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Jun 09 2022

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHESTERFIELD COUNTY
Court of General Sessions

The Honorable Paul Burch, Circuit Court Judge

Case No. 2019-1274

State of South Carolina.....Respondent,

James David BusbyAppellant.

v.

PETITION FOR REHEARING

Pursuant to SCACR Rule 221, Petitioner respectfully asks this Court to rehear his case. Respectfully, this Court has overlooked or misapprehended issues of law that require the Court to grant this petition.

RELEVANT FACTS

James David Busby was convicted of voluntary manslaughter in the death of Mickey Short, a drug user, with whom he had a dispute regarding Short’s alleged purchase of a shotgun from him. Apparently Short paid Busby for the gun but did not receive it. ROA 74, 191, 349. In the late hours of June 18, 2017, in rural Chesterfield County, Short was shot in the face with buckshot and died. When first responders arrived, it appeared that someone had rifled through Short’s pockets. ROA 254. No drugs or money were located at the incident location. Tire tracks which appeared, to law enforcement, consistent with the tires on Busby’s truck were present. The State’s expert, however, testified those tires were mass produced and

that she did not detect any random characteristics or wear patterns. ROA 247. According to one witness—also a heavy drug abuser—Busby indicated he shot Short after Short attacked him with a machete.

During what the court concluded was a “consensual” search of Busby’s truck, law enforcement located items belonging to Short inside of a cowboy boot located in the truck. Once these items were recovered, law enforcement obtained a search warrant. ROA 195.

On June 21, 2017, Busby gave his first statement to law enforcement after he was arrested on an outstanding warrant from another jurisdiction. He had been up for days because he had been ingesting crystal methamphetamine. He spoke to law enforcement again on June 22, 2017. During both encounters, Busby denied responsibility for the death of Short. During his second statement, he indicated that another person committed the murder. Busby did, however, indicate to law enforcement that he knew where the murder weapon, and some items from the scene were located. The State’s expert however, testified that she was unable to tell what firearm fired the buckshot that killed Short. ROA 270.

Busby took law enforcement to Lake Terry where a Department of Natural Resources (DNR) dive team recovered items relating to the crime from the bottom of the lake. ROA 281. Later, the State obtained a buccal swab from Busby. ROA 220-229. With his DNA, the State was able to show that Short’s DNA was located on a Maglite found in Busby’s car and on a pair of blue jeans that belonged to Busby. Busby’s DNA was found in the interior waistband of those jeans.

In its case-in-chief, the State also heavily relied on cell phone data to show that Kenneth Parker, who Busby claimed actually shot Short, was not in the area when Short was killed. That data also showed that Busby and Short had been in communication shortly before Short's death. The State also introduced evidence tending to show that Busby tried to convince others that he had not been with Short that evening. ROA 340.

The defense presented a witness who testified that about a week before Short was killed, Busby assisted Short when he was injured due to an accident with a horse. ROA 483.

ARGUMENT

The trial court erred in not suppressing evidence found during the search of Busby's truck, nor the admission of other items that were obtained based on that search, because Chesterfield County's search violated Busby's rights under the Fourth Amendment and the South Carolina Constitution, Article I, §10.

The State, lacking probable cause to search Busby's truck, improperly enlisted the help of a neighboring jurisdiction to manufacture Busby's "consent to search" wherein law enforcement located items connecting Busby to Short's death. Prior to the start of trial, the trial court held a suppression hearing.

The State called Jason Catoe of the Lancaster County Sheriff's Office. Catoe testified that he received a call from Wayne Jordan of the Chesterfield County Sheriff's Office, asking about David Busby. ROA 60. Catoe told Jordan that Lancaster County was investigating Busby for a robbery and stolen pistol. Lancaster County had already retrieved the stolen pistol at the time of this conversation. ROA

61. Jordan asked Catoe to get a warrant on Catoe's charges in Lancaster County. At the time of this request, Catoe had not already received approval to obtain a warrant. ROA 61. After its discussions with Chesterfield County, Lancaster County then obtained warrants for breach of trust, obtaining goods under false pretenses, and receiving stolen goods. ROA 65. Jordan, with Chesterfield County, did not receive copies of the warrants. ROA 65.

With Lancaster County's warrants issued, Jordan located Busby at Nicole Deese's house. ROA 70. Jordan told Busby that he had warrant for him from Lancaster County and that he needed the pistol. He told Busby that he needed to search Busby's car to search for the pistol. ROA 71. Busby consented to that limited search. ROA 71. According to Jordan's testimony, Busby gave him the keys to his car. Then Busby was handcuffed. Sergeant Burns and Jordan then searched Busby's car and found the victim's identification cards located inside of a cowboy boot. ROA 71. Law enforcement then secured Busby's truck and took it to the police station. ROA 72. Jordan admitted during trial that he has been denied a search warrant before. ROA 79. Jordan's search of Busby's truck was improper because it was not based on probable cause and because it exceeded the limited scope of Busby's consent (which was improperly obtained because the pistol Jordan claimed he needed to search for was already in the possession of Lancaster County).

The fruit of the poisonous tree doctrine holds that where evidence would not have come to light but for the illegal actions of the police, and the evidence has been obtained by the exploitation of that illegality, the evidence must be excluded. *State v.*

Plath, 277 S.C. 126, 284 S.E.2d 221 (1981); see *Wong Sun v. United States*, 371 U.S. 471 (1963).

Consent to search, by itself, is not sufficient to purge the taint of a previous unlawful search or seizure. “When a consensual search is preceded by a Fourth Amendment violation, ... the government must prove not only the voluntariness of the consent under the totality of the circumstances, but the government must also ‘establish a break in the causal connection between the illegality and the evidence thereby obtained.’” *United States v. Melendez-Garcia*, 28 F. 3d 1046, 1053 (10th Cir. 1994) (citation and footnote omitted); see *State v. Robinson*, 306 S.C. 399, 412 S.E.2d 411 (1991) (holding consent to search procured during unlawful stop invalid unless State proves consent is voluntary and that sufficient attenuating circumstances remove taint of unlawful stop so that search is not an exploitation of unlawful stop). See also *State v. Greene*, 330 S.C. 551, 499 S.E.2d 817 (Ct. App. 1997).

Busby did not provide voluntary consent to Jordan to search his car. As Jordan testified:

We knock on the door. Nicole Deese answers the door and we ask her if Mr. Busby is in the residence. She said he is. She pointed to—she said he was in the back bedroom.

I walked through the hall, went through the living room, down the hall, and I met Mr. Busby face-to-face in the back bedroom and told him—I said—I asked him who he was. He said his name was David Busby. I said, man, you’ve got a warrant out on you out of Lancaster County. Where’s the pistol? He said I don’t have a pistol. **I said, man, I need to search your car for a pistol.** He said, okay, no problem, I don’t have a pistol.

ROA 70-71 (emphasis added).

Busby was then handcuffed while his car was searched. ROA 71. The State did not provide any evidence that Busby signed a waiver. Busby clearly only “consented” to Jordan’s search of his car for the pistol because Jordan told him he had an arrest warrant out for him.

Jordan continued to describe the encounter:

I said I need to search your truck for the pistol. He said, okay, I don’t have a pistol in my truck. **I said, well, I need to search it.** He said okay. I said where’s your keys, because we saw—we knew the vehicle was locked because you can see where the vehicle was locked. He said they were in his pocket. I said I need your keys. He reached in his pants pocket and handed me his keys. When I had them in my possession, I handcuffed him.

ROA 72, ll. 13-20.

Jordan then testified that, had Busby denied him consent to search the car, he would have “obtained a search warrant for the vehicle for the tires. . .”

Those tires were very—they were very unique. I say unique because they were a mud grip tire. They were a big tire. They wasn’t a standard street tire. They had mud grips to them, and that it very similar, very, very close in similarity to what we found on our scene.

ROA 73, ll. 14-18.

Okay. So if he had not given you consent to search or said no, you are not searching the vehicle, you would have gotten a search warrant, towed it, based on the fact that the tires appeared similar to the tracks at the scene?

That is correct. If he would have told us no at the onset, we would seize—we were going to seize the vehicle. **That was our intent going there, seizing the vehicle for the tire impressions.**

ROA 73, l. 19- ROA 74, l. 1.

First of all, Jordan did not seek consent to search Busby's truck so much as informed him that *he was going to search it* to find the pistol that was then sitting in an evidence locker in Lancaster County. Jordan then implicitly threatened to arrest Busby on the Lancaster warrant. Busby was then immediately placed in handcuffs after Jordan told him he needed to search the truck and Busby handed him his keys. Busby was not informed of his right to refuse consent. *Cf. State v. Adams*, 337 S.C. 334, 659 S.E.2d 272 (Ct. App. 2008) (defendant found to have voluntarily consented when defendant asked officer if he could refuse consent and officer told him he could). It was error for the trial court to find that Busby voluntarily consented to the search of his truck.

Additionally, Jordan's testimony during the suppression hearing does not make sense. If Jordan had believed the tire impressions were such strong evidence against Busby for murder, then why did he reach out to another jurisdiction to have Lancaster County swear out warrants against *his* suspect? In other words, if he was so confident in his case, why did not appear before a magistrate judge and obtain his own warrant for murder? The fact that Jordan knew the tire impressions did not constitute probable cause for a search warrant is underscored by the State's expert witness who testified during the State's case-in-chief that the tires on Busby's truck were mass produced and that she could not conclude, based on those tracks, that Busby's truck was the source of the tracks found at the scene. The tire tracks would not have constituted probable cause for a search warrant, as Jordan must have

known, and Jordan's actions were calculated to evade his responsibility for complying with the warrant requirement and Busby's Fourth Amendment rights.

It is further proof of Jordan's search of Busby's truck was a sham that his pretext—to search for the stolen pistol—was rendered null by the fact that Lancaster County *already had the pistol in their custody*. Jordan certainly was not going to find any evidence of that “stolen pistol” in Busby's car since it was, at the time of the search, located in Lancaster County, most likely in an evidence locker.

Law enforcement's actions in this case were an egregious violation of Busby's rights to be free from unreasonable searches and seizures. Chesterfield County, unwilling to obtain its own warrant because it lacked probable cause to search Busby's truck, had a neighboring jurisdiction obtain warrants in its jurisdiction solely to assist Chesterfield County. Chesterfield County then coerced Busby into “consenting” by threatening to arrest him on a stolen pistol charge when that pistol had already been recovered and was in Lancaster County's custody. Chesterfield County searched Busby's truck without probable cause and without valid consent in violation of Busby's rights under the federal and state constitutions. U.S.C. Amend. IV; S.C. Constitution, Article I, §10. This Court should find the search was invalid and suppress the fruits of the poisonous tree. *United States v. Najjar*, 300 F.3d 466 (4th Cir. 2002); *Wong Son v. United States*, 371 U.S. 471, 484-85 (1963) (Generally, evidence derived from an illegal search or arrest is deemed fruit of the poisonous tree and is inadmissible.”).

CONCLUSION

This Court should grant Busby's petition for rehearing and grant him relief.

Respectfully submitted,

/s/ Elizabeth Franklin-Best

Elizabeth Franklin-Best, P.C.

Bar #72555

3710 Landmark Drive, Suite 113

Columbia, South Carolina 29204

(803) 445-1333

elizabeth@franklinbestlaw.com

June 9, 2022.