STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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Appeal From Williamsburg County
Honorable Howard P. King, Circuit Court Judge

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THE STATE,

Respondent,

vs.

LEVELL WEAVER,

Petitioner.

_____

BRIEF OF RESPONDENT

_____

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ATTORNEYS FOR RESPONDENT.

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ISSUE PRESENTED

Whether the Court of Appeals erred by ruling any deficiencies in the search warrant process were irrelevant because a search warrant was not needed under the "automobile exception," where the state failed to file a return of the items allegedly seized pursuant to S.C. Code §17-13-140 & 141, particularly where the state's mishandling of seized evidence was at issue, and since Article I, §10 of the South Carolina Constitution provided petitioner additional protection against unreasonable searches and seizures in the privacy area?

STATEMENT OF THE CASE

Petitioner (Levell Weaver) is currently confined to the McCormick Correctional Institution of the South Carolina Department of Corrections pursuant to commitment orders from the Williamsburg County Clerk of Court. The Williamsburg County Grand Jury indicted Petitioner at the August 23rd, 1999 term of the Court of General Sessions for Williamsburg County for murder, armed robbery, and possession of a weapon during a violent crime (99-GS-45-236) in connection with the June 23rd, 1999 homicide of Dwayne McKnight. The case proceeded to trial on the charges on August 28-30, 2001, before the Honorable Howard P. King, Circuit Court Judge, and a jury. At trial, Petitioner was represented by William Jenkinson, and Michael Nettles, Esquires. The State was represented by Harry Conner, Assistant Solicitor for the Third Judicial Circuit.

On August 30th, 2001, the jury found Petitioner guilty of murder and possession of a weapon during commission of a crime of violence. Judge King sentenced Petitioner to thirty (30) years for murder; and five (5) years, concurrent, for possession of a weapon during the commission of a violent crime.

A timely Notice of Appeal was served. On November 24th, 2003, appellate counsel filed a Final Brief of Petitioner in which he raised the following issues:

1. Whether the court erred by ruling any deficiencies in the search warrant process were irrelevant because a search warrant was not needed under the "automobile exception," and by admitting evidence seized from appellant's vehicle, where the state failed to file a return of the items allegedly seized pursuant to S.C. Code § 17-13-140 & 141, particularly where the state's mishandling of seized evidence was at issue, since Article I, §10 of the South Carolina Constitution provided appellant additional protection against unreasonable searches and seizures in this privacy area?

2. Whether the court erred by allowing Lieutenant Ricky Weston to testify that "all the evidence led to Levell Weaver" since this allegation was hearsay because it was based upon what other people allegedly told Lieutenant Weston?

3. Whether the court erred by refusing to declare a mistrial where the solicitor argued that only the appellant could tell the jury why he was outside the nightclub that night, since this was an impermissible comment on appellant's right not to testify, and it was so prejudicial a curative instruction was insufficient to cure the extreme prejudice?

The Final Brief of Respondent was filed on January 5th, 2004. Following oral arguments, on June 9th, 2004, the Court of Appeals affirmed Petitioner's conviction in an Opinion filed on September 7th, 2004. ***State v. Weaver***, Op. No 3864.

The Court denied a timely Petition for Rehearing on November 18th, 2004. Petitioner filed the Petition for Writ of Certiorari on February 18th, 2005. Respondent made its Return to Petition for Writ of Certiorari on March 21st, 2005. This Court granted Certiorari in part on March 23rd, 2006.

STATEMENT OF THE FACTS

The decision of the Court of Appeals sets forth a sufficient statement of the evidence against Petitioner for purposes of this Return:

> At approximately 10:00 p.m. on June 23, 1999, Marion Dwayne McKnight was shot thirteen times while outside a club called Rob's Place in Hemingway, South Carolina. At the time of the shooting, McKnight was getting into his car with Antonio Brown and Tracy Scott. After the shooting, Scott contacted his mother, Loretta, who drove to the club. When she arrived she saw Weaver covered in blood, standing over McKnight's body that had been stripped to its underwear.
>
> Investigator Sandy Thompson, with the Williamsburg County Sheriff's Department, was called around 11:00 p.m. to investigate the incident. Leroy Powell, who witnessed the shooting, identified Weaver as the shooter. Investigator Thompson interviewed other witnesses and spoke with investigators at the scene who informed him that Weaver was a suspect and that he left the scene driving a green Jeep. Upon further investigation, the officers discovered that Weaver was at his cousin's house. Investigator Thompson then left for the residence accompanied by Investigator Collins and several other officers. At the home, the officers spoke with Weaver's cousin, Arnold Weaver. He confirmed Weaver arrived driving a green Jeep and told them Weaver had asked for bleach, a trash bag, and a change of clothes.
>
> After the discussion with Weaver's cousin, officers found the Jeep in the backyard. When Investigator Thompson opened the driver's side door, he noticed the Jeep's back area was wet and smelled of bleach. On a pump house near the Jeep, Investigator Thompson also discovered a bag containing a towel and some socks which smelled of bleach. To preserve the evidence for investigation, the officers seized the bag and towed the Jeep to an impoundment area. During the early morning hours of June 24, 1999, Weaver turned himself in at the Williamsburg County Jail.
>
> After the Jeep was impounded, Lieutenant Ricky Weston requested and obtained a search warrant. Though the police

searched the impounded vehicle after the warrant was issued, no return of the warrant was made.

SLED Agent Steve Lambert processed the vehicle and collected samples of blood evidence from the Jeep and the decedent's vehicle. During the search, Agent Lambert found a cloth with blood evidence on the back seat of the Jeep. As part of the investigation, Lambert analyzed a pair of underwear that contained blood evidence. Agent Lambert received this evidence from Investigator Dennis Parrott who identified the underwear as belonging to Weaver. Investigator Parrott also turned over the bag of clothing that was seized from the pump house near the Jeep. DNA testing of the evidence revealed that all of the samples matched the decedent's blood type.

ARGUMENT
I.

The Court of Appeals correctly found that the trial judge did not abuse his discretion by finding the search and seizure of Petitioner's vehicle proper under the automobile exception to the warrant requirement.

Petitioner asserts that the Court of Appeals erroneously found that the trial judge did not err by ruling a search warrant was not needed to search Petitioner's jeep under the automobile exception. The Court of Appeals found that under the facts of this case, there existed probable cause to believe the vehicle contained evidence of a crime and exigent circumstances. Thus, there was no requirement of a search warrant.

After the shooting, Petitioner drove a green jeep to his aunt's home and asked his cousin, Arnold Weaver, for bleach, a trash bag, and a change of clothes. Arnold Weaver gave Petitioner the items and left Petitioner, who went straight to the bathroom, alone. He eventually left the house using alternate transportation. (R. 232-236).

Police were informed that Petitioner was at his cousin's home and drove a green jeep that night. Later, at approximately 4:00 a.m., the following morning, Officers from the Williamsburg County Sheriff's Department arrived at the aunt's house. Arnold Weaver told police that Petitioner had been there and he gave him the bleach, bag and clothes. After the discussion with Weaver, officers opened the jeep, which was in the backyard. The back area of the jeep was wet and smelled of bleach, and a bag of clothes which smelled of bleach was also in the jeep. In order to preserve the evidence for investigation, the officers seized the jeep and clothes. No other search was made of the vehicle at the scene, and the vehicle was immediately driven to an impoundment area. (R. 258-262). After impoundment, a search warrant was obtained. (R. 270).

After an in camera hearing, the trial court denied Petitioner's motion to suppress, finding that the automobile exception applied in that the state had probable cause to search and seize the jeep without a warrant although the search was not contemporaneous. (R. 335-339).

The Court of Appeals found the State's failure to produce a return as set forth in S.C. Code Ann. § 17-13-140 was more than a ministerial error. However, suppression was not appropriate because a warrant was not needed to search and seize the jeep. We assert this finding is correct.

Petitioner argues that under Art. I, § 10 of the South Carolina Constitution, the search was an unreasonable invasion of privacy. That section states:

> The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures and unreasonable invasions of privacy shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, the person or thing to be seized, and the information to be obtained.

The General Assembly has imposed stricter requirements than federal law for issuing a search warrant. Both the Fourth Amendment of the U.S. Constitution and Article I, §10 of the S.C. Constitution require an oath or affirmation before probable cause can be found by an officer of the court, and a search warrant issued. ***State v. Jones***, 342 S.C. 121, 536 S.E.2d 675 (2000); U.S. Const. amend. IV; S.C. Const. art. I, §10. Additionally, the South Carolina Code mandates that a search warrant "shall be issued only upon affidavit sworn to before the magistrate, municipal judicial officer, or judge of a court of record...." S.C.Code Ann. §17-13-140 (1985).

Generally, warrantless searches are per se unreasonable unless an exception to the warrant requirement is present. ***State v. Peters***, 271 S.C. 498, 248 S.E.2d 475 (1978); ***State v. Dunbar***, 354 S.C. 479, 581 S.E.2d 840 (Ct.App 2003). Recognized exceptions to the warrant requirement include: (1) a search incident to a lawful arrest; (2) "hot pursuit"; (3) stop and frisk; (4) automobile exceptions; (5) the "plain view" doctrine; and (6) consent. ***State v. Bailey***, 276 S.C. 32, 274 S.E.2d 913 (1981); ***State v. Dunbar***, *supra*.

The automobile exception was first established by the U.S. Supreme Court in ***Carroll v. United States***, 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543 (1925). In Carroll, the Court held that an officer can make a warrantless search of an automobile if he has probable cause to believe that the automobile which he stops contains contraband. *Id*. In ***United States v. Ross***, 456 U.S. 798, 102 S.Ct. 2157, 72 L.Ed.2d 572 (1982), the U.S. Supreme Court determined the extent of a permissible search under the "automobile" exception to the search warrant requirement. The Court in ***Ross*** held a warrantless search of an automobile: "is not unreasonable if based on facts that would justify the issuance of a warrant, even though a warrant has not actually been obtained." ***Ross***, U.S. at 809, S.Ct. at 2168, L.Ed.2d at 583.

The mobility of automobiles creates circumstances of such exigency that, as a practical necessity, rigorous enforcement of the warrant requirement is impossible. If probable cause exists to justify the warrantless search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle and its contents that may conceal the object of the search. ***Wyoming v. Houghton***, 526 U.S. 295, 119 S.Ct. 1297, 143 L.Ed.2d 408 (1999). As noted in ***California v. Carney***, 471 U.S. 386, 105 S.Ct. 2066, 85 L.Ed.2d 406 (1985)] probable cause *alone* is sufficient to justify a warrantless search: “the pervasive schemes of regulation, which necessarily lead to reduced expectations of privacy, and the exigencies attendant to ready mobility justify

searches [of vehicles] without prior recourse to the authority of a magistrate so long as the overriding standard of probable cause is met." Additionally, once the vehicle is in police custody, the search need not be contemporaneous. The U.S. Supreme Court has held the justification to conduct a warrantless search does not vanish once the car has been immobilized. ***Florida v. Myers***, 466 U.S. 380, 104 S.Ct. 1852, 80 L.Ed.2d 381 (1984)(warrantless search of automobile which was impounded and in police custody, conducted approximately eight hours after concededly valid initial search conducted at time of defendant's arrest, was proper); ***United States v. Johns***, 469 U.S. 478, 105 S.Ct. 881, 83 L.Ed.2d 890 (1985)(search of packages from car three days later valid).

The Court of Appeals disagreed with Petitioner's implication that the S.C. Constitution provides additional protections which would, in effect, vitiate the automobile exception. Undoubtedly, the South Carolina Constitution provides greater privacy rights than the Fourth Amendment. *See* ***State v. Forrester***, 343 S.C. 637, 541 S.E.2d 837 (2001). However, the state Court's decisions have never indicated a departure from Fourth Amendment principles governing vehicle searches. As noted by the Court of Appeals:

> In analyzing the automobile exception in this case, we have not blindly applied the exception as a blanket provision for the admissibility of evidence. Instead, we have adhered to the probable cause requirement established by our case law that inherently provides protection against unreasonable searches and seizures as well as unreasonable invasions of privacy. . .

The automobile exception allows law enforcement officials to conduct a search of an automobile based on probable cause alone due to the lessened expectation of privacy in motor

vehicles traveling on public highways. ***State v. Cox***, 290 S.C. 489, 351 S.E.2d 570 (1986); ***State v. Bultron***, 318 S.C. 323, 457 S.E.2d 616 (Ct.App. 1995). Although Petitioner "challenges the assertion that his automobile was 'readily mobile' while it was parked in the backyard of a private residence," he misses the thrust of the automobile exception – an automobile has an inherent mobility whether parked or not. *See* ***State v. Cox***, *supra*. (No prior U.S.Supreme Court cases have recognized a distinction between vehicles parked in public and private places. Indeed, such a distinction would not harmonize with the Court's reasoning in automobile search cases). Also, officers were faced with the attempt to destroy evidence. In this case, probable cause certainly existed to search the vehicle.

Officers had probable cause to believe Petitioner shot and killed the victim. They received information that Petitioner shot the victim and was bloody at the crime scene. They were also informed that the green Jeep Petitioner drove from the scene was located at a cousin's house. Upon arriving at the home, he was no longer there, but the cousin informed the officers he had given Petitioner bleach, a change of clothes and a trash bag. Upon an initial inspection of the vehicle, the officers saw the back of the jeep was wet with bleach. Therefore, police knew the vehicle used by Petitioner had just been wiped down by him in an apparent attempt to eliminate evidence and that he was still at large. Accordingly, a warrantless search under the automobile exception was proper and the trial judge did not abuse his discretion in so ruling.

Petitioner also contends the search warrant was invalid because the state did not comply with the statutory requirements for search warrants. However, a warrant was clearly unnecessary. As discussed above, the search and seizure of Petitioner's Jeep was proper under the automobile exception. Thus, a warrantless search was constitutional. Petitioner's constitutional rights, federal and state, are not violated by a search done in a legal manner.

CONCLUSION

For the reasons stated above, Respondent submits that this Court should affirm the Opinion and judgment of the Court of Appeals.

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By: _____
ATTORNEYS FOR RESPONDENT

August 23, 2006.

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Appeal From Williamsburg County
Honorable Howard P. King, Circuit Court Judge

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THE STATE,

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CERTIFICATE OF SERVICE

_____

I, Derrick K. McFarland, counsel for Petitioner, certify that I have served the within Brief of Respondent on Petitioner by depositing three copies of same in the United States mail, postage prepaid, addressed to his attorney of record, Robert M. Dudek, Esquire, South Carolina Commission on Indigent Defense, P.O. Box 11589, Columbia, South Carolina 29211-1589.

This 23rd day of August, 2006.

_____

_____

DERRICK K. McFARLAND

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ATTORNEY FOR RESPONDENT

August 23, 2006

The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

Re: *The State v. Levell Weaver*

Dear Mr. Shearouse:

Enclosed for filing are the original and fifteen (15) copies of the State's Brief of Respondent, along with a Certificate of Service, in the above-referenced matter.

Thank you for your assistance in this matter.

Sincerely,

Derrick K. McFarland
Assistant Attorney General

Enclosures

cc: Honorable Kenneth A. Richstad (with copy of Petition)
Robert M. Dudek, Esquire
Ms. Sandi Wofford, Victim Services