey did not conduct an inventory but "tore apart" Appellant's car looking for evidence of a crime. In considering the motion the lower court reviewed the video footage that captured Pelfrey's actions in allegedly inventorying the vehicle and filling out the inventory form. Appellant has not offered new grounds on appeal to support his position but has merely described the portions of the video which the lower court considered prior to its ruling that support the argument that Pelfrey had pretextual investigatory motives in searching Appellant's car.

Finally, Appellant has not argued that the "South Carolina constitution should be interpreted to *only* permit inventory searches if the driver is first afforded an opportunity to make alternative arrangements or refuse the inventory search altogether." IBOR, pg. 25, n. 17. In discussing the applicable law to this matter Appellant cited to both the majority and dissenting

opinions in South Dakota v. Opperman, 428 U.S. 364 (1967), and Colorado v. Bertine, 479 U.S. 367 (1987). In those cases, decided decades ago, the United States Supreme Court discussed how the advances of technology and security had diminished the reasoning behind inventory searches. Considering that South Carolina's Constitution offers its citizenry a higher level of privacy, and the continued advances in technology and security, Appellant suggested that there should be other safeguards in place to ensure the privacy of those facing an inventory search. One such safeguard would be to require law enforcement to allow the driver to arrange for the someone else to take the vehicle or to refuse the inventory. This suggestion was in no way an argument that the privacy provision of our state's Constitution can only be interpreted in one way.

The motion to suppress was made on constitutional grounds, specifically that Appellant's right to privacy and to be free from unreasonable searches and seizures was infringed upon by Pelfrey. This constitutional argument, like the other arguments challenged by Respondent, was made below and is preserved for review.

The rules of issue preservation do not require exact language to preserve an issue for appellate review. State v. Brannon, 388 S.C. 498, 697 S.E.2d 593 (2010). The rules only require that the objection must be sufficiently specific to bring into focus the precise nature of the alleged error so it can be reasonably understood by the trial judge. State v. Johnson, 363 S.C. 53; 609 S.E.2d 520 (2005). Counsel Byford argued that Pelfrey's actions and words, as seen on the body worn camera footage, showed that he acted in a pretextual matter. The error and arguments that Appellant has presented are preserved for review by this Court.

CONCLUSION

Based on the foregoing arguments, along with those arguments set forth in Appellant's Initial Brief, Appellant respectfully request that this Court reverse his convictions and sentences and remand this case to the Oconee County Court of General Sessions for a new trial.

Jessica M. Saxon
Appellate Defender

ATTORNEY FOR APPELLANT

This 24th day of February, 2022.

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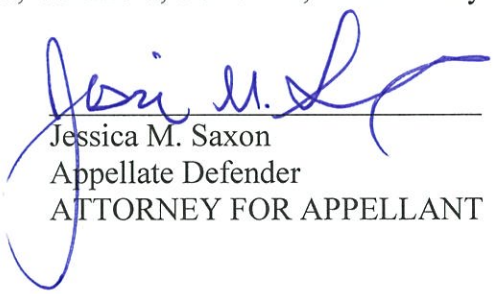
CERTIFICATE OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies that a true copy of the Initial Reply Brief of Appellant in the above referenced case has been served upon Mark Farthing, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS); and a copy has been served on Gary M. Wirtz, #226837, at Kirkland Correctional Institution, 4344 Broad River Road, Columbia, SC 29210, this 24th day of February, 2022.



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