STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

On Writ of Certiorari to the Supreme Court
Appeal from Richland County
William Jeffrey Young, Circuit Court Judge
Appellate Case No. 2013-000398

THE STATE OF SOUTH CAROLINA,

Respondent,

vs.

KENDRICK DENNIS

Petitioner.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF ISSUES ON CERTIORARI

I.

The Court of Appeals properly affirmed the denial of Petitioner's motion for directed verdict where: (1) Officer Gore had probable cause to arrest Petitioner and (2) the State presented evidence that the parking lot where the arrest occurred was a public place.

STATEMENT OF THE CASE

Procedural History

A Richland County Grand Jury indicted Petitioner for resisting arrest in violation of S.C. Code Ann. §16-9-320(A). R.135 (Indictment). The State, represented by Ricardo Bunge and Foster Mathews, called the case for trial on February 3, 2011. R. 4. James Cooper and Clark Newton represented Petitioner. R. 1. The jury returned a verdict of guilty. R. 124. The Honorable William J. Young sentenced Petitioner to one year's imprisonment. R. 133.

Petitioner filed a notice of appeal. On October 24, 2012, the Court of Appeals affirmed Petitioner's conviction and sentence. App. 1-2. On November 5, 2012, Petitioner filed a petition for rehearing. App. 3-8. On January 25, 2013, the Court of Appeals denied the petition for rehearing. App. 9.

Factual History

Trial Testimony

On October 25, 2009, officer Steven Oliphant of the Richland County Sheriff's Department responded to Spring Valley Apartments concerning a reported single-car accident and leaving the scene. After Oliphant turned into the apartment complex, he saw a burgundy van taking up two or three parking spaces, skid marks, and debris from the vehicle. He went to apartment building 300 directly in front of the van and knocked on the door of the first apartment on the right. A woman came to the door and said that she owned the van. The woman indicated that Petitioner (her boyfriend) had driven the

van that night and described him to Oliphant. R. 8-10. R. 15, R. 23, R. 40. Oliphant radioed the description to Officer James Gore, another officer responding to the scene. R. 9. A short time later, Gore radioed back that he had located Petitioner. As Oliphant joined them, he noted Petitioner's stumbling, speaking with slurred speech and smelling of alcohol. R. 10. Oliphant testified that when Gore asked Petitioner questions, Petitioner got progressively louder some ten to fifteen feet from the apartments, and Gore told him several times to calm down. R. 11. Oliphant testified that Gore tried to handcuff Petitioner, but Petitioner did not follow the officer's instructions to put his hands behind his back. R. 12. Petitioner twisted away even while Oliphant tried to assist Officer Gore. A struggle ensued with Petitioner face down on the ground with both arms beneath him, and both officers attempted to put his arms behind his back. Finally, Gore used a taser. R. 13. Petitioner then put his hands behind his back, and the officers handcuffed him. Once cuffed, Petitioner stated that but for the handcuffs he would beat Oliphant.

Officer Gore testified about the same events. He saw extensive damage to the side of the van that appeared trashed. R. 23-24. There were skid marks on the road and missing chunks of the curb. Gore saw Petitioner (who matched the description Oliphant radioed) right next to a sidewalk and about ten feet from an apartment. R. 24-25. Petitioner appeared intoxicated and emotionally upset. He was staggering, loud and boisterous, and his speech was slurred and audible to the other residents. R. 25-26. Petitioner did not offer the requested driver's license or identification but raised his voice and said that he wasn't driving. Gore arrested Petitioner for being drunk in public,

disorderly conduct. R. 24 -27; 52. Gore also testified about Petitioner's persistent resistance, how Petitioner fought the officers' efforts to handcuff him, the necessary use of the taser, and Petitioner's threat towards Oliphant. R. 25-34; 45.

On cross-examination, defense counsel introduced a photograph of the sign at the entrance of the apartment declaring that the complex is private property. R. 48-49. On redirect, Officer Gore testified that the entrance to the apartment complex was open. He acknowledged there was a private property sign, but anyone could get into the complex. There was a driveway in, a driveway out, and shrubbery. Gore explained that the apartment parking lot is freely accessible to the public, there is a driveway leading in and out of the parking lot off of a main road, the entrance and exits are not blocked by access gates; and the public is free to enter the complex without the requirement of passing through security or using codes. R.51.

The Directed Verdict Motion at Trial

At the close of the state's case, Petitioner moved for a directed verdict. Defense counsel argued that Petitioner was improperly arrested under S.C. Code § 16-17-530 (prohibiting being found "at any public place . . . in a grossly intoxicated condition . . ."), because Petitioner was on private property. Petitioner used the photograph he presented as evidence, and claimed that the State had not presented evidence that this area was not private property. Because of this, Petitioner alleged the arrest was unlawful. Petitioner also argued several other issues that are not on appeal. R. 53-55, 58, 62. Petitioner renewed this motion at the close of the evidence. R. 106-107.

The State cited State v. Williams, 280 S.C. 305, 312 S.E.2d 555 (1984). R. 56. The State asserted that the apartment parking lot was a public place under the definition this Court provided in Williams. Also the assistant solicitor noted probable cause for the police to have arrested Petitioner for a "variety of things."[1] R. 61.

The court found there was sufficient evidence to present a jury issue and denied the motion for directed verdict. R. 61-63. The trial court again denied the motion after it was renewed at the close of the evidence. R. 106-107.

ARGUMENT

THE COURT OF APPEALS PROPERLY AFFIRMED THE DENIAL OF PETITIONER'S MOTION FOR DIRECTED VERDICT WHERE: (1) OFFICER GORE HAD PROBABLE CAUSE TO ARREST PETITIONER AND (2) THE STATE PRESENTED EVIDENCE THAT THE PARKING LOT WHERE THE ARREST OCCURRED WAS A PUBLIC PLACE.

There are two reasons that the trial judge properly denied Petitioner's motion for directed verdict. First, Officer Gore had probable cause to arrest Petitioner. Second, a motion for directed verdict is concerned with the existence of evidence, not its weight, and the State presented sufficient evidence for a jury to logically infer that the apartment parking lot was a public place.

Standard of Review

In criminal cases, the appellate court sits to review errors of law only. State v. Wilson, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). "When ruling on a motion for a

[1] As a matter of law, apart from the State's position at trial (R. 67-68), the officers' investigation at the scene may have supported probable cause to arrest for a freshly committed offense of driving under the influence, reckless driving and a driver's license violation.

directed verdict, the trial court is concerned with the existence or nonexistence of evidence, not its weight." State v. Weston, 367 S.C. 279, 292, 625 S.E.2d 641, 648 (2006). When reviewing a trial court's denial of a Petitioner's motion for a directed verdict, an appellate court must view the evidence in a light most favorable to the State. State v. Venters, 300 S.C. 260, 264, 387 S.E.2d 270, 272 (1990). An appellate court must find a case is properly submitted to the jury if any direct evidence or any substantial circumstantial evidence reasonably tends to prove the guilt of the accused. Weston, 367 S.C. at 292-93, 625 S.E.2d at 648. An appellate court may reverse a trial court's denial of a motion for a directed verdict if there is no evidence to support the trial court's ruling or if the ruling is based on an error of law. State v. Dantonio, 376 S.C. 594, 603, 658 S.E.2d 337, 342 (Ct. App. 2008).

Critically, the appellate court may only reverse the trial judge's denial of a directed verdict motion if there is no evidence supporting the trial judge's ruling. State v. Gaster, 349 S.C. 545, 555, 564 S.E.2d 87, 92 (2002). **"[U]nless there is a total failure of evidence** tending to establish the charge laid in the indictment, the trial judge's ruling upon a motion for a directed verdict must stand absent an error of law." State v. Nix, 288 S.C. 492, 496, 343 S.E.2d 627, 629 (Ct. App. 1986) (emphasis added).

A. Officer Gore had probable cause to arrest Petitioner. Therefore Officer Gore lawfully arrested Petitioner, and the trial court properly denied the motion for directed verdict.

Petitioner was tried for resisting arrest, not disorderly conduct. R.135. He was charged under S.C. Code Ann. § 16-9-320(A) (1976). To determine whether Petitioner

could have lawfully resisted arrest, the court must consider whether, at the moment the arrest was made, the arresting officer had probable cause to make it. State v. Maybank, 352 S.C. 310, 318, 573 S.E.2d 851, 856 (quoting Beck v. Ohio, 379 U.S. 89, 101 (1964)). Probable cause turns not on an individual's actual guilt or innocence, but on whether facts within the officer's knowledge would lead a reasonable person to believe the individual arrested was guilty of a crime. Jackson v. City of Abbeville, 366 S.C. 662, 666, 623 S.E.2d 656, 658 (2005) (quoting State v. George, 323 S.C. 496, 509, 476 S.E.2d 903, 911 (1996)). Probable cause is not an exercise in academic hindsight. Jackson, 366 S.C at 667, 623 S.E.2d at 659 (Quoting George, 323 S.C. at 509, 476 S.E.2d at 911). The statute for disorderly conduct states:

> Any person who shall [signal omitted] be found on any highway or at any public place or public gathering in a grossly intoxicated condition or otherwise conducting himself in a disorderly or boisterous manner . . . shall be deemed guilty of a misdemeanor and upon conviction shall be fined not more than one hundred dollars or be imprisoned for not more than thirty days.

S.C. Code Ann. §16-17-530 (1976).

To have probable cause to arrest Petitioner, Officer Gore must have observed two elements at the time of the arrest: that Petitioner was in a public place, and that petitioner was grossly intoxicated and/or conducting himself in a disorderly or boisterous manner. Gore witnessed that Petitioner was grossly intoxicated; in fact, both officers Oliphant and Gore testified that he was staggering, shuffling, loud, and slurring his speech. R. 10-11, 26. Petitioner was also emotionally upset and acting in a loud and boisterous manner –

audible to other residents in the early morning – next to the sidewald and only some ten feet from an apartment.

Gore also observed that Petitioner was in a public place—the apartment parking lot. R. 52. He testified that the apartment parking lot is freely accessible to the public, there is a driveway leading in and out of the parking lot off of a main road, the entrance and exits are not blocked by access gates; and the public is free to enter the complex without the requirement of passing through security or using codes. R.51. The standard for probable cause is whether facts within the officer's knowledge would lead a reasonable person to believe the individual arrested was guilty of a crime. It is not an academic exercise in hindsight. See Jackson, 366 S.C. at 661, 623 S.E.2d at 659. Having observed the facts, Officer Gore's belief that a parking lot was a public place is quite reasonable. Therefore, he had probable cause to believe that the disorderly conduct occurred in a public place.

Since Officer Gore observed Petitioner acting grossly intoxicated in what he reasonably believed was a public place, he had probable cause to arrest Petitioner. This made the arrest lawful. Since Petitioner may only resist unlawful arrest, and Respondent presented evidence at trial that the arrest was lawful, the trial judge properly denied Petitioner's motion for directed verdict. This Court should deny certiorari on this issue.

B. The State presented evidence at trial that the parking lot was a public place and thus the motion for directed verdict was properly denied.

Petitioner includes an argument about landlord-tenant duties in his brief, but does not develop its relevance to the issue he raises. See Cert. Pet. 8. The State respectfully submits landlord-tenant duties are irrelevant.

Also, Petitioner argues that the number of people witnessing a disorderly conduct is important. Cert. Pet. 9-10. The State respectfully submits that the number of people witnessing disorderly conduct is also irrelevant. The statute states that the offense must occur in a public place, not that the public must be present. S.C. Code Ann. § 16-17-530(a). In fact, it would be unreasonable and dangerous for police to search for witnesses in the early hours of the morning before charging someone with a misdemeanor such as disorderly conduct.

To clarify, while the arrest was on the grounds of an apartment complex, it actually occurred in the area around the parking lot that was a common area. See Cert. Pet. 8. As Officers Gore and Oliphant testified, the area consisted of a parking lot, sidewalks, and grass where any resident (or visitor) can walk. R. 11-12, R. 26-27.

Petitioner alleges the State did not submit any evidence that the parking lot where this arrest took place was a public place. On the contrary, the State submitted substantial evidence for the jury to find that the disorderly conduct occurred in a public place.

Under the disorderly conduct statute, this Court has defined "public place" as:

> A place to which the general public has a right to resort; not necessarily a place devoted solely to the uses of the public, but a place which is in point of fact public rather than private, a place visited by many persons and usually accessible to the neighboring public. Any place so situated that what passes there can be seen by any considerable number of persons, if they happen to look. Also, a place in which the public has an interest as affecting the safety, health, morals, and welfare of the community. A place exposed to the public, and where the public gather together or pass to and fro.

State v. Williams, 280 S.C. 305, 306-307, 312 S.E.2d 555, 556 (1984) (citations omitted). In State v. McGowan, the court notes that because "a jury could have determined McGowan's conduct was prohibited, his arrest was lawful such that he was not entitled to a directed verdict on the charge of resisting arrest . . .." 347 S.C. 618, 626, 557 S.E.2d 657, 662 (2001). Thus, the determination of whether a location is a public place is a question of fact for the jury to resolve. See Id.

Here, the State presented sufficient evidence for a jury to conclude that the apartment parking lot was a public place. Officer Gore testified that the parking lot is freely accessible to the public, there is a driveway leading in and out of the parking lot off of a main road, the entrance and exits are not blocked by access gates; and the public is free to enter the complex without the requirement of passing through security or using codes. R.51. Any of these statements allow a jury to logically infer that the parking lot is a place which the general public has a right to resort. The apartment parking lot may not be only devoted to the use of the public, but it may be visited and accessed by the neighboring public. Also, people living in the apartments have an interest as affecting the safety, health and welfare of the community there. The parking lot is a place exposed to

the public, and it is where members of the public gather together or pass to and fro. See Williams.

The fact that Petitioner presented evidence to the contrary is irrelevant to a directed verdict motion. An appellate court is only concerned with the existence of evidence, not the weight. Thus, the trial judge properly denied the motion for directed verdict and allowed the jury to decide whether Petitioner was in a public place.

Therefore, this Court should deny certiorari because the appellate court correctly affirmed the trial court's decision to submit the conflicting evidence to the jury.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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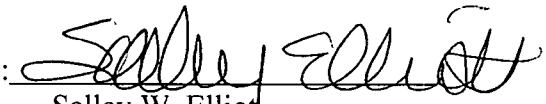
BY: 
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June 21, 2013

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Richland County
The Honorable Jeffrey Young., Circuit Court Judge
Appellate Case No: 2013-000398

THE STATE,

RESPONDENT,

v.

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PETITIONER.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the **Return to Petition for Writ of Certiorari**, has been served upon opposing counsel by mailing two (2) copies in the United States mail, postage prepaid:

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This 21st day of June, 2013

Angela Bennett

ANGELA BENNETT
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