STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from York County
Honorable Lee S. Alford, Circuit Court Judge

Appellate Case No: 2012-212042

THE STATE,

Respondent,

vs.

JOMAR ANTAVIS ROBINSON,

Petitioner.

BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

SALLEY W. ELLIOTT
Senior Assistant Deputy Attorney General
S.C. Bar No: 1871

Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

KEVIN S. BRACKETT
Solicitor, Sixteenth Judicial Circuit

1675 1A York Highway
York, South Carolina 29745
(803) 628-3020

ATTORNEYS FOR RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

Did the Court of Appeals properly affirm the trial court's denial of Appellant's motion to suppress when Apppellant had no reasonable expectation of privacy or property interest in the porch and when law enforcement officers acted reasonably in first observing and then investigating apparent drug activity?

STATEMENT OF THE CASE

Petitioner was charged with possession of cocaine base with intent to distribute in proximity (2008-GS-46-3141), possession of cocaine base with intent to distribute (2008-GS-46-3142), resisting arrest (2008-GS-46-3143), carrying a pistol unlawfully (2008-GS-46-3144), and possession of marijuana (2008-GS-46-3145). Petitioner was represented by counsel at his trial in absence February 9-11, 2009, before the Honorable Lee S. Alford, and a jury. The jury found the defendant guilty and the court sealed the sentences. Petitioner and his counsel came before the court for sentencing on March 12, 2009, and the court imposed sentences including life imprisonment without parole.

Petitioner timely served notice of appeal. After full briefing and oral argument, the South Carolina Court of Appeals affirmed the convictions and sentences. State v. Jomar Robinson, 396 S.C. 577, 722 S.E.2d 820 (Ct. App. 2012). Appellant submitted a petition for rehearing dated March 1, 2012, which was denied by the Court of Appeals by order filed March 29, 2012.

On June 8, 2012, Petitioner filed and served a Petition for Writ of Certiorari on one of the two issues presented on appeal to the Court of Appeals and Respondent submitted a Return to the Petition for Writ of Certiorari on June 15, 2012. This Court granted the Petition for Writ of Certiorari by order dated August 7, 2013. Petitioner filed and served the Brief of Petitioner on December 6, 2013. This Brief of Respondent follows.

ARGUMENT

The Court of Appeals properly affirmed the trial court's denial of Appellant's motion to suppress when Appellant had no reasonable expectation of privacy or property interest in the porch and when law enforcement officers acted reasonably in first observing and then investigating apparent drug activity?

At trial, Petitioner moved *in limine* to suppress his seizure by law enforcement officers arguing that officers improperly entered onto private property without a search warrant or exigent circumstances. R. pp. 6; 44 – 45. The trial court denied the motion finding that citizen complaints about illegal drug and weapon activity combined with specialized knowledge and experience of the officers, prior knowledge of drug activity in the area and immediate surveillance by officers of ongoing drug transactions by an individual wearing a black jacket and standing on the porch attached to apartment 122 supported reasonable suspicion that criminal activity was afoot to support an investigation and that the suspicion was heightened based upon the smell of green marijuana and observation of what officers believed to be an illegal pistol to allow for a pat-down for officer safety. The weapon and Petitioner's actions in response, including the struggle over the weapon and fight with the officer, created probable cause for Petitioner's arrest and the subsequent search of Petitioner's jacket and seizure of drug evidence. R. pp. 49-59. The trial court also determined Petitioner did not possess a reasonable expectation of privacy on the porch. R. pp. 58 - 59.

After the close of the state's case, the court declined to suppress and found that the investigation was based upon the officers having reasonable suspicion, going to the porch, smelling marijuana, asking for identification, and seeing the handle of the gun in the defendant's jacket. The safety pat-down resulted in the defendant's refusing to cooperate, fleeing, and officers finding the contraband. (Tr. p. 23-242).

In his brief to the Court of Appeals, Petitioner asserted that the trial erred in denying his motion to suppress the drug evidence seized from him because officers violated his right to be free from unreasonable searches and seizures when they entered the porch on which he was standing without a warrant and in the absence of exigent circumstances. The Court of Appeals affirmed the trial court's denial of the suppression motion opining that Petitioner failed to establish that he had a reasonable expectation of privacy in that he did not live at the apartment, was not an overnight guest, had no connection to the apartment, and did not ask the officers to leave. The Court of Appeals also opined that officers did not need a warrant or exigent circumstances because officers had reasonable suspicion that criminal activity was afoot upon seeing the drug transaction and the pistol in Petitioner's possession.

Appellant now contends the Court of Appeals erred in its decision because officers violated the Fourth Amendment when they stepped onto the curtilage of Apartment 122 for the purpose of searching and seizing the occupants and in concluding that law enforcement action was based upon reasonable suspicion. Respondent submits that our Court of Appeals properly affirmed the trial court's ruling that Appellant had no possessory interest or reasonable expectation of privacy on the porch of Apartment 122 and that officers properly stepped onto the porch, properly asked to speak with the occupants, and acted reasonably in investigating possible criminal activity.

Summary of Testimony

Appellant moved *in limine* to suppress his seizure by law enforcement officers. R. p. 6. During the *in camera* hearing, Officer Ligon testified that he and Officer Schettler went to the Hall Street Apartments about 10:30 PM in response to complaints about people carrying guns on the premises and drugs being sold. Officer Ligon also testified that another officer (Ervin) had also been conducting surveillance of the area and reported what, based upon training and experience, appeared to be drug transactions in the parking lot of that location. R. pp. 7-8; 18-19. Specifically, Ligon was informed by Ervin that an individual would leave to porch of 122 Hall Street Apartments and meet with individuals in vehicles as they pulled into the parking lot. R. p. 8. Evin reported to Ligon that a black male in baggy pants and a big black jacket was among a group of five individuals standing on the porch at the particular address at those apartments. He would leave the porch, go briefly to the window of vehicles pulling into the parking lot, and return to the porch. (Tr. pp. 8-9). Officers Ligon and Schettler went to the apartments and found the scene as described by Officer Ervin but noted that two of the men five men were wearing black jackets. R. pp. 9 – 10. Ligon testified that "[a]s we approached the porch, myself and Officer Schettler, as soon as coming up on the porch and encountering these five individuals, there was a strong odor of marijuana." R. p. 10, lines 10 – 14; 29 – 30; 33. Ligon stated that the two individuals fitting the description provided by Ervin and later identified as Petitioner and Laquaris Patton were "standing on the porch and we are right at the edge of the porch where they are standing on the porch right there." R. 11.

Ligon asked the two individuals for identification. R. 10. The two men had stepped away from the group and wore similar jackets. The two individuals were standing

on the porch and the officers were at the edge of the porch. R. p. 11. While looking at their identifications, Officer Ligon saw a pistol protruding from Petitioner's jacket pocket. R. pp. 11 – 12. He told the men that he smelled marijuana and saw the pistol and wanted to conduct a pat-down. R. p. 12; 33. Petitioner began backing away causing Ligon to become concerned. R. p. 12. As Petitioner began to back away, Ligon grabbed the pistol and Petitioner also grabbed the pistol R. 13. Ligon and Petitioner struggled for the pistol and a fight followed, and the two men went off the porch, with Petitioner assaulting Ligon while Ligon maintained control of the pistol in Petitioner's pocket. R. pp. 13; 35; Officer Ligon shouted "gun " several times and told Petitioner to stop and that Petitioner was under arrest. R. p. 36. Officer Ligon kept control of the pistol and stripped off Petitioner's jacket when Petitioner turned to run. R. p. 13 – 15; 35. The jacket fell to the ground with the pistol still inside, and Petitioner fled. (Tr. pp. 9-15; 30-33). Ligon pursued Petitioner and was assaulted again by Petitioner when he caught up with Petitioner. R. 16. Ultimately, Ligon was able to subdue Petitioner. R. 16.

Ligon testified that he and Officer Schettler were not dressed in uniform but wore their law enforcement badges around their necks to identify them as police officers. R. 16. He also stated that they used flashlights on the badges to identify themselves as officers and told the individuals that they were police officers. R. 16 17. Ligon testified that Petitioner did not present a concealed weapons permit with his identification or advise Ligon of the existence and location of the weapon both of which are required of individuals with valid concealed weapons permits. R. 16- 17.

Officer Schettler testified at the hearing that he recovered State's 9, 10, and 11 from the jacket - the gun, and what appeared to be marijuana, and crack cocaine. Tr. pp. 37; 40.

During trial Officer Ligon testified that he and another officer went to the Hall Street Apartments ["a little apartment complex and ... a lot of traffic in people hanging out on the porches"] about 10:30 PM in response to complaints about people carrying guns and drugs being sold. Another officer (Ervin) watching the area through binoculars had observed apparent drug sales to vehicles - a black male in blue jeans and a black jacket would come out from among a group of five persons in the area of a particular porch at the apartments and meet vehicles. Officer Ligon investigated and found the scene as described. About five people were out on the porch. But two of the men wore black jackets, and three other men separated themselves from the two. Officers Ligon and Schettler approached, identified themselves, and noted the strong odor of green marijuana coming from the defendant or the other man. Ligon asked both men for identification, and they complied. While looking at the identifications, Ligon saw a pistol hanging out of Petitioner's jacket pocket. (Tr. pp. 142-152; 174; 178; 180; 204-207; 211, lines 15-18; 218-219). He told the men that he wanted to do a pat-down. Petitioner tried to back away. Officer Ligon grabbed the weapon, and Petitioner got his hand on top of the officer's hand. A struggle for the pistol and fight followed. Officer Ligon kept control of the pistol and ripped off Petitioner's jacket. Officer Ligon told Petitioner he was under arrest. The jacket went to the ground, and Petitioner fled. (Tr. pp. 153-156; 173).

Officer Schettler searched the jacket and found the pistol, one bag containing loose crack and one bag with eleven individually wrapped crack rocks (State's Exhibit 11), and marijuana (Defendant's Exhibit 1). Petitioner objected only to the pistol [State's Exhibit 9], pursuant to his earlier position. (Tr. p. 226, line 20 - p. 231, line 3). State's Exhibit 14, the chemist's drug report of State's Exhibit 11, was admitted with Petitioner's express want of any objection. Petitioner objected to States Exhibit 11, the drugs themselves, pursuant to his earlier objection. (Tr. pp. 256 - 261). The chemist testified from her report that she found State's Exhibit 11 to contain .84 grams and 2.97 grams of cocaine base or crack cocaine, and Defendant's Exhibit 1 was 3.2 grams marijuana. (Tr. p. 262).

A defense witness, and friend of Petitioner, was standing in the group of individuals on the porch when the police arrived. The police announced smelling the green marijuana immediately when getting out of their vehicle - at least ten feet away from the porch. (Tr. pp. 289-291; 301). The witness verified that neither he nor Petitioner lived in the apartment complex and stated that Petitioner's girlfriend lived in another building. He also verified that two of the other three individuals also lived in locations other than the apartment complex. R. 207; 219; 221; 223; 233.

Defendant's Objections to Seized Evidence

Before trial Petitioner wanted to suppress the police seizing him. (Tr. p. 6). Appellant said the police lacked a search warrant or exigent circumstances or observation of a crime to enter onto private property. Also Officer Ligon showed his badge and thereby "actually seized the individuals at that moment," and had placed himself illegally when he saw the gun. He also contended that Ligon's claim of smelling marijuana was

not credible. (Tr. pp. 44 - 45). He further argued that the officers did not walk up to just talk; rather, they went with the intent to seize and seized the persons without reasonable suspicion - after that they had the encounter and struggle. (Tr. pp. 47 - 48).

Petitioner recognized the necessity for a contemporaneous trial objection to preserve pretrial rulings for appellate review and specifically indicated to the trial judge the manner in which he would note his prior objection to the evidence. (Tr. pp. 64 - 65).

Petitioner introduced the marijuana found in the jacket (Tr. pp. 89-90; 125-126, line 5) and questioned the officer about his ability to have smelled it. (Tr. pp. 91 - 95). There was no objection at trial to Officer Schettler's trial testimony about searching Petitioner's jacket and finding one bag of loose crack and one bag with eleven individually wrapped crack rocks (State's Exhibit 11). (Tr. p. 151, line 20 - p. 156, line 3). Further, at trial, State's Exhibit 14 - the chemist's drug report about State's Exhibit 11 - was admitted with Petitioner's affirmative statement that he had no objection to admission of the drug report. Petitioner later objected to States Exhibit 11, the drugs themselves, pursuant to his earlier objection. (Tr. pp. 174 - 179). The chemist testified from her report that she found State's Exhibit 11 to contain .84 grams and 2.97 grams of cocaine base or crack cocaine, and Defendant's Exhibit 1 was 3.2 grams marijuana. (Tr. p. 180).

After the close of the State's case Petitioner wanted to suppress "items" (apart from the marijuana) since the officers seized Petitioner without reasonable suspicion. (Tr. pp. 235 - 242).

Trial Court Rulings

In limine the trial court denied the motion to suppress. The police were investigating apparent drug activity, and a surveillance officer had seen a man approaching vehicles in a manner indicating possible drug activity. An officer saw two men who met the description of a man observed approaching cars. The court found there was reasonable suspicion for the officers to approach and request identification. When Petitioner offered identification [showing a different address on another street], the officer smelled green marijuana - providing additional ground for reasonable suspicion - and saw the pistol hanging out of Petitioner's pocket. There was then probable cause to believe that the defendant illegally possessed the weapon, and the officers had a right to search. The trial court denied the motion to suppress. (Tr. p. 49, line 24 - p. 59, line 16).

After the close of the state's case, the trial court declined to suppress and found that the investigation was based upon the officers having reasonable suspicion, going to the porch, smelling marijuana, asking for identification, and seeing the handle of the gun in Petitioner's jacket. The safety pat-down resulted in Petitioner refusing to cooperate, fleeing, and the police finding the contraband. (Tr. p. 234 - 242).

On appeal, Petitioner contends that the police entered the porch area of an apartment complex without a warrant and in the absence of exigent circumstances in violation of his right to be free from unreasonable searches and seizures. Petitioner then asks whether the Court of Appeals erred in affirming the trial court's denial of his motion to suppress the drugs.

Discussion

At trial the substance of Petitioner's grounds for suppression of the seized evidence was that the police lacked any reason to approach and to investigate the group of individuals standing on the porch of Apartment 122. Respondent submits the officers clearly approached the apartment to investigate tips and law enforcement observations of drug and illegal gun sale activity possibly by at least one of the individuals on the porch. Officers properly accessed the front porch of Apartment 122 as any other citizen or visitor might do to conduct an inquiry in furtherance of the investigation. Upon approaching the porch, the odor of green marijuana became obvious to the officers and heightened their suspicions that illegal activity was afoot. Officers asked for identifications from the individuals and the individuals did not refuse, retreat into the apartment, or ask the officers to leave. Instead, the individuals remained in place and complied with the request. Petitioner offered identification which showed a different address on another street, the officer smelled green marijuana and saw the pistol. Probable cause to believe that the defendant illegally possessed the weapon existed, and the officers had a right to search. Respondent submits that the conduct of the officers was reasonable and did not constitute a violation of Petitioner's Fourth Amendment rights.

The admission of evidence is within the discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. State v. Wright, 391 S.C. 436, 706 S.E.2d 324 (2011). An abuse of occurs when the trial court's ruling is based upon an error of law or upon a factual conclusion that is without evidentiary support. Id. Appellate courts sit to review errors of law only in criminal cases. State v. Baccus, 367

S.C. 41, 625 S.E.2d 216 (2006). When reviewing a Fourth Amendment search and seizure issue, the appellate court is limited to determining if there is any evidence to support the trial court's findings and must affirm if there is any evidence to support the rulings. Id.; State v. Flowers, 360 S.C. 1, 598 S.E.2d 725 (Ct.App. 2004); State v. Brockman, 339 S.C. 57, 528 S.E.2d 661 (2000).

The Fourth Amendment protects "[t]he right of people to be secure in their person, houses, papers, and effects, against unreasonable government searches and seizures . . . ." U.S. Const. amend IV. This Court and the United States Supreme Court have opined that searches and seizures inside a home without a warrant are presumptively unreasonable absent exigent circumstances. Kentucky v. King, __ U.S. __, 131 S.Ct.1849 (2011) citing Brigham City v. Stuart, 547 U.S. 398 (2006); State v. Herring, 387 S,C, 201, 692 S.E.2d 490 (2010) citing.U.S. v. Karo, 469 U.S. 705 (1984). The Fourth Amendment, then, protects an individual's home and curtilage of the home from unreasonable government intrusion. Florida v. Jardines, __U.S. _, 133 S.Ct. 1409 (2013). "[T]he Fourth Amendment has drawn a firm line at the entrance to the house." Kentucky v. King, 131 S.Ct. at 1856.

However, the touchstone of the Fourth Amendment is reasonableness subjecting the warrant requirement to exceptions. Id.; Florida v. Jimeno, 500 U.S. 248 (1991). When analyzing Fourth Amendment matters, our courts consider the reasonableness of law enforcement conduct. Id. at 250 (citing Katz v. U.S., 389 U.S. 347 (1967). Only unreasonable searches and seizures are constitutionally prohibited. State v. Foster, 269 S.C. 373, 237 S.E.2d 589 (1977) citing Terry v. Ohio, 392 U.S. 1 (1968). The inquiry is whether the search or seizure being challenged violated the rights of a defendant who

seeks to have the evidence excluded at trial. Rakas v. Illinois, 439 U.S. 128 (1978). "It is recognized that law enforcement officers may briefly detain and question a person upon a reasonable suspicion, short of probable cause for arrest, that he is involved in criminal activity." State v. Foster, 269 S.C at 378, 237 S.E.2d at 591.

The United States Supreme Court has held that the Fourth Amendment does not require an officer to have a warrant or reasonable suspicion to approach a home, knock on the door, and conduct an inquiry if the occupant opens the door because the officer does no more than a private citizen might do. Florida v. Jardines, __U.S. _, 133 S.Ct. 1409 (2013); see also State v. Wright, 391 S.C.at 436, 706 S.E.2d at 324. The right to do so is based upon an implied license permitting "solicitors, hawkers, peddlers" and other visitors to approach another person's home. This implied license has been held to extend to law enforcement officers if accomplished in a reasonable manner consistent with the way any citizen might approach the home. Id.; see also Kentucky v. King, __U.S. __, 131 S.Ct. 1849 (2011). "When law enforcement officers who are not armed with a warrant knock on a door, they do no more than any private citizen might do. And whether the person who knocks on the door and requests the opportunity to speak is a police officer or a private citizen, the occupant has no obligation to open the door or to speak." Kentucky v. King, 131 S.Ct at 1862 citing Florida v. Royer, 460 U.S. 491 (1983). This implied license typically permits the visitor, including law enforcement officers, to approach the home by the front path, promptly knock on the door, wait briefly, and then leave if there is no response. Id.

The United States Supreme Court has determined that a police officer may approach a home and knock in this manner because it is no more than a citizen would do.

Florida v. Jardines, 133 S.Ct. at 1416; Kentucky v. King, 131 S.Ct. at 1849. It has also been recognized that officers sometimes must contact occupants of a residence at a location other than the front door if done in a reasonable manner. U.S. v. Raines, 243 F.3d 419 (8th Cir. 2001). The occupant has no obligation to open the door to the officer or anyone else if the occupant so chooses. The officer may approach a residence, knock, and ask questions unless the occupant asks the officer to leave. Rogers v. Pendleton, 249 F.3d 279 (4th Cir. 2001); see also Florida v. Bostick, 501 U.S. 429 (1991)(stating officer may approach a citizen in an effort to speak with or question the person without implicating the Fourth Amendment as long as a reasonable person under the circumstances would feel free to disregard the officer and leave if he or she so chooses); State v. Foster, 269 S.C. at 379, 237 S.E.2d at 591 (stating there is nothing in the constitution preventing an officer from addressing questions to a person on the street); State v. Rivens, 679 S.E.2d 145 (N.C.App. 2009)(officers have the right to approach a person's residence to inquire whether the person is willing to answer questions). A seizure does not occur merely because an officer approaches an individual and asks questions. Florida v. Bostick, 501 U.S. at 434.

If the occupant opens the door, the officer cannot enter the premises unless the occupant permits entry. Kentucky v. King, 131 S.Ct. 1849 (2011). However, in U.S. v. Cephas, the Fourth Circuit Court of Appeals held that a voluntary response to an officer's knock at the front door generally does not implicate the Fourth Amendment and, if an occupant opens the door, he voluntarily exposes to the public any odors and view as any individual standing in the door could perceive. 254 F.3d 488, 494 (4th Cir. 2001). Any observation made from the areas included within the implied consent is permissible under

the Fourth Amendment. Robinson v. Commonwealth, 625 S.E.2d 651 (Va.App. 2006). Moreover, and contrary to Petitioner's suggestion that this Court must analyze the officers' subjective intent in this case, the United States Supreme Court has "'repeatedly rejected' a subjective approach, asking only whether 'the circumstances, viewed *objectively*, justify the action.'" Kentucky v. King, 131 S.Ct. at 1859; see also Brigham City v. Stuart, 547 U.S. at 1948; U.S. v. Mendenhall, 446 U.S. 544 (1980); Whren v. U.S., 517 U.S. 806 (1996). Also, contrary to Petitioner's contention that officers in this case were required to obtain a warrant rather than approach Apartment 122, the United States Supreme Court has held that officers are not under a constitutional duty to halt investigations to obtain a warrant instead of knocking on the door and seeking to speak with the occupant. The Court recognized that there were many proper reasons officers might not want to seek a search warrant as soon as the bare minimum of evidence to support probable cause is acquired. Kentucky v. King, 131 S.Ct. at 1860.

Respondent submits, first, that although the front porch is considered the curtilage of Apartment 122, Florida v. Jardines, 133 S.Ct. at 1409, the officers in this case did not need reasonable suspicion or probable cause to step onto the porch to investigate an anonymous tip and observations of possible illegal drug or gun sale activity but properly approached and entered onto the porch to speak with its occupants just as any citizen might do. No Fourth Amendment search was involved by the officers' conduct of merely by approaching the apartment in order to speak with the occupants. Kentucky v. King, 131 S.Ct. at 1849; see also Florida v. Jardines, 131 S.Ct. at 1416; U.S. v Cephas, 254 F.3d at 493; State v. Wright, 391 S.C. 436, 706 S.E.2d 324 (2011). Contrary to Petitioner's claim, when officers go to the door of a home for the purpose of inquiry or

interview as they are permitted to do under the authority referenced above, the officers are not trespassers. State v. Rivens, 679 S.E.2d at 148. The officers properly identified themselves as officers orally and by shining flashlights on their badges so as not to alarm the individuals standing on the porch as they approached. The officers in this case used the parking area and normal path to the front door which included the unenclosed front porch on which Petitioner was standing. Unlike in Jardines upon which Petitioner relies, the officers did not exceed the scope of the implied license by using a drug dog or other perception enhancing device unavailable to the average citizen but used only the normal senses of sight and smell just like any other citizen would do. The officers also did not veer from the normal route to the front door, meander, or take a circuitous route, look into any windows or do anything but identify themselves, walk directly to the front porch and request information from the individuals standing there. There were no signs warning trespassers not to enter or other impediments restricting access to the apartment or the porch. As confirmed in Florida v. Jardines, the United States Supreme Court in Kentucky v. King established that law enforcement officers do not engage in a Fourth Amendment search when officers approach a house to speak with the occupants because we are all invited to do that. The mere purpose of discovering information while doing so does not violate the Fourth Amendment. 133 S.Ct. at 1416. The officers in this case did not exceed their investigative authority but only used the senses any ordinary citizen would have available.

Moreover, the officers approached the apartment to **investigate** and had reason to do to. Officers received a number of complaints and tips about illegal drug and gun sales at the apartment complex and previously made a number of drug arrests in that area

generally. Additionally, an experienced drug enforcement officer observed a person within the group on the porch of Apartment 122 conducting what appeared to be drug sales shortly before the arrival of the two officers. It was completely reasonable for the officers to travel to the scene to investigate the matters based upon previous complaints, the anonymous tip received that night, and observations of an officer stationed near the scene.

Upon arrival, the officers acted reasonably by identifying themselves as law enforcement officers orally and by shining flashlights on their badges so that the occupants of the porch of Apartment 122 knew who they were. Contrary to Petitioner's contention, the officers did not attempt to deceive or coerce Petitioner or the other men on the porch but announced their presence forthrightly to clearly identify themselves to Petitioner and the other occupants of the porch in a permissible manner. See Kentucky v. King, 131 S.Ct. at 1849 (stating officers may have good reason for the manner in which officers announce or knock and this does not constitute a Fourth Amendment violation). The officers merely approached the occupants on the porch to make contact and speak with them in furtherance of the investigation. Upon approaching, the officers immediately smelled the odor of green marijuana coming from Petitioner or the other individual wearing a black jacket. The odor of green marijuana was clear and obvious to the officers' normal senses as it would have been to any citizen. The smell of green marijuana heightened the officers' suspicion of illegal drug activity.

The officers were permitted to ask questions and request identification in the course of that investigation. State v. Foster, 269 S.C. at 380, 237 S.E.2d at 592; 3 W. LaFave, Search and Seizure § 9.2, pp. 36-37 (1978)(interrogation is the most common

investigative technique utilized in a *Terry* type stop and may include both a request for identification and inquiry addressing suspicious conduct of person detained). The officer observed a gun hanging from Petitioner's jacket and knew Petitioner had not notified him of the weapon or provided a concealed weapons permit with his identification as is required by law for a lawful concealed weapons permit holder. The observation of the gun was probable cause for arrest and more than sufficient for what the officer announced as a pat-down search. The subsequent discovery of the contraband in the jacket cannot be seriously challenged.

Petitioner was fully aware that officers were approaching, did not refuse their entry onto the porch or ask the officers to leave, did not retreat into the apartment, and had not erected any impediments to access. The officers' action in going to the apartment to investigate was reasonable as was the officers' conduct after arriving. Because officers entered the porch for a legitimate purpose in an objectively reasonable manner, the officers' entry did not violate the Fourth Amendment. There was no error.

Moreover, as the trial court and Court of Appeals properly concluded, Petitioner was not in a position to challenge the conduct of the officers. Petitioner cites to nothing in the record to show he had a connection with the premises or apartment lessee to allow him to assert a reasonable expectation of privacy or property interest in the open porch of Apartment 122. Petitioner lived in another area of town and his girlfriend lived in another building of the apartment complex. There was no showing that any of the other individuals on the porch were visiting or lived there. Petitioner did not establish that he was a guest at the apartment. Petitioner also failed to show he was on the porch with the consent or invitation of the lessee of the apartment. In fact, there was no evidence that

the apartment was occupied at all. Because Petitioner failed to establish he had a connection with the apartment by way of property interest or legitimate expectation of privacy, he cannot challenge the officers' action. The only evidence of Petitioner's connection to the apartment is his presence on the porch for a short period of time while he sold drugs.

Contrary to Petitioner's claim, the burden of showing the connection to the premises was on Petitioner. See State v. Bowie, 360 S.C. 210, 600 S.E.2d 112 (Ct.App. 2004) (stating that a defendant seeking to suppress evidence on Fourth Amendment grounds bears the burden of proving he had a reasonable expectation of privacy in the area searched or item seized); State v. Crane, 296 S.C. 336, 372 S.E.2d 587 (1988)(stating that because defendant cannot make the threshold showing of a legitimate expectation of privacy in connection with the searched premises, he is not entitled to present a challenge to the search); State v. McKnight, 291 S.C. 110, 352 S.E.2d 471 (1987)(defendant seeking to suppress evidence on Fourth Amendment grounds must establish his own rights were violated by demonstrating a legitimate expectation of privacy on the searched premises).

Petitioner also asserts the Court of Appeals erred in refusing to address the merits of the marijuana search. As noted in its Return to Petition for Certiorari, Respondent submits the issue is not properly before this Court. Petitioner failed to raise this issue in his Petition for Rehearing. The argument and issue should not be considered by this Court. See Rule 242(d)(2), SCACR. Further, the Court of Appeals followed substantial precedent in holding that Petitioner having introduced the marijuana into evidence may not complain about its admission on appeal. State v. Robinson, 396 S.C. 577, 722 S.E.2d

820 (Ct.App. 2012); accord Ohler v. U.S., 529 U.S. 753 n. 3 (2000) (generally a party cannot introduce evidence and then complain on appeal that evidence was erroneously admitted); State v.Washington, 315 S.C. 108, 432 S.E.2d 448 (1992). Further, Petitioner introduced the marijuana found in the jacket (Tr. pp. 89-90; 200-201, line 5) and questioned the officer about his ability to have smelled it. (Tr. pp. 91 - 95). A defendant cannot introduce evidence seized by the police and claim that other evidence introduced by the state - from the same seizure - was introduced in violation of his constitutional rights. State v. Dicapua, 373 S.C. 452, 646 S.E.2d 150 (Ct. App. 2007)(defendant cannot preserve objection for appellate review when he raises an objection through an *in limine* motion to suppress, later states he has no objection when evidence is introduced at trial, and later seeks to renew objections by means of post-verdict motions and motion for new trial). When a defendant both objects to evidence and offers similar evidence in his defense, the objection is waived. State v. Bullock, 235 S.C. 356, 375, 111 S.E.2d 657 (1959), overruled on other grounds, State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991). Also, while Petitioner objected to the introduction of the actual drugs, he had no objection either to the officer's testimony of finding the bags of crack in the defendant's jacket or the chemist's report about the drugs. The actual drugs were cumulative to other evidence, and, again, there was no possible error. State v. Martucci, 380 S.C. 232, 669 S.E.2d 598 (Ct. App. 2008), citing State v. Schumpert, 312 S.C. 502, 507, 435 S.E.2d 859 (1993)(finding any error in the admission of evidence cumulative to other evidence admitted without objection is harmless).

Lastly, Respondent submits that Petitioner's misapprehends the record when he accuses the trial judge of improperly considering economic class when ruling on the

motion. In fact, the questions by the trial court were clearly intended to clarify for the location and accessibility to the parking area and apartment by citizens generally in order to assess the propriety of the officers' conduct when approaching the porch. These are appropriate considerations as can be seen from the discussion in the cases cited by the parties in determining whether law enforcement action was reasonable and mirrored that of an ordinary citizen when approaching a home. See Nieminski v. State, 60 So.3d 521 (Fla. 2011) (stating evidence developed for a search warrant during a "knock and talk" after officers walked through an unlocked gate to approach the door did not violate the Petitioner's expectation of privacy); Robinson v. Commonwealth, 625 S.E.2d 651 (Va.App. 2006) (stating the implied invitation to have members of the public intrude upon areas of a homeowner's property extends only to those areas a visitor could reasonably be expected to cross when approaching the residence in an ordinary attempt to speak with the occupants such as the driveway, parking area, sidewalks, pathways and front porch). Economic status was not a matter in discussion but, rather, the map and configuration of the complex in which the apartment was located was the subject of the inquiry. Moreover, in order to invoke his constitutional rights, Petitioner could merely ask the officers to leave, refuse to answer questions or retreat into the apartment, all of which are unrelated to economic status. This issue was certainly not raised to or ruled upon at trial and cannot be considered on appeal. State v. Hudgins, 319 S.C. 233, 460 S.E.2d 388 (1995).

CONCLUSION

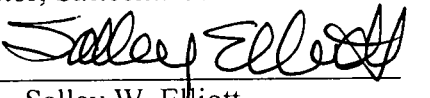
For the foregoing reasons, this Court must affirm the decision of the Court of Appeals and Appellant's conviction.

Respectfully submitted,

ALAN WILSON
Attorney General

SALLEY W. ELLIOTT
Senior Assistant Deputy Attorney General

KEVIN S. BRACKETT
Solicitor, Sixteenth Judicial Circuit

BY: 
Salley W. Elliott
S.C. Bar No: 1871

Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

April 7, 2014

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from York County
Honorable Lee S. Alford, Circuit Court Judge

Appellate Case No: 2012-212042

THE STATE,

Respondent,

vs.

JOMAR ANTAVIS ROBINSON,

Petitioner.

PROOF OF SERVICE

I, Angela Bennett, certify that I have served the within Brief of Respondent to Petitioner by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

David Alexander, Esquire
South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589

I further certify that all parties required by Rule to be served have been served.
This 7th day of April, 2014.

ANGELA BENNETT
Administrative Assistant

Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211
(803) 734-3727