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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Charleston County
Honorable Jennifer B. McCoy, Circuit Court Judge
Appellate Case No. 2025-001219

THE STATE,

Respondent,

vs.

KENNETH MILLER, JR.,

Appellant.

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

"Did the trial court incorrectly apply Article I, section 10 of the South Carolina Constitution by denying Appellant's motion to suppress a warrantless search of Appellant's person for gunshot residue where he expressly denied consent?"

COUNTER-STATEMENT OF ISSUE ON APPEAL

Did the trial judge correctly deny Appellant's suppression motion when the brief post-arrest warrantless collection of gunshot residue particles from the exterior of Appellant's hands not long after he was lawfully taken into custody for shooting his elderly aunt was constitutionally proper pursuant to both the search-incident-to-arrest exception and the exigent circumstances doctrine and did not constitute an unreasonable invasion of Appellant's privacy?

STATEMENT OF THE CASE

In January of 2024, Appellant Kenneth Miller, Jr. was arrested following an investigation into a report he entered his elderly aunt's residence, shot her in the knee, and then swiftly left. In October of 2024, the Charleston County Grand Jury indicted Appellant for attempted murder and possession of a weapon during the commission of a violent crime. Thereafter, in March of 2025, the Charleston County Grand Jury indicted Appellant for assault and battery of a high and aggravated nature ("ABHAN") in place of the earlier attempted murder charge[1] while also additionally indicting Appellant for possession of a firearm by a person previously convicted of possession of a controlled substance with intent to distribute.[2] On June 9, 2025, a jury trial was commenced in the Charleston County Court of General Sessions with the Honorable Jennifer B. McCoy, circuit court judge, presiding. At the conclusion of the four-day trial, the jury convicted Appellant as indicted. Following the verdict, the trial judge sentenced Appellant to concurrent terms of imprisonment of fifteen years for ABHAN, five years for possession of a weapon during the commission of a violent crime, and five years for possession of a firearm by a person previously convicted of possession of a controlled substance with intent to distribute. Appellant then timely filed a notice of appeal.

[1] The attempted murder indictment was subsequently withdrawn and cancelled. (Order Cancelling Indictment).

[2] Prior to his most-recent offenses, Appellant was previously convicted of possession of crack cocaine with intent to distribute. (Tr. pp. 491-492; Indictment). During trial, the parties stipulated Appellant had a "qualifying prior conviction for a prohibitive controlled substance from October 2005," and that stipulation was presented to the jury along with an appropriate limiting instruction from the trial judge. (Tr. pp. 405-407).

STATEMENT OF FACTS

On the morning of June 4, 2024, eighty-four-year-old Juanita Dukes ("Victim") was at her longtime[3] residence on Easton Street in North Charleston, South Carolina, when Appellant, her nephew, unexpectedly strolled into the home. (Tr. p. 117; pp. 171-172; p. 176; pp. 178-179). Although she was not expecting Appellant that morning, Victim—at least at that point—was not concerned at all by Appellant's sudden appearance. (Tr. p. 179). Indeed, Victim had known Appellant "all his life," and he tended to visit her at her residence on a somewhat regular basis with him popping by every few months. (Tr. pp. 173-174). Appellant also appeared to be in a "[n]ormal" mood when he first arrived that morning, and nothing seemed to be amiss. (Tr. pp. 179-180). Unfortunately, things did not remain normal for long. (Tr. pp. 181-182).

After arriving and greeting her as "Aunt Nita" in a friendly manner, Appellant put his arm around Victim's waist and steered her toward the home's den. (Tr. pp. 179-180; pp. 205-206). However, as they walked toward the den, Appellant's tone suddenly changed, and he—while sounding "[l]ike a monster"—asked her to open a nonexistent door. (Tr. pp. 181-182). Victim was immediately confused because the door Appellant asked her to open was no longer there due to some remodeling that had been performed at an earlier point, and she alerted Appellant of that fact. (Tr. pp. 181-182). Shockingly, Appellant responded by producing a gun and telling Victim: "Well, I'm going to shoot you." (Tr. p. 181). Upon seeing the gun, Victim quickly told Appellant to put his gun away, but Appellant insisted he was going to shoot her. (Tr. p. 181). For no readily-apparent reason, he then did so, suddenly firing a bullet from his gun into Victim's knee. (Tr. pp. 181-182).

[3] By that point, Victim had lived in the Easton Street house for roughly sixty years. (Tr. p. 172).

Unsurprisingly, upon being shot, Victim fell to the floor in pain. (Tr. pp. 181-182; p. 197; State's Ex. # 14 (Photograph)). Meanwhile, Appellant calmly walked away and promptly headed out the door, leaving his bleeding elderly aunt behind. (Tr. p. 181; p. 183; p. 270).

Once Appellant was gone, Victim called several family members to alert them of what had happened before quickly calling 911 for help at approximately 11:12 a.m. (Tr. pp. 183-186; pp. 313-314). During the call, Victim—who appeared to be in significant pain—reported she was bleeding badly from her knee after having been shot and identified the shooter as her "doggone nephew." (Tr. pp. 184-186; State's Ex. # 1 (911 Call Recording)). She further reported she thought Appellant may have just "snapped."[4] (State's Ex. # 1).

Following that, officers from the North Charleston Police Department rushed to the scene and quickly began providing aid to Victim, who had an obvious gunshot wound to her knee. (Tr. pp. 186-187; pp. 254-258; State's Ex. # 2 (Body Camera Audio Recording)). While the officers tended to her, Victim repeated her account of what had occurred and identified Appellant by name as the shooter several times.[5] (Tr. p. 187; p. 204; p. 259; p. 269; State's Ex. # 2). Ultimately, due to her injuries, Victim was rushed to the hospital. (Tr. p. 187; p. 213; p. 265).

While Victim was being treated at the hospital,[6] the responding officers quickly began investigating the shooting. (Tr. pp. 254-255; pp. 313-314; p. 318). During that investigation,

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[4] Although no clear motive for the shooting was ever identified, Appellant's mother opined during the sentencing proceedings Appellant may have just snapped following the loss of his job, and defense counsel suggested Appellant may have felt "some dissociation with his family" based on her own interactions with him. (Tr. pp. 494-497).

[5] Later on, Victim—who was obviously already familiar with her nephew and his appearance—confirmed Appellant was the shooter without any hesitation when shown his driver's license photograph. (Tr. pp. 172-173; pp. 187-188; pp. 334-335).

[6] As a result of the shooting, Victim had to undergo surgery to clean out bone fragments, repair her artificial knee, and reattach her patella tendon. (Tr. pp. 216-218; p. 228). Notably, a lodged

Officer John Winn located a .40-caliber shell casing on the floor near where he had first encountered Victim. (Tr. p. 254; pp. 262-264). Meanwhile, through her efforts, Detective Charity Steinbrunner discovered Appellant lived at an address in Goose Creek, South Carolina, and was possibly driving a rental vehicle at the time. (Tr. pp. 320-321). Based on that information, officers travelled to Appellant's residence, and he was arrested there at approximately 12:30 p.m. upon arriving home in a rented black Toyota 4Runner. (Tr. p. 321; p. 325; State's Ex. # 23 (Photograph)).

Following his arrest, Appellant was transported to the police department office located at North Charleston City Hall and interviewed there by Detective Steinbrunner beginning around 1:00 p.m. (Tr. pp. 325-326; p. 333). During that interview, Appellant—after being advised of and waiving his rights—admitted he had been driving a rental vehicle that day but denied shooting Victim. (Tr. p. 326; p. 351). Appellant further claimed he did not own or fire a firearm on that date, and he asserted he had been in Goose Creek as opposed to North Charleston that morning. (Tr. pp. 326-327).

As the interview continued, Detective Steinbrunner asked Appellant if he would be willing to submit to gunshot residue ("GSR") testing. (Tr. pp. 327-328; p. 340; p. 390). Such testing merely involved gently pressing sticky pads onto a suspect's skin to collect potential GSR particles. (Tr. p. 327). Initially, Appellant indicated he would consent to the testing, but his consent was conditioned on him being permitted to monitor any search conducted of his home. (Tr. p. 340). And, when the detective would not agree to his proposed conditions, Appellant physically resisted by pulling his hands away. (Tr. p. 328). Based on Appellant's obstructive actions and the time-sensitive nature of GSR testing, Detective Steinbrunner proceeded forward

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bullet was also recovered from a damaged artificial knee component associated with Victim's earlier knee replacement. (Tr. p. 220; State's Ex. # 10 (Photograph)).

with the testing without Appellant's consent and, with the assistance of two other officers, was able to collect GSR samples from Appellant's hands approximately two-and-one-half hours[7] after the shooting. (Tr. pp. 328-330; p. 341; pp. 352-353). Subsequent to that, Appellant was booked into the detention center around 2:45 p.m. (Tr. p. 332; State's Ex. # 24 (Booking Photograph)).

Thereafter, as the investigation into the incident continued, Megan Fletcher, a forensic chemist at the South Carolina State Law Enforcement Division ("SLED") and an expert in gunshot residue analysis, analyzed the samples collected from Appellant's hands subsequent to his arrest. (Tr. p. 384; p. 386; p. 390). Through her analysis, Fletcher concluded GSR particles were, in fact, present on the samples collected. (Tr. p. 393).

In addition to that, officers confirmed Appellant was the person who rented the black Toyota 4Runner. (Tr. pp. 310-311; State's Ex. # 8 (Rental Agreement)). Furthermore, officers were able to obtain surveillance footage captured at 11:08 a.m. on the morning of the incident. (Tr. pp. 277-278; p. 317; State's Ex. # 6 (Surveillance Footage); State's Ex. # 7 (Photograph)). Notably, on that footage, a vehicle consistent with the Toyota 4Runner Appellant had rented could be seen travelling along Victim's street shortly after the shooting. (Tr. pp. 277-278; p. 280; pp. 303-304; p. 317; State's Ex. # 6; State's Ex. # 12 (Map)).

Based on what was uncovered through the investigation into the shooting, Appellant was subsequently indicted for ABHAN and other charges, and he elected to proceed forward to trial. (Tr. p. 22; Indictments). Toward the outset of trial, defense counsel moved to suppress the results of GSR testing performed in Appellant's case because the warrantless collection of the

[7] Later on during trial, Detective Steinbrunner explained her belief was GSR testing had to be conducted "within three hours" of a shooting incident in order to be useful for evidentiary purposes. (Tr. p. 352). Along with that, expert testimony was presented establishing the limited time frame for viable GSR testing was "really about four to six hours" at most. (Tr. p. 389).

samples from Appellant's hands purportedly constituted both an unreasonable search and an unreasonable invasion of privacy in violation of Appellant's state constitutional rights. (Tr. pp. 69-72). As support for that contention, defense counsel conceded GSR evidence "can go away" but nevertheless maintained "[i]t doesn't just disintegrate into thin air." (Tr. p. 71). Defense counsel further maintained the officers easily could have obtained a search warrant for the GSR evidence because Appellant was "completely in their control and custody" and the police department was "very conveniently located to judges." (Tr. p. 72). Accordingly, because Appellant did not consent to the testing of his hands and it was conducted without a warrant, defense counsel argued Appellant's constitutional rights had been violated. (Tr. p. 72). However, in making that particular argument, defense counsel candidly admitted "a lot of courts" throughout the country had allowed GSR evidence collected without a search warrant to be admitted into evidence during trial. (Tr. p. 70).

In rebuttal, the solicitor argued defense counsel's suppression motion should be denied. (Tr. pp. 72-73). As support for that argument, the solicitor noted the testing of Appellant's hands for GSR was a "minimally invasive test" that was time-sensitive while GSR itself was incredibly fragile and could be removed simply by touching objects, including in the interview room where Appellant was situated at the time of the testing. (Tr. pp. 73-74). Moreover, the solicitor noted two-and-one-half hours had already elapsed by the time Appellant's hands were tested while SLED would not even analyze samples collected more than six hours after an incident. (Tr. pp. 73-74). Beyond that, the solicitor noted the exigent nature of the circumstances involved in Appellant's case was only increased by the fact he had pulled his hands away from the officers and refused to let them touch him, which suggested he might attempt to destroy evidence. (Tr. p. 74). For those reasons, the solicitor contended the warrantless search that occurred was

reasonable pursuant to both the exigent circumstances and search-incident-to-arrest exceptions. (Tr. pp. 72-75).

Ultimately, after listening to the arguments of counsel, the trial judge took the matter under advisement overnight. (Tr. pp. 145-146). Thereafter, on the next morning, the trial judge declined to suppress the GSR evidence based on "the case law reviewed."[8] (Tr. pp. 145-146).

Following the trial judge's ruling, the trial proceeded forward, and Victim recounted the shocking details of her encounter with Appellant on the date of the incident. (Tr. pp. 172-206). During her testimony, Victim repeatedly identified Appellant as the person who shot her, and a recording of her call to 911 in which she likewise identified Appellant as the shooter was admitted into evidence and played for the jury. (Tr. pp. 181-182; pp. 185-186; p. 188; pp. 204-205; State's Ex. # 1). Beyond that, Victim pointed Appellant out in the courtroom and once again identified him as the shooter. (Tr. pp. 188-189).

In addition to Victim's testimony, her daughter, Chante Dukes, confirmed her mother called her on the morning of the incident and—while screaming and crying—reported Appellant had just shot her. (Tr. pp. 240-241). Similarly, Officer Winn testified Victim identified Appellant to him multiple times as the shooter after he responded to Victim's residence on the date of the incident, and an audio recording from his body camera corroborating that testimony was admitted into evidence and played for the jury. (Tr. pp. 254-255; pp. 258-259; State's Ex. # 2). Along with that, testimony and evidence was presented linking Appellant to the black Toyota 4Runner, and the surveillance footage depicting what appeared to be a black Toyota 4Runner

[8] In arguing against suppression, the solicitor—amongst other things—expressly cited to the decision of the Fourth Circuit Court of Appeals in United States v. Simmons, 380 F. App'x 323 (4th Cir. 2010), which found a warrantless search to recover GSR evidence after Simmons was transported to the police department constituted a proper search incident to arrest and was also justified by exigent circumstances. (Tr. pp. 74-75).

speeding along Victim's street just after the shooting was introduced and played for the jury. (Tr. pp. 277-278; pp. 303-304; pp. 310-312; p. 321). Furthermore, Detective Steinbrunner recounted the details of her investigation into the shooting and, as part of her testimony, discussed her collection of the GSR evidence—which was admitted into evidence over defense counsel's renewed objection—from Appellant's hands roughly two-and-one-half hours after Victim had been shot. (Tr. pp. 313-354).

Following that testimony, Fletcher, who was qualified as an expert in GSR analysis, testified about the results of her analysis of the samples collected from Appellant, and she confirmed she determined particles characteristic with GSR were present on his hands. (Tr. pp. 384-396). Fletcher also explained the presence of GSR—which she indicated could be "easily removed" or transferred through "normal activity," including by touching a steering wheel, wiping your hands on your pants, putting your hands in your pockets, washing your hands, or even just sweating—suggested a person was in the vicinity of a gun being discharged, fired a gun personally, or came into contact with an object that had GSR on it. (Tr. pp. 389-390). Due to the fragility of GSR evidence, Fletcher likewise indicated it would not be expected to remain on an individual's hands for more than four to six hours after a shooting, and she further confirmed SLED as a matter of policy would not analyze samples collected more than six hours after an incident. (Tr. p. 389).

After that testimony and evidence was presented, the State rested its case, and Appellant elected to testify in his own defense. (Tr. p. 407). Through his testimony, Appellant insisted he did not shoot Victim, was not around a firearm on the date of the incident, and had no idea who had shot his aunt. (Tr. pp. 416-418; p. 424). However, he did acknowledge he knew where

Victim lived, had been to her home on prior occasions, and had resided just twenty-two minutes away from her at the time of the incident. (Tr. pp. 419-421).

Once Appellant's testimony had concluded, the defense rested its case, the parties presented their closing arguments[9] to the jury, and the trial judge instructed the jury on the applicable law. (Tr. p. 425; pp. 437-483). The case was then submitted to the jury, and, after deliberating on the matter, the jury ultimately convicted Appellant as indicted. (Tr. p. 487).

[9] As part of her closing argument remarks, defense counsel noted the State's expert had explicitly confirmed the presence of GSR on a person's hands does not mean that person necessarily fired a gun. (Tr. p. 456). Furthermore, defense counsel pointed out GSR was easily transferred and, based on that, suggested it could have been transferred to Appellant's hands by one of the multiple officers who had touched him before the testing was conducted. (Tr. pp. 456-459).

STANDARD OF REVIEW

In criminal cases, appellate courts sit only to review errors of law. State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). When reviewing a ruling regarding the constitutional propriety of a warrantless search or seizure on appeal, the appellate court will "review the trial court's factual findings for any evidentiary support" and treat "the ultimate legal conclusion" as "a question of law subject to de novo review." State v. Frasier, 437 S.C. 625, 633, 879 S.E.2d 762, 766 (2022).

ARGUMENT

The trial judge properly denied Appellant's suppression motion because the brief post-arrest warrantless collection of gunshot residue particles from the exterior of Appellant's hands not long after he was lawfully taken into custody for shooting his elderly aunt was constitutionally proper pursuant to both the search-incident-to-arrest exception and the exigent circumstances doctrine and did not constitute an unreasonable invasion of Appellant's privacy.

Appellant contends the trial judge reversibly erred by refusing to suppress the GSR evidence that was collected from his hands roughly an hour or so after he was validly arrested and approximately two-and-one-half hours after his elderly victim was shot. As support for that contention, Appellant maintains the warrantless collection of that evidence constituted an unreasonable invasion of his privacy in violation of Article I, Section 10 of the South Carolina Constitution because: (1) he was physically touched by police officers for the sole purpose of obtaining evidence without a search warrant; (2) the search-incident-to-arrest exception allegedly was not applicable since the GSR evidence was collected after he was transported to the police department and there purportedly was no pressing need for immediate action on the part of law enforcement at that time; and (3) exigent circumstances purportedly did not exist because other search warrants allegedly had already been obtained,[10] the GSR testing occurred at a location that would have made obtaining a search warrant convenient, and there was supposedly still "more than an hour" of time available in which viable GSR collection could have occurred. To the contrary, no unreasonable search or invasion of privacy occurred in Appellant's case because: (1) Appellant was lawfully under arrest at the time the minimally-intrusive GSR testing

[10] In support of that particular contention, Appellant cites solely to arguments made by defense counsel in support of the suppression motion. (App. Br. p. 10). Importantly though, defense counsel—in making those arguments—did *not* expressly assert the search warrants were already obtained in Appellant's case prior to the collection of the GSR evidence, and the testimony presented during trial merely indicated search warrants were obtained at some point but did not definitively establish any of the obtained warrants were issued *before* the GSR testing was conducted. (Tr. pp. 69-70; pp. 321-324; p. 344).

was conducted, which meant his expectations of privacy were necessarily diminished; (2) pursuant to the search-incident-to-arrest exception, it was constitutionally reasonable to conduct a search of Appellant's person—which included his hands—incident to his arrest to prevent the loss or destruction of evidence; and (3) pursuant to the exigent circumstances doctrine, it was reasonable for the officers to conduct the GSR testing without a search warrant because any time spent obtaining such a warrant would have increased the risk probative, delicate, and time-sensitive evidence would have been lost or destroyed. Therefore, since nothing unreasonable occurred in Appellant's case, Appellant's constitutional rights were not violated, and the trial judge correctly declined to suppress the GSR evidence collected from the exterior of Appellant's hands. Appellant's convictions should be affirmed.

Both the Fourth Amendment of the United States Constitution and Article I, Section 10 of the South Carolina Constitution provide protections to our citizens against unreasonable searches and seizures. U.S. Const. amend. IV; S.C. Const. art. I, § 10. Furthermore, primarily to guard against invasive technological advancements, the South Carolina Constitution also expressly protects our citizens from "unreasonable invasions of privacy." S.C. Const. art. I, § 10; see State v. Forrester, 343 S.C. 637, 647, 541 S.E.2d 837, 842 (2001) ("[T]he drafters of our state constitution's right to privacy provision were principally concerned with the emergence of new electronic technologies that increased the government's ability to conduct searches.").

Through the additional provision regarding invasions of privacy, "the people of South Carolina have indicated that searches and seizures that do not offend the federal Constitution may still offend the South Carolina Constitution." State v. Weaver, 374 S.C. 313, 322, 649 S.E.2d 479, 483 (2007). Thus, "the South Carolina Constitution favors an interpretation offering a higher level of privacy protection than the Fourth Amendment." Id. However, the South

Carolina Constitution by its express language only forbids searches, seizures, and invasions of privacy that are *unreasonable*. S.C. Const. art. I, § 10. As a result, only unreasonable searches, seizures, and invasions of privacy are impermissible in our state. See State v. Foster, 269 S.C. 373, 378, 237 S.E.2d 589, 591 (1977) ("It is only unreasonable searches and seizures that are prohibited."); see also Heien v. North Carolina, 574 U.S. 54, 60 (2014) ("To be reasonable is not to be perfect[.]"); Illinois v. Rodriguez, 497 U.S. 177, 185 (1990) ("It is apparent that in order to satisfy the 'reasonableness' requirement of the Fourth Amendment, what is generally demanded of the many factual determinations that must regularly be made by agents of the government . . . is not that they always be correct, but that they always be reasonable.").

Generally speaking, warrantless searches are considered to be unreasonable per se unless they fall under an exception to the warrant requirement, and any evidence seized as the result of an unreasonable search typically must be excluded from trial. Weaver, 374 S.C. at 319, 649 S.E.2d at 482; see State v. Peters, 271 S.C. 498, 501, 248 S.E.2d 475, 476 (1978) (instructing searches conducted without a warrant are per se unreasonable unless an exception to the warrant requirement is applicable). However, "warrantless searches are allowed when the circumstances make it reasonable . . . to dispense with the warrant requirement." Kentucky v. King, 563 U.S. 452, 462 (2011). Significantly, the "application of traditional standards of reasonableness requires a court to weigh the promotion of legitimate government interests against the degree to which the search intrudes upon the individual's privacy." Maryland v. King, 569 U.S. 435, 448 (2013) (citation, brackets, and internal quotations omitted). Regarding the situations where a warrantless search is considered to be constitutionally reasonable, South Carolina courts have recognized several exceptions to the warrant requirement, including: (1) the search-incident-to-arrest exception; (2) the hot pursuit exception; (3) the stop and frisk exception; (4) the

automobile exception; (5) the plain view exception; (6) the consent exception; (7) the abandonment exception; (8) the exigent circumstances exception; and (9) the inventory search exception. State v. Miller, 423 S.C. 95, 100, 814 S.E.2d 166, 169 (2018); State v. Brown, 401 S.C. 82, 89, 736 S.E.2d 263, 266 (2012); State v. Herring, 387 S.C. 201, 209, 692 S.E.2d 490, 494 (2009); see State v. Lemacks, 275 S.C. 181, 183-184, 268 S.E.2d 285, 286 (1980) (rejecting a constitutional challenge to a routine inventory search of a vehicle that was raised pursuant to both the federal constitution and the state constitution).

Of those exceptions, the search-incident-to-arrest exception is a long-recognized one permitting a warrantless search following a lawful arrest to: (1) ensure the arrestee is disarmed for officer safety purposes; and (2) prevent the concealment or destruction of any evidence in the arrestee's possession. United States v. Robinson, 414 U.S. 218, 235 (1973); Chimel v. California, 395 U.S. 752, 763 (1969); see Birchfield v. North Dakota, 579 U.S. 438, 458 (2016) ("The search-incident-to-arrest doctrine has an ancient pedigree."); Riley v. California, 573 U.S. 373, 382 (2014) (explaining the search-incident-to-arrest exception has been explicitly recognized—by 2014—"for a century"). Indeed, the government's right to search the person of a legally-arrested individual has *always* been recognized under English and American law. King, 569 U.S. at 449; see Robinson, 414 U.S. at 224 ("The validity of the search of a person incident to a lawful arrest has been regarded as settled from its first enunciation, and has remained virtually unchallenged[.]"). Pursuant to the search-incident-to-arrest exception, police officers—after making a lawful arrest—"may make a search of an arrestee's person and the area within his immediate control for weapons *and* destructible evidence without first obtaining a search warrant." State v. Ferrell, 274 S.C. 401, 405, 266 S.E.2d 869, 871 (1980) (emphasis added); see State v. Freiburger, 366 S.C. 125, 132, 620 S.E.2d 737, 740 (2005) (noting the

historical rationales for the search-incident-to-arrest exception are the need to disarm a suspect in order to take him into custody *and* the need to preserve evidence for later use at trial and explaining "[a] search may be conducted incident to an arrest only if it is substantially contemporaneous with the arrest and is confined to the immediate vicinity of the arrest"). And, for that exception to be applicable, the fact of a lawful arrest *standing alone* permits the search incident to arrest without a need for any additional individualized justification. Michigan v. DeFillippo, 443 U.S. 31, 35 (1979); see Robinson, 414 U.S. at 235 ("A custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment; that intrusion being lawful, a search incident to the arrest requires no additional justification. It is the fact of the lawful arrest which establishes the authority to search, and we hold that in the case of a lawful custodial arrest a full search of the person is not only an exception to the warrant requirement of the Fourth Amendment, but is also a 'reasonable' search under that Amendment."); Ferrell, 274 S.C. at 405, 266 S.E.2d at 871 ("The sole prerequisite is that there be a prior arrest supported by probable cause.").

Meanwhile, the exigent circumstances doctrine is another long-recognized exception to the warrant requirement, and, as a matter of both federal and state constitutional law, it "allows a warrantless search when an emergency leaves police insufficient time to seek a warrant" and probable cause exists to believe evidence will be found. Birchfield, 579 U.S. at 456; see State v. Counts, 413 S.C. 153, 163, 776 S.E.2d 59, 65 (2015) (recognizing—in a case in which the search was challenged on both federal and state constitutional grounds—the exigent circumstances doctrine permits a warrantless search when "from an objective standard, a compelling need for official action and no time to secure a warrant exists" (citation and internal quotations omitted)); State v. Bultron, 318 S.C. 323, 332, 457 S.E.2d 616, 621 (Ct. App. 1995) ("Another established

exception to the exclusionary rule is the exigent circumstances doctrine which allows law enforcement agents to conduct a warrantless search based upon probable cause when there exists a compelling need for official action and no time to secure a warrant."). Significantly, "[a] variety of circumstances may give rise to an exigency sufficient to justify a warrantless search[.]." Missouri v. McNeely, 569 U.S. 141, 149 (2013). Amongst them, officers may typically conduct a search without a warrant "to prevent the imminent destruction of evidence." Id.; see Riley v. California, 573 U.S. 373, 391 (2014) ("If the police are truly confronted with a now or never situation, . . . they may be able to rely on exigent circumstances to search . . . immediately." (citations and internal quotations omitted)); Roaden v. Kentucky, 413 U.S. 496, 505 (1973) ("Where there are exigent circumstances in which police action literally must be 'now or never' to preserve the evidence of the crime, it is reasonable to permit action without prior judicial evaluation."). Ultimately, the determination of whether it is reasonable for an officer to act without a warrant when faced with an emergency in a particular case depends on the totality of the circumstances and must be decided on a case-by-case basis. McNeely, 569 U.S. at 149-150.

To date, there do not appear to be any published appellate court decisions in South Carolina specifically addressing the issue of whether the warrantless post-arrest collection of GSR evidence from an arrestee's hands is constitutionally proper. Notably though, numerous other state and federal courts throughout the nation have already considered that particular issue, and those courts have consistently and overwhelmingly found such warrantless searches to be constitutionally reasonable pursuant to the search-incident-to-arrest exception, the exigent circumstances doctrine, or both. See, e.g., United States v. Simmons, 380 F. App'x 323, 330 (4th Cir. 2010) (concluding a warrantless post-arrest GSR test was constitutionally permissible

pursuant to both the search-incident-to-arrest exception and the exigent circumstances doctrine); United States v. Johnson, 445 F.3d 793, 795-796 (5th Cir. 2006) ("Because the presence of gun powder on his hands was relevant evidence that Johnson (or merely time) could have eventually removed or destroyed, if his arrest was valid, the performance of the gun powder residue test was lawful, and the admission of the results at trial was proper." (footnote omitted)); Ray v. State, 803 S.W.2d 894, 899 (Ark. 1991) (concluding a warrantless post-arrest GSR test was reasonable and constitutionally proper pursuant to the exigent circumstances doctrine because "[h]ad appellant washed his hands, the chance to conduct the test would have been gone"); Lawler v. State, 576 S.E.2d 841, 847 (Ga. 2003) ("The search of Lawler *at the police station* was a lawful search incident to his arrest. Swabbing for blood or gunshot residue at that time was not an unconstitutional search." (emphasis added)); People v. Allen, 875 N.E.2d 1221, 1228 (Ill. App. Ct. 2007) ("The hand swab performed on the defendant was a minor intrusion, no more offensive than fingerprinting or photographing. Because the hand swabbing was so minor an imposition that the defendant suffered no true humiliation or affront to his dignity, we find a search warrant was not required to justify the GSR test after defendant was in custody and while the arresting officers were assigned to investigate the April 17 attempt robbery. In light of the circumstances in this case, we find the hand swabbing was not an unreasonable search and seizure." (citations and internal quotations omitted)); Jones v. State, 74 A.3d 802, 812-813 (Md. Ct. Spec. App. 2013) ("The limited intrusion on the individual required to collect GSR evidence is often analyzed as a search incident to a legal arrest, or justified by exigent circumstances due to how easily GSR evidence can be destroyed through either intentional or unintentional actions. Both analyses are applicable to the facts presented in the instant appeal."); State v. Lentz, 229 A.3d 536, 549 (N.J. Super. Ct. App. Div. 2020) (rejecting a state-and-federal constitutional challenge

to a warrantless GSR test and holding "if an individual is lawfully arrested and in police custody, a delayed search of the arrestee's person for GSR evidence is constitutionally permissible under the search incident to arrest exception as long as the delay itself and the scope of the search are objectively reasonable"); State v. Coplen, 530 S.E.2d 313, 320 (N.C. Ct. App. 2000) (concluding a warrantless GSR test was constitutionally proper pursuant to the exigent circumstances doctrine); White v. State, 437 P.3d 1061, 1070 (Okla. Crim. App. 2019) ("We conclude that GSR swabs of a lawfully arrested suspect's body surface are permissible without regard to individualized suspicion, exigent circumstances, probable cause, or prior judicial approval."); Commonwealth v. Simonson, 148 A.3d 792, 801 (Pa. 2016) ("[W]e conclude that the gunshot residue test constitutes a reasonable search incident to arrest."); State v. Lawrence, 154 S.W.3d 71, 76 (Tenn. 2005) (concluding GSR evidence was admissible during trial because it was obtained through a valid search incident to arrest); State v. Riley, 500 S.E.2d 524, 533 (W. Va. 1997) (affirming the constitutional propriety of warrantless GSR tests and instructing "superficial examination of a lawfully arrested individual for evidence of gunpowder residue is not violative of the Fourth Amendment prohibition against unreasonable searches and seizures"); Sen v. State, 301 P.3d 106, 118 (Wyo. 2013) (rejecting a state-and-federal constitutional challenge to a warrantless GSR test and holding "in light of the minimal intrusion caused by the swab for gunshot residue and the easy destructibility of such evidence, administration of the gunshot residue test was a valid search incident to arrest").

In the case sub judice, the trial judge correctly declined to suppress the GSR evidence because—just as has been recognized by the *many* out-of-state courts that have been confronted with similar constitutional challenges in the past—the collection of that evidence was entirely constitutionally proper and constituted neither an unreasonable search nor an unreasonable

invasion of Appellant's right to privacy. That is true because the officers' actions in collecting the GSR evidence from the *exterior* of Appellant's hands through nothing but brief gentle swabbing were minimally invasive if invasive at all, imminently reasonable under the specific circumstances involved, and justified by both the search-incident-to-arrest exception and the exigent circumstances doctrine.

However, before getting to the applicability of those exceptions, it is important to note several key points. First, at the time the GSR collection occurred, Appellant was unquestionably in the lawful custody of law enforcement and validly under arrest. In light of that, Appellant's expectations of privacy—although not totally eliminated—were by necessity greatly diminished in scope. See King, 569 U.S. at 462 ("The expectations of privacy of an individual taken into police custody necessarily are of a diminished scope."). Second, as previously explained, the GSR testing that Appellant now characterizes as unreasonable merely involved an officer gently swabbing the exposed exterior of Appellant's hands with a "little sticky pad."[11] (Tr. p. 327). Such swabbing could not have been anything but painless, did not require the removal of Appellant's clothing, did not involve any intrusions *into* Appellant's body or *underneath* his skin, and was not something that could reasonably be described as particularly humiliating or degrading. See Jones, 74 A.3d at 814 ("[T]he procedure used to collect the GSR evidence is non-invasive, requiring nothing more than the rubbing of a swab across appellant's hands."); cf.

[11] More specifically, Detective Steinbrunner explained the GSR testing process as follows:

> So a GSR kit is a sealed kit that would detect or remove particles from gunshot residue. . . . So there are two little cylinders that are secured. And there's a little sticky pad on the end of each cylinder. And you would gently press into the skin to remove those particles. And then it's sealed back up and then sent off to SLED.

(Tr. p. 327).

Birchfield, 579 U.S. at 438 (describing the physical intrusion involved in a post-arrest breath test as "almost negligible"); King, 569 U.S. at 464 ("A brief intrusion of an arrestee's person is subject to the Fourth Amendment, but a swab of this nature does not increase the indignity already attendant to normal incidents of arrest."). Indeed, the GSR testing involved was strikingly less invasive than the standard booking process in South Carolina, which—amongst other things—includes the routine collection of saliva *or* tissue samples for DNA purposes from *all* suspects arrested for offenses like Appellant's. See S.C. Code Ann. § 23-3-620(A) (mandating a person subjected to a lawful custodial arrest in South Carolina for a felony offense—like ABHAN—or an offense punishable by a sentence of five years or more "must provide a saliva or tissue sample from which DNA may be obtained for inclusion in the State DNA Database" and instructing the sample "must be taken at a jail, sheriff's office that serves a courtesy summons, courthouse where a direct presentment indictment is served, or detention facility at the time the person is booked and processed into the jail or detention facility following the custodial arrest, or other location when the taking of fingerprints is required prior to a conviction"); see also King, 569 U.S. at 462 (explaining a search of a detainee being booked into custody may be relatively extensive and can include requiring some detainees to lift their exposed genitals or cough while in a squatting position). Third, the *sole* limited information that could be gleaned from the GSR testing conducted in Appellant's case was whether particles of GSR were present on Appellant's hands, which helped to minimize the privacy concerns implicated by such testing due to the fact no sensitive information was revealed by what occurred. Cf. Birchfield, 579 U.S. at 462 (indicating post-arrest breath testing does not implicate significant privacy concerns because, amongst other things, "breath tests are capable of revealing only one bit of information, the amount of alcohol in the subject's breath"); State v. German, 439

S.C. 449, 470, 887 S.E.2d 912, 923 (2023) ("[B]reath tests do not intrude greatly into the body, they do not reveal more than one piece of information, and they do not cause more embarrassment than what is inherent in an arrest."). Fourth and finally, the GSR testing strongly promoted legitimate governmental interests because it helped ensure potentially-important and fragile evidence bearing on the issue of the guilt or innocence of an individual whose long-term freedom was at stake was not unnecessarily lost. See Simonson, 148 A.3d at 801 ("[W]e need not engage in a long discussion on the Commonwealth's vital interests in identifying, arresting, and prosecuting individuals who have unlawfully discharged a firearm, shot at another individual, or shot an individual. Arguably, the two paramount interests of the Commonwealth are ensuring the public safety and welfare. The gunshot residue test promotes these interests by identifying individuals who might have unlawfully discharged a firearm or who might have harmed or murdered another person—and then preserving the evidence for trial."); see also Davis v. United States, 564 U.S. 229, 237 (2011) (recognizing the unavailability of reliable evidence bearing on guilt or innocence in a criminal case "exacts a heavy toll on both the judicial system and society at large"). Significantly, those key points were and are critical to a proper evaluation of the constitutional reasonableness of the GSR testing that occurred in Appellant's case. See King, 569 U.S. at 446 ("The fact than an intrusion is negligible is of central relevance to determining reasonableness, although it is still a search as the law defines the term."); Wyoming v. Houghton, 526 U.S. 295, 300 (1999) (explaining an evaluation of a particular search or seizure under "traditional standards of reasonableness" involves assessing "the degree to which it intrudes upon an individual's privacy" in conjunction with "the degree to which it is needed for the promotion of legitimate governmental interests").

With that in mind, the GSR testing that occurred in Appellant's case unquestionably occurred after Appellant was lawfully arrested. Therefore, pursuant to the long-recognized search-incident-to arrest exception, the arresting officers could properly and permissibly conduct a warrantless search incident to Appellant's arrest for the legitimate purpose of—in part—preventing the loss or destruction of any evidence in Appellant's control, which necessarily included any evidence that may have been concealed on Appellant's hands. See State v. Muquit, 381 S.C. 114, 118, 671 S.E.2d 643, 645 (Ct. App. 2009) ("Authority to search an arrestee derives not only from the need to disarm him, but also from the need to preserve evidence on his person for later use at trial. When an arrestee's property is already in the custody of law enforcement as an incident of the arrest, the police may seize it at a later time as evidence relating to his offense." (citations omitted)); see also Robinson, 414 U.S. at 235 (emphasizing "a search incident to the arrest requires no additional justification" beyond the justification necessary to render the arrest itself reasonable); Simonson, 148 A.3d at 801 ("[S]ince the search incident to arrest exception applies categorically—and not on a case-by-case basis—Appellant's claims that the police 'had time' to obtain a warrant and that the police 'could have 'bagged' the hands of Appellant until a warrant was obtained,' necessarily fail."). Therefore, it was not unreasonable for the officers to conduct a brief and non-invasive GSR test of Appellant's hands incident to his arrest[12] in order to prevent the loss or destruction of the delicate GSR particles that might have

[12] Notably, even though it took place at the police department, the GSR test was conducted in a manner that was substantially contemporaneous to Appellant's arrest since it occurred not long after Appellant was taken into custody and before the arrest process itself was fully completed. See State v. Dowd, 306 S.C. 268, 270, 411 S.E.2d 428, 429 (1991) (holding an arrest in South Carolina "is an ongoing process, finalized only when the defendant is properly confined" after being delivered to the jailer); see also United States v. Edwards, 415 U.S. 800, 803 (1974) (recognizing the distinction between a search incident to arrest of an arrestee's person and a search incident to arrest of the area within the arrestee's control and holding—subsequent to its earlier decision in Chambers v. Maroney, 399 U.S. 42 (1970)—it is "plain that searches and

been—and were—present on them. See Johnson, 445 F.3d at 795-796 (holding a GSR test was constitutionally reasonable as a search incident to arrest); see also Chimel, 395 U.S. at 763 ("When an arrest is made, . . . it is entirely reasonable for the arresting officer to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction."). And, since the officers' actions in doing so were not unreasonable, those actions—much like the actions involved in the many other types of warrantless searches that are routinely performed incident to arrests in South Carolina and elsewhere in our country—did not run afoul of the constitutional prohibition against *unreasonable* searches, seizures, and invasions of privacy. See S.C. Const. art. I, § 10 (prohibiting only unreasonable searches, seizures, and invasions of privacy); cf. Birchfield, 579 U.S. at 474 (holding "warrantless breath tests incident to arrests for drunk driving" are constitutionally reasonable and permissible); King, 569 U.S. at 465 ("In light of the context of a valid arrest supported by probable cause respondent's *expectations of privacy* were not offended by the minor intrusion of a brief swab of his cheeks." (emphasis added)); Davis v. Mississippi, 394 U.S. 721, 727 (1969) ("Fingerprinting involves none of the probing into an individual's private life and thoughts that marks an interrogation or search.").

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seizures that could be made on the spot at the time of arrest may legally be conducted later when the accused arrives at the place of detention"); id. at 805 ("This was and is a normal incident of a custodial arrest, and reasonable delay in effectuating it does not change the fact that Edwards was no more imposed upon than he could have been at the time and place of the arrest or immediately upon arrival at the place of detention. The police did no more on June 1 than they were entitled to do incident to the usual custodial arrest and incarceration."); Ferrell, 274 S.C. at 406, 266 S.E.2d at 871 ("Searches and seizures that could be made on the spot at the time of arrest may legally be conducted later when the accused arrives at the place of detection."); cf. Abel v. United States, 362 U.S. 217, 239 (1960) ("We do not think it significantly different, when the accused decides to take the property with him, for the search of it to occur instead at the first place of detention when the accused arrives there, especially as the search of property carried by an accused to the place of detention has additional justifications, similar to those which justify a search of the person of one who is arrested.").

Relatedly, at the time the GSR testing was conducted, the officers had a probable cause basis to believe Appellant had recently shot his elderly aunt with a pistol, which meant GSR particles might still be present on his hands at that time. See Bultron, 318 S.C.at 332, 457 S.E.2d at 621 ("The standard for probable cause to conduct a warrantless search is the same as that for a search with a warrant. That is, a justifiable determination, based upon the totality of the circumstances and in view of all the evidence available to law enforcement officials at the time of the search, that there exists a practical, nontechnical probability that a crime is being committed or has been committed and incriminating evidence is involved." (citations omitted)). Furthermore, the officers also were well aware GSR particles are highly fragile in nature and could be easily lost or destroyed if not collected as quickly as possible, and, indeed, the testimony presented during Appellant's trial confirmed even *sweating* could result in the loss of such evidence. See Jones, 74 A.3d at 813 (recognizing GSR evidence is "viable for only a few hours" and "easily destroyed either intentionally or unintentionally"); cf. United States v. Love, 482 F.2d 213, 218 (5th Cir. 1973) ("The nitrate on Oglesby's hands was even more likely to vanish than the materials lodged under Murphy's fingernails, or the alcohol in Schmerber's blood. The first vigorous scrubbing of the hands would have destroyed Murphy's material, but merely rubbing the hands would have destroyed the nitrate oils."). Beyond that, Appellant responded to the request for permission to test his hands for GSR particles by physically pulling his hands back and attempting to resist the officers. Cf. Cupp v. Murphy, 412 U.S. 291, 296 (1973) (concluding the warrantless collection of fingernail scrapings from Murphy while he was detained but not yet arrested was constitutionally reasonable because Murphy was aware of the officers' suspicions he was involved in his wife's killing, Murphy had a motive to attempt to destroy what evidence he could, and he behaved suspiciously after refusing to consent to a search

of his fingernails); Simmons, 380 F. App'x at 330 ("[E]xigent circumstances also justify the [GSR] search because Simmons was requesting to use the bathroom and both parties agree that washing his hands could have removed any gun-shot residue."); State v. Dobbins, 420 S.C. 583, 594, 803 S.E.2d 876, 881 (Ct. App. 2017) (concluding exigent circumstances existed that supported an objectively reasonable belief there was an immediate threat evidence would be destroyed when officers responded to a camper, immediately detected an odor of marijuana, identified themselves and announced their intentions at the door of the camper, and then "encountered a very uncooperative Dobbins"). Critically, such circumstances left the officers with an immediate need to act since *any* time spent obtaining a search warrant would have only increased the likelihood the fragile and time-sensitive GSR evidence would be lost or destroyed, and, therefore, it was entirely reasonable for the officers to conduct the brief warrantless search they conducted pursuant to the exigent circumstances doctrine. Hamrick v. State, 426 S.C. 638, 654, 828 S.E.2d 596, 604 (2019) ("The exigent circumstances exception applies when the exigencies of the situation make the needs of law enforcement so compelling that a warrantless search is objectively reasonable under the Fourth Amendment." (citations and internal quotations omitted)); cf. United States v. Bridges, 499 F.2d 179, 184 (7th Cir. 1974) ("It is apparent that had the agent not swabbed Bridges' hands at the time, the opportunity may not have knocked again, especially if Bridges washed his hands. . . . The swabbing was no more offensive to Bridges' person than fingerprinting or photographing him. We hold that the swabbing was not an unreasonable search, and affirm the district court's ruling.").

Accordingly, because the brief and minimally-invasive GSR test performed on Appellant's hands shortly after he was arrested for shooting his elderly aunt in the knee was not unreasonable for a multitude of reasons, Appellant's constitutional rights were not violated, and

the trial judge properly allowed the GSR evidence to be introduced during trial.[13] See Foster, 269 S.C. at 378, 237 S.E.2d at 591 (recognizing only unreasonable searches and seizures are constitutionally forbidden); cf. Weaver, 374 S.C. at 322, 649 S.E.2d at 483 ("Once the officers have probable cause to search a vehicle, the state constitution's requirement that the invasion of one's privacy be reasonable will be met."). Appellant's convictions should be affirmed.

[13] Moreover, even assuming the admission of the GSR evidence was somehow improper, its admission was entirely harmless in light of the other powerful evidence of Appellant's guilt presented during trial, which included Victim's unwavering identifications of her nephew as the shooter from just after she was shot all the way through trial, coupled with the fact the value of the GSR evidence was—as defense counsel aptly argued to the jury—inherently limited due to the nature of such evidence, which cannot definitively reveal whether a particular person fired a gun or merely had GSR transferred to them from another source. See State v. Bryant, 369 S.C. 511, 518, 633 S.E.2d 152, 156 (2006) ("[A]ppellate courts will not set aside convictions due to insubstantial errors not affecting the result."); cf. State v. Jenkins, 412 S.C. 643, 652, 773 S.E.2d 906, 910 (2015) ("Notwithstanding the DNA evidence, there was abundant, independent evidence in the record from which the jury could have found [Jenkins] guilty. For example, the victim testified at length, giving a detailed account of the assault and the events that followed. . . . [W]hile we agree that the DNA evidence was compelling, there is no jurisprudence in this State that DNA is either necessary or conclusive to establishing a defendant's guilt beyond a reasonable doubt. Rather, there are countless cases in which the State has not presented DNA evidence—either because it could not or chose not to do so—and a jury nonetheless properly convicts the defendant. DNA evidence is merely one way to establish that the accused is the perpetrator. However, the presence or absence of DNA evidence does not taint the remainder of the evidence in the record, nor does it overwhelm the jury's ability to make credibility determinations and decide whether a defendant is guilty. Like with fingerprinting and blood typing, both of which are similarly compelling types of evidence, DNA evidence can be disputed. Accordingly, we find the admission of the DNA evidence in this case was harmless error, and we decline to adopt a per se rule that a new trial is mandatory any time DNA evidence is wrongly admitted."); State v. Thompson, 276 S.C. 616, 621, 281 S.E.2d 216, 219 (1981) ("[Thompson]'s accomplice testified, subject to cross examination, against [Thompson] at trial and identified him in court. In light of the accomplice's damaging testimony and other corroborative evidence linking [Thompson] to the crime, the improper in-court identification by the clerk was merely cumulative to independent and overwhelming evidence of guilt.").

CONCLUSION

For all the foregoing reasons, it is respectfully submitted the judgment and conviction of the lower court be affirmed.

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