IN THE SUPREME COURT OF THE STATE OF VERMONT

STATE OF VERMONT, APPELLEE

V.

DEVAN CALABRESE, APPELLANT

SUPREME COURT DOCKET NO. 2020-079

APPEAL FROM THE

SUPERIOR COURT OF VERMONT – CRIMINAL DIVISION
WINDHAM COUNTY
DOCKET No. 1068-9-19 WMCR

REPLY BRIEF OF THE APPELLANT

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STATEMENT OF THE ISSUES

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I. Devan Calabrese had standing to challenge the constitutional violations.

The State raises for the first time on appeal, that Mr. Calabrese did not have standing to raise the Fourth Amendment or Article 11 violations. It is well settled law that arguments not raised below, including those raised by an Appellee, will not be considered on appeal. State v. Placey, 169 Vt. 557, 557 (1999) (mem.) ("It is a fundamental tenet that arguments not raised below will not be considered on appeal. See State v. Caron, 155 Vt. 492, 510, 586 A.2d 1127, 1137 (1990).") See also, State v. Sole, 2009 VT 24, ¶13 ("The preservation rule exists so that the trial court can address any correctable errors before they are presented here, and develop an adequate record for any appeal. State v. Wool, 162 Vt. 342, 346, 648 A.2d 655, 658 (1994).")

In any event, the State's argument that "since he wasn't present at the time of the search, he had no participatory interest" is incorrect. Mr. Calabrese's whereabouts at the time of the search is not relevant.

> [A] participatory interest "stresses the relationship of the evidence to the underlying criminal activity and defendant's own criminal role in the generation and use of such evidence," and confers standing on a person who "had some culpable role, whether as a principal, conspirator, or accomplice, in a criminal activity that itself generated the evidence."

(citations omitted) State v. Bruns, 796 A.2d 226, 233 (NJ 2002); State v. Welch, 160 Vt. 70, 77 (1992). Since it was Mr. Calabrese that has been charged with the criminal activity that generated the evidence, he has a participatory interest in the seized bullet.

II. Trooper Waitekus did not find the bullet in plain view from a place he was lawfully permitted to occupy.

Contrary to the State's assertion, Justice Gorsuch's statement is not predicated on facts not found by any court. His statement is predicated on the fact that the game wardens peered in the window of the garage, a place law enforcement was not lawfully permitted to occupy, without consent or a warrant. His statement is predicated on the fact that the majority's decision in Bovat, does not comport with the law established in Florida v. Jardines, 569 U.S. 1 (2013).

> Maybe a court could have discredited Mrs. Bovat's testimony about how long the wardens wandered around the garage. Maybe a court could have attempted to offer some explanation why items viewable only through a garage window were within the "plain view" of visitors proceeding directly and without delay from the street to the front door. But it seems a good deal more likely that any court applying Jardines would have agreed with Chief Justice Reiber, who explained in dissent that the wardens exceeded the scope of their implied license to approach the front door by heading to the garage and spending so much time peering through its window. As Chief Justice Reiber noted, Jardines plainly held that the home's curtilage and observations made anywhere within its bounds are covered by the Fourth Amendment; no exceptions. And the Fourth Amendment hardly tolerates the sort of meandering search that took place here. The wardens violated the Constitution, and the warrant they received premised on the fruits of their unlawful search was thus tainted.

Bovat v. Vermont, 2020 WL 612478 at *2, 592 U.S. ____ (2020) (mem.)

Trooper Waitekus did not simply see the bullet, in plain view, as he walked away from the house. He stood in the curtilage[1], approximately fifteen feet from the house, lingering longer than he needed to accomplish his purpose of conducting the

[1] The trial court did not dispute that this portion of the driveway was part of the curtilage.

welfare check, and told himself that while there, he should look for the bullet. He then searched the lawn with his flashlight. He did not just happen to see the bullet as he walked down the driveway. His "behavior objectively reveals a purpose to conduct a search, which was not what anyone would think he had a license to do. Jardines, 569 U.S. at 9.

Trooper Waitekus conducted a warrantless and unconstitutional search and seizure.

III. The admission of the racial epithet was highly prejudicial and not relevant.

Assuming that the State is correct that the motion to exclude was untimely made below, since the trial court addressed the motion, the issue is ripe and should be reached on appeal.

And here, once again like the argument about standing, the argument made by the State as to the relevance of the use of the word nigger, is made for the first time on appeal[2]. The State never argued that introducing the "racial-animus related language" was relevant to credibility. The only argument made by the State below was:

> I want to make sure that there's no issue about that, because I do have an amendment where I can add the hate-based enhancement. But I don't have to. And it wouldn't change the penalty in the case, but we certainly can proceed that way if there's any question about its relevance in admissibility. And I want to make sure that we're doing that before, rather than after I raise it with the jury.

[2] For the reasons already stated, this argument raised for the first time on appeal should not be entertained by this Court.

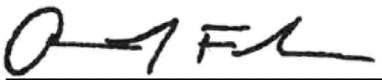
Thus, it appears that the argument as to relevance was that Mr. Calabrese was racially motivated in committing the alleged offense, something the trial court specifically found was not supported by the record. And now the State argues on appeal that it was not relevant as to motive but to credibility (See Appellee's brief, Footnote 4), yet all the cases cited by the State are examples of where the offending evidence was admissible because it was relevant to intent and motive, a reason not present here.

With no probative value, the court should have excluded the highly prejudicial and offensive evidence. It was not simply a single word, said in passing, as the State suggests. Mr. Calabrese's parole officer had very brief, limited testimony and yet the jury specifically requested to hear it again. Her testimony that he used the word nigger was not probative to the crimes charged, yet highly inflammatory. His convictions must be reversed.

CONCLUSION

For the above stated reasons and for all the reasons stated in his principal brief, Devan Calabrese requests this Court reverse his convictions.

Dated at Montpelier in the County of Washington and State of Vermont this 15th day of December, 2020.

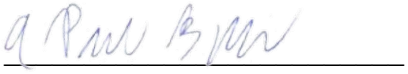


Allison N. Fulcher

CERTIFICATE OF COMPLIANCE

I certify that the above brief submitted under Rule 32(a)(7)(B) was typed using Microsoft Word for Office 365 and the word count is 1,093.

Dated at Montpelier, Vermont this 15th day of December, 2020.



Anthony Bambara

cc: David Tartter, Esq.