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

FINAL BRIEF OF APPELLANT

JESSICA M. SAXON
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the trial court erred in denying Appellant's pre-trial motion to suppress the contraband discovered during the search of Appellant's vehicle where there was a clear investigatory motive on the part of the police rendering the inventory a violation of Appellant's rights under the United States and South Carolina Constitutions?

STATEMENT OF THE CASE

During the February 2020 term of the Oconee County grand jury, Appellant was indicted for one count of trafficking methamphetamine 10 to 28 grams, third offense, and one count of possession of a weapon during the commission of a violent crime. R. 151-152; 155-156. The State, represented by Lindsey Simmons and David Alderman, called the case to trial on October 12, 2020, before the Honorable Letitia H. Verdin and a jury. R. 1. Appellant was represented by E. Jennings Byford. R. 2. Appellant was found guilty of both charges on October 13, 2020. R. 148. Judge Verdin sentenced Appellant to twenty-five years imprisonment on the trafficking charge, and five years imprisonment on the weapons charge, sentences to run concurrently. R. 153.

STANDARD OF REVIEW

The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion. An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support. State v. Wright, 391 S.C. 436, 442, 706 S.E.2d 324, 326 (2011) (citations and internal quotation marks omitted). On appeal from a suppression hearing, appellate courts are bound by the circuit court's factual findings if any evidence supports the findings. State v. Brockman, 339 S.C. 57, 66, 528 S.E.2d 661, 666 (2000). This deference does not bar appellate courts from conducting their own review of the record to determine whether the trial court's decision is supported by the evidence. State v. Tindall, 388 S.C. 518, 521, 698 S.E.2d 203, 205 (2010); See Also State v. Khingratsaiphon, 352 S.C. 62, 70, 572 S.E.2d 456, 460 (2002) (stating "Brockman does not hold the appellate court may not conduct its own review of the record to determine whether the trial judge's decision is supported by the evidence"). Questions of law are reviewed *de novo*. State v. Miller, 423 S.C. 95, 99, 814 S.E2d 166, 169 (2018) (citing State v. Adams, 409 S.C. 641, 647, 763 S.E.2d 341, 344 (2014)).

ARGUMENT

The trial court erred in denying Appellant's pre-trial motion to suppress the contraband discovered during the search of Appellant's vehicle where there was a clear investigatory motive on the part of the police rendering the inventory a violation of Appellant's rights under the United States and South Carolina Constitutions.

Relevant Facts

Prior to the start of Appellant's trial, Counsel Byford made a written motion to suppress the evidence found during the search of Appellant's vehicle. R. 129. The motion argued two grounds for suppression: 1) that the inventory was pretextual and 2) that the opening of the containers inside the vehicle was in violation of Florida v. Wells, 495 U.S. 1 (1990), because the Oconee County Sheriff's Department (OCSD) did not have a written policy regarding the opening of closed containers found during an inventory. Attached to the motion was a general order from OCSD regarding motor vehicle towing and impoundment procedures, which did not contain any language regarding the search of containers during an inventory. R. 135-137. The State subsequently supplemented the general order with two pages from a 171-page manual of standard OCSD policies and procedures that contained language regarding the search of containers found during an inventory. R. 138-139.

During the hearing on the motion to suppress, Counsel Byford conceded that the pages from the standard policy and procedure manual contained the "magic language" required by Wells, *supra*. R. 6, ll. 2-6. Counsel Byford instead focused on the first argument in the written motion, that the inventory was a pretext to search the vehicle driven by Appellant. Counsel Byford argued that United States Supreme Court case law prevents law enforcement from using inventory searches as "cart blanche to just tear apart a car, look for evidence of a crime, instead

of actually inventorying the vehicle." Counsel Byford pointed to exchanges in the video footage[1] from Officer Pelfrey's body worn camera where Pelfrey repeatedly asked Appellant what he would find in the vehicle. Further, Counsel Byford brought to the trial court's attention that Pelfrey only stated that he would be inventorying the vehicle after Appellant expressly forbade a search of the vehicle. R. 6, ll. 7-23.

The State[2] maintained that the inventory was proper, and that Pelfrey's actions conformed with the caretaker function set forth in case law and in the OCSD policies provided to the court. R. 6, l. 19-R. 7, l. 9. Relevant to this matter, the written policy of OCSD requires officers to tow a vehicle when the "driver has been arrested or charged with an offense which does not allow them to operate that vehicle. Except when the driver/owner of the vehicle designates another person within the vehicle (or close by at the discretion of the deputy) to take possession of the vehicle." R. 135-137. The trial court agreed with the State, ruling that Pelfrey acted in accordance with the written policy and procedure of OCSD. Further, those policies and procedures comported with the standards promulgated in both state and federal case law. The court ruled that Pelfrey "acted in accordance with the policy and did not act in a pretextual manner in inventorying this vehicle, that a bag such as the nature that this evidence was found in would have to be inventoried." R. 9, ll. 7-25.

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[1]The entire encounter between Appellant and Pelfrey was captured on Pelfrey's body-worn camera and submitted during the suppression hearing as Court's Exhibit 3. A copy of this video footage is on file with this Court.

[2] The State did not call Pelfrey to the stand to elicit testimony regarding his motivations for the stop and Judge Verdin did not request any testimony be taken. Instead, Judge Verdin ruled on defense counsel's motion after argument by both sides and after indicating on the record that she had reviewed the video footage from Pelfrey's body worn camera. R. 8, ll. 24-25.

The video recording of the encounter provides a complete picture of the encounter and search. At no point in the hour-long video does Pelfrey inform Appellant that the encounter began due to a cracked windshield, despite telling the backup officers that he saw Appellant "pulling out of a house, waited for him to come, tried to pull[3] him over, he jumped in here, I went turned around and *got out with him for the cracked windshield.*" Court's Ex. 3 at 37:16 (emphasis added). Instead, Pelfrey began the encounter by asking Appellant why he sped up[4] when Appellant passed his patrol vehicle. Pelfrey asked Appellant for identification and inquired about whether Appellant had any "weapons or anything" on his person while performing a brief pat down of Appellant's shorts. Court's Ex. 3 at 1:30.

Appellant did not have any identification on his person. He provided the name Jeremy Wirtz with a date of birth in 1985 along with an address for Pelfrey to check through dispatch. Roughly four minutes into the encounter, Pelfrey asked Appellant if there was "anything in the vehicle that shouldn't be in the vehicle," and a full minute passed before Pelfrey finally asked Appellant to provide the vehicle registration[5]. Court's Ex. 3 at 3:58-5:15. While this was occurring, dispatch responded that Jeremy Wirtz had a valid license and that the female passenger had a suspended license. Court's Ex. 3 at 6:35.

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3 Pelfrey did not initiate a traffic stop with lights and/or sirens.

4 At trial, Pelfrey testified that the encounter occurred because he "saw a light-colored sedan pass me with a cracked windshield. As soon as the vehicle passed me, it sped up. That seemed a little odd for somebody who just passed a police car, so I left the parking lot and proceeded to try to catch up with the vehicle." R. 30, ll. 6-12.

5 The vehicle was registered to Appellant's uncle. Court's Ex. 3 at 11:43. OCSD policy allows the driver/owner to designate another person to take possession of the vehicle to avoid the tow and inventory process. R. 135-137.

Pelfrey continued to question Appellant regarding his identity, eventually placing him in investigative detention, because he believed Appellant was not being truthful about his name. Pelfrey performed a second, more thorough search of Appellant's shorts, asking him again if he had anything on him before securing Appellant in his patrol vehicle. Court's Ex. 3 at 7:42-9:30. Pelfrey then began to question the passenger in the vehicle, asking her if there was anything illegal in the vehicle that he needed to know about. Court's Ex. 3 at 10:41. Pelfrey and the passenger had the following exchange:

> **Pelfrey:** The way things are going, something.... he's probably going to go to jail okay if he's not who he says he is.
> **Passenger:** Okay
> **Pelfrey:** Okay. *Now, is there something in this car I need to know about – I'm going to give you one chance to tell me and if nobody tells me anything then both of you can be charged with something.*
> **Passenger:** Not that I know of cause this is not my car
> **Pelfrey:** You understand you are both in it.
> **Passenger:** Are you serious?
> **Pelfrey:** *Do you know if he stashed something? Ask you to hold onto something*?
> **Passenger:** No, I don't, no no, hell no, definitely don't but I mean....is it like a new law or something
> **Pelfrey:** *I'm just saying if he denies it*

Court's Ex. 3 at 12:50 (emphasis added).

Dispatch provided Pelfrey with a picture of Jeremy Wirtz. When Pelfrey confronted Appellant with the photograph, Appellant maintained that it was him just before he got neck tattoos. Pelfrey then asked if they should "look up what Gary Wirtz[6] looks like." Pelfrey reviewed the driving record for Gary Wirtz and determined that Appellant was Gary, not Jeremy, Wirtz. Pelfrey then told Appellant to "be straight with me, what's in the car," but Appellant continued to deny that there was anything in the vehicle. Court's Ex. 3 at 14:00-16:20.

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6 Pelfrey comes up with the name "Gary Wirtz" on his own. No one on scene or through dispatch had provided the name "Gary Wirtz" to Pelfrey. This indicates at least some familiarity by Pelfrey with Appellant.

At this point, Appellant had not been told that he was under arrest nor given Miranda[7] warnings. However, Appellant did request to speak with Pelfrey, and the following discussion was had:

> **Appellant:** Listen, listen I was supposed to go pick something up real quick for somebody; somebody told me to go pick it up and that's all I know.
> **Pelfrey:** *Uh-Huh Where's it at, what'd you pick up?*
> **Appellant**: No, I gotta go pick it up, you can follow me there, hide down the road do whatever works.
> **Pelfrey:** We can't do that, you ain't being honest with me.
> **Appellant:** I'm being honest with you.
> **Pelfrey:** What's your name?
> **Appellant:** I'm being honest with you.
> **Pelfrey:** What...is your name Gary?
> **Appellant:** Yes.
> **Pelfrey:** Okay, well at least we are getting somewhere. *Is there anything in that car I need to know about?*
> **Appellant:** *No, no, but there was about to be if you'd work with me.*
> **Pelfrey:** *We're going to search that car real quick, make sure.*
> **Appellant:** *No, they ain't searching that car.*
> **Pelfrey:** *We are going to inventory it. Are we going to find anything during the inventory?*
> **Appellant:** *No, they ain't searching that car – I gotta call my uncle to search that car.*
> **Pelfrey:** You're driving, it's being towed.
> **Appellant:** Yeah, they can tow it.
> **Pelfrey:** Okay, gotta inventory it – watch your legs.

Court's Ex. 3 at 17:35-18:26 (emphasis added).

Dispatch then informed Pelfrey that Appellant had a pending warrant. Pelfrey returned to Appellant and read him his Miranda rights. After Pelfrey administered Appellant his rights, he stated:

> **Pelfrey:** *Both of y'all are in the car okay, I'm going to give her the same chance I'm going to give you, if there is something in there now, tell me.*
> **Appellant:** *There's nothing in there, I mean it's not my car for you to search.*
> **Pelfrey:** *We are going to inventory it, if we find something during the inventory it's the same.*

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[7] Miranda v. Arizona, 384 U.S. 436 (1966)

Appellant: That's an illegal search, I done been through this, that's an illegal search.
Pelfrey: Gary, I'm trying to give you the benefit of the doubt here okay
Appellant: You ain't trying to give me shit man, you trying to railroad me

Court's Ex. 3 at 21:05 (emphasis added).

One of the assisting officers asked Pelfrey if he has "gotta search it" and Pelfrey responded with "inventory it." Court's Ex. 3 at 23:39. Pelfrey then began the search of the vehicle by picking up a beer can and then pulling on some plastic that was jammed into the door handle, but he quickly stopped to get gloves from his vehicle. While Pelfrey is getting gloves, the following can be heard:

Appellant: Hey I'd like a supervisor down here before y'all search my car.
Pelfrey: This isn't a search this is an inventory.
Appellant: It's a search, it's a search of my car.
Pelfrey: It's an inventory.
Appellant: *I don't have nothing in there that needs inventorying, nothing.*
Pelfrey: *Okay that doesn't matter, we gotta do it per policy.*
Appellant: No, you don't.

Court's Ex. 3 at 24:15 (emphasis added).

Pelfrey began the "inventory" a second time, opening a zipped black bag in the driver's seat. A sum of money, cellphones, and what appears to be narcotics are inside seen when the bag is opened. After placing the passenger in investigative detention, Pelfrey continued the "inventory" by shaking out a shirt, lifting the cans in the cup holders, shaking out a cigarette pack, trying to forcefully remove the center console, rummaging through open bags in the back seat, and pulling the trunk lining away from the sides of the trunk. Court's Ex. 3 at 24:45. At no point during this "inventory" does Pelfrey relay what he sees or finds to the other officers, nor does he take down any notations about the items in the vehicle. The backup officer specifically states that he does not "know what you [Pelfrey] want to put on this inventory because I don't know what you pulled out of there." Pelfrey responded by telling him "just a tattoo kit and

ummm." Court's Ex. 3 at 37:54. He eventually tells the backup officer "you can just put on the inventory, uh recorded on Axon, Pelfrey." Court's Ex. 3 at 39:18. Pelfrey only calls for a tow truck *after* he has completed the search of the vehicle. Court's Ex. 3 at 31:14.

Pelfrey then returned to Appellant to give him his phone and explain what was found during the search of the vehicle. Pelfrey stored the contraband in an unsealed, unmarked evidence bag in the trunk area of his patrol vehicle. Court's Ex. 3 at 39:44.

Discussion

Despite the eventual characterization of the search as an "inventory," the sole purpose of the intrusion into Appellant's vehicle by Pelfrey was to search for contraband. This is evident in the words used by Pelfrey when he asked numerous times about illegal items in the vehicle and then in his actions, which were not those of one inventorying a vehicle but of one searching for evidence. Merely labeling the search an inventory does not diminish the investigatory purpose of the search. After being told that there was nothing illegal in the vehicle, Pelfrey stated: "We're going to search that car real quick, make sure." These words alone should have indicated to the trial court that Pelfrey's sole interest was in searching the vehicle for contraband and not in inventorying it for any caretaker purpose.

The basic purpose of the Fourth Amendment, as recognized repeatedly by the United States Supreme Court, is "to safeguard the privacy and security of individuals against arbitrary invasions by government officials." Cady v. Dombrowski, 413 U.S. 433, 453 (1973) (Brennan, J. dissenting). Through its exclusionary rule, the Fourth Amendment to the United States Constitution prohibits unreasonable searches and seizures. U.S. Const. Amend. IV. Similarly, the South Carolina Constitution provides protection against unlawful searches and seizures. S.C. Const. art. I, § 10. In fact, the South Carolina Constitution contains an express right to privacy

provision that favors an interpretation *offering a higher level of privacy protection* than the Fourth Amendment. See State v. Key, 431 S.C. 336, 848, S.E.2d 315 (2020) (emphasis added).

When evaluating a search through the framework of the Fourth Amendment, "[t]he ultimate standard set forth...is reasonableness." Dombrowski at 439. "Whether a search and seizure is unreasonable within the meaning of the Fourth Amendment depends upon the facts and circumstances of each case." S. Dakota v. Opperman, 428 U.S. 364, 375 (1976). Evidence seized in violation of the Fourth Amendment will be excluded in both state and federal court. See Mapp v. Ohio, 367 U.S. 643 (1961); State v. Forrester, 343 S.C. 637, 643, 541 S.E.2d 837, 840 (2001).

"Generally, a warrantless search is per se unreasonable and thus violative of the Fourth Amendment's prohibition against unreasonable searches and seizures." State v. Bultron, 318 S.C. 323, 331, 457 S.E.2d 616, 621 (Ct. App. 1995). "However, a warrantless search will withstand constitutional scrutiny where the search falls within one of a few specifically established and well delineated exceptions to the Fourth Amendment exclusionary rule." Id. at 331-32, 457 S.E.2d at 621. In such cases, the *burden is upon the State to justify a warrantless search.* State v. Bailey, 276 S.C. 32, 35, 274 S.E.2d 913, 915 (1981) (emphasis added).

One of the exceptions to the warrant rule is an inventory search conducted according to standard police procedures. Robinson v. State, 407 S.C. 169, 185, 754 S.E.2d 862, 870 (2014) (stating "if police officers are following their standard procedures, they may inventory impounded property without obtaining a warrant" (citing Colorado v. Bertine, 479 U.S. 367, 374 (1987))). "For an inventory search to be valid, the vehicle searched should first be in the valid custody of the law enforcement officers conducting the inventory." United States v. Brown, 787

F.2d 929, 931-32 (4th Cir. 1986) (citing Opperman, 428 U.S. at 374); See Also State v. Miller, 423 S.C. 95, 111, 814 S.E.2d 166, 175 (Beaty, C.J. Dissenting) (2018). "The question ... is ... whether the police officer's decision to impound was reasonable under the circumstances." Brown, 787 F.2d at 932.

However, "[a]n inventory search will not be sustained where the court believed that the officers were searching for incriminating evidence of other offenses." U.S. v. Feldman, 788 F.2d 544, 553 (9th Cir. 1986) citing Opperman, 428 U.S. at 376. In analyzing inventory searches the United States Supreme Court has explained,

> [A]n inventory search must not be a ruse for a general rummaging in order to discover incriminating evidence. The policy or practice governing inventory searches *should be designed to produce an inventory.* The individual police officer must not be allowed so much latitude that inventory searches are turned into a 'purposeful and general means of discovering evidence of a crime.'

Florida v. Wells, 495 U.S. 1, 4 (1990) (emphasis added). The California Court of Appeals for the Fourth District further elaborated on the principle outlined in Wells, *supra*, stating,

> Just as inventory searches are exceptions to the probable cause requirement, they are also exceptions to the usual rule that the police officer's [s]ubjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis...*courts will explore police officers subjective motivations for impounding vehicles in inventory search cases, even when some objectively reasonable basis exists for the impounding.*

People v. Torres, 188 Cal. App. 4th. 775, 787-788, Cal. Rptr. 3d 48 (4th Dist. 2010), as modified on denial of reh'g, (Oct. 21, 2010) (emphasis added).

Reasonableness of the Encounter and Impound

As Chief Justice Beatty stated in his dissent in Miller, *supra*, before analyzing the reasonableness of an inventory search, "the Court must first determine whether the predicate seizure was lawful as the inventory search is contingent on the seizure of the vehicle." Miller at 111, S.E.2d at 175 (Beatty, C.J., Dissenting). In Miller, our supreme court held that the decision

to seize Miller's vehicle from a private parking lot was reasonable because the officers were acting pursuant to lawful authority and in accordance with the requirements set forth in a written police department policy. Id. at 101, 814 S.E.2d at 169. That policy included three requirements that the Court held were "standardized criteria" that limited the officers' discretion to impound a vehicle and "the officers' compliance with the requirements render[ed] the decision to tow it reasonable under the Fourth Amendment." Id. at 102-105, 814 S.E.2d at 170-171.

However, while the exercise of police discretion in towing a vehicle is allowed when that discretion is exercised according to standard criteria, it must also be exercised on the basis of something other than suspicion of evidence of criminal activity. Id. at 113, 814 S.E.2d at 176 (Beatty, C.J., Dissenting). In Miller, Chief Justice Beatty opined that the officer's decision to tow Miller's vehicle when no traffic violation preceded the encounter was based solely on the suspicion of drug activity, and therefore the seizure was improper. Id. He further stated that, even if the stop was justified and the impoundment was not pretextual, "the mere existence of a police department policy is insufficient to satisfy the State's burden of proving the applicability of the inventory search exception to the Fourth Amendment." Id.

Admittedly, Pelfrey was acting according to written departmental procedures that control, to an extent, an officer's discretion in choosing to tow a vehicle. However, unlike the policy in Miller, the OCSD policy allows the officer, in his discretion, to let the driver/owner contact an individual to take possession of the vehicle. It would be reasonable to conclude that if Pelfrey was not acting in an investigatory capacity, he would have at least offered to let Appellant contact the owner of the vehicle to come claim it prior to the impoundment. Instead, Pelfrey spent the encounter questioning Appellant and the passenger about what contraband would be located within the vehicle when he searched it.

No testimony was elicited during the suppression hearing in Appellant's case. However, Pelfrey's body-worn camera footage provided invaluable insight. Initially, it should be noted that Pelfrey provided different reasons for approaching Appellant. He told backup officers that he "got out with him [Appellant] on the cracked windshield" yet never mentioned the windshield to Appellant during the hour-long encounter. Instead, he told Appellant, and later the trial court, that he caught up with him because Appellant "sped up" when he passed a cop which Pelfrey found "odd." Neither a cracked windshield[8] nor speeding up are traffic violations. While it was eventually discovered that Appellant was driving on a suspended license, there was nothing offered at the suppression hearing, in the trial testimony, or on the video that would justify the encounter prior to that discovery.

Pelfrey pursued an encounter with Appellant because he thought it was "odd" that Appellant sped up as he passed Pelfrey's patrol vehicle. Pelfrey also testified that Appellant was "very fidgety, trying to move around the vehicle. He was having trouble keeping his train of thought and talking all over the place." R. 34, l. 2-5. Pelfrey's testimony shows that he had a generalized suspicion that Appellant was engaged in a criminal activity. The video footage of the encounter showed that Pelfrey was not engaged in any community caretaking function but was "engaged in the often-competitive enterprise of ferreting out crime." Opperman, 428 U.S. at 383. Thus, the seizure of the vehicle was not reasonable in these circumstances and was violative of both the U.S. Constitution and the South Carolina Constitution. However, even if

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[8] A cracked windshield that is not obstructing the driver's view is not a traffic violation. S.C. Code Ann. § 56-5-5000 only prohibits the driving of a motor vehicle with "any sign, poster or other nontransparent material upon the front windshield...which obstructs the driver's clear view of the highway or any intersecting highway." S.C. Code Ann. § 56-5-5310 requires vehicle equipment to be in "good working order" and the vehicle must be in "safe mechanical condition."

this Court finds the seizure of the vehicle reasonable, the investigatory search cannot be deemed reasonable.

Reasonableness of the "Inventory" Search

The main purpose of the inventory exception is that police may "search a lawfully impounded vehicle *to compile an inventory list of the vehicle's contents* without violating the Fourth Amendment." United State v. Rowland, 341 F.3d 774, 779 (8th Cir. 2003) citing Opperman, 428 U.S. at 376 (emphasis added). The prevailing justification for inventory searches has been in the "community caretaking duties" ascribed to police officers. Inventory searches are designed to be "totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute." Dombrowski at 441. (1976). The Supreme Court of the United States has stated that these "caretaking duties" are made up of "three distinct needs: the protection of the owner's property while it remains in police custody; the protection [of] the police against claims or disputes over lost or stolen property; and the protection of the police [and the public] from potential danger." Opperman at 369.

However, the advances in security and technology that have occurred in the last forty years have greatly diminished the need to protect the police against claims of loss or from potential danger. As noted in both the majority opinion and the dissent of Bertine, *supra*, the use of secure impound lots effectively eliminates the last two concerns. Bertine at 382 (Marshall, J., Dissenting). Thus, as Justice Marshall pointed out, the only interest actually served by automobile inventory searches is that of the owner's property. Id. (Citing to Justice Powell's concurring opinion in Opperman at 378, which recognizes "there is little danger associated with impounding unsearched automobiles"). However, modern inventory policies do not take into

account the vehicle owner/driver's wishes or even require that police speak with the owner prior to searching the vehicle for an "inventory."

South Carolina's Constitution offers its citizenry a higher level of privacy protection than the federal Constitution. While privacy expectations in an automobile are somewhat diminished, "the word 'automobile' is not a talisman in whose presence the Fourth Amendment fades away..." Any search, even of an automobile, is a substantial invasion of privacy. Opperman at 387-88 (Marshall, J., Dissenting). Thus, for an inventory search to be reasonable, there must be other safeguards in place to ensure the privacy of the driver/owner and occupants. One such safeguard would be to require law enforcement to allow the driver to make arrangements for the vehicle or to deny the inventory search. As Justice Marshall stated his dissent in Opperman,

> The Court makes clear ... that the police may not proceed to search an impounded car if the owner is able to make other arrangements for the safekeeping of his belongings. Additionally, While the Court does not require consent before a search, it does not hold that the police may proceed with such a search in the face of the owner's denial of permission. In my view, if the owner of the vehicle is in police custody or otherwise in communication with the police, his consent to the inventory is prerequisite to an inventory search.

Opperman at 392 n.12.

Just prior to searching the vehicle, Pelfrey asked Appellant, for the sixth[9] time, if there was something in the vehicle he should know about. Appellant again told Pelfrey there was nothing in the vehicle, to which Pelfrey replied that they would "search it real quick, make sure." Appellant immediately responded that they could not search the vehicle, and that only his uncle could give them permission to search the vehicle. Pelfrey stated it would not be a search but would be an inventory, and Appellant told him there was nothing in the vehicle that needed to be inventoried. Based on Appellant's statements to Pelfrey, there was no reason for an inventory to

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9 Five times prior to this, Pelfrey asked Appellant, or the passenger, what was in the vehicle or on their persons that would illegal.

be performed. Again, Pelfrey had the time and opportunity to contact the owner of the vehicle, but he did not do so. This was because Pelfrey was intent on searching the vehicle for narcotics and not on performing his supposed "caretaker" duties.

There were numerous other problems with the alleged "inventory" of Appellant's vehicle in this case. Most glaring was the fact that Pelfrey does not actually complete a written inventory of the vehicles contents while searching the vehicle or after. When questioned by backup officers about what to include on the inventory, Pelfrey merely said a tattoo gun and then later says to put down that it was recorded on his body camera. The body camera footage certainly shows a myriad of items[10] in the vehicle that are never mentioned or written down.

Next was the manner in which Pelfrey "inventoried" the vehicle. He was not looking for valuables to secure. He was, as he stated to Appellant, checking to see if there was anything illegal in the vehicle. It borders on the absurd to characterize his actions as looking for valuables when he looks underneath a can in the cupholder, shakes out the contents of a cigarette pack, attempts to forcibly remove the center console, and peels back the lining of the trunk to see what might be hidden there, all the while not noting what the contents of the vehicle were.

Appellant's case is similar to that of the defendant in U.S. v. Taylor, 636 F.3d 461 (2011). In Taylor, Kansas City police were responding to a request by a fellow officer to follow a green 1500 Chevrolet truck and initiate a traffic stop if the driver committed a traffic violation. Id. at 463. The officers were informed that the driver of the vehicle was a suspect in a drug investigation and that narcotics were believed to be in the vehicle. Officers observed the truck change lanes without signaling and initiated a traffic stop. When Taylor could not provide proof

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10 Pelfrey removed the narcotics, a sum of money, a cell phone, and a gun from the vehicle. There was also a tattoo kit, paint, clothing, stereo speakers, and other various items seen on the body camera that do not appear recorded anywhere.

of insurance he was arrested, and the truck was impounded and searched pursuant to Kansas City Police Department's written policies. Id.

While searching the truck under the guise of an inventory, officers located seventy-four grams of cocaine, along with various clothing, toiletries, tools, equipment, and papers. On the inventory form, the officer merely listed the myriad of items in the truck as "misc. tools." Id. The Court of Appeals for the Eighth Circuit held that the search of the truck was not justified by the inventory search exception to the warrant requirement because the officer's description of "misc. tools" was insufficient to remove the inference that the search was investigatory. Id. at 465. Additionally, the Court of Appeals held that in addition to not adhering to the procedures, the fact that the officers were asked to follow the vehicle suggested that the police were engaging in their criminal investigatory function, not their caretaking function, when they searched the truck. Id.

OCSD policies require the department to "inventory all vehicles towed" and to fill out the inventory form completely. R. 136 (emphasis in the original). "Non-evidentiary items of significant value found in the vehicle should be removed for safekeeping and afforded adequate security. Contraband or evidence found in the vehicle should be immediately seized and preserved in accordance with existing procedures governing the seizure of physical evidence." R. 138. Based on the video recording, these policies were not followed in Appellant's case.

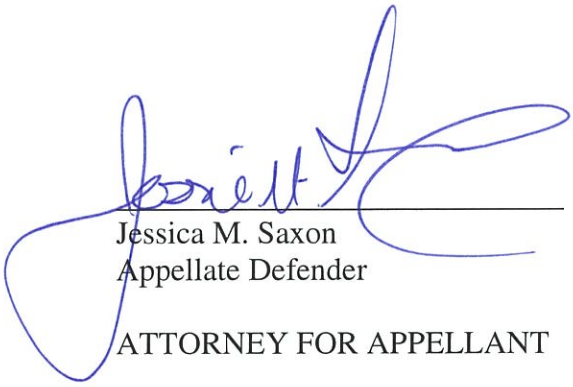
The inventory form was not filled out, and Pelfrey told officers to put that it was recorded on his body camera, thus the description of the contents of the vehicle was insufficient to remove the inference that the search was investigatory. Additionally, Pelfrey's apparent knowledge of Appellant's name, his conflicting reasons for beginning the encounter, and his repeated and persistent questioning about contraband that would be found in the vehicle show that he was

engaged in his criminal investigatory function and not his caretaking function. Hence, the "inventory" was not reasonable and was a violation of Appellant's rights under the U.S. and South Carolina Constitutions.

Finally, during the suppression hearing, the State asserted no other exception to justify the search of the vehicle and did not offer anything outside of the written policy pages to justify the inventory. The State is required to prove the legitimacy of the inventory prior to the evidence being admitted, and merely proving the existence of the policy does not satisfy the State's burden to prove that the inventory exception applied in this case. Further, Pelfrey had no articulable reason to approach Appellant and engage him in the investigatory encounter. Without more, the reasonableness of the inventory cannot be upheld. See People v. Spencer, 408 Ill. App. 3d 1, 8–9, 948 N.E.2d 196, 203 (2011) ([T]he existence of a police regulation cannot be used as a predicate to determine the lawfulness or reasonableness of an inventory search of a vehicle). Appellant respectfully requests this Court find the seizure and search of the vehicle he was driving unreasonable under both the United States and South Carolina constitutions.

CONCLUSION

By reason of the foregoing arguments, 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 28th day of March, 2022

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Mar 28 2022
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.

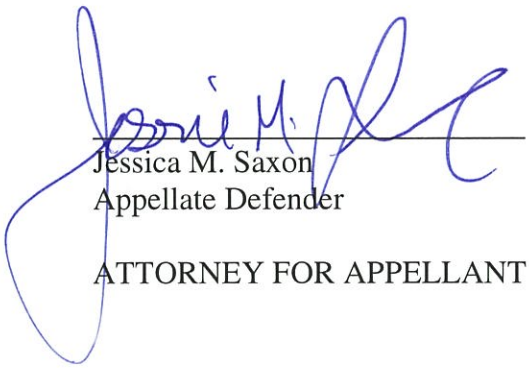
GARY M. WIRTZ,

APPELLANT.

APPELLATE CASE NO. 2020-001388

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 Final Brief of Appellant in the above referenced case has been served upon Mark R. Farthing., Esquire, the primary e-mail address listed in the Attorney Information System (AIS), this 28th day of March, 2022.



Jessica M. Saxon
Appellate Defender

ATTORNEY FOR APPELLANT