STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. SUPREME COURT

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas
Honorable Alexander S. Macaulay, Circuit Court Judge

Appellate Case No. 2014-001449

STATE OF SOUTH CAROLINA,

RESPONDENT,

v.

BENJAMIN NEWMAN,

PETITIONER.

PETITION FOR WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

Counsel for the Petitioner certifies, pursuant to Rule 242(d)(1), SCACR, that the Petition for Rehearing was made and finally ruled on by the South Carolina Court of Appeals on June 3, 2014.

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Questions Presented

Issue I.

Did the Court of Appeals err in affirming Petitioner's convictions and sentences where the Trial Court erred in denying his Motion to Suppress the drug evidence obtained as a result of an unlawful search?

ISSUE II.

Did the Court of Appeals err in affirming Petitioner's conviction nd sentence for trafficking in cocaine where record below supports Petitioner's position that the Trial Court erred in failing to grant his Motion for a Directed Verdict on the charge of Trafficking in Cocaine, 400 grams or more?

Statement of the Case

Petitioner was arrested in Lexington County on June 5, 2011 on charges of Trafficking in cocaine, 100 grams or more, but less than 200 grams, Trafficking in ice, crank or crack – 200 grams or more, but less than 400 grams, Trafficking in cocaine, 400 grams or more, and Trafficking in marijuana, 10 pounds or more, but less than 100 pounds. He proceeded to trial by jury on October 15-17, 2012, in Lexington County Court of General Sessions, before the Honorable Alexander McCaulay, on indictments 2011-GS-32-02259, First Offense Trafficking in marijuana, 10 pounds or more, but less than 100 pounds and 2011-GS-32-0261, Trafficking in cocaine, 400 grams or more.

At the conclusion of said jury trial, Petitioner was convicted on both indictments on October 17, 2012, and received a sentence of Twenty-Five (25) years incarceration in the South Carolina Department of Corrections on Indictment 2011-GS-32-0261 and a concurrent Ten (10) years incarceration in the South Carolina Department of Corrections on Indictment 2011-GS-32-0259. Petitioner filed and served his timely Notice of Intent to Appeal his conviction on October 23, 2012. Following briefing by both sides, the Court of Appeals affirmed Petitioner's convictions and sentences. See, *State v. Benjamin J. Newman*, Up. Op. No. 2014-UP-034, filed January 29, 2014. Petitioner filed Petition for Rehearing on February 24, 2014. The Respondent filed a Return to said Petition on April 23, 2104. The Petition for Rehearing was denied by Order of the Court of Appeals Filed June 3, 2014. Petitioner now prays that the Writ might be granted and that he be afforded to fully brief the issues summarized herein. Petitioner certifies that the issues addressed herein were addressed in his Petition for Rehearing which was denied by the Court of Appeals.

ARGUMENT

Issue I.

Did the Court of Appeals err in affirming Petitioner's convictions and sentences where the Trial Court erred in denying his Motion to Suppress the drug evidence obtained as a result of an unlawful search?

At Petitioner's trial, the testimony was that a team of officers entered the residence in question after audio surveillance of a drug transaction between Petitioner, a confidential informant and undercover police officer. According to the testimony adduced at trial, Petitioner ran out of the back door of the residence just as the SWAT team entered the front of the residence. ROA at p.202, ll. 2-15. Despite clearly witnessing Petitioner go out the back door of the residence, the record below indicates that the a confidential informant, the undercover agent and some members of the SWAT team remained inside the residence for between fifteen and twenty minutes while they waited for a search warrant for this residence. ROA at p.39, ll. 10-22. It was during this time period when officers allegedly observed the drugs involved in this case in plain view.

Petitioner would respectfully submit that once the residence was checked for any immediate threat to the officers at the scene, law enforcement had no authority to remain inside this residence pending their receipt of a search warrant. At trial, Agent Paige Barnes testified that she observed the cocaine in this case in an open book bag after looking near the counter where she had been told the cocaine was located. Her testimony actually indicates that law enforcement waited inside the house for approximately *thirty* minutes before the search warrant arrived. ROA at p.293, l. 21- ROA at p.298, l. 24. In addition, the audio recording of this operation documented a conversation between law enforcement officers at the scene in which it was stated that ***"officers were searching around for cocaine prior to the search warrant being***

there." ROA at p.247, ll. 5-7. This recording was entered in its entirety during the pre-trial hearing on Petitioner's Motion to Suppress. It was marked and introduced as Court's Exhibit No. 7. ROA at p.42, ll. 5-24.

The Fourth Amendment to the United States Constitution protects individuals from unlawful searches and seizures. S.C. Code Ann., §17-13-140, reflects this same standard provided by our United States Constitution. *State v. Covert*, 368 S.C. 188, 628 S.E.2d 482 (Ct. App. 2006); *State v. Jones*, 342 S. C. 121, 536 S.E.2d 675 (2000). In the present matter, the trial court clearly erred when it failed to suppress the drug evidence improperly seized during a search of 433 Longview Rd, in Lexington County, prior to the procurement of a search warrant by law enforcement. On the facts of this case, the failure of law enforcement to obtain a search warrant was more than a procedural mistake, it constituted a deliberate violation of Petitioner's Constitutional rights.

According to the testimony adduced at trial, Agents of the Lexington County Multi-Agency Narcotics Task Force (NET team) conducted an undercover operation utilizing a confidential informant to allegedly broker a drug transaction with Petitioner on June 5, 2011. ROA at p.25, l. 8-13. When the Lexington County SWAT team entered the residence at 433 Longview Road, they immediately discovered that Petitioner had run outside the back door of the home. He was subsequently located in the rear f the property. ROA at p.31, l. 21-25, p. 32, l. 1-5. After Petitioner was placed under arrest, Agent Tracy obtained a search warrant for the premises. ROA at p.32, l. 10-25. The record below supports Petitioner's position that the search warrant was actually obtained and delivered to the scene a significant period of time after Petitioner's arrest and after the discovery of the drug evidence in this case. ROA at p.39, l. 10-22.

During the pretrial hearing on Petitioner's motion to suppress drug evidence, several officers testified before the Court regarding the circumstances surrounding the arrest, search, and subsequent search warrant for 433 Longview Rd. Agent Slice with the NET team actually claimed in his testimony that no search was conducted while they waited for the Search Warrant to be signed. ROA at p.41, l. 5-10. Clearly, however, this claim was directly contradicted by an audio recording made by another office. That audio recording contains a conversation amongst the NET team officers in which they can be heard to state that ***"officers were searching around for cocaine prior to the search warrant being there."*** ROA at p.247, l. 5-7 The audio recording in its entirety was offered as an exhibit (Court's Exhibit 7) during the pretrial hearing ROA at p.42, l. 5-24. Officer Carver, also with the NET team, admitted in his trial testimony that he, along with Agents Barnes and Setree, were sitting inside the residence for a period of time waiting on the search warrant. He claimed, however, that nobody was looking around or searching the residence while they waited. ROA at p.90, l. 5-23. Agent Setree contradicts the testimony of both the previous officers. In his testimony he stated that there was something ***"chaotic about this whole search thing"*** and that officers were in fact searching all around for drug evidence. ROA at p.97, l. 19-25, p. 98, l. 1-23 and ROA at p.106, l. 20-23. It was his testimony that established that the drug evidence in question was located by Agent Barnes ROA at p.107, l. 21-23. This testimony directly contradicted the earlier claim by Agent Carver that he, Agent Barnes, and Agent Setree, were not looking around or searching at all. Agent Barnes testified that she was originally outside during the drug transaction but, after monitoring "the transmission between the undercover, and Benji Newman ands the CI, she went into the house for the sole purpose of getting Agent Carver out of the residence. Agent Barnes forthrightly admitted that after she retrieved Agent Carver they were all outside for about five minutes before they went back into the house. She described there being a commotion because the officers

could not locate the cocaine. Agent Barnes went back into the house in search of the drug evidence in response to statements made by Agent Carver prior to them re-entering the dwelling. ROA at p.294, l. 11 - p. 297, l. 11.

The testimony offered from the State's witnesses was at best contradictory. The admissions by Agents Setree and Barnes, as well as those preserved on the audio tape, confirm that law enforcement in fact was searching inside and out of this residence trying to locate drug evidence before the search warrant was obtained.

In a case very similar to Petitioner's, our Supreme Court examined the admissibility of evidence obtained when law enforcement officers gained entry into a dwelling and subsequently conducted a search prior to obtaining a search warrant. In that case, the State claimed that speed was of the essence. In that case, this Honorable Court found that where a location has been secured it would be reversible error to allow evidence of the search, and the evidence found as a result of that search, into evidence at a trial. *State v. Vice*, 259 S. C. 30, 190 S.E.2d 510 (1972) *See also, Stoner v. California*, 376 U.S. 483 (1964) The record below is crystal clear. At the time the drugs in question were located, the location had been secured by the Lexington County SWAT team, as well as the NET team, Petitioner had been taken into custody and there were no exigent circumstances requiring a speedy, warrantless search.

In addition to claiming no actual search was conducted, the State argued that to the extent there was a search, the drug evidence was only located in plain view. These two arguments are not only inconsistent with each other, they also don't match up with the actual Return filed with the search warrant. Specifically, the Return specifically lists the ***"quantity of off-white material consistent w/cocaine located in area by kitchen by Tucker (Barnes)."*** As evidence taken ***"pursuant to the warrant."*** ROA at p.8. Agent Barnes specifically admitted going back in the house to ***"look"*** for the cocaine in a specific area of the residence based upon what she had been

told by Agent Carver concerning where he last saw the cocaine. ROA at p.297, l. 1-4. She continued to ***"look"*** for ***"several minutes."*** ROA at p.306, l. 24-25.

Petitioner respectfully asserts that the drug evidence in question should have been suppressed in response to Petitioner's Motion to Suppress. The officers in this case went back into the residence in question well after they panned the area to insure their safely and the security of any evidence in the dwelling. Petitioner maintains that several minutes of ***"looking"*** without a warrant constituted a search and should have resulted in the suppression of the evidence, discovered pursuant to that search. The fact that the drugs in question were not readily viewed out in ***"plain sight"*** is readily established by Agent Barnes' admission that she went back in the house to search further for these drugs because they ***"could not locate"*** the drugs. The fact that a team of experienced narcotics agents did not initially locate the drugs, even when searching for them, refutes any notion that the drugs were located in plain view where they would have been observed by anyone looking around the room for legitimate purposes. Even assuming *arguendo* that the cocaine in the backpack was visible by someone looking into the backpack from above its location, that should not have defeated Petitioner's Motion to Suppress where any legitimate reason for law enforcement being in the residence had been exhausted, Petitioner was in custody and the only reason Agent Barnes went back into the house before the search warrant was obtained was expressly to look for drug evidence. During Petitioner's trial, Agent Slice testified that the deal in this case was for Petitioner to exchange 25 ounces of cocaine for 50 pounds of marijuana. He clearly testified that the deal ***"went down"*** on Sunday, June 5, 2011 at ***"around 1:30, 2 o'clock".*** ROA at p.129, ll. 8 – 25. In his testimony, this officer strongly implies that he found and seized the drug evidence in this case after the search warrant arrived. ROA at p.151, ll. 1 – 11 and ROA at p.154, ll. 3 – 8. On closer inspection however, it is clear that Agent Slice did not ***"find"*** the book bag and observe the cocaine in plain

view inside the bag, he was shown this evidence by Agent Carver, whose ruffled nerves about the location of the cocaine had previously been soothed when Agent Barnes located it for him before the search warrant was obtained. ROA at p.154, ll. 10 – 15.

The actions of law enforcement in this case violated Petitioner's rights pursuant to the Fourth and Fourteenth Amendments to the United States Constitution and the evidence found as a result of their actions should have been suppressed.

ISSUE II.

Did the Court of Appeals err in affirming Petitioner's conviction nd sentence for trafficking in cocaine where record below supports Petitioner's position that the Trial Court erred in failing to grant his Motion for a Directed Verdict on the charge of Trafficking in Cocaine, 400 grams or more?

When considering the Trial Court's refusal to grant a Defendant's directed verdict motion, the reviewing appellate court must view the evidence in the light most favorable to the State. *State v. McHoney*, 344 S.C. 85, 544 S.E.2d 30 (2001). On the very unusual and narrow facts of this case, Petitioner asserts that the trial court erred in failing to grant his Motion for a Directed Verdict of Acquittal on the cocaine charge he was convicted and sentenced for. The Trial Court erred in denying Petitioner's Motion for a Directed Verdict when made at the conclusion of testimony both the State's and Petitioner's cases. (R. p 324, l. 21-25, p. 325, l. 1-25, p. 326, l. 1-10, p. 337,l. 12-25, and p. 338, l. 1-7)

During a trial, the Trial Court, in a directed verdict motion, must be concerned with the existence or nonexistence of evidence. *State v. Cherry*, 361 S.C. 588, 606 S.E.2d 475 (2004). In *State v. Edwards*, this Honorable Court reminded the trial court that it should not hesitate to grant a Defendant's motion where the evidence presented by the State merely raises suspicion of guilt. *State v. Edwards*, 298 S.C. 272, 379 S.E.2d 888 (198). In this case the operative question

is more unique. Where the State engages in a controlled buy during which its agents exchange a quantity of one controlled substance for another quantity of a second type of drug, should the State be allowed to turn what was essentially one drug deal into two by charging Petitioner with trafficking in both drugs.

A directed verdict should be granted when evidence presented by the State only establishes circumstances that are suspicious, but ultimately falls short of providing a basis upon which a jury could reasonably determine the Defendant's guilt. *State v. Arnold*, 351 S.C. 302, 569 S.E.2d 379 (Ct. App. 2002) Further, the State bears the burden of demonstrating that the Defendant was not only at the scene of a crime, but actually committed the criminal act to withstand a directed verdict challenge. *State v. Schrock*, 283 S. C. 129, 32 S.E.2d 450 (1984).

The record below indicates that a confidential informant and an undercover agent set up a drug transaction with Petitioner in the course of which he allegedly exchanged a quantity of cocaine for a quantity of marijuana. In this monitored drug transaction, Agent Carver testified that Petitioner was suppose to trade twenty-five ounces of cocaine for fifty pounds of marijuana, but added two extra ounces. ROA at p.199, ll. 4-17. Testimony at trial in fact establishes that the cocaine was ultimately found in a book bag that had been brought to the residence by law enforcement. According to law enforcement testimony, the 50 pounds of marijuana brought to the scene by law enforcement was carried into the house in two bags. One duffle bag contained four, ten pound bales of marijuana. The remaining ten pound bale was brought to the scene in the book bag that was subsequently found to contain the 27 ounces of cocaine seized at the scene. ROA at p.164, ll. 7 – 15. Thus, Petitioner would respectfully submit that the evidence conclusively establishes that the transfer of the cocaine for the marijuana had already taken place prior to the raid of law enforcement on this residence. Therefore, according to the evidence introduced by the State, the law enforcement agents involved in this drug transaction had taken

physical custody of the cocaine prior to Petitioner's arrest. According to the testimony of the State's witnesses, the deal was no sooner consummated than the house was raided by the various law enforcement officers monitoring the transaction. Again, according to their own witnesses, Petitioner fled out the back door just as their law enforcement teams were bursting on the scene having listened to the transaction on audio surveillance equipment. On the facts of this case, it would violate due process for the State to be permitted to turn one drug transaction into two by electing to use one drug as the currency to purchase another type of drug of equal value.[1] For that reason, Petitioner would respectfully submit a directed verdict of acquittal should have been granted on the cocaine charge. On the facts of this case, the cocaine in question was, according to the State's own evidence, used as currency to purchase the marijuana traded for it. The testimony of the State's own witnesses establishes that the transaction had been completed when the raid occurred and Petitioner ran out the back door. Thus, even under the testimony of the State's own witnesses, the cocaine in question no longer belonged to Petitioner inasmuch as the agents of the State sent in to conduct this undercover transaction had taken possession of the cocaine in question. The fact of the completion of the transaction was documented at trial in a number of ways, the most obvious being that the cocaine was found inside a book bag brought to the scene by the State's agents and was used to carry part of the marijuana traded for the cocaine.

Petitioner respectfully submits that all the evidence in this case indicates that the only cocaine involved in this transaction was clearly under the exclusive dominion and control of the law enforcement agents who had taken possession of the cocaine in question at the time it was seized. There being no evidence of any other cocaine being in Petitioner's possession, the

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[1] This case is reminiscent of, although admittedly not on all fours with, *State v. Sammie Lee Brown*, 319 S.C. 400, 461 S.E.2D 828 (1995), wherein the Court of Appeals found that it would violate the double jeopardy clauses of both the United States Constitution and the South Carolina Constitution to allow the State to punish *Brown* twice for what was in essence one drug transaction turned into two separate offenses by the actions of the State.

Motion for Directed Verdict on that charge should have been granted. For these reasons, Petitioner respectfully asks this Honorable Court to grant the writ and set aside his conviction and sentence on the cocaine charge. Alternatively, he asks that the writ be issued and that he be afforded the opportunity to more fully brief the issue summarized herein.

CONCLUSION

For all the reasons set forth herein, Petitioner asks that his convictions and sentences be vacated. Alternatively, he asks that he be granted the opportunity to fully brief the issues summarized herein.

Respectfully submitted,

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ATTORNEY FOR THE PETITIONER

This 18th day of August, 2014.

IN THE STATE OF SOUTH CAROLINA
In The Supreme Court

Appeal from Lexington County
Court of General Sessions

Honorable Alexander S. Macaulay, Circuit Court Judge

Appellate Case No. 2014-001449

The State,

Respondent,

v.

Benjamin J. Newman,

Petitioner.

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Petition for Writ of Certiorari in the above matter has been served on opposing counsel, Jennifer Ellis Roberts, Assistant Attorney General, by mailing in an envelope properly addressed to the Office of the Attorney General, P. O. Box 11549, Columbia, SC 29211, with postage prepaid on this the 18th day of August, 2014.

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ATTORNEY FOR PETITIONER.

SWORN TO BEFORE me this 18th day of August, 2014.

NOTARY PUBLIC FOR SOUTH CAROLINA

My Commission Expires 2/28/24