STATE OF SOUTH CAROLINA) IN THE GENERAL SESSIONS COURT
) FOR THE NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON) INDICTMENT NUMBERS: 2023GS10-4935
) 2023GS10-4936
STATE OF SOUTH CAROLINA,)
)
Plaintiff,)
)
-versus-) ORDER GRANTING DEFENSE
) MOTION TO DISMISS
ELISABETH ANNE GERMAIN,)
Defendant.)

This matter came before the Court on August 21, 2024, after the Defendant, by and through her attorney, J. Scott Bischoff, II, submitted a Motion to Dismiss after the call of this case. The Defendant was present, and was represented by her attorney, J. Scott Bischoff, II. The State was represented by Assistant Solicitors Jewel Gearding and Andrew McAllister. After hearing from witnesses for both parties, and hearing arguments from counsel, the court grants the Defendant's motion, and makes the following findings of fact and law:

BRIEF FACTS AS PRESENTED

The state presented deputies who testified that they received a call for service to respond to the Defendant's residence due to some sort of domestic dispute. Unbeknownst to the deputies at the time, the Defendant had called 911 several times to ask for help. The calls to 911 became increasingly angrier when it took law enforcement an inordinate amount of time to respond to the calls. The Defendant had apparently been calling 911 and cursing at the operators. There was later testimony that it took police 73 minutes to arrive at the residence. The deputies, however, were on other calls, and were unaware of the extended period of time that had elapsed between the first call and their arrival at the home.

When the deputies arrived at the Defendant's residence, she was described as belligerent, using profanity, and being under the influence of alcohol. The Defendant later admitted to drinking a bottle of wine. The Defendant had made allegations of some kind of domestic situation going on in the residence, but would not elaborate with the deputies. The Defendant wanted the deputies to make her live-in boyfriend leave the residence. When they told her they could not do that, she became angrier still, and more upset. After speaking with the Defendant, the deputies made the decision that no domestic violence had occurred. They told the Defendant that, if she called 911 again, she was going to be arrested. The state played body-worn camera footage from one of the deputies, which confirmed their testimony. The deputies had not listened to the 911 calls up until then.

Before the deputies could get out of the neighborhood, the Defendant had called 911 again, and had again used profanity towards the 911 operator. The deputies went back the Defendant's residence. When they arrived, and were still out by the road, the Defendant went from her front porch into her home. Deputies went up the door and knocked several times, trying to get her to the door. When they would walk away from the door occasionally, she would open the door and yell at the deputies, closing it immediately. At some point, with the Defendant inside her home, behind a closed door, and the deputies outside, one of the deputies told her that she was under arrest. They told her that if she didn't come out, that would be resisting arrest, which would be another charge. One of the deputies then warned the Defendant that, if she didn't come to the door, he would kick the door down. Deputies would later admit that they knew they could not kick the door down; that it was just a tactic to try to get her to the door.

Body-worn camera footage showed that, at some point after the threat to kick down the door, the Defendant opened the door and stood inside the threshold of the doorway. One of the deputies then reached across the threshold, pulled the Defendant out of her home, and placed her under arrest, charging her with Unlawful Use of 911, and Resisting Arrest. The deputies did not have arrest warrants for the Defendant at this time. It should be noted here that both charges are misdemeanors.

CONCLUSIONS OF LAW

A. Warrantless arrest for a misdemeanor

Defense counsel argued that an officer may only make a warrantless arrest for a misdemeanor when the crime occurs in the officer's presence. That is one instance when an officer may make such an arrest. The other situation is when the misdemeanor crime has been "freshly committed." South Carolina Code Ann. § 17–13–30 (1985) states that sheriffs and deputy sheriffs "may arrest without warrant any and all persons who, within [the officers'] view, violate any of the criminal laws ... if such arrest be made at the time of such violation of law or immediately thereafter." However, in *State v. Martin*, 275 S.C. 141, 268 S.E.2d 105 (1980), the court noted that the rule in § 17–13–30 must be interpreted in light of S.C.Code Ann. § 23–13–60 (1989), which provides that such officers "may for any suspected freshly committed crime, whether upon view or upon prompt information or complaint, arrest without warrant...." Thus, Martin holds "an officer can arrest for a misdemeanor [not committed within his presence] when the facts and circumstances observed by the officer give him probable cause to believe that a crime has been freshly committed." 275 S.C. at 146, 268 S.E.2d at 107 (emphasis in original).

In *Fradella v. Town of Mount Pleasant*, Fradella had wrecked his car, and left it on the side of the road. Someone picked him up and gave him a ride home, the returned to the accident scene. Meanwhile, police had been called out to the scene. See *Fradella*, 325 S.C. 469, 482 S.E.2d 482 (Ct. App. 1997). Through investigation, police figured out that Fradella had the car that night. *Id.* The bystander told police he had given Fradella a ride home, and that he smelled of alcohol. *Id.* Police went and spoke to Fradella, and he admitted that he was the one driving the car that night. *Id.* He failed a field sobriety test, and officers noted that he smelled of alcohol, had slurred speech, and bloodshot eyes. *Id.* The Court of Appeals held that "as long as the facts and circumstances observed or perceived by an officer justify the conclusion that a crime has been freshly committed, then the *Martin* rule is satisfied." *Id,* at 477.

In this case, the Defendant made the calls to 911, asking, at first for help. She never denied making the calls. She admitted to police that she made the calls, and, although she called numerous times, the officers arrived shortly after they had been informed about the calls for service. Because of these facts, the court finds that the facts and circumstances here fit the "freshly committed" requirement, obviating the need for an arrest warrant.

B. Resisting arrest

Deputies here charged the Defendant with Resisting Arrest after telling her that she was under arrest, through the closed doorway to her home. They never laid hands on her until she came to the doorway, when they reach across the threshold, removing her from her home.

The concepts of arrest and seizure, while similar, are distinguishable because a person can be seized without being under arrest. See *Terry v. Ohio*, 392 U.S. 1, 16, 88 S.Ct. 1868, 1877, 20

L.Ed.2d 889 (1968). Furthermore, the concepts of arrest and seizure are also distinguishable because each concept requires a distinct analysis. In determining whether an arrest has occurred, the focus is on the intent of the police officer and the suspect. *State v. Brannon*, 388 S.C. 697 S.E.2d 593, 596 (2010), citing *State v. Williams*, 237 S.C. 252, 257, 116 S.E.2d 858, 860–61 (1960). By contrast, an individual is seized under the Fourth Amendment when a reasonable person, in view of all the circumstances of a particular case, would not believe he was free to leave. *Michigan v. Chesternut*, 486 U.S. 567, 573, 108 S.Ct. 1975, 1979, 100 L.Ed.2d 565 (1988).

In the *Brannon* case, police were called to the scene of a motor vehicle break-in, where the suspect had left, but had entered another nearby vehicle. When police arrived, they saw Brannon standing outside the other vehicle. They yelled to him, "stop, police." A foot chase ensued, where Brannon was caught and arrested for B&E Motor Vehicle and Resisting Arrest. Brannon was tried and convicted of both charges. The Court of Appeals reversed, saying that Brannon was not "seized under the Fourth Amendment, and therefore not under arrest when he ran. The Supreme Court upheld the result, but noted that the Court of Appeals had used the wrong analysis. See *Brannon* at 501.

In analyzing whether an arrest was being made, the Supreme Court cited *Williams*, 237 S.C. at 257, 116 S.E.2d at 860–61. Where the police officer does not manually touch the suspect, an arrest requires intent on the part of the officer to arrest the suspect and intent on the part of the suspect to submit to the arrest, under the belief that submission was necessary. *Id.* This requires a subjective analysis. Probable cause does not figure into the analysis in this case. *Brannon*, at 504.

In this case, it is quite clear the police had the intention to arrest the Defendant. However, the Defendant had no intention to submit to the arrest, at all. Further, the officers never physically touched the Defendant, and in fact, told her she was under arrest through a closed doorway. There was no arrest being made at the time, therefore the resisting charge is unsupported by the facts of this case, and the law of resisting arrest.

C. The arrest itself

The Fourth Amendment to the United States Constitution prohibits unreasonable searches and seizures through its exclusionary rule. U.S. CONST. amend IV. An individual in a private residence normally expects privacy, free of governmental intrusion not authorized by a warrant, and society recognizes this as a justifiable expectation. *State v. Herring*, 387 S.C. 201, 209, 692 S.E.2d 490, 494 (2009). As such, a warrantless search is inherently unreasonable, and thus, it violates the Fourth Amendment's prohibition against unreasonable searches and seizures. *State v. Johnson*, 410 S.C. 10, 17, 763 S.E.2d 36, 40 (Ct. App. 2014). However, "because the ultimate touchstone of the Fourth Amendment is 'reasonableness,' the warrant requirement is subject to certain exceptions." *Herring*, 387 S.C. at 210, 692 S.E.2d at 494 (citing *Katz v. United States*, 389 U.S. 347, 357, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967)).

"The exigent circumstances doctrine provides an exception to the Fourth Amendment['s] protection against warrantless searches, but only where, from an objective standard, a compelling need for official action and no time to secure a warrant exist." *State v.* Dobbins, 420 S.C. 538, 803 S.E. 2d 826, (Ct. App. 2017), citing *Abdullah*, 357 S.C. at 351, 592 S.E.2d at 348. This exception was argued in this case. "Exigent circumstances—such as imminent destruction of

evidence, the potential for a suspect to flee, or a risk of danger to police or others—may justify a warrantless entry, but absent hot pursuit, there must be at least probable cause to believe the exigent circumstances were present." *Dobbins,* at 592, citing *Minnesota v. Olson*, 495 U.S. 91, 100, 110 S.Ct. 1684, 109 L.Ed.2d 85 (1990).

In the present case, the court finds that no exigency existed here. There was no concern about the destruction of evidence in this case. The calls to 911 were recorded, and custody of the recordings is with the 911 system operators. Given the defendant's condition, there was no real chance that she would even attempt to flee the area. All she did was go into her home. Finally, there was no indication that any weapons were present or that the defendant could have or would have obtained one. The officers could see into the home and could have seen her coming at them if she had a weapon.

Among the smaller issues in this case, the major issue was the arrest of the defendant in the threshold of the doorway to her home. In viewing the body-worn camera that was presented, the court was able to view the events leading up to the arrest, as well as the arrest itself. After being told that she was under arrest, through a closed doorway, and being told that the police were going to kick the door down, the defendant finally came to the door and opened it. She did not go out, nor did she cross the threshold of the doorway. The officer then reached into the home and removed the defendant, arresting her.

In support of its view that the arrest was proper, the State cited the case of *United States v. Santana*, 427 U.S. 38, 96 S.Ct. 2406, 49 L.Ed.2nd 300 (1976). In that case, police had information that Santana had marked police buy money in her possession after a controlled drug

buy from her residence. See *Santana*, generally. When police went to her home, they saw her standing in her doorway, holding a brown paper bag. *Id*, at 40. As police pulled up, she retreated into the entryway of her home, where she was caught and arrested. *Id.* The Court found that Santana was in a public place when the police pulled up, having no expectation of privacy. *Id*, at 42. "What a person knowingly exposes to the public, even in his own house or office, is not a subject of Fourth Amendment protection." *Id,* citing *Katz v. United States*, 389 U.S. 347, 351, 88 S.Ct. 507, 511, 19 L.Ed.2d 576 (1967). Citing to the "hot pursuit" exception to the warrant requirement, the Court noted that, just because the chase ended almost as soon as it started, it was of no matter. *Id*, at 43. Moreover, the Court recognized the possibility of the destruction of evidence in this case should Santana have gotten away. *Id.* In that case, the Court also went on to hold that an arrest that has been set into motion in a public place cannot be defeated by escaping into a private place. *Id.*

The facts of this case are distinguishable from those in *Santana.* In that case, officers were attempting to make a warrantless felony arrest. In this case, the defendant was being arrested for two misdemeanors. In *Santana*, that defendant was standing outside of her residence, holding a paper bag, after doing a drug deal with an informant. The police pulled up to within fifteen feet of her, and yelled, "police!". She then turned and ran into her residence. In the instant case, the defendant went inside her residence while the police were still at the street, and had not yet engaged her. It wasn't until after she was inside her home that she was told that she was under arrest, or until the police even attempted contact with her.

Four years after *Santana*, the Supreme Court decided the case of *Payton v. New York.* That was a part of a challenge to New York's law, which allowed police to enter someone's home,

with or without force, in order to affect a routine felony arrest. See *Payton v. New York*, 445 U.S. 573, 100 S.Ct. 1371, 63 L.Ed.2nd 639 (1980), generally. In that case, police developed Payton as a murder suspect and went to his residence to affect a warrantless arrest of him. *Id.* Upon entry, they learned that Payton was not home but found a spent .30 caliber shell casing that was eventually admitted against him in his murder trial. *Id.* Payton was eventually convicted and had his conviction affirmed all the way to the United States Supreme Court. *Id.* The Court noted, too, that this case involved a warrantless entry in order to make an arrest when there was ample time to get an arrest warrant.

After a discussion about warrantless entry and the need for recognized exceptions, the court held "[a]t the very core [of the Fourth Amendment] stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion." *Id*, at 1382, citing *Silverman v. United States*, 365 U.S. 505, 511, 81 S.Ct. 679, 683, 5 L.Ed.2d 734. In terms that apply equally to seizures of property and to seizures of persons, the Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant.

The court, in the instant case, also considered the reasoning in *Unites States v. McCraw*, 920 F.2d 224 (4th Cir. 1990). In that case, the Fourth Circuit held that a person does not surrender his expectation of privacy in his hotel room or consent to police officers' entry into room when he partially opened door to determine identity of officers knocking on door. Additionally, the reasoning in *United States v. Jones*, 204 F.3d 541, 543 (4th Cir. 2000), was also persuasive. In that case, the Fourth Circuit recognized that, even assuming the existence of probable cause, exigent circumstances are required to justify an officer's warrantless entry into a residence. In

that case, however, there was exigency that allowed the officers' entry into his home. Those conditions are not present here.

CONCLUSION AND ORDER

For the foregoing reasons, the Defendant's motion is hereby granted.

IT IS SO ORDERED

September 6, 2024

The Honorable David P. Caraker, Jr.
Presiding judge for the 9th Circuit