**IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI**

**MICHAEL SHANE BUFORD** **APPELLANT**

**V.** **NO. 2019-KA-00024-COA**

**STATE OF MISSISSIPPI** **APPELLEE**

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# BRIEF OF THE APPELLANT

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## CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of this court may evaluate possible disqualifications or recusal.

1. State of Mississippi
2. Michael Shane Buford, Appellant
3. Honorable John K. Bramlett, Jr., District Attorney
4. Honorable John H. Emfinger, Circuit Court Judge

This the 23rd day of September, 2019.

Respectfully Submitted,

INDIGENT APPEALS DIVISION
OFFICE OF STATE PUBLIC DEFENDER

BY: /s/Hunter N. Aikens
Hunter N. Aikens
COUNSEL FOR APPELLANT

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# BRIEF OF THE APPELLANT

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## STATEMENT OF THE ISSUES

**I. The trial court erred in denying Buford's motion to suppress evidence.**

## STATEMENT OF THE CASE

This appeal proceeds from the Circuit Court of Rankin County, Mississippi, and a judgment of conviction for possession of more than 2 but less than 10 grams of methamphetamine entered against Michael Shane Buford following a jury trial on August 1, 2018, the Honorable John Huey Emfinger, Circuit Judge, presiding. (C.P. 65-68; R.E. 7-10). Buford was represented at trial by Jeffrey Knight, Esq. The trial court adjudged Buford a subsequent drug offender under Mississippi Code Annotated Section 41-29-147 and a habitual offender under Mississippi Code Annotated Section 99-19-81, and the trial court sentenced Buford to serve sixteen (16) years in the custody of the Mississippi Department of Corrections. (C.P. 66-68; R.E. 8-10). Buford is presently

incarcerated in the custody of the MDOC, and he appeals to this Honorable Court for relief.

## STATEMENT OF THE FACTS

In March of 2017, Sybil Brooks had a verbal agreement with Jason Sebren that Sebren and his girlfriend could live in one of Brooks' trailers while Sebren made repairs/renovations to the trailer. (Tr. 31, 33, 53-54). Michael Buford helped Sebren with the repairs, and Buford and his wife, Amy, began staying in the trailer also. (Tr. 31, 34, 49-50). On March 24, 2017, Brooks and Sebren had some sort of disagreement, and Sebren and his girlfriend moved out of Brooks' trailer. (Tr. 31, 49-50). Buford and Amy remained in the trailer into the next day because he did not have a vehicle and was waiting to get paid for the job. (Tr. 51).

On the afternoon of March 25, 2017, Brooks called police and complained that there was a couple living in her trailer that was not supposed to be there and she wanted them out. (Tr. 31-32, 40, 137, 159, 161). Officer Jeannie Easterling of the Pearl Police Department was the first officer to arrive at the trailer. (Tr. 40, 155). About 15 or 20 minutes later, officers Marc Gatlin, Michael Bankston, and Brad Winningham, arrived. (Tr. 40, 45-46, 138, 161). According to Gatlin and Winningham, Buford provided police[1] oral consent to search his person, Winningham removed a tobacco dip can from Buford's pocket, and Winningham opened the can and found a baggie containing what appeared to be crystal methamphetamine. (Tr. 14, 60, 63, 139-40, 162-63; Ex. S-1, S-3). The substance was sent to the Mississippi Crime Laboratory, where forensic scientist Eric Frazier examined the substance and determined that it contained 2.16 grams (+/- 0.04 grams) of methamphetamine. (Tr. 180-81). And Buford was indicted for possession of two (2) or more grams

[1] According to Officer Gatlin, Officer Bankston asked Buford for consent to search. (Tr. 139). Officer Winningham testified that he asked Buford for consent. (Tr. 63, 162). Officer Easterling testified that she did not hear a conversation about consent. (Tr. 48).

but less than ten (10) grams of Methamphetamine under Mississippi Code Annotated Section 41-29-139 (c)(1)(C).[2] (C.P. 7-8).

Prior to trial, Buford moved to suppress the drugs as the fruit of an illegal search and seizure. (C.P. 33-37). The trial court held a hearing, at which Brooks, Buford and officers Easterling and Winningham testified. (Tr. 13-22, 30-63). Brooks testified that she had agreed to let Sebren and his girlfriend live in the trailer to fix it up and make repairs. (Tr. 31, 33). She acknowledged meeting/seeing Buford at the trailer at least once, but she denied having any kind of agreement with Buford regarding him living there. (Tr. 33-35). Brooks also recounted calling police because Sebren had moved out of the trailer, but the Bufords remained and she wanted to know how to get them out. (Tr. 31-32).

Easterling testified that she received a dispatch relaying Brooks' complaint that "there were people living in her rental property that were not supposed to be there." (Tr. 40-41). Easterling was the first officer to arrive. (Tr. 40). According to Easterling, Buford answered the door, Easterling asked if he was supposed to be at the trailer, and "we proceeded into the living room." (Tr. 40, 46). Easterling denied that Buford ever told her not to come inside or demanded to see a search warrant. (Tr. 44). Buford's wife, Amy Buford, then walked into the living room from the back of the trailer. (Tr. 40-41). Easterling testified that she asked Buford for documentation/proof that he was supposed to be living there, but Buford did not have an ID or any verifying documentation. (Tr. 40-43).

Easterling testified that about 15 or 20 minutes later, officers Gatlin, Bankston and Winningham arrived; Winningham asked Easterling if she had searched Buford yet; and Winningham and the other officers then "dealt with" Buford, while she identified and searched Amy.

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[2] The indictment also alleged that Buford was subsequent drug offender under Section 41-29-147 and a habitual offender under Section 99-19-81. (C.P. 7-8).

(Tr. 43-46). Easterling testified that she did not hear Buford give consent for the search, and although she saw the dip can, she did not see Winningham remove the can from Buford because she was facing Amy. (Tr. 47-48). Easterling claimed that she did not believe that Buford was already handcuffed at the time he was searched; but she admittedly did not recall whether Buford was handcuffed at that time. (Tr. 47).

Winningham was the last officer to arrive and that the other officers and the Bufords were already inside the trailer. (Tr. 14, 16-17). Winningham testified that he asked Easterling if she had searched Buford yet, Easterling told him no, and "I asked him [Buford] did he have any issues with me searching him and he advised he did not. I searched him and then I found a snuff can in his pocket that contained what I believed to be crystal meth." (Tr. 14; *see also*, Tr. 60). The trial court asked Winningham "on what basis did you search Mr. Buford?" and Winningham's initial response was, "That he was trespassing, to make sure he didn't have anything illegal on him." (Tr. 16-17). The trial court then asked, "So you were doing a pat down for weapons, or what were you doing?" and Winningham then pivoted to consent as the reason for the search. (Tr. 17).

Winningham admitted that he did not ask for consent to open and search the can specifically. (Tr. 18, 63). He also acknowledged that at the time of the search, there was no proof that Buford had committed/was committing any crime other than trespassing. (Tr. 21). Winningham denied that he found the can on the table beside Buford or that he already had the can in his hand when he searched Buford . (Tr. 18-19). Winningham and Easterling both acknowledged that nothing about the can posed a threat of harm and/or caused concern for their safety. (Tr. 19, 47-48).

Winningham and Easterling also both acknowledged that out of all the officers present, body cam footage was produced from only one officer–Officer Gatlin. (Tr. 17-18, 46). And the footage from Gatlin's body cam showed only a one-minute excerpt of the encounter. (Ex. S-2). The footage

begins[3] with Winningham standing behind a handcuffed Buford, while Officer Bankston opens the can and pulls out a baggie. (Ex. S-2). In disbelief, Buford then says, "Man, come on man," Bankston says, "was that not just in your pocket?" and Buford says, "No, sir." (Ex. S-2). Winningham then points to officers Gatlin and Easterling–inferring that their body cameras captured the can being removed from Buford's pocket; and Winningham then searches Buford and pulls a pack of cigarettes and a couple other small items out of Buford's pockets as the officers conveniently claim on camera that the can came out of Buford's pocket. (Ex. S-2). Winningham then leads Buford out of the trailer, and damage to the trailer door can be seen. (Ex. S-2).

Buford testified that on the morning of March 25th, he and Amy were lying in the back bedroom when they heard "some bumping" in the trailer, and he went in the living room and saw Sybil near the refrigerator. (Tr. 50). Sybil told Buford she wanted everybody gone, Buford told Sybil he did not have a problem with that, but he asked her if he could stay until 5:00p.m. to finish the job so he get paid to find vehicle to move his stuff out. (Tr. 51, 56).

Buford testified that Officer Easterling subsequently came to the trailer and asked if he was Jason Sebren, and Buford said he was not Jason and demanded that police get a warrant. (Tr. 51). Buford testified that Easterling threatened to kick the door in, and he went back to the bedroom and Amy said that Brooks will make him pay for the door if it damaged because they just spent money to put in the door. (Tr. 52, 54). A male officer then started beating on the door; Buford unlocked the door, cracked it open, and demanded a warrant; and police shoved or kicked the door open and

[3] At trial, Officer Galtin testified that he activated his body cam "right after Officer Winningham pulled the snus can out of Mr. Buford's pocket and opened it up and I saw what it was." (Tr. 144). Gatlin also testified that when a body cam is activated, it actually captures about 30 seconds before; on the footage, Gatlin's hand can be seen activating the body cam at about the 24-second mark. (Tr. 151; Ex. S-2).

came inside saying, "We didn't need a warrant. We're are [sic] the F-ing warrant." (Tr. 52, 54-55). Buford testified that he never gave police consent to search his person. (Tr. 53). He also testified that the dip can was not on his person. (Tr. 56-57).

After hearing arguments from counsel, the trial court denied Buford's motion to suppress the drugs, finding that police were not limited to a Terry pat down and that the search was justified as a valid consent search. (Tr. 67).

At trial, Officers Easterling and Winningham provided essentially the same testimony as they did at the suppression hearing. (Tr. 155-74). Winningham acknowledged that the body cam footage did not show him pul the can from Buford's pocket, and he denied that Buford was already handcuffed when he searched him, and . (Tr. 166-67, 169). To this end, Winningham testified that he handcuffed Buford, "Right after I found the Camel snus can in his pocket, puled it out, opened it up, closed it, handed it to the other officer and turned around and told Mr Buford - - told the Defendant to put his hands behind his back, that he was under arrest." (Tr. 174).

Officer Gatlin testified that when he arrived, Officer Easterling was in the living room talking to Buford and Amy, and he went into the living room and talked to them until Officer Winningham arrived. (Tr. 138, 153-54). Gatlin testified that Buford gave police consent to search; however, Gatlin recalled that Officer Bankston[4] (not Winingham) asked Buford for consent, and Gatlin's testimony indicatedthat ambiguity may have present in the purported consent interaction:

> Q. [D]id you or one of the other officers ask Mr. Buford *if there were any weapons or anything illegal*?
>
> A. I believe *Officer Bankston did*.

[4] At the time of Buford's trial, Officer Bankston was living in New Orleans working at a different job. (Tr. 144).

Q. All right. And as one these officers asked him that question, were you present? Did you hear Mr. Buford's response?

A. Yes.

Q. And did Mr. Buford - - what was his response?

A. Yes.

Q. Yes, okay, as to you can - -

A. *From how I understood it, he was giving permission to search him.*

Q. Okay. So one of the officers asked Mr. Buford if they could search for weapons or illegal and Mr. Buford said yes?

A. I don't know if for weapons or illegal, I think that he asked if he could search him.

Q. Okay. All right. So one of the other officers asked if they could search him?

A. Right.

Q. And Mr. Buford said yes?

A. Yes.

(Tr. 139-40) (emphasis added).

Gatlin testified that Officer Winningham searched Buford and found a can in Buford's pocket that contained what appeared to be crystal meth. (Tr. 140; Ex. S-1). Gatlin testified that he activated his body camera "[r]ight after Officer Winningham pulled that snus can out of Mr. Buford's pocket and opened it up and I saw what it was." (Tr. 144). He agreed that the recording did not show Buford give consent or the can being pulled from Buford's pocket. (Tr. 151-52). Gatlin also testified that he believed Buford was handcuffed before Winningham searched him. (Tr. 149).

Albert Henson testified for the defense. Henson testified that he worked as a handyman for living; he met Buford in April of 2017, shortly after the incident; and Buford helped him do some

work. (Tr. 198, 200). Henson testified that Buford and Amy were living in the back part of the trailer and helped Brooks with things around the trailer. (Tr. 199). Hensen testified that he met Brooks several times when he went to the trailer to pick up Buford for work or drop him off after work. (Tr. 199).

After receiving instructions from the trial court and retiring for deliberations, the jury returned a verdict finding Buford guilty as charged. (Tr. 225; C.P. 65; R.E. 7).

## SUMMARY OF THE ARGUMENT

The trial court erred in denying Buford's motion to suppress evidence. Buford's alleged consent to search was involuntary and ineffective because he was being illegally detained at the time of the consent. At the time consent was given, police had exceeded the scope of the initial investigatory detention to investigate Brooks' complaint that Buford was not supposed to be in her trailer. The evidence also strongly indicated that Buford was handcuffed before he was searched. Furthermore, Buford's alleged consent was only a general consent to search him; he did not provide consent to search the contents of the can. His general consent to search his person did not extend to a search of the can's contents. The can was not incriminating from its outward appearance, and police lacked probable cause to believe that the can contained drugs. The search and seizure at issue was unreasonable and unconstitutional, and the trial court erred in refusing to suppress the drugs as fruit of the poisonous tree. Without evidence of the drugs, the evidence would not support a conviction. Accordingly, Buford requests this Court to reverse his conviction and sentence and render a judgment of acquittal in his favor.

## ARGUMENT

### I. The trial court erred in denying Buford's motion to suppress evidence.

Review of Fourth Amendment issues entail a mixed standard of review. "The existence of probable cause or reasonable suspicion is reviewed de novo. [] 'But the de novo review is limited to the trial court's decision based on historical facts reviewed under the substantial evidence and clearly erroneous standards.'" *May v. State*, 222 So. 3d 1074, 1078 (Miss. Ct. App. 2016) (quoting *Cook v. State*, 159 So. 3d 534, 537 (Miss. 2015)).

Both the United States Constitution and the Mississippi Constitution guarantee individuals the right to be free from unreasonable searches and seizures of their person and possessions or effects. U.S. Const. amend. IV; Miss. Const. art. 3, § 23. "'Section 23 provides greater protections to citizens than does the United States Constitution [and] . . . should be liberally construed in favor of individual citizens and strictly construed against the State.'" *Sutton v. State*, 238 So. 3d 1150, 1155 (Miss. 2018) (quoting *State v. Woods*, 866 So. 2d 422, 425 (Miss. 2003)). All evidence obtained as a result of an unreasonable search or seizure is inadmissible. *McFarlin v. State*, 883 So. 2d 594, 598 (Miss. Ct App. 2004) (quoting *Terry v. Ohio*, 392 U.S. 1, 30, 88 S.Ct. 1868 (1968)).

"'The Fourth Amendment proscribes all unreasonable searches and seizures, and it is a cardinal principle that searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.'" *Anderson v. State*, 16 So. 3d 756, 759 (Miss. Ct. App. 2009) (quoting *United States v. Ross*, 456 U.S. 798, 825, 102 S.Ct. 2157 (1982)). "The State bears the burden to show that a warrantless search falls under one of the permissible exceptions." *May v. State*, 222 So. 3d 1074, 1078 (Miss. Ct. App. 2016) (citing *Galloway v. State*, 122 So. 3d 614, 669 (Miss. 2013)).

In this case, the State pointed to Buford's purported consent to justify the search. Consent to search is a "'jealously and carefully drawn'" exception to the warrant requirement. *Crawford v. State*, 192 So. 3d 905, 933 (Miss. 2015) (quoting *Georgia v. Randolph*, 547 U.S. 103, 109, 126 S.Ct. 1515, 164 L.Ed.2d 208 (2006)). Where the State relies on consent to justify a search, "[t]he State has the burden of proving that the necessary consent was obtained and that it was freely and voluntarily given, a burden that is not satisfied by showing a mere submission to a claim of lawful authority." *Florida. v. Royer*, 460 U.S. 491, 497, 103 S. Ct. 1319, 1324 (1983) (citations omitted). "[T]he question whether a consent to a search was in fact 'voluntary' or was the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of all the circumstances." *Schneckloth v. Bustamonte*, 412 U.S. 218, 227, 93 S. Ct. 2041, 2047–48 (1973).

**Buford's consent was coerced and ineffective, as it was given during an illegal detainment that had exceeded the permissible scope of an investigatory detention[5]**

Consent given during an illegal detainment is ineffective and tainted and cannot be used to justify a search, absent probable cause. *See Royer*, 460 U.S. at 507-08, 103 S. Ct. 1319. In this case, at the time Buford allegedly provided consent, police had exceeded the permissible scope of the investigatory detention related to Brooks' complaint that Buford was trespassing and should be removed from her trailer. And police had no probable cause to believe that Buford was committing any other criminal offense. As such, the search cannot be justified on Buford's purported consent; the trial court erred in refusing to suppress the drugs; and this Court should reverse and render Buford's conviction and sentence.

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[5] Buford's motion to suppress, argued, among other things, that "The officers herein did not have the constitutionally requisite reasonable suspicion to justify their continued questioning of the Defendant." (C.P. 36; R.E. 14).

"[A]n officer may, consistent with the Fourth Amendment, make a brief, investigatory detention without a warrant when the officer has a reasonable suspicion that criminal activity is afoot." *Rainer v. State*, 944 So. 2d 115, 118 (Miss. Ct. App. 2006) (citing *Terry v. Ohio*, 392 U.S. 1, 30-31, 88 S.Ct. 1868 (1968). The reasonableness of an investigative detention is determined by "[w]hether the officer's action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place." *Terry*, 392 U.S. at 19–20, 88 S. Ct. 1868. "Although not expressly authorized in *Terry*, *United States v. Brignoni-Ponce*, 422 U.S. 873, 881–882, 95 S.Ct. 2574, 2580–2581, 45 L.Ed.2d 607 (1975), was unequivocal in saying that reasonable suspicion of criminal activity warrants a temporary seizure for the purpose of questioning limited to the purpose of the stop." *Royer*, 460 U.S. at 498, 103 S. Ct. 1319. In this case, the purpose was to investigate whether Buford was supposed to be at the trailer.

The law "is clear [that] an investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop. Similarly, the investigative methods employed should be the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time." *Royer*, 460 U.S. at 500, 103 S. Ct. 1319 (citing *Brignoni-Ponce*, 422 U.S., at 881–882, 95 S.Ct., at 2580–2581). "It is the State's burden to demonstrate that the seizure it seeks to justify on the basis of a reasonable suspicion was sufficiently limited in scope and duration to satisfy the conditions of an investigative seizure." *Royer*, 460 U.S. at 500, 103 S. Ct. at 1325–26.

In this case, Officer Easterling testified that she arrived at the trailer, informed Buford why she there and asked him if he was supposed to be there and for documentation showing that he was supposed to be there. Easterling testified that Buford could produce no such documentation. At this point, Easterling had a complaint from Brooks that the couple in her trailer was not supposed to be there, and Buford could not provide Easterling anything indicating otherwise. Easterling had

employed the least intrusive means to investigate Brooks' complaint, and her suspicion should have been considered verified. "Detention [] may last no longer than required to effect the purpose of the stop." *United States v. Jenson*, 462 F.3d 399, 404 (5th Cir. 2006) (citing *United States v. Lopez–Moreno*, 420 F.3d 420, 430 (5th Cir.2005)). "[O]nce an officer's suspicions have been verified or dispelled, the detention must end unless there is additional articulable, reasonable suspicion." *United States v. Valadez*, 267 F.3d 395, 398 (5th Cir. 2001). According to Easterling, Buford was nice, friendly and cooperative. (Tr. 43). Thus, there was no reason that Easterling should not have simply told Buford to leave and ended the detention.

Instead, Easterling remained at the trailer–prolonging the detention–and other officers arrived about 15 or 20 minutes later. (Tr. 45-46). When the other officers arrived, the encounter took on a different character approaching the conditions of an arrest. "Detentions may be "investigative" yet violative of the Fourth Amendment absent probable cause. In the name of investigating a person who is no more than suspected of criminal activity, the police may not carry out a full search of the person or of his automobile or other effects. Nor may the police seek to verify their suspicions by means that approach the conditions of arrest." *Royer*, 460 U.S. at 499, 103 S. Ct. at 1325. "'Where a detention . . . exceeds the scope of an investigative stop, it approaches a seizure. To justify a search and seizure without a warrant, the state must show probable cause for arrest.'" *Floyd v. State*, 500 So. 2d 989, 992 (Miss. 1986) (quoting *McCray v. State*, 486 So. 2d 1247, 1250 (Miss. 1986)).

Officer Gatlin testified that he arrived and went in the trailer with Easterling and the Bufords, and they waited until Officer Winningham. Officer Winningham–the officer that ultimately searched Buford–testified that he arrived after the other three officers were inside the trailer with the Bufords. Upon his arrival, Winningham revealed his intent to perform a suspicionless exploratory search by asking Easterling if she had searched Buford yet. Winningham claimed that he then asked for and

received consent to search Buford, a claim Buford denied. At the time, there were now four police officers around Buford in a rapidly escalating environment of intimidation. "[T]he threatening presence of several officers" is a factor indicating that a person is has been seized. *United States v. Mendenhall*, 446 U.S. 544, 554, 100 S. Ct. 1870, 1877 (1980) (citations omitted). "Consent" that is the product of official intimidation or harassment is not consent at all." *Florida v. Bostick*, 501 U.S. 429, 438, 111 S. Ct. 2382, 2388 (1991). "[T]he Fourth and Fourteenth Amendments require that a consent not be coerced, by explicit or implicit means, by implied threat or covert force. For, no matter how subtly the coercion was applied, the resulting 'consent' would be no more than a pretext for the unjustified police intrusion against which the Fourth Amendment is directed." *Schneckloth v. Bustamonte*, 412 U.S. 218, 228, 93 S. Ct. 2041, 2048, 36 L. Ed. 2d 854 (1973).

Additionally, although Winningham denied that Buford was handcuffed before he searched him, Officer Gatlin's body cam footage (Ex. S-2) indicates that Buford was handcuffed at the time of the search; Gatlin even testified that he believed Buford was handcuffed at the time. (Tr. 149). Winningham's claim that he handcuff Buford after the search is extremely difficult to reconcile with Gatlin's body cam footage (Ex. S-2), Gatlin's testimony that he cut his camera on as soon as Winningham discovered the drugs (Tr. 144), Gatlin's testimony that his camera actually records/captures about 30 seconds prior to manual activation (Tr. 151), and Winningham's testimony that he handcuffed Buford right after he found the drugs. (Tr. 174).

Furthermore, there was no reason for Winningham to believe that a search of Buford would turn up items related to the purpose of the initial stop. The record does not even a suggest that any legitimate need existed for Winningham to search Buford. "[T]wo competing concerns must be accommodated in determining the meaning of a 'voluntary' consent—the *legitimate need* for such searches and the equally important requirement of assuring the absence of coercion." *Schneckloth*,

412 U.S. at 227, 93 S. Ct. at 2048 (emphasis added); *see also, Royer*, 460 U.S. at 500, 103 S. Ct. at 1325 ("The scope of the detention must be carefully tailored to its underlying justification."). Also, although the State is not required to establish the defendant's knowledge of his or her right to refuse, knowledge of the right to refuse is a factor to be considered in determining whether consent was voluntary. *Schneckloth*, 412 U.S. at 227, 93 S. Ct. at 2048. And the record in this case does not establish that the officers informed Buford that he had the right to refuse consent to search; the record also establishes that Buford was not read his *Miranda* rights prior to the search. (Tr. 19).

The totality of the circumstances establish that Buford's consent was coerced and involuntary. The circumstances surrounding Buford's alleged consent were not such that "a reasonable person would feel free to decline the officers' requests or otherwise terminate the encounter." *Bostick*, 501 U.S. at 436, 111 S. Ct. at 2387. The record establishes that Buford's consent was tainted and ineffective, as it was given during an illegal seizure and detention that exceeded the permissible scope of the intial investigatory detention to investigate Brooks' complaint that Buford was not supposed to be at the trailer. "[A]t the time [Buford provided consent], the detention to which he was then subjected was a more serious intrusion on his personal liberty than is allowable on mere suspicion of criminal activity." *Royer*, 460 U.S. at 502, 103 S. Ct. at 1326–27. And police had no reasonable suspicion or probable cause to believe that Buford had committed any crime other crime, such as possessing drugs. *See Eaddy v. State*, 63 So. 3d 1209, 1213–14 (Miss. 2011) ("[W]hen police detention exceeds the scope of the stop, the stop becomes a "seizure," and the State must show probable cause.") (citing *Floyd*, 500 So. 2d at 992). The drugs seized were the fruit of an unreasonable and unconstitutional search and seizure; the trial court erred in refusing to suppress the drugs; and this Court should reverse and render Buford's conviction and sentence.

**Buford's consent to generally search his person did not extend to search the contents of the can[6]**

"The scope of consent under the Fourth Amendment is examined for 'objective reasonableness.'" *May v. State*, 222 So. 3d 1074, 1080 (Miss. Ct. App. 2016) (quoting *O'Donnell v. State*, 173 So. 3d 907, 914 (Miss. Ct. App. 2015)). "We must ask ourselves: '[W]hat would the typical reasonable person have understood by the exchange between the officer and the suspect?'" *Id*.

In the analogous case of *May*, the defendant, upon an officer's request, consented to remove his shoe; when the defendant removed his shoe, a lighter fell out; and the officer disassembled the lighter and found a bag of marijuana inside. *May*, 222 So. 3d at 1077. The *May* Court noted that, "[t]here was no testimony that the lighter was inherently incriminating or illegal, that the lighter was a weapon or could contain a weapon, or that Officer DeGeorge was concerned for his safety because of the lighter." *Id*., at 1080. The May Court also explained that "'[t]he scope of consent under the Fourth Amendment is examined for 'objective reasonableness[]'" and that the relevant inquiry is "'[w]hat would the typical reasonable person have understood by the exchange between the officer and the suspect?'" *May v. State*, 222 So. 3d 1074, 1080 (Miss. Ct. App. 2016) (quoting *O'Donnell v. State*, 173 So. 3d 907, 914 (Miss. Ct. App. 2015)). The Court reversed May's conviction, reasoning as follows:

> Applied to the facts here, we cannot find that by consenting to remove his shoes, May would have understood that he was consenting to Officer DeGeorge taking apart and searching the lighter that fell from his shoe. Rather, we find the scope of May's

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[6] Citing *May v. State*, 222 So. 3d 1074, 1085 (Miss. Ct. App. 2016), Buford argued that his consent to search his person generally did not extend to a search of the contents of the can. (Tr. 64, 66).

> consent only extended to the contents of the shoe that were plainly viewable as incriminating or dangerous. Because Officer DeGeorge had no basis to search the lighter and May had not consented to the search of the lighter, May retained a reasonable expectation of privacy in its contents. Without May's consent, the State was required to prove probable cause or another exception to the warrant requirement for the contents of the lighter to be admissible under the Fourth Amendment.

*Id*., at 1080–81.

Similarly, in this case, the dip can was not inherently incriminating or illegal, and Officers Easterling and Winningham admitted that the can posed no threat of harm and caused no concern for safety. (Tr. 19, 47-48, 168). And it is not objectively reasonable to conclude that by consenting, generally, to a search of his person, Buford would have understood that he was consenting to a search of the contents of the closed dip can in his pocket. Winningham agreed that Buford only generally consented to a search, and Buford did not provide him with consent to search the contents of the can. (Tr. 18, 63, 168). Winningham also testified that Buford seemed confused when he searched the can. (Tr. 62).

Moreover, "[p]robable cause for a search [is] required when an officer believed the object in question contained contraband." *Anderson v. State*, 16 So. 3d 756, 760–61 (Miss. Ct. App. 2009) (citing *McFarlin v. State*, 883 So. 2d 594, 598 (Miss. Ct. App. 2004)); *see also*, *Ferrell v. State*, 649 So. 2d 831, 834 (Miss. 1995) ("'[A] container cannot be opened unless its contents are in plain view or they can be inferred from the container's outward appearance.'") (quoting *United States v. Sylvester*, 848 F.2d 520, 525 (5th Cir.1988)). The can was made of tin, its contents were not visible, and nothing about the outward appearance of the dip can inferred that illegal drugs were inside. Winningham lacked the probable cause required to justify a search of the can's contents. Buford's general consent to search did not extend to a specific search of the can's contents, and the search of the can's contents was not supported by probable cause. Accordingly, this Court should reverse and

render Buford's conviction and sentence.

## CONCLUSION

Based on the propositions briefed and the authorities cited above, together with any plain error noticed by the Court which has not been specifically raised, Buford respectfully requests this Honorable Court to reverse his conviction and sentence and render a judgment of acquittal in his favor.

Respectfully Submitted,

OFFICE OF STATE PUBLIC DEFENDER
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For Michael Shane Buford, Appellant

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## CERTIFICATE OF SERVICE

I, Hunter N. Aikens, Counsel for Michael Shane Buford, do hereby certify that on this day I electronically filed the forgoing **BRIEF OF THE APPELLANT** with the Clerk of the Court using the MEC system which sent notification of such filing to the following:

Honorable Jason L. Davis
Attorney General Office
Post Office Box 220
Jackson, MS 39205-0220

Further, I have this day caused to be mailed electronically or via United States Postal Service, First Class postage prepaid, a true and correct copy of the above to the following non- MEC participants:

Honorable John H. Emfinger
Circuit Court Judge
Post Office Box 1885
Brandon, MS 39043

Honorable John K. Bramlett, Jr.
District Attorney, District 20
Post Office Box 68
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This the 23rd day of September, 2019.

/s/Hunter N. Aikens
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