IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 26806

STATE OF SOUTH DAKOTA,

Plaintiff and Appellant,

v.

RASHAUD JAUNTEL SMITH,

And

CRICKET LEANNE CORPUZ,

Defendants and Appellees.

APPEAL FROM THE CIRCUIT COURT
SIXTH JUDICIAL CIRCUIT
LYMAN COUNTY, SOUTH DAKOTA

THE HONORABLE PATRICIA J. DEVANEY
Circuit Court Judge

APPELLANT'S BRIEF

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Appeal Granted on October 11, 2013

TABLE OF CONTENTS

TABLE OF AUTHORITIES

OTHER AUTHORITY:

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And

CRICKET LEANNE CORPUZ,

Defendants and Appellees.

PRELIMINARY STATEMENT

In this brief, the State of South Dakota, Plaintiff and Appellant, identifies the Defendants individually by each of their names, Smith or Corpuz. The State calls them "Defendants" when it refers to them collectively. The State refers to itself, Plaintiff and Appellant, as "State." The record consists of two files, *State v. Cricket Leann Corpuz,* Lyman County CR. 12-81, and *State v. Rashaud Jauntel Smith*, Lyman County CR. 12-82. The State calls these files "CR" for Corpuz Record and "SR" for Smith Record, respectively. References to the appendix of this brief are noted as "APP." The two records contain several transcripts. The State calls the Transcript of Suppression Hearing, May 22, 2013, "SH". The CR file contains a transcript of Preliminary Hearing, called "PH". The

SR file contains transcripts of Grand Jury proceedings. The State does not refer to the Grand Jury transcripts.

Finally, there is an envelope containing exhibits. The State refers to these exhibits by letter exhibit, either "A" (video CD of the stop) or "B" (South Dakota Driver's License Manual).

JURISDICTIONAL STATEMENT

In this criminal case, the State filed a petition for intermediate appeal on September 6, 2013. The Defendants and Appellees did not reply to the petition. The Petition requested permission to appeal from an order of the trial court dated August 9, 2013, attested and filed August 23, 2013, which order denied in part and granted in part Smith's Motion to Suppress. APP 2; SR 131. Notice of Entry was dated, served, and filed August 29, 2013. App 33; SR 162. *See*, Order dated August 9, 2013, attested and filed August 13, 2013. APP 2; SR 131. The State filed its Petition for Intermediate Appeal September 6, 2013, pursuant to the provisions of SDCL 23A-32-5. Under that statute the petition was timely. This Court granted the Petition in an Order signed, attested, and filed October 11, 2013. SR 261; CR 238.

STATEMENT OF LEGAL ISSUE AND AUTHORITIES

DID THE TRIAL COURT ERR ON SEVERAL GROUNDS WHEN IT SUPPRESSED THE COCAINE FOUND ON SMITH'S PERSON?

The trial court suppressed the cocaine.

State v. Hirning, 1999 S.D. 53, 592 N.W.2d 600

Rawlings v. Kentucky, 448 U.S. 98, 100 S.Ct. 2556, 65 L.Ed.2d 633 (1980)

State v. Littlebrave, 2009 S.D. 104, 776 N.W.2d 85

Guthrie v. Weber, 2009 S.D. 42, 767 N.W.2d 539

STATEMENT OF THE CASE AND FACTS

A. Statement of the Case.

The State charged co-defendants Smith and Corpuz on December 3, 2012, by complaint with various drug offenses. The court released Smith on bail on December 6, 2012. SR 10. The Lyman County Grand Jury returned an Indictment against Smith on January 25, 2013, charging him with numerous felony and misdemeanor drug offenses. APP 31; SR 14. Defendant Smith had his arraignment on May 22, 2013.

Corpuz did not initially make bail, and a magistrate held a preliminary hearing on December 6, 2012, in which the magistrate found probable cause and bound Corpuz over to circuit court for trial. PH, *generally*. The State filed its information on December 17, 2012. APP 28; CR 11. The Information charged two felony and one misdemeanor drug offenses.

The circuit court, the Honorable Patricia J. DeVaney, Circuit Court Judge, Sixth Judicial Circuit, Lyman County, South Dakota, held an arraignment for Corpuz on December 20, 2012.

Each Defendant moved to suppress all evidence seized after the Defendants' car was stopped. The court held a Motion Hearing on

May 22, 2013 (SH). The court filed its Memorandum Decision on June 27, 2013, APP 17; SR 66; CR 41, and its findings and conclusions on August 13, 2013. APP 3; SR 91; CR 62. The court's Memorandum Decision, Findings of Fact, Conclusions of Law, and Order granted suppression of a package containing cocaine seized from Smith's sock. APP 2; SR 131. The State moved to reconsider suppression of the cocaine on August 1, 2013. APP 35; SR 70. The court denied the Motion to Reconsider by letter dated August 13, 2013. APP 26; SR 77; CR 48.

The State gave Notice of Entry of Findings of Fact, Conclusions of Law, and Order on Defendants Motion to Suppress on August 29, 2013. APP. 33; SR 162; CR 122. Thereafter, the State filed its Petition for Permission to Appeal from Intermediate Order with this Court on September 6, 2013. This Court granted the Petition on October 11, 2013. SR 261; CR 238.

B. Statement of Facts.

On November 30, 2012, South Dakota Highway Patrolman Brian Biehl (Biehl) stopped Defendants' car for following another vehicle too closely. SH 16-17. Trooper Biehl has been with the Highway Patrol for twelve years and is a Police Service Dog handler. SH 13. Biehl approached Defendants' car and "could smell the odor of burnt marijuana coming from the vehicle." SH 18. Corpuz was the driver, and Smith was the passenger. SH 14. Biehl informed Corpuz he intended to

write her a courtesy warning ticket for following too closely and asked her to come to his patrol vehicle. SH 18.

After Biehl and Corpuz got into the patrol car, Biehl requested a license check. SH 18-19. Corpuz told Biehl she and Smith, whom she called her boyfriend, were taking Smith back to the east coast where Smith attended school. She was unable to tell Biehl what Smith was studying. SH 19. She also told Biehl that Smith had lost his billfold and his identification and was unable to fly. SH 19. Trooper Biehl detected the smell of marijuana coming from Corpuz's person. SH 19; SH Ex. A video tape at 13:44. Biehl told Corpuz that he could smell marijuana on her. SH 20. Corpuz admitted to having used marijuana a couple of days ago. SH 19. Biehl radioed in a request for backup and told Corpuz he was going to talk to Smith and search the car. SH 20; *see* SH Ex. A (videotape of stop at approximately 13:46).

Biehl walked up to the car and again smelled marijuana. SH 21. Biehl asked for Smith's identification and Smith said his wallet had been stolen and he had no I.D. *Id.* When Biehl asked Smith if he attended school on the east coast, he said he did not, but stated he (Smith) and Corpuz were going to see family. *Id.* Biehl informed Smith he could smell marijuana on Corpuz and he could also smell marijuana coming from the car. *Id.* Smith admitted to Biehl that "they had a blunt" in the vehicle. *Id.* A blunt is a marijuana cigar. Biehl asked Smith to step out

of the car and told Smith he was going to search the car. *Id.*; SH Ex. A at 13:47.

Biehl was concerned for his safety because he was the only officer present. SH 21-22, 35-36. Moreover, at this point Biehl had smelled marijuana coming from the car and from Corpuz, Biehl's requested backup had not arrived, Corpuz had informed Biehl of marijuana use "a couple days ago" (SH 19), and Smith had informed Biehl that they had marijuana in the car. SH 21. Biehl handcuffed Smith and searched him. SH 21, 22, 35-36. He pulled up Smith's pant leg and found a bulge in his sock. SH 22. Biehl removed a package of white powder. He asked Smith what it was, and Smith stated it was "coke." SH 23.

Biehl next searched the vehicle. *Id.* He found a small plastic bag with 0.1 ounce of marijuana in a make-up bag located in the rear of the vehicle; three TracFones with the batteries removed; a bullet; and other items, including Smith's wallet containing his I.D. card. *Id.* The wallet was underneath the passenger seat. *Id.* Biehl noticed that the kick panel on the rear door of the passenger side was out of place. *Id.* A search of the passenger door revealed eight vacuum-sealed one-half pound packages of marijuana. *Id.* The driver's door had also been tampered with, and a search of that door panel uncovered eight more one-half pound packages of marijuana. *Id.*

The circuit court suppressed the evidence of cocaine found in Smith's sock, finding the State failed to enumerate an exception to the

search warrant requirement that would permit searching Smith without a warrant. APP. The court denied the Motion to Suppress Evidence in other respects. *Id.* This Court granted the State's Petition for Intermediate Appeal on October 11, 2013. SR 261; CR 238.

ARGUMENT

THE TRIAL COURT ERRED ON SERVERAL GROUNDS WHEN IT SUPPRESSED THE COCAINE FOUND ON SMITH'S PERSON.

A. Standard of Review

This Court applies the de novo standard to its review of a circuit court decision to grant or deny a motion to suppress. *State v. Hirning*, 1999 S.D. 53, ¶ 8, 592 N.W.2d 600, 603. The circuit court's findings of fact are reviewed under the clearly erroneous standard, but no deference is given to a circuit court's conclusions of law. *Id.* "Whether police had a lawful basis to conduct a warrantless search is reviewed as a question of law." *Id.* (other cites omitted).

B. The Trooper had Particularized Probable Cause to Search Smith.

In *State v. Hirning,* 1999 S.D. 53, 592 N.W.2d 600, this Court held that where drugs were found in a vehicle with three occupants, and the driver admitted that the drugs "belonged to basically all of them" the officer had probable cause to search all the occupants of the vehicle. This Court upheld the search of all the occupants without imposing any further requirements. *Hirning,* 1999 S.D. 53, ¶¶ 12, 14, 592 N.W.2d at 604. This Court concluded that because there was probable cause to

search the occupants of the vehicle, this Court did not need to decide "whether the subsequent seizure of drugs in [passenger Hirning's] pocket exceeded the scope of a legitimate pat down, or even whether the inevitable discovery doctrine justified admitting the evidence." *Hirning,* 1999 S.D. 53 at ¶ 12, 592 N.W.2d at 604.

In *Hirning,* this Court acknowledged that passengers and drivers have a reduced expectation of privacy in the property they transport in a car. Moreover, this Court relied on *Wyoming v. Houghton,* 526 U.S. 295, 119 S.Ct. 1297, 143 L.Ed.2d 408 (1999) when it noted that "[a]utomobile passengers are 'often . . . engaged in a common enterprise with the driver, and have the same interest in concealing the fruits or the evidence of their wrongdoing.'" *Hirning*, 1999 S.D. 53 at ¶ 14, 592 N.W.2d at 605 (citing *Houghton* at 119 S.Ct. at 1302). This Court cautioned, however, that before an automobile passenger can be searched, there must be a particularized suspicion of wrongdoing to justify a search of that particular person. *Id.* (citing *United States v. Di Re,* 322 U.S. 581, 587, 68 S.Ct. 222, 225, 92 L.Ed.2d, 210 (1948)); *see also Ybarra v. Illinois*, 444 U.S. 85, 91, 100 S.Ct. 338, 342, 62 L.Ed.2d 238 (1979), *reh'g. denied*, 444 U.S. 1049, 1005 S.Ct. 74, 62 L.Ed.2d 737 (1980).

Here, there was particularized probable cause directed toward Smith that enabled Biehl to search Smith without a warrant. Biehl smelled marijuana on Corpuz and in the car, Corpuz indicated that she

had not used marijuana for a couple of days, and Smith admitted that he and Corpuz had marijuana in the car. SH 21.

It is well settled that the odor of an illegal drug can be highly probative in establishing probable cause for a search. *See Johnson v. United States,* 333 U.S. 10, 13, 68 S.Ct. 367, 369, 68 L.Ed. 436 (1948); *State v. Pfaff,* 456 N.W.2d 558, 561 (S.D. 1990); *United States v. McCoy,* 200 F.3d 582 (8th Cir. 2000) (finding probable cause to arrest a driver and search a vehicle after the police smelled the odor of burnt marijuana on the driver when the driver sat in the patrol car); *United States v. Caves,* 890 F.2d 87, 90-91 (8th Cir. 1989) (the smell of marijuana coming from a car driver provides probable cause to search the car). Similarly, an Illinois court held that the odor of marijuana coming from a vehicle provided probable cause to search a passenger in the vehicle. *People v. Boyd*, 298 Ill.App.3d 1118, 700 N.E.2d 444 (1998). *See also* George L. Blum, "*Validity of Warrantless Search of Motor Vehicle Passenger Based on Odor of Marijuana,"* 1 ALR 6th 371 (2005).

In this case, under the totality of the circumstances, including the odor of marijuana, Corpuz's statement that she had not smoked marijuana for a couple of days, and Smith's admission that he and Corpuz had marijuana in the car, a reasonable and prudent person would believe it fairly probable that a crime had been committed by Smith and Corpuz and that evidence relevant to the crime would be uncovered by a search of both Smith and the car. *Hirning,* 1999 S.D. 53

at ¶¶ 12, 14, 592 N.W.2d at 604; *see State v. Zachodni*, 466 N.W.2d 624, 629 (S.D. 1991); *see generally State v. Mitchell*, 167 Wis. 2d 672, 682-83, 482 N.W.2d 364, 368 (1992).

When Biehl approached the car, he smelled the odor of marijuana. Biehl asked Smith whether there was marijuana in the car, and Smith admitted that they had a blunt in the vehicle. SH 21. At that point, Biehl had probable cause to both arrest and search Smith. *Hirning,* 1999 S.D. 53 at ¶¶ 12, 14, 592 N.W.2d at 604; *State v. Peterson,* 407 N.W.2d 221 (S.D. 1987); *United States v. Robinson*, 414 U.S. 218, 235, 94 S.Ct. 467, 476-77, 38 L.Ed.2d 427 (1973); *Chimel v. California*, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 684 (1969); *Blake v. Alabama*, 772 So.2d 1200, 1206 (Ala. Crim. App. 2000) (upholding the search of a passenger in a vehicle from which the officer detected an odor of marijuana and the seizure of cocaine from that passenger's pocket). As in *Hirning*, the admission from Smith that "they had a blunt" in the car admits that marijuana was in the car and it also provides a link between both Defendants and the contraband. It was not one or the other who had the blunt, but they that had it, just as "basically all of them" had it in *Hirning*.

Biehl's search of Smith was based upon probable cause. Smith was also located in a mobile vehicle. The automobile exception, which excuses the requirement to secure a search warrant, applies to the facts in this case. Moreover, the probable cause search was appropriate to

prevent the destruction or removal of the cocaine evidence. *Hitchcock v. State*, 118 S.W.3d 844 (Tex.App. - Texarkana 2003); George L. Blum at 1 A.L.R. 6th 371, § 4. The cocaine located in Smith's sock should not have been suppressed.

C. The Trooper Appropriately Searched Smith Incident to Arrest.

The circuit court found that because Smith was not physically arrested until after the search of his person, the search of Smith should not be deemed a search incident to arrest. "A search incident to arrest permits a warrantless search of an individual and of the area within his immediate vicinity following his arrest, so long as the search is contemporaneous with the arrest and is confined to the immediate vicinity of the arrest." *State v. Hodges,* 2001 S.D. 93, ¶ 22, 631 N.W.2d 206, 212. The search is authorized to secure any weapons and prevent the destruction of evidence. *Id.* The only question is whether probable cause for the arrest existed. *Id.*

Simply because Biehl did not immediately place Smith under arrest is not a basis to suppress evidence obtained during a valid search of Smith. *See Rawlings v. Kentucky*, 448 U.S. 98, 111, 100 S.Ct. 2556, 2564, 65 L.Ed.2d 633 (1980) ("Where the formal arrest followed quickly on the heels of the challenged search of petitioner's person, we do not believe it particularly important that the search preceded the arrest rather than vice versa."). *See also State v. Adams*, 815 So.2d 578, 582 n.4 (Ala. 2001):

> Our conclusion is in accord with those of other jurisdictions that have held that, where police officers smell the odor of burned or burning marijuana coming from a legally stopped automobile, police officers have probable cause to arrest all of the automobile's occupants and that police officers' search of one of the occupants prior to arrest is valid as a search incident to arrest. *See State v. Overby*, 590 N.W.2d 703 (N.D. 1999); *Brunson v. State*, 327 Ark. 567, 940 S.W.2d 440, *cert denied*, 522 U.S. 898, 118 S.Ct. 244, 139 L.Ed.2d 173 (1997); *State v. Mitchell*, 167 Wis.2d 672, 482 N.W.2d 364 (1992); *State v. Hammond*, 24 Wash.App. 596, 603 P.2d 377 (1979); *Dixon v. State*, 343 So.2d 1345 (Fla.Dist.Ct.App. 1977); *see also State v. Merrill*, 538 N.W.2d 300, 301 (Iowa 1995) ("Our review of other jurisdictions reveals that the majority of states have adopted the view that the smell of burnt marijuana, standing alone, may provide probable cause for a warrantless search."); Donald M. Zupanec, Annotation, *Odor of Narcotics as Providing Probable Cause for Warrantless Search*, 5 A.L.R.4th 681, at § 6 (1981) (citing cases holding "that the odor of marijuana, standing alone, was a sufficient basis upon which to conduct warrantless searches of persons or their clothing").

The trial court agreed there was probable cause to conduct a warrantless search of the vehicle before the search of Smith's sock. APP 21; SR 62; CR 37. The trial court finding, however, that "Biehl clearly did not believe he had probable cause to arrest Smith for possession of marijuana at the time the pat down search was conducted" (APP 24; SR 59; CR 34) is irrelevant. First, this finding is not determative because the probable cause standard is an objective one. *State v. Littlebrave,* 2009 S.D. 104, ¶ 18, 776 N.W.2d 85, 92; *State v. Engesser*, 2003 S.D. 47, ¶ 26, 661 N.W.2d 739, 748. Second, Biehl testified he did have probable cause to search Smith's person. SH 36. Probable cause to

arrest is ordinarily the same as probable cause to search the vehicle, *Hirning*, 1999 S.D. 53 at ¶ 13, 592 N.W.2d at 604.

Here, discovery of actual marijuana in the car was not necessary for probable cause to arrest Smith, particularly when the officer smelled marijuana and Smith had already admitted he and Copruz had marijuana in the car. *See Littlebrave*, 2009 S.D. 104 at ¶ 20, 776 N.W.2d at 93 (Defendant's admission there were drugs in a car justified search of the car based on probable cause).

The cases defining probable cause to search or arrest demonstrate that Biehl had probable cause to arrest both Defendants for marijuana possession before the search of Smith or the car. *Id.* Biehl had not only smelled marijuana, he had an admission from Smith that they had marijuana in the car. SH 21. Finding an additional sixteen one-half pound packages of marijuana only confirmed Smith's earlier admission that a marijuana "blunt" was in the car. In accordance with *Rawlings* and *Adams,* Biehl's search of Smith prior to his arrest is valid as a search incident to the arrest.

D. The Evidence from Smith's Sock is Admissible Under the Inevitable Discovery Doctrine.

The circuit court also found that the cocaine in Smith's sock was not admissible under the inevitable discovery doctrine. This doctrine is an exception to the exclusionary rule and should be sparingly utilized. When evidence is obtained in violation of the constitution, it should not,

however, be suppressed "if the prosecution can establish by a preponderance of evidence that the information ultimately or inevitably would have been discovered by lawful means. . . ." *Guthrie v. Weber,* 2009 S.D. 42, ¶ 24, 767 N.W.2d 539, 547 (quoting *Nix v. Williams,* 467 U.S. 431, 444, 104 S.Ct. 2501, 2509, 81 L.Ed.2d 377 (1984)). As this Court has recognized, the "inevitable discovery doctrine applies where evidence may have been seized illegally but where an alternative legal means of discovery, such as a routine police inventory search, would inevitably have led to the same result." *State v. Boll,* 2002 S.D. 114, ¶ 21, 651 N.W.2d 710, 716.

Here, the circuit court found that Biehl ultimately had probable cause to arrest Smith and Corpuz for possession of marijuana and the cocaine found in Smith's sock "would have been discovered in a lawful search of his person incident to that arrest." APP 24; SR 59; CR 34. But the trial court refused to apply the inevitable discovery doctrine because it found that the application of the exclusionary rule warranted the suppression of the cocaine found in Smith's sock to deter unlawful pat-down searches. APP 24; SR 59; CR 34.

Biehl had probable cause to search the car at the time he searched Smith. Thus, the cocaine was certain to have been discovered when Smith was properly arrested for the marijuana found in the car. This evidence would have been inevitably discovered because the circuit court found there was probable cause to search the vehicle. APP 21; SR 62;

CR 37. Unlike *State v. Shearer*, 1996 S.D. 52, ¶¶ 4, 21, 548 N.W.2d 792, 794 and 796-97, where the officer gained access to the evidence through expansion of an unlawful pat down search, the trial court found that Biehl had probable cause to search the vehicle. There is nothing improper or unlawful to deter under the trial court's findings and conclusions. No more than probable cause was required to execute a search under the automobile exception. Even if the trial court was correct, the presence of marijuana in the car would have inevitably led to Smith's arrest and search after Biehl searched the car and found the marijuana load.

Unlike *Boll,* where the Defendant would not have been arrested if he had not been illegally searched, the arrest here was proper and would have taken place without the search of Smith's person. Here, the State has adequately demonstrated, as in *Guthrie*, that "it is more likely then not that the state would have inevitably employed the search incident to arrest, *and* that this procedure inevitably would have led to the discovery of the exact same evidence." *Guthrie*, 2009 S.D. 42 at ¶ 26, 767 N.W.2d at 548. Suppressing evidence that was certain to have been found legally through an inevitable search incident to arrest serves no valid deterrent purpose. *Id.*

REQUEST FOR ORAL ARGUMENT

The State hereby requests that it be granted oral argument in this matter.

CONCLUSION

The State respectfully requests that the trial court's Order suppressing evidence (cocaine) seized from Smith's sock be reversed, and that the case be remanded to the circuit court for trial.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. I certify that the Appellant's Brief is within the limitation provided for in SDCL 15-26A-66(b) using Bookman Old Style typeface in 12 point type. Appellant's Brief contains 3,530 words.

2. I certify that the word processing software used to prepare this brief is Microsoft Word 2010.

Dated this 10th day of December, 2013.

_____
Craig M. Eichstadt
Assistant Attorney General

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 10th day of December, 2013, two true and correct copies of Appellant's Brief in the matter of *State of South Dakota v. Rashaud Jauntel Smith and Cricket LeAnne Corpuz* were served by United States mail, first class, postage prepaid, upon Amy R. Bartling, Attorney at Law, P.O. Box 149, Gregory, SD 57533 and Steve Smith, Smith Law Office, P.O. Box 746 Chamberlain, South Dakota 57325.

_____
Craig M. Eichstadt
Assistant Attorney General

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Circuit Court Judge

APPELLEE'S BRIEF

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Appeal granted on October 11, 2013

TABLE OF CONTENTS

TABLE OF AUTHORITIES

PAGE

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Defendants and Appellees.

PRELIMINARY STATEMENT

Throughout this brief, the State of South Dakota, Plaintiff and Appellant, will be identified as "State." Each Defendant will be referred to respectively by their names, Smith and/or Corpuz. When the word "Defendants" is used in this brief, it is a reference to both Smith and Corpuz collectively. Two files compose this record, *State v. Rashaud Jauntel Smith*, Lyman County Cr. 12-82 and *State v. Cricket Leanne Corpuz*, Lyman County Cr. 12-81. The reference to the Corpuz record shall be "CR" and the reference to the Smith record shall be "SR." Any reference to the appendix of this brief shall be "APP." There have been several transcripts prepared relating to these cases. The reference to the suppression hearing transcript, which was held on May 22, 2013, shall be referred to as "SH." Corpuz's preliminary hearing transcript shall be referred to as "PH." The grand jury transcript from the SR shall be referred to as "GJ."

The State introduced two exhibits at the suppression hearing. One of these exhibits is reference in this brief and is contained in an envelope and marked as follows: the video of the stop shall be Exhibit "A."

STATEMENT OF LEGAL ISSUE AND AUTHORITIES

THE TRIAL COURT PROPERLY SUPPRESSED THE COCAINE FOUND ON SMITH'S PERSON BY FINDING THAT THE SEARCH WAS A VIOLATION OF THE WARRANT REQUIREMENT OF THE FOURTH AMENDMENT.

State v. Labine, 2007 SD 48, 773 NW2d 265, 269

Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.E.2d 889 (1968)

State v. Shearer, 1996 SD 52, 548 NW2d 792

State v. Sleep, 1999 SD 18, 590 NW2d 235

STATEMENT OF THE CASE AND FACTS

A. Statement of the Case.

Defendant Rashaud J. Smith was charged with Possession of a Controlled Substance, Possession of Marijuana with Intent to Distribute, Possession of Marijuana (Less Than Ten Pounds) and Possession of Drug Paraphernalia by a complaint filed with the Court on December 3, 2012, in Lyman County, SD. SR 10. A grand jury indicted Smith on the same charges on January 25, 2013. APP 27; SR 14. Smith was arraigned in Lyman County on May 22, 2013.

A Motion to Suppress was filed by Smith, and a hearing on that suppression motion was held on May 22, 2103. On June 27, 2013, the court filed a Memorandum Opinion (App 16; SR 66) and filed findings of facts and conclusions of law on August 13, 2013. App 2; SR 91. An Order Granting in

Part and Denying in Part Smith's Motion to Suppress was filed on August 13, 2013. App 1; SR 131. The state filed a motion for reconsideration of the suppression issue on August 1, 2013, (App 31; SR 70) which the court denied on August 13, 2013. App 25; SR 77.

Notice of Entry of Findings of Fact and Conclusions of Law and Order on Defendant's Motion to Suppress was given on August 29, 2013. App 29; SR 162. The State further filed the Petition for Permission to Appeal from Intermediate Order with the South Dakota Supreme Court on September 6, 2013. The Court granted the Petition for Permission to Appeal from Intermediate Order on October 11, 2013. SR 261.

B. Statement of Facts.

South Dakota Highway Patrol Officer Brian Biehl (Biehl) stopped a vehicle for following too closely on November 30, 2012, in Lyman County. SH 16-17. Smith was a passenger in that vehicle. SH 14. Beihl made contact with the vehicle and the driver, who was identified as Defendant Corpuz. SH 14. Biehl indicated by his testimony that he could smell the odor of marijuana coming from the vehicle. SH 18. Biehl asked Corpuz to come back to his patrol vehicle so that he could issue a courtesy warning for the traffic violation. SH 18.

Once in the patrol vehicle, Biehl requested a license check and proceeded to ask Corpuz about their trip. SH 18-19. Corpuz indicated that her and Smith were traveling to the east coast to take Smith to school. SH 19. Biehl testified that he could smell marijuana coming from Corpuz's person once she was

inside his patrol vehicle. SH 19; SH Ex. A at 13:44. Biehl informed Corpuz that he could smell marijuana coming from her person and Corpuz admitted to using marijuana a few days ago. SH 19. At that point, Biehl requested back up assistance and informed Corpuz that he was going to search the vehicle. SH 20.

Biehl made contact with the passenger and asked for a driver's license. SH 21. Biehl also asked about where Corpuz and Smith were headed. *Id.* Smith indicated that they were traveling to the east coast to see family. *Id.* Biehl then informed Smith that he could smell marijuana coming from the vehicle and that he was going to search the vehicle. *Id.* Smith admitted that there was a blunt in the back of the vehicle. *Id.* At that point, Smith was asked to exit the vehicle. *Id.*

Biehl then informed Smith that he was going to conduct a "pat-down" search of Smith's person for safety reasons. Biehl further testified at the Motions hearing that he conducted the pat-down search because he was the only officer on the scene and he was concerned about someone standing behind him while he conducted the search of the vehicle. SH 21. Biehl inquired whether Smith had weapons on his person, which Smith answered negatively. SH 22. Beihl informed Smith that he was not under arrest and that Smith was being detained until Biehl could "figure out what was going on." SH Ex. A at 13:48. At approximately 1:48 pm, Biehl conducted the pat-down search of Smith and located a bulge in the sock of Smith. *Id,* at 13:49. Biehl couldn't

immediately identify the bulge as a weapon, but assumed it was marijuana. SH 23. Smith admitted to Biehl that the bulge was "coke." SH 23.

Biehl proceeded to search the vehicle and found the marijuana blunt in a make-up bag located in the rear of the vehicle. *Id.* Biehl also located various other items in the car. *Id.* While searching, Biehl observed the rear kick-panels of the car to be misplaced and requested the vehicle be towed for further investigation. SH 24. Before the vehicle was towed, at approximately 2:15 PM, Biehl placed Smith under arrest for possession of cocaine. SH Ex. A at 14:14. Smith was only arrested for possession of marijuana based on his admission that the marijuana that had been found in the make-up bag was his. *Id*, at 14:15. A search of the rear panels of the car revealed sixteen vacuum-sealed one-half pound packages of marijuana. SH 24.

The circuit court suppressed the cocaine from coming into evidence finding that the State did not show an exception to the warrant requirement. The Motion to Suppress was denied on all other allegations.

ARGUMENT

THE CIRCUIT COURT PROPERTY EXCLUDED THE COCAINE FOUND ON SMITH'S PERSON FROM BEING ADMITTED TO EVIDENCE AS A VIOLATION OF HIS FOURTH AMENDMENT RIGHT AGAINST UNREASONABLE SEARCH AND SEIZURE.

A. Standard of Review

An appeal from a circuit court's granting or denying of a motion to suppress is reviewed on a de novo standard of review. *State v. Hiring*, 1999 S.D. 53, ¶8, 592 N.W.2d 600, 603. The circuit court's findings of facts are reviewed under a clearly erroneous standard but there shall be no deference given to the

conclusions of law given by the circuit court. *Id.* The question dealing with whether or not an officer had a lawful basis for conducting a warrantless search is reviewed as a question of law. *Id.*

B. Trooper Biehl completed an illegal pat-down search of Smith when he asked him to step out of the vehicle rather than a probable cause search based on the smell of marijuana in the vehicle.

There is a requirement that for an officer to search an individual that a warrant must be issued to justify the search. *State v. Labine*, 2007 S.D. 48, ¶ 13, 733 N.W.2d 265. An exception to this rule is the "*Terry*" search – when an officer has grounds to believe that a suspect may be armed and dangerous or poses a threat to the officer or a threat to others. *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968); *State v. Sleep*, 1999 S.D. 18, ¶19, 590 N.W.2d 235, 238-39; *State v. Shearer*, 1996 S.D. 52, ¶18. In order to justify a *Terry* stop, and to determine the reasonableness of the officer's actions, an officer needs to give specific and articulate reasons for the pat-down search. *Sleep*, ¶19. In *Sleep*, the Court held that "a limited protective search of this type is not contrived to discover evidence of a crime, but to allow the officer to pursue his investigation without fear of violence." *Id.* (internal citations omitted).

While conducting a lawful pat-down search of an individual, officers are allowed to seize non-threatening contraband as long as the officer does not violate the scope of a *Terry* search. If an officer is able to immediately identify what an object is and has probable cause to believe the item is contraband, it

can be seized without the warrant requirement. *Minnesota v. Dickerson*, 508 U.S. 366, 113 S.Ct. 2130, 124 L.Ed.2d 334 (1994).

Biehl initially made contact with the driver of the vehicle, who is also the co-defendant in this matter. SH 14. After speaking with the driver, Biehl indicated he smelled the presence of marijuana and indicated he was going to search the vehicle. SH 19. At this time, Biehl requested Smith step out of the vehicle so a search of the vehicle could be done. SH 20.

The facts of this case in no way demonstrate that Smith was carrying weapons or that Biehl's safety was an issue. The stop was for following to close and the reason for searching the vehicle was due to an odor of marijuana. There was no concern that Smith, or the driver, were involved in a serious violent crime, had weapons on their possession or posed a threat to the safety of others or Biehl. Biehl indicated he was concerned because his back up hadn't arrived and made statements indicating he was concerned about Smith standing behind him as he searched the vehicle. SH 21. There were no specific, articulate facts given by Biehl to justify his pat-down search. Biehl was only able to give generalizations about his safety concerns when searching a vehicle and did not have reasons specific to Smith to justify his safety concern. This makes the pat-down search Biehl performed unconstitutional on its face. *Shearer*, at ¶19 (ruling that if an officer conducts a pat-down search as a standard procedure when searching a car, the pat-down search is unconstitutional under a *Terry* standard). Because of the facts of this case, Biehl did not have the ability to conduct a protective pat-down search of Smith

when he asked him to step out of the vehicle. Even if the pat-down search meets the exception to a warrant requirement, Biehl testified that he was unable to immediately identify the object and made assumptions as to the contents in Smith's sock.

The State argues that the search was a search based on probable cause. There are multiple cases, including cases from South Dakota, that indicate the smell of marijuana coming from a vehicle during a traffic stop gives an officer the ability to search not only the vehicle but the occupants of that vehicle. *Johnson v. United States*, 333 U.S. 10, 13, 68 S.Ct 367, 369, 68 L.Ed. 436 (1948); *State v. Pfaff*, 456 N.W.2d 558, 561 (S.D. 1990); *United States v. McCoy*, 200 F3d 87, 90-91 (8th Cir. 1989); *State v. Hanson*, 1999 S.D. 9, ¶14, 588 N.W.2d 885, 890 (quoting *State v. Zachodni*, 446 N.W.2d 624, 629 (S.D. 1991). It is uncontested by Smith that Biehl smelled the odor of marijuana coming from the vehicle or from Corpuz, but that was not the basis for why Biehl conducted the search. The facts of this case distinguish it from the cited cases by the State to support a search based on probable cause.

Biehl specifically stated to Smith that he was *not* under arrest at the time of the pat-down search. SH Ex. A at 13:48. Smith was informed that he was being placed in handcuffs and detained exclusively as a precautionary measure while Biehl searched the vehicle for marijuana. Id. Biehl requested that Smith exit the vehicle so that he could conduct a search of the vehicle and determine what was going on. *Id.* It was only during the suppression hearing that Biehl

indicated that he conducted a probable cause search based on the smell, yet he specifically indicates that Biehl was not under arrest at the time of the search.

The United States Supreme Court has also limited a warrantless search of an automobile to just the automobile itself. *United States v. De Ri*, 332 U.S. 581, 68 S.Ct. 222, 92 L.Ed. 210 (1948). In *State v. Gefroh*, the Defendant was a driver in an automobile stopped for traffic violations. 801 N.W.2d 429. A drug-dog indicated that the car contained controlled substances and the defendant was asked to step out of the vehicle. Actions of the defendant gave police officers suspicions about their safety, so a pat-down search was conducted. During the pat-down search, officers found cocaine in Gefroh's pocket. The trial court held that the pat-down search was not conducted properly and that the automobile exception to the warrant requirement did not extend beyond the vehicle and the vehicle's containers. *Id*, at ¶13. Given the heightened privacy expectations of one's person, the North Dakota court properly relied upon the United State's Supreme Court's ruling. *De Ri,* at 587 (holding that a search warrant for a home or automobile does not automatically expand to the persons found within those structures, so a warrantless search of an automobile should not give an officer more latitude to search a person found within the vehicle).

In this particular case, Biehl smelled the odor of marijuana. SH 18. He then had an admission that there was marijuana in the car. SH 21. However, when Biehl first conducted the search of Smith, he was clear that the search was to ensure Biehl would be safe searching the car with someone behind him. SH Ex. A at 13:48. Biehl further stated that Smith was not under arrest at the

time of the search and that he was just being detained for safety purposes. *Id.* This does not establish that Biehl was relying on probable cause to search Smith's person.

The circuit court correctly determined that Biehl's search of Smith's person was not based on probable cause, but was an illegal pat-down of Smith's person.

C. Trooper Biehl did not search Smith as "incident to arrest" as the arrest of Smith came approximately thirty minutes after the search of Smith's person.

Other states have determined that a search that is quickly followed by a formal arrest is a search incident to an arrest. The State relies on multiple cases where the actual arrest came immediately upon the heels of the search of a person. *State v. Hodges*, 2001 S.D. 93, ¶22, 631 N.W.2d 206, 212; *Rawlings v. Kentucky*, 448 U.S. 98, 111, 100 S.Ct. 2556, 2564, 65 L.Ed.2d 633 (1980); *State v. Adams*, 815 So.2d 578, 582 n.4 (Ala. 2001). However, in each of those cases the search of the person, whether as a pat-down search or a probable cause search, the search resulted in the arrest of the person *immediately* after the search was conducted. Smith was not arrested until approximately twenty-seven minutes after the search of his person.

The amount of time between the search of Smith's person and his arrest is very important in this case. The amount of time between the search and the arrest distinguishes this case from the State's cited cases. During the searches in each of those cases, the arrest of the defendant came immediately after the search of the defendant's person. The State would likely be successful arguing

that this search was a "search incident to arrest" if the arrest of Smith immediately followed the search. In the case law that the State relies upon, there wasn't a significant lapse in time between the search of the defendants and the arrest of the defendants. The facts in this case lay out a different picture. The time lapse between the search of Smith's person and his arrest was approximately thirty minutes, making this case distinguishable from the State's cited cases.

When Smith was eventually arrested, he was only arrested on the charges of possession of a controlled substance and was not arrested for possession of marijuana. SH Ex. A at 14:14. Once Smith claimed ownership of the marijuana found in the make-up bag, Biehl then arrested Smith for possession of marijuana. As the trial court properly concluded, it is clear that Biehl did not believe he had probable cause to arrest Smith for possession of marijuana at the time of the pat-down search. Based on the amount of time between the search of Smith's person and the initial statements of why Smith was being arrested, this is not a search incident to arrest.

E. The trial court was correct when the inevitable discovery doctrine was not applied to this case based on the facts and circumstances under which the cocaine was discovered.

The State's final argument is based on the inevitable discovery doctrine. This doctrine allows information that was found during a violation of a person's constitutional rights to be admitted into evidence if the information would have inevitably been discovered by lawful means. *Guthrie v. Weber*, 2009 S.D. 42, ¶24, 767 N.W.2d 539, 547 (quoting *Nix v. Williams*, 467 U.S. 431, 444, 104

S.Ct. 2501, 2509, 81L.Ed.2d 377 (1984). If the same evidence found during an illegal search would have eventually been found through alternative, legal means, the State is allowed to use that evidence. *State v. Boll*, 2002 S.D. 114, ¶21, 651 N.W.2d 710, 716.

However, this doctrine should be applied sparingly and should only be used when the "deterrence benefits outweigh its 'substantial societal costs.'" *Labine,* at ¶22. As the trial court noted, as part of the search a substantial amount of marijuana was found during the search of the vehicle and the circuit court determined the search of the vehicle to be a valid search. As this court has decided in *Shearer*, an unlawfully intrusive search of the defendant's person warrants exclusion of the evidence to deter law enforcement from using "unconstitutional shortcuts to obtain evidence." *Shearer*, at ¶22. In that same case, this court cautions against a loose application of the inevitable discovery doctrine. *Id*, ¶21-23.

In this instance, Biehl violated Smith's Fourth Amendment rights when he conducted an illegal pat-down search of his person. There should not be an award of an illegal search of admitting evidence into a trial when an officer takes a short cut to conduct a search of a person. If officers are permitted to conduct an illegal search of a passenger of a vehicle when they suspect criminal activity, and eventually find evidence of criminal activity in the vehicle, there is no reason for officers to abide by the Constitution. Officers have a duty to uphold the constitutional rights of all persons, whether suspicions of criminal activity is underfoot or not. In this particular instance, Biehl informs Smith

that he is not under arrest and shows a general pattern of conducting pat-down searches of individuals without giving specific reasons to justify a protective pat-down search. This is a policy that should be discouraged by this court.

Given the amount of marijuana that was allowed to come into evidence by the circuit court's Order, there is no societal interest in allowing the cocaine found during an illegal search of Smith's person to be entered into evidence. By keeping the cocaine excluded as evidence, it reinforces the principal created by this Court that the warrant requirement of the Fourth Amendment is alive and well.

CONCLUSION

Biehl violated Smith's Fourth Amendment rights when he conducted the pat-down search without an articulated concern for his safety or the safety of others. There has not been an exception to the warrant requirement of the fourth amendment presented by the State to overturn the circuit court's decision to suppress the cocaine from coming into evidence. The search of Smith was not a search based on probable cause, a search incident to arrest and should not fall into the inevitable discovery doctrine. Because of this, the evidence suppressed by the circuit court should remained suppressed from evidence.

RESPECTFULLY SUBMITTED this 27th day of January 2014.

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CERTIFICATE OF COMPLIANCE

1. I certify that the Appellee's Brief is within the limitation provided for in SDCL 15-26A-66(b) using Bookman Old Style typeface in 12 point type. Appellee's brief contains 2,692 words.
2. I certify that the word processing software used to prepare this brief is Microsoft Word 2008 for Mac.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 27th day of January 2014, a true and correct copy of the foregoing Brief in Support of a Motion to Suppress and Certificate of Service were mailed to:

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and that said mailing was by first class United States post office mail, electronic filing and electronic mail.

/s/Amy R. Bartling
Amy R. Bartling

IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 26806

STATE OF SOUTH DAKOTA,

Plaintiff and Appellant,

v.

RASHAUD JAUNTEL SMITH,

And

CRICKET LEANNE CORPUZ,

Defendants and Appellees.

APPEAL FROM THE CIRCUIT COURT
SIXTH JUDICIAL CIRCUIT
LYMAN COUNTY, SOUTH DAKOTA

THE HONORABLE PATRICIA J. DEVANEY
Circuit Court Judge

APPELLANT'S REPLY BRIEF

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CORPUZ

Appeal Granted on October 11, 2013

TABLE OF CONTENTS

TABLE OF AUTHORITIES

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No. 26806

STATE OF SOUTH DAKOTA,

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v.

RASHAUD JAUNTEL SMITH,

And

CRICKET LEANNE CORPUZ,

Defendants and Appellees.

For the Preliminary Statement and Jurisdictional Statement, the State incorporates by reference material contained at pages 1-3 of its Appellant's Brief. Likewise, for the Statement of the Case, the State incorporates by reference the material contained at pages 3-4 of its Appellant's Brief.

STATEMENT OF LEGAL ISSUE AND AUTHORITIES

DID THE TRIAL COURT ERR ON SEVERAL GROUNDS WHEN IT SUPPRESSED THE COCAINE FOUND ON SMITH'S PERSON?

The trial court suppressed the cocaine.

State v. Hirning, 1999 S.D. 53, 592 N.W.2d 600

Rawlings v. Kentucky, 448 U.S. 98, 100 S.Ct. 2556, 65 L.Ed.2d 633 (1980)

State v. Littlebrave, 2009 S.D. 104, 776 N.W.2d 85

Guthrie v. Weber, 2009 S.D. 42, 767 N.W.2d 539

REPLY TO STATEMENT OF THE FACTS

The State reasserts the Statement of Facts contained in its Appellant's Brief at pages 4-7. Defendant Rashaud Jauntel Smith (Smith) does not misstate the facts, and there appear to be few, if any, disputes of fact on appeal. Smith does, however, omit certain crucial facts in his statement. At page 4, in the first full paragraph, where relating Smith's story about the direction of travel, Smith omits to mention that he also states that he was not going to school in Connecticut, which further conflicts with Corpuz's story. SH 21, APP 75.

In the paragraph partially on page 4 and partially on page 5, Smith omits to state that Trooper Brian Biehl (Biehl) testified he conducted the search of Smith because he had probable cause to search him. SH 22, APP 76; SH 36-37, APP 89-90.

REPLY ARGUMENT

THE TRIAL COURT ERRED ON SEVERAL GROUNDS WHEN IT SUPPRESSED THE COCAINE FOUND ON SMITH'S PERSON.

A. *Introduction.*

The State reasserts all of the arguments contained in its Appellant's Brief in this matter, and relies principally on those. The State offers the following specifically in reply to the arguments in Defendant Smith's brief (DB).

B. *Search Based on Probable Cause.*

Smith sets up a straw man in arguing that there is an "illegal pat down search" in this case. The State has not sought on appeal to justify the search as a pat down. While Biehl cited this as one reason for the search, it was only one reason. He also stated that he had probable cause for the search. SH 22, APP 76; SH 36-37, APP 89-90. His probable cause consisted of the smell of marijuana from the vehicle and Corpuz, SH 18, APP 72; SH 19, APP 73; the conflict in the stories between the two Defendants, SH 19, APP 73, SH 21, APP 75; and Smith's admission that they had marijuana in the vehicle, SH 21, APP 75. Smith does not dispute that Biehl so testified. DB 8, first full paragraph. The facts of how Biehl conducted the initial search are not at issue in this appeal.

Rather, the issue is whether there is an objective basis on the record to justify the search. Whether the law enforcement officer believed he had probable cause for his search is not relevant because probable cause is determined objectively. Thus, a search when a law enforcement officer had an improper reason in his mind does not make the search illegal so long as a proper reason exists objectively on the record. In fact, even where the officer's reason for the search is pretextual, and he does the search for an improper purpose, the search is not unconstitutional so long as an objective basis exists on the record to justify the search. *State v. Littlebrave*, 2009 S.D. 104, ¶ 18,

776 N.W.2d 85, 92; *State v. Engesser*, 2003 S.D. 47, ¶ 26, 661 N.W.2d 739, 748. Since probable cause for the search existed, the subjective reason the officer searched is not relevant. Thus, when Smith argues that Biehl's pat down search for officer's safety was not justified, it makes no difference because Biehl had probable cause to search Smith under cases such as *State v. Hirning*, 1999 S.D. 53, ¶¶ 12, 15, 592 N.W.2d 600, 604-05.

Smith does not refute the idea that Biehl had probable cause to conduct the search of Smith's person. To quote Smith, DB 8, "there are multiple cases, including cases from South Dakota, that indicate the smell of marijuana coming from a vehicle during a traffic stop gives an officer the ability to search not only the vehicle but the occupants of the vehicle." Defendant omits to cite the most relevant case, *Hirning*, but the cases he does cite make the point quite well. He then proceeds to state that Smith does not contest that Biehl smelled the odor of marijuana coming from the vehicle and from Corpuz. Smith's argument is "that was not the basis for why Biehl conducted the search." DB 8. Of course, Biehl's reason for conducting the search does not matter under the objective test. *Littlebrave* specifically holds that even a search conducted for an improper reason is constitutional if objectively justified under the facts.

Smith argues in the first full paragraph of DB 9 that a warrantless search of an automobile is limited to the vehicle itself. This

is unsupported by the cases the parties cite. In *Hirning*, 1999 S.D. 53 at ¶ 14, 592 N.W.2d at 604-05, this Court relied on both *Wyoming v. Houghton*, 526 U.S. 295, 303, 1195 S.Ct. 1257, 1302, 143 L.Ed.2d 408 (1999) and *United States v. Di Re*, 332 U.S. 581, 587, 68 S.Ct. 222, 225, 92 L.Ed 210 (1948) to hold that an officer may search a passenger in a vehicle when the officer has individualized suspicion to justify the search of that passenger. In *Di Re*, there was no reason to suspect the passenger, so searching him was unjustified. Here, there is abundant probable cause to search Smith, including the smell of marijuana and Smith's own admission that there was marijuana in the vehicle, as well as the conflicting stories of Smith and Corpuz.

Smith is also incorrect when he states that Biehl conducted the search solely as a pat down for weapons. As noted above, Biehl specifically testified otherwise, and there is no indication in the trial court's memorandum decision or its findings of fact that Biehl was not testifying truthfully on these matters. SSR 60, APP 23; FF 59 at SSR 85, APP 9. Rather, the circuit court specifically held that the search was not permissible as a matter of law, because there was no independent warrant exception applying solely to Smith, as opposed to Corpuz or the vehicle. SSR 60, APP 23; SSR 76-77, APP 26-27; SSR 80, APP 14. This holding is flatly contrary to *Hirning* most notably because Smith admitted he and Corpuz had marijuana in the vehicle. SH 21, APP 75; SH 36, APP 90.

C. *Search Incident to Arrest.*

In arguing that the search was not incident to Smith's arrest, he contends that Biehl did not believe he had probable cause to arrest Smith for possession of marijuana. Biehl, however, testified that he had probable cause to search Smith. SH 22, APP 76; SH 36-37, APP 89-90. The same quantum of evidence is required for probable cause to arrest. *Hirning*, 1999 S.D. 53 at ¶ 13, 592 N.W.2d at 604.

The argument is also contrary to the objective nature of the probable cause standard: what Biehl believed is not relevant. It is up to the courts to determine whether, based on these undisputed facts, probable cause exists as a matter of law. The law enforcement officer does not have the authority to make this determination. *See Littlebrave*, 2009 S.D. 104 at ¶ 18, 776 N.W.2d at 92; *Engesser*, 2003 S.D. 47 at ¶ 26, 661 N.W.2d at 748.

Smith also argues that twenty-seven minutes is too long to wait after the search before making the arrest. The case law cited, first by the State, and then by Smith at DB 10-11, does not set some arbitrary limit upon when an arrest can be made. *See Rawlings v. Kentucky*, 448 U.S. 98, 111, 100 S.Ct. 2556, 2564, 65 L.Ed.2d 633 (1980). The question, as always, is whether probable cause existed for the arrest, and whether the search was conducted at or near the time of the arrest. Biehl certainly had probable cause to arrest Smith as soon as Smith

admitted, by his "blunt" statement, that he and Corpuz were possessing marijuana in the vehicle. It was merely a matter of expediency or convenience that the arrest did not occur until after the vehicle search. And the fact that the search and the arrest were separated by twenty-seven minutes is without practical significance under the case law previously cited.

The trial court based its ruling on whether Biehl thought he had probable cause to arrest before the search. SSR 59-60, APP 23-24; SSR 79-80, APP 14-15. This overlooks the objective nature of the probable cause standard.

D. *Inevitable Discovery.*

This leads to the State's final argument, that the evidence should be admitted under the inevitable discovery doctrine. Even if the search took place too far prior to the arrest to be justified under that exception, it is plain that Smith was ultimately arrested and certainly would have been searched, even if the search would have occurred twenty-seven minutes later. This is therefore a case where inevitable discovery should be applied.

Smith argues that Biehl conducted an illegal pat down search. As indicated above, however, Biehl's reason for conducting the search does not matter if his conduct was objectively allowable. Smith virtually admits that the search was proper under the automobile exception, DB 8, and argues only that Biehl was thinking of a different

exception at the time that he searched Smith. If the search was objectively justifiable, Biehl's subjective reasons make no difference under the applicable case law. *Littlebrave*, 2009 S.D. 104 at ¶ 18, 776 N.W.2d at 92; *Engesser*, 2003 S.D. 47 at ¶ 26, 661 N.W.2d at 748.

Moreover, the actual basis for the inevitable discovery doctrine is present here, as it was in *Guthrie v. Weber*, 2009 S.D. 42, ¶ 24, 767 N.W.2d 539, 547. Unlike *State v. Boll*, 2002 S.D. 114, ¶ 21, 651 N.W.2d 710, 716, the evidence here actually would have been discovered whether or not the supposed illegality occurred. There is no question, and Smith admits, that he was appropriately arrested after the search of the vehicle. There is no doubt that such a proper arrest would have inevitably resulted in seizing the cocaine from Smith's sock. In *Boll*, the evidence would not have been discovered if an illegal search had not been completed. Here, however, the cocaine in Smith's sock would have been discovered after his arrest in any event. There is no reason to suppress evidence that the State would have legally obtained twenty-seven minutes later regardless of an arguably illegal action.

CONCLUSION

The State respectfully requests that the trial court's suppression of the cocaine found in Smith's sock be reversed, and that the matter be returned to the circuit court for trial.

REQUEST FOR ORAL ARGUMENT

The State hereby renews its request for oral argument.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. I certify that the Appellant's Reply Brief is within the limitation provided for in SDCL 15-26A-66(b) using Bookman Old Style typeface in 12 point type. Appellant's Reply Brief contains 1,764 words.

2. I certify that the word processing software used to prepare this brief is Microsoft Word 2010.

Dated this _____ day of February, 2014.

_____
Craig M. Eichstadt
Assistant Attorney General

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this _____ day of February, 2014, a true and correct copy of Appellant's Reply Brief in the matter of *State of South Dakota v. Rashaud Jauntel Smith and Cricket Leanne Corpuz* was served via electronic mail upon Amy R. Bartling at amy.bartling@gmail.com and Steve Smith at steversmith@qwestoffice.net.

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