STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Greenville County

John C. Few, Circuit Court Judge

Opinion No. 2011-UP-588 (S.C. Ct. App. filed 12/21/2011)

08-GS-23-04268

THE STATE,

RESPONDENT,

V.

LORENZO R. NICHOLSON,

APPELLANT

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

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CERTIFICATE OF COUNSEL

Counsel for petitioner certifies that the petition for rehearing was made and finally ruled on by the Court of Appeals on 1/30/2012.

QUESTION PRESENTED

Did the Court of Appeals err in affirming the trial judge's refusal to suppress cocaine and a weapon found pursuant to a search warrant where the probable cause for the search warrant was based on a warrantless search of the appellant's home and the State failed to establish an exception to the warrant requirement in violation of the Fourth Amendment prohibition against unreasonable searches and seizures?

STATEMENT OF THE CASE

In April of 2008, the Greenville County Grand Jury indicted Nicholson for possession of a weapon during the commission of a violent crime and trafficking in cocaine, indictment #2008-GS-23-4268. On August 12, 2009, Nicholson, represented by counsel, Christopher Scalzo, picked a jury for the trial of his case. The jury trial was to begin the following day but Nicholson waived his right to a jury trial and elected to proceed with a bench trial before the Honorable John C. Few. Judge Few found Nicholson guilty and sentenced him to 13 years for trafficking and 5 years concurrent for the weapon charge. A timely notice of intent to appeal was served on August 13, 2009, and the appeal perfected. On December 21, 2011, the South Carolina Court of Appeals affirmed the conviction and sentence. The petition for rehearing was filed on January 5, 2012, and denied on January 30, 2012. This petition for writ of certiorari follows.

ARGUMENT

The Court of Appeals erred in affirming the trial judge's refusal to suppress cocaine and a weapon found pursuant to a search warrant where the probable cause for the search warrant was based on a warrantless search of the appellant's home and the State failed to establish an exception to the warrant requirement in violation of the Fourth Amendment prohibition against unreasonable searches and seizures.

On March 5, 2008, Investigators David Weiner, Craig Hannieg and Michael Fortner went to appellant Nicholson's home to serve an arrest warrant for armed robbery. Investigator Hanneig knocked on the front door and when Nicholson opened the door, Investigators Hanneig and Weiner placed him under arrest at the threshold of the front door. (R. p. 40, lines 4- p. 41, lines 1-19). Investigator Hannieg testified that after placing one handcuff, the defendant began to back into the house. (R. p. 41, lines 20-24). The investigator testified, "As we handcuffed the defendant, he –we got the first handcuff on him without incident. As soon as we did, we were going for the second hand and he started pulling back as opposed to – not actively resisting but just kind of backing into his house." (R. p. 41, lines 20-24). When asked how far he backed up the officer testified, "A foot, one person's foot, maybe two feet inside the dwelling." (R. p. 42, lines 3-4). The officers were able to obtain Nicholson's other hand and handcuff him. (R. p. 42, lines 1-7). When asked what happened after Nicholson was handcuffed, the investigator testified, "Uh, he was, uh, since he was inside his residence we walked in the residence." (R. p. 42, lines 9-10).

Investigator Weiner testified that that they took him into the house and sat him in a chair. (R. p. 25, lines 3-10). Investigator Weiner testified, "We took about three feet into the house with him into the door. We were able to get his two hands together and cuff. We sat him down in the chair, got him to calm down a little bit and then I moved the handcuffs to the rear. That is when I

did that." (R. p. 34, lines 24 – p. 35, lines 1-4). Investigator Hannieg testified that they smelled burned marijuana when they entered the house. (R. p. 42, lines 9-12).

Investigator Weiner then testified, "Once he settled down and we got him handcuffed, I did the first level protective sweep and Investigator Hannieg stayed downstairs while Investigator Fortner stayed with Mr. Nicholson." (R. p. 35, lines 12-16). Investigator Wiener found unsmoked bits of marijuana on a dresser in a back bedroom. (R. p. 10, lines 18-p. 11, lines 1-9). Investigator Hannieg went upstairs and found a smoked marijuana cigarette. (R. p. 44, lines 12-25). Investigator Hannieg testified that Investigator Fortner then obtained a search warrant based on the smell of marijuana and the marijuana found in the house. (R. p. 45, lines 22 – p.46, lines 1-2). Investigator Weiner admitted that his report and the affidavit in support of the search warrant did not include any information about investigators smelling marijuana. (R. p. 26, lines 11 – p. 27, lines 1-16; Search Warrant, R. p. 123).

The investigators executed the search warrant and found 15.28 grams of crack cocaine and a gun. (R. p. 100, lines 19 – p. 101, 102, 103, 104 lines 1-4). Counsel for Nicholson moved to suppress the drugs and the gun. (R. pp. 1-83). In support, counsel cited State v. Abdullah, 357 S.C. 344, 592 S.E.2d 344 (Ct. App. 2004) and Maryland v. Buie, 494 U.S. 325, 337, 110 S.Ct. 1093, 108 L.Ed.2d 276 (1990) arguing that the officer's search of the back bedroom and upstairs exceeded what is allowed under the protective sweep exception for warrantless searches. (R. pp. 67-83). The judge denied the motion to suppress. (R. p. 83, line 6). The judge erred.

In an appeal from a motion to suppress evidence based on Fourth Amendment grounds, an appellate court may conduct its own review of the record to determine whether the evidence supports the circuit court's decision. See State v. Khingratsaiphon, 352 S.C. 62, 70, 572 S.E.2d 456, 460 (2002). Generally, a warrantless search is per se unreasonable and thus violative of the

Fourth Amendment's prohibition against unreasonable searches and seizures. State v. Bultron, 318 S.C. 323, 331, 457 S.E.2d 616, 621 (Ct. App. 1995) citing State v. Bailey, 276 S.C. 32, 274 S.E.2d 913 (1981).

However, a warrantless search will withstand constitutional scrutiny where the search falls within one of a few specifically established and well delineated exceptions to the Fourth Amendment exclusionary rule. Id. 318 S.C. at 331-32, 457 S.E. 2d at 621. In such cases, the burden is upon the State to justify a warrantless search. State v. Bailey, 276 S.C. 32, 35, 274 S.E.2d 913, 95 (1981).

Exigent circumstances can be the basis for an exception to the warrant requirement. The exigent circumstances doctrine provides an exception to the Fourth Amendments 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. Brown, 289 S.C. 581, 587, 347 S.E.2d 882, 886 (1986) (quoting Michigan v. Tyler, 436 U.S. 499, 98 S.Ct. 1942, 56 L.Ed2 486 (1978)). For instance, a warrantless search is justified under the exigent circumstances doctrine to prevent a suspect from fleeing or where there is a risk of danger to police or others inside or outside a dwelling. Minnesota v. Olson, 495 U.S. 91, 100, 110 S.Ct. 1684 109 L.Ed2d 85 (1990). In such circumstances, a protective sweep of the premises may be permitted. See Maryland v. Buie, 494 U.S. 325, 337, 110 S.Ct. 1093, 108 L.Ed.2d 276 (1990) (allowing a protective sweep of a house during an arrest where the officers have a reasonable belief based on specific and articulable facts that the area to be swept harbors an individual posing a danger to those on the arrest scene).

The State failed to present evidence that exigent circumstances existed to justify the officers entering a back bedroom and going upstairs after placing Nicholson in custody. In

trying to explain his actions in regard to the warrantless search, Investigator Weiner testified, "Continue a protective sweep of the residence again based on what type of warrant it was, the fact that I had been informed that he disappeared from view for several minutes before coming to the door. There was also a co-defendant in the case that was out on bond." (R. p. 10, lines 11-16). Investigator Weiner admitted that Nicholson was secured prior to the warrantless search. (R. p. 25, lines 3 – 23). He also admitted that he did not hear anybody "rummaging around upstairs." (R. p. 25, lines 20 – p. 26, line 1).

Investigator Hannieg testified, "Based on the burnt marijuana and the fact that we had an arrest warrant for a subject for armed robbery where there was other co-defendants, not knowing who was in the house, I stayed with the Defendant along with Investigator Fortner." (R. p. 43, lines 13-17). Investigator Hannieg then testified that Investigator Weiner went into a back bedroom located 20 to 25 feet from where Nicholson was secured. (R. p. 43, lines 21 – p. 44, lines 1-5). Investigator Hannieg admitted that he did not have any specific information indicating that there were other people in the home at the time of the arrest. (R. p. 58, lines 22 – p. 59, line 1). Investigator Fortner testified that the affidavit in support of the search warrant stated that a protective sweep of the residence was conducted to ensure there were no other subjects present in the house. (R. p. 66, lines 6-17).

Maryland v. Buie 494 U.S. 325, 337, 110 S.Ct. 1093, 108 L.Ed.2d 276 (1990) allows a protective sweep when the officers have a reasonable belief based on specific and articulable facts that the area to be swept harbors an individual who poses a threat to those on the arrest scene. In Buie, the Court wrote, "We conclude that the Fourth Amendment would permit the protective sweep undertaken here if the searching officer 'possesse[d] a reasonable belief based on 'specific and articulable facts which, taken together with the rational inferences from those

facts, reasonably warrant[ed]' the officer in believing,' Michigan v. Long, 463 U.S. 1032, 1049-1050, 103 S.Ct. 3469, 3480-3481, 77 L.Ed.2d 1201 (1983) (quoting Terry v. Ohio, 392 U.S. 1, 21, 88 S.Ct. 1868, 1880, 20 L.Ed.2d 889 (1968)), that the area swept harbored an individual posing a danger to the officer or others." 494 U.S. at 327-328, 110 S.Ct. at 1095. In the present case, the officers' general assertion that there may have been others present in the house is not sufficient under Buie to justify the warrantless search. The State failed to demonstrate that the officers possessed a reasonable belief based on specific and articulable facts that there was another in the house posing an immediate danger to justify the warrantless search of a back bedroom and upstairs when the officers were present on the scene for the purpose of serving an arrest warrant and Nicholson had already been secured.

The case is distinguished from State v. Abdullah, 357 S.C. 344, 592 S.E.2d 344 (Ct.App. 2004), where the South Carolina Court of Appeals found that exigent circumstances existed to justify a protective sweep. In Abdullah, officers responded to call in reference to a burglary and gunfire at an apartment. When the officers arrived at the apartment, the door was open and they saw a man inside. The officers also saw bullet holes in the walls of the apartment. When the man refused to cooperate with the officers, they placed him in custody and conducted a protective sweep looking into a bedroom where the man had been standing. The officer saw a gun, money, drug paraphernalia and bags of marijuana. The officers then sought a search warrant based on what they had seen during the protective sweep. Importantly, at the time of the sweep, the officers needed to determine if there were other victims or suspects inside the apartment because they were responding to a call in regard to a burglary and gun shots and observed bullet holes in the walls of the apartment. A warrantless search is justified when the police reasonably believe that there is a

person inside in immediate need of aid. Mincey v. Arizona, 437 U.S. 385, 392, 98 S.Ct. 2408, 57 L.Ed.2d 290 (1978).

In the present case the officers had no reason to believe that a victim or person in immediate need was in the back bedroom or upstairs. In the present case the officers had no reason to believe that there were others inside the house who posed a threat. The officers had ample time to seek a search warrant based on the alleged smell of marijuana upon entering the house. The officers, however, did not base the search warrant on the smell of marijuana. Instead, the search warrant was based on the marijuana seen during the illegal warrantless search in violation of the Fourth Amendment. The drugs and gun found pursuant to the search warrant are fruit of the poisonous tree and should have been suppressed. See Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963).

In affirming the conviction the South Carolina Court of Appeals wrote:

> The record supports the trial court's finding that the protective sweep was reasonable. Arresting officers attested they tried to arrest Nicholson for armed robbery, pursuant to a warrant, at the front door of his house. The officers stated they entered Nicholson's house while trying to handcuff him because he was uncooperative and backed into his house. The officers asserted Nicholson remained uncooperative after being handcuffed and, in addition, asked to read the arrest warrant, delaying the departure from the house. Moreover, their statements indicated that his sister's arrival at the front door contributed to Nicholson's unsettling behavior. The officers testified they were concerned dangerous persons were in the house, like a passenger from a car waiting in Nicholson's driveway with its engine running and the operator in the driver's seat, one of Nicholson's codefendants in the armed robbery who was out on bond, or others staying at the house. They also considered a protective sweep was necessary for their safety considering the crime for which Nicholson was being arrested and his disappearance from view before opening the door.

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While the officers testified that they were concerned that someone else was in the house, Officer Weiner admitted that he did not hear anyone upstairs and Officer Hannieg admitted that he did not have any specific information as to whether there was someone else in petitioner's house. (R. pp. 25-31; pp 55-58). Before the officers attempted to serve the arrest warrant, they spoke with the driver of the vehicle waiting in petitioner's driveway and learned that petitioner was probably at home. (R. p. 7). The officers had no specific articulable reason to believe that a passenger from that car was inside the house. The officers had absolutely no information to believe that a codefendant was inside the house.

"The Fourth Amendment permits a properly limited protective sweep in conjunction with an in-home arrest when the searching officer possesses a reasonable belief based on specific and articulable facts that the area to be swept harbors an individual posing a danger to those on the arrest scene." Maryland v. Buie 494 U.S. 325, 337, 110 S.Ct. 1093, 1099 - 1100 (1990). Once Nicholson was handcuffed just inside his front door, the officers had no reason to continue into the house, seat Nicholson at his table and search the entire house under the guise of a protective sweep.. Under the facts of this case, the warrantless search of a bedroom 20-25 feet away from where Nicholson was handcuffed and the search of the upstairs is not justified as a protective sweep.

CONCLUSION

Based on the above argument, the petition for writ of certiorari should be granted to allow further briefing on the issue.

Respectfully submitted,

Susan B. Hackett for
Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER.

This 7th day of May, 2012

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THE STATE,

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LORENZO R. NICHOLSON,

APPELLANT

CERTIFICATE OF SERVICE

I certify that a true copy of the petition for writ of certiorari and a copy of the appendix, in this case has been served on Mark R. Farthing, Esquire, and the S.C. Court of Appeals this 7th day of May, 2012.

Susan B. Hackett for
Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 7th day
of May, 2012.

Karen E Case (L.S.)
Notary Public for South Carolina
My Commission Expires: August 23, 2014.