STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Orangeburg County

Maite Murphy, Circuit Court Judge

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SC Court of Appeals

THE STATE,

RESPONDENT,

V.

RODSHEEN AYER,

APPELLANT

APPELLATE CASE NO 2015-002416

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

I. Did the police violate Appellant's reasonable expectation of privacy in his hospital room pursuant to the Fourth Amendment to the United States Constitution by entering his room without a warrant and taking a photograph of him while he was sleeping following surgery to repair injuries caused by a gunshot wound?

II. Did the police violate Appellant's right to privacy in his hospital room pursuant to the South Carolina Constitution by entering his room without a warrant and taking a photograph of him while he was sleeping following surgery to repair injuries caused by a gunshot wound?

III. Did the trial judge err in permitting two officers to testify to hearsay made by numerous individuals where the testimony was offered for the truth of the matter asserted and did not fall within any exception, including the "investigative exception" cited by the state?

STATEMENT OF THE CASE

An Orangeburg County grand jury indicted Appellant for murder and two counts of attempted murder. R. 11, ll. 12-13; R. 669-670. Appellant's co-defendant, Terrance Johnson, was indicted for the same charges arising out of the same set of facts and circumstances. R. 11, ll. 9-11. The state, represented by Don Sorenson and Ashley Cornwell, called the case for trial on November 16-19, 2015, before the Honorable Maite Murphy and a jury. R. 1.[1] Breen Stevens and Minh Lee Wyman represented Appellant. R. 1. Scott Palmer represented Johnson. R. 1. The jury acquitted Appellant of murder and one count of attempted murder. However, the jury found Appellant guilty of one count of attempted murder. R. 663, ll. 15-24; R. 666, l. 19 – R. 81, l. 2. The jury acquitted Johnson on all three charges. R. 663, l. 25 – R. 664, l. 7; R. 666, ll. 13-21. Judge Murphy sentenced Appellant to thirty years' imprisonment. R. 668, ll. 15-18; R. 671.

On November 20, 2015, Appellant filed and served his notice of appeal. This brief follows.

[1] The transcript cover lists the Honorable Edgar W. Dickson as the presiding judge. This was a typographical error by the court reporter. The Honorable Maite Murphy presided over the trial.

ARGUMENT

I. <u>The police violated Appellant's reasonable expectation of privacy in his hospital room pursuant to the Fourth Amendment to the United States Constitution by entering his room without a warrant and taking a photograph of him while he was sleeping following surgery to repair injuries caused by a gunshot wound.</u>

Relevant facts

Prior to trial, Appellant moved to suppress a photograph taken by the Lexington County Sheriff's Department of Appellant while he was in a hospital room recovering from a gunshot wound. R. 2, l. 23 – R. 3, l. 1. Appellant explained the police entered his hospital room while he was sleeping as a result of medication following surgery and photographed him. R. 3, ll. 2-8.

> Here, Judge, law enforcement entered the room. Entered without a warrant. They entered when he was asleep due to the effects of medication, when he was in his most vulnerable state. He was half naked and recovering from a surgical procedure. Now, Judge, no exigent circumstances exist[]. I mean, clearly he's not going anywhere. He's unconscious. He's clearly not armed. He's already stripped by the hospital. If they wanted a photograph all they had to do was post an officer by the door, get a warrant. Yet they did not. However, when we actually look at hospital records, they show[] that they did wait at the hospital door after they'd already [done] this stuff. So clearly they could have done it and yet they chose not to. Instead, the[y] chose to go in and photograph this man asleep in his room.

R. 4, ll. 12-25.

Appellant arrived at the hospital at 10:48 p.m. on September 10. R. 6, ll. 14-19. For several hours, the hospital treated his injuries. R. 6, ll. 19-20. The police arrived at 1:15 a.m. R. 6, ll. 20-21. At 3:01 a.m., the forensics unit arrived and photographed Appellant. R. 6, ll. 23-25. The police reports indicated Appellant was asleep and under the influence of medication. R. 7, ll. 23-24. Appellant "only woke up due to pain because [the police] were swabbing his hands for

GSR while he was asleep in the confines and security of his own hospital room trying to recuperate." R. 7, l. 25 – R. 8, l. 2.

Appellant argued "that an occupant of a closed hospital room recovering from any procedure whether it's, you know, repair the surgery on his arm from gunshot wound or whether it's recovering from childbirth, ... anybody that's recovering in a closed hospital room with doors and walls has a reasonable right to privacy in their closed room." R. 3, ll. 9-15. In essence, Appellant argued the Fourth Amendment protection against unreasonable governmental intrusions applied to hospital room settings. R. 3, ll. 15-16; R. 8, ll. 18-23. Appellant likened the hospital setting to the reasonable expectation of privacy an individual has in a public telephone booth. R. 3, l. 22 – R. 4, l. 1. Appellant explained telephone booths typically have clear or opaque walls, indicating the privacy interest would be less than in a hospital room where the walls were solid. R. 4, ll. 1-2. Additionally, Appellant noted the vulnerability of people recuperating in a hospital. R. 4, ll. 2-4. Appellant further likened the hospital setting to the reasonable expectation of privacy of an individual in a hotel room. R. 4, ll. 9-11.

The state argued law enforcement was called because "they have got a gunshot victim that shows up at the hospital." R. 5, ll. 14-17. The police were "in the process of basically investigating a crime at that point in time." R. 5, ll. 16-18. The solicitor argued Appellant gave "false name," and "a kind of sketchy description of what happened to him." R. 5, ll. 21-22. The solicitor continued, "And at that point in time, I mean, they're in the process of trying to investigate what is going on." R. 5, ll. 23-24. Again, the state claimed the police were "investigating a crime at that point in time" and did not do "anything improper." R. 9, ll. 3-5.

In ruling on the motion, the judge explained Appellant never indicated "that he wished to exercise any kind of privacy rights." R. 15, ll. 20-21. The judge opined that Appellant "freely

spoke" to the police before and after the photograph was taken. R. 15, ll. 21-23. The judge then remarked that because Appellant used his brother's name – Emanuel Ayer – that Appellant had "no standing to judge to whatever this Emanuel Ayer[] stated was his expectation of privacy." R. 16, ll. 2-7. As a result, the judge denied the motion to suppress. R. 16, ll. 7-8.

When Appellant made clear that his argument was not that Appellant was not in the photograph, the judge did not alter her ruling. R. 16, ll. 9-16. When the state moved to introduce the photograph, Appellant renewed his prior objection, and the judge overruled the objection. R. 226, ll. 20-24; State's Exhibit #65.

Discussion

The Fourth Amendment guarantees individuals the right to be free from unreasonable searches and seizures. U.S. Const. amend. IV. South Carolina's Constitution guards against unreasonable searches and seizures as well as unreasonable invasions of privacy. S.C. Const. art. I, § 10. "[T]he Fourth Amendment protects people, not places." Katz v. United States, 389 U.S. 347, 351 (1967). Protection under the Fourth Amendment is afforded to those who have a legitimate expectation of privacy in the place searched. Rakas v. Illinois, 439 U.S. 128, 143 (1978). To demonstrate an expectation of privacy, the defendant must show he had a subjective expectation of not being discovered and the expectation was one that society recognized as reasonable. Oliver v. United States, 466 U.S. 170, 177 (1984).

The essence of the Fourth Amendment is to protect a person's right to be free from unreasonable government intrusions in his own home. Kyllo v. United States, 533 U.S. 27, 31 (2001). The Fourth Amendment is a personal right and an individual must invoke its protections. Minnesota v. Carter, 525 U.S. 83, 88 (1998).

> [I]n order to claim the protection of the Fourth amendment, a defendant must demonstrate that he personally has an expectation of privacy in the place searched,

> and that his expectation is reasonable; i.e., one that has 'a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society.'

Id. (quoting Rakas, 439 U.S. at 143-144, and n.12). The contours of the Fourth Amendment's protections depend upon "whether the person who claims the protection of the Amendment has a legitimate expectation of privacy in the invaded place." Katz, 389 U.S. at 351; Rakas, 439 U.S. at 143. A subjective expectation of privacy is legitimate if it is "one that society is prepared to recognize as reasonable." Rakas, 439 U.S. at 143-144.

Appellant is unaware of any case from the United States Supreme Court or the South Carolina Supreme Court addressing one's expectation of privacy in a hospital room. Nevertheless, the body of law that has developed regarding overnight guests in the United States Supreme Court and in the South Carolina Supreme Court provides persuasive authority that a reasonable expectation of privacy exists in a hospital room. Additionally, the body of law that has developed in other states regarding an expectation of privacy by social guests also provides persuasive authority that a reasonable expectation of privacy exists in a hospital room. Finally, other states have concluded that individuals have a reasonable expectation of privacy in hospital rooms, and those cases provide persuasive authority that a reasonable expectation of privacy exists in a hospital room under the Fourth Amendment.

In Minnesota v. Olson, 495 U.S. 91, 94 (1990), the United States Supreme Court held that an overnight guest had a reasonable expectation of privacy in another's home. Olson's status as an overnight guest was enough to show he had a legitimate expectation of privacy that society recognized as reasonable. Id. at 96. Therefore, Olson was permitted to challenge the search. Id. at 100.

> To hold that an overnight guest has a legitimate expectation of privacy in his hosts' home merely recognizes the everyday expectations of privacy that we all share.

> Staying overnight in another's home is a longstanding social custom that serves functions recognized as valuable by society. We stay in others' homes when we travel to a strange city for business or pleasure, when we visit our parents, children, or more distant relatives out of town, when we are in between jobs or homes, or when we house-sit for a friend. We will all be hosts and we will all be guests many times in our lives. From either perspective, we think that society recognizes that a houseguest has a legitimate expectation of privacy in his host's home.

Id. at 98. The fact that "the guest has a host who has ultimate control of the house is not inconsistent with the guest having a legitimate expectation of privacy." Id. at 99. Guests "are entitled to a legitimate expectation of privacy despite the fact that they have no legal interest in the premises and do not have the legal authority to determine who may or may not enter the household." Id.

The South Carolina Supreme Court found an individual had a reasonable expectation of privacy in an apartment where he was a guest. State v. Missouri, 361 S.C. 107, 603 S.E.2d 594 (2004). The Court was persuaded that Missouri expected privacy in the apartment of his "good friend," with whom he had grown up and frequently visited. In the past, Missouri had spent the night occasionally. Missouri explained he felt comfort at the apartment. He had a key and kept a change of clothes there. He was present in the apartment as a social guest and had been there for at least seven hours prior to the execution of the search. Id. at 115, 603 S.E.2d at 597. The Court held "[b]y choosing to share the privacy of their home with [defendant] on several occasions in the past and on the occasion in question, both the [homeowners] and [defendant] demonstrated a subjective expectation of privacy, and that expectation, we hold is one that society is prepared to recognize as reasonable." Id. at 115, 603 S.E.2d at 597-598. In Kolle v. State, 386 S.C. 578, 590, 690 S.E.2d 73,79 (2010), this Court re-affirmed its holding in Missouri, supra, that an overnight guest has a reasonable expectation of privacy and is afforded protections pursuant to the Fourth Amendment as a result.

However, in Carter, supra, the United States Supreme Court found defendants who were not overnight guests and were in the home for a few short hours for a business transaction had no reasonable expectation of privacy. Carter, 525 U.S. at 90. Citing O'Connor v. Ortega, 480 U.S. 709 (1987) to recognize that property used for commercial purposes is treated differently for Fourth Amendment purposes and that in some circumstances a worker can claim Fourth Amendment protection over his workplace, the Court found no indication the defendants had "nearly as significant a connection to [the home searched] as the worker in O'Connor had to his own private office." Id. The Court then discussed the continuum of privacy rights for individuals in others' homes explaining that an overnight guest "typif[ies] those who may claim the protection of the Fourth Amendment in the home of another, and one merely 'legitimately on the premises' [typifies] those who may not do so." Id. at 91. The Court determined the case before it was "obviously somewhere in between." Due to the "purely commercial nature of the transaction engaged in here, the relatively short period of time on the premises, and the lack of any previous connection between [the defendants] and the householder," the Court held the "situation is closer to that of one simply permitted on the premises." Id.

In his concurrence in Carter, Justice Kennedy wrote that in his view "almost all social guests have a legitimate expectation of privacy, and hence protection against unreasonable searches, in their host's home." Carter, 525, U.S. at 99 (Kennedy, J. concurring). According to Kennedy, "Fourth Amendment rights are personal, and when a person objects to the search of a place and invokes the exclusionary rule, he or she must have the requisite connection to that place." Id. This "requisite connection is an expectation of privacy that society recognizes as reasonable." Id. at 101. Kennedy explained that "application of that rule involves consideration of the kind of place in which the individual claims the privacy interest and what expectations of privacy are traditional and

well recognized." Id. Thus, "most, if not all, social guests legitimately expect that, in accordance with social custom, the homeowner will exercise her discretion to include or exclude others for the guests' benefit." Id. "[A]s a general rule, social guests will have an expectation of privacy in their host's home." Id. at 102.

Although five justices held the defendants, who were in the apartment of another for a short time and solely for the purpose of packaging cocaine did not have a legitimate expectation of privacy in the apartment, four justices concluded the defendants were protected by the Fourth Amendment. Carter, 525 U.S. at 103 (1998)(Breyer, J. concurring); Id. at 106-107 (Ginsburg, J. dissenting)(stating that "when a homeowner or lessee personally invites a guest into her home to share in a common endeavor, whether it be for conversation, to engage in leisure activities, or for business purposes licit or illicit, that guest should share his host's shelter against unreasonable searches and seizures"). In light of Justice Kennedy's concurrence that almost all social guests have a legitimate expectation of privacy in their host's home, it appears that at least five justices of the United States Supreme Court would hold that all social guests are protected by the Fourth Amendment with the only quibble being what defines a social guest.

Following the reasoning of the Supreme Court, several courts throughout the United States have concluded that individuals who were guests, even if not overnight guests, in a person's home had a reasonable expectation of privacy. United States v. Gray, 491 F.3d 138, 144-146 (4th Cir. 2007) (detailing the distinctions between business and social guests for purposes of Fourth Amendment protections); United States v. Paradis, 351 F.3d 21, 27 (1st Cir. 2003) (finding Paradis was entitled to Fourth Amendment protection in his girlfriend's home because Paradis lived there when the two were not fighting and he kept possessions there); United States v. Rhiger, 315 F.3d 1283, 1286-1287 (10th Cir. 2003) (holding that a social guest has a sufficient expectation of privacy

to challenge unreasonable searches of his host's home); United States v. Fields, 113 F.3d 313, 320-321 (2d Cir. 1997) (holding Fields had a reasonable expectation of privacy in the place searched where he had a key, paid the owner weekly to use the apartment, had used the apartment forty or fifty times, could bring guests, and could come and go as he pleased with minor restrictions despite the fact that Fields did not sleep at the place and used it for illegal activity); Bonner v. Anderson, 81 F.3d 472, 475 (4th Cir. 1996) (holding that Bonner, who was not an overnight guest, had an expectation of privacy in the home of a neighbor because Bonner was a frequent visitor who ran errands for her elderly neighbor); United States v. Foster, 654 F.Supp.2d 389, 395 (E.D.N.C. 2009) (holding the defendant had standing to challenge the search of his fiancé's apartment where the record suggested that he had moved into the apartment or was, at a minimum, a frequent visitor); Nieves v. New York City Police Dept., 716 F.Supp.2d 299, 307 (S.D.N.Y. 2010) (finding Nieves had a legitimate expectation of privacy in his friend's apartment where Nieves had been friends with the owner for several years, spent the night in the apartment about five times a month, had a key to the apartment, kept personal items there, and was the sole occupant when the police arrived to search); State v. Cuntapay, 85 P.3d 634, 641-642 (Hawai'i 2004) (holding that a guest had a reasonable expectation of privacy in his friend's home where the guest visited once or twice a week to play cards and darts under the state's constitution); In re Welfare of B.R.K., 658 N.W.2d 565, 578 (Minn. 2003) (holding that a juvenile remaining at the home of another minor after a party without adult supervision or authorization – a short term social guest – had a reasonable expectation of privacy in the other minor's home and was afforded the Fourth Amendment's protections); State v. Tullous, 692 N.W.2d 790, 794 (S.D. 2005) (holding that the defendant had a reasonable expectation of privacy in the home of another where the defendant was a regular social guest at the home, who occasionally babysat for the homeowner and knew the location of the hidden key); State

v. Trecroci, 630 N.W.2d 555, 569-570 (Wis. Ct. App. 2001) (holding that a defendant had a reasonable expectation of privacy in the attic space of her fiancée's apartment building even though the attic was not used as an attic and the defendant was not an overnight guest).

Turning more to the point at issue in this case, several state courts have concluded that individuals have an expectation of privacy in hospital rooms. Relying upon the recognized reasonable expectations of privacy in a public telephone booth, in an automobile, in an office, and in the home, the Supreme Court of New Jersey recognized an individual's reasonable expectation of privacy in a hospital room. State v. Stott, 171 A.2d 120, 128 (N.J. 2002). The court "accept[ed] as basic premise that a hospital room is more akin to one's home than to one's car or office." Id. at 127. "It is a place to shower, dress, rest, and sleep." Id. The court recognized that the "duration of one's stay at a facility also may be relevant to the analysis." Id. Further, the court explained "the nature or scope of the privacy interest may differ depending on the facts and circumstances of a given case." Id. In a hospital room, though the "staff must enter the room regardless of the patient's wishes, the patient may at least restrict the access of visitors or non-medical personnel. In that way, a patient may control the degree of privacy within the room." Id. (internal citation omitted). "Even when a patient consents to the presence of hospital employees in the room, it has been held that such consent does not waive the otherwise reasonable expectation of privacy from police intrusion that one may enjoy in a hospital room." Id. (internal citation omitted).

In Jones v. State, 648 So.2d 669, 675 (Fla. 1994), the Florida Supreme Court held the police violated a defendant's Fourth Amendment right when the police confiscated his clothing while the defendant was in the hospital. The Court concluded the defendant's "constitutionally protected possessory rights" were compromised when his clothing was seized without a warrant. Id. The Florida Court determined the defendant "did not have the heightened expectation of privacy in his

hospital room that he would have had in his home." Id. at 676-677. However, the court refused to classify the hospital room as a public place. Id. at 677. Specifically, the court explained that the defendant "could expect that hospital personnel would enter his room to perform routine hospital procedures, and that members of the public would be allowed to visit him in his room if he did not object," the defendant "had no reason to believe that third parties would enter his room to look for and seize his personal property." Id.

Comparing a hospital room to a hotel room, the Supreme Court of Appeals of Virginia held that a hospital room assigned to a patient may not lawfully be entered without a search warrant. Morris v. Commonwealth, 157 S.E.2d 191, 194 (Va. 1967). Morris was in attendance at a public dance hall when an altercation occurred. Id. at 193. During the altercation, Morris's relative was beaten. Id. Thereafter, shots rang out. Id. Two individuals were taken from the scene by ambulance to a nearby hospital. Id. At first, Morris did not realize he had been shot, but when he did, he also went to the nearby hospital. Id. The next morning, the police arrived at the hospital and requested Morris's clothing from a nurse on duty. Id. The "nurse took the clothes from the wardrobe in the room which had been assigned to Morris and turned them over to the officer." Id. Morris was under sedation and asleep in his room when this occurred. Id. The police discovered powder marks on Morris's pants and claimed the powder marks indicated a gun had been discharged in the pocket of the pants. Id. Over Morris's objection, the trial court admitted the pants and the officer's testimony regarding the powder marks on the pants. Id. at 194. The appellate court reversed finding the seizure violated the Fourth Amendment. Id.

This Court should recognize a reasonable expectation of privacy in a hospital room under the Fourth Amendment. Individuals who are admitted to hospitals subjectively expect privacy, and society is prepared to recognize that expectation of privacy as illustrated by the case law

delineated and the facts known to all individuals regarding how hospitals function. Patients may exclude individuals from their hospital rooms. Routinely, hospitals have security who assist patients in excluding individuals. Some members of the public may be barred from visitation at all due to illness, age, or behavior. Clearly, society recognizes one's expectation of privacy in a hospital room, and this Court should as well.

Further, this Court should find law enforcement violated the Fourth Amendment by entering Appellant's hospital room without a warrant and when no exigent circumstances existed. Appellant is aware of South Carolina's statutory requirement for medical personnel "who knowingly treats any person suffering from a gunshot wound" to report "the existence of the gunshot wound to the sheriff's department." See S.C. Code Ann. § 16-3-1072. However, the duty to report a gunshot wound to authorities does not give law enforcement the ability to abridge an individual's Fourth Amendment rights. See Ferguson v. City of Charleston, 532 U.S. 67 (2001)(holding a state-funded hospital violated the Fourth Amendment rights of its patients by implementing and executing a policy, in conjunction with law enforcement, to conduct warrantless drug testing of pregnant mothers and report the findings to law enforcement for criminal prosecution). Certainly, the police were bound to investigate the report of Appellant suffering a gunshot wound, but conducting such an investigation would not require abrogation of Appellant's constitutional rights. Additionally, public policy concerns dictate that individuals be encouraged to seek medical attention for gunshot wounds. Thus, any decision that would equate treatment for gunshot wounds with forfeiture of constitutional rights would defy public policy.

Contrary to the state's assertion that the police were investigating a crime when they entered his room and took his photograph, the police were doing no such thing. The police were simply responding to a call from the hospital that an individual presented with a gunshot wound

– a call the hospital was required to make by statute. The presence of a gunshot wound did not equate with the commission of a crime. Individuals may suffer gunshot wounds for all sorts of reasons that do not constitute crimes – primarily accidents, such as hunting accidents, accidental self-infliction, and accidental infliction by others. When the police arrived at the hospital, they were not investigating a crime at all. Further, even after obtaining a photograph of Appellant and speaking to Appellant, the police had not connected him to the shooting in Orangeburg; thus, the police could not have been in his hospital room to investigate that crime.

As a result of Appellant's reasonable expectation of privacy in his hospital room and the police officer's violation of that privacy expectation, this Court should hold the trial judge erred in admitting the photograph of Appellant taken by police when he was in the hospital bed recovering from surgery to repair injuries he suffered as a result of a gunshot wound.

II. The police violated Appellant's right to privacy in his hospital room pursuant to the South Carolina Constitution by entering his room without a warrant and taking a photograph of him while he was sleeping following surgery to repair injuries caused by a gunshot wound.

Relevant facts

Appellant incorporates by reference the relevant facts discussed in Issue I, supra. Additionally, Appellant notes that his motion to suppress the photograph was based upon his "heightened privacy protections of Article I Section 10 of the South Carolina Constitution." R. 3, ll. 16-18; R. 8, ll. 18-23.

Discussion

South Carolina's Constitution provides: "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures and unreasonable invasions of privacy shall not be violated." S.C. Const. Art. I, Section 10. "The South Carolina Constitution, with an express right to privacy provision included in the article prohibiting unreasonable searches and seizures, favors an interpretation offering a higher level of privacy protection than the Fourth Amendment." State v. Forrester, 343 S.C. 637, 645, 541 S.E.2d 837, 841 (2001). "[T]he federal Constitution sets the floor for individual rights while the state constitution establishes the ceiling." Id. at 647, 541 S.E.2d at 842. According to the Supreme Court, "[t]he focus in the state constitution is on whether the invasion of privacy is reasonable, regardless of the person's expectation of privacy" in the place searched. State v. Weaver, 374 S.C. 313, 322, 649 S.E.2d 479, 483 (2007). "By articulating a specific prohibition against 'unreasonable 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." Id. (citing Forrester, 343 S.C. at 644-45, 541 S.E.2d at 841).

The South Carolina Supreme Court recently decided a similar issue in State v. Counts, 413 S.C. 153, 776 S.E.2d 59 (2015). In reaching the conclusion, the Court noted "'[o]ur state constitution's provision protecting unreasonable invasions of privacy *necessarily requires* some analysis of the privacy interests involved when a warrantless seizure is made on private property.'" Id. at 172, 776 S.E.2d at 69 (quoting State v. Weaver, 374 S.C. 313, 326, 649 S.E.2d 479, 485 (Pleicones, J., concurring)). Explaining that "the privacy interests in one's home are the most sacrosanct," the Court required "some threshold evidentiary basis for law enforcement to approach a private residence." Id. Thus, the Court required that "law enforcement must have reasonable suspicion of illegal activity at a targeted residence prior to approaching the residence and knocking on the door." Id. at 172, 776 S.E.2d at 70.

In light of the South Carolina Constitution's express right to privacy, this Court should hold that individuals have a right to be free from governmental intrusions in a hospital room. One can hardly imagine an environment more requiring of privacy protections. Individuals in hospital rooms are often vulnerable due to illness or medication. Hospital rooms often contain extremely private information about individuals that would be unavailable otherwise – such as charts detailing medical histories, paperwork showing vital signs, and even documents detailing a person's excrement frequencies. While hospital personnel must have some ability to intrude upon these private matters, one would not expect that anyone off the street could plunder through an individual's hospital room any more than that same person could plunder through an individual's home. Thus, the police should not be permitted to plunder through the hospital room either due to the heightened right to privacy of all South Carolinians, including in a hospital room.

III. The trial judge erred in permitting two officers to testify to hearsay made by numerous individuals where the testimony was offered for the truth of the matter asserted and did not fall within any exception, including the "investigative exception" cited by the state.

Relevant facts

The state's lead investigator, John Stokes, told the jury about his entire investigation, including hearsay from numerous witnesses. R. 335, ll. 18-19. Initially, when Stokes began saying what a witness, Alvin Clark, stated, Appellant objected on the basis of hearsay, and the state rephrased its question so as not to elicit hearsay. R. 337, ll. 6-15. On the subsequent question, Stokes again responded with hearsay from Clark and Appellant objected. R. 337, ll. 17-20. The judge entertained a bench conference at defense counsel's request, and permitting the state's questioning to proceed. R. 337, ll. 19-23. Thereafter, Stokes revealed that Clark named "Terrance" as a suspect and provided two possible last names. R. 338, ll. 1-6. Stokes testified regarding Clark's provision of other identifying information of the suspect, including his hometown and college. R. 338, ll. 7-9. When Stokes testified regarding Clark's claims about a car allegedly involved in the shooting, Appellant again objected. R. 338, ll. 12-17. The judge made clear she was overruling the objection. R. 338, l. 18. He later testified to Clark's statements made in connection with a photographic line-up, including Clark's claim to having known Terrance for years. R. 340, ll. 11-17. Trial counsel and the judge agreed that his hearsay objection was a "continuing" objection for the duration of Stokes' testimony. R. 340, ll. 19-21.

Later, Stokes switched gears and began testifying to hearsay from a fellow officer, Leonarde Cain, including his contact with Tenaja Minick. R. 346, ll. 10-14. Again, trial counsel interposed an objection, explaining Stokes' testimony consisted of hearsay within hearsay. R. 346, ll. 15-16. Still, the judge permitted the examination. According to Stokes, Cain said Tenaja

provided "two additional names," including Taquan Morrison, and "Rah." R. 346, ll. 20-25. Yet again, trial counsel objected. R. 347, ll. 1-2. Stokes then testified to information Cain received from Tenaja regarding a white Chevy Impala. R. 347, ll. 5-9.

Stokes received information from Lexington Medical Center that Emanuel Ayer had been treated for a gunshot wound and that Emanuel was from New York. R. 347, l. 11 – R. 348, l. 11. Stokes provided that information to Cain, "who followed up with New York." R. 348, ll. 12-14.

Stokes then referred to a photographic line-up in which Calvin Kennedy identified Taquan Morrison as one of the shooters; however, Taquan was not on trial. R. 348, l. 19 – R. 349, l. 8. According to Stokes, Alvin Clark was unable to identify Taquan. R. 349, ll. 9-13.

The solicitor continued to elicit hearsay, and even hearsay within hearsay, when he asked about information Cain received about "Rah." R. 349, ll. 14-15. Stokes answered that Cain received information from NYPD regarding a photograph he had submitted. R. 349, ll. 16-19. That information was the name – Rodsheen Ayer. R. 349, ll. 22-23.

The state's next witness was Leonarde Cain, the police officer previously referenced by Stokes. He was first contacted by Stokes "in reference to locating Terrance Johnson, who had outstanding warrants with the sheriff's office for three counts of attempted murder." R. 379, ll. 14-17. Stokes claimed he "received" information that Appellant was a student at Denmark Technical College. R. 379, ll. 18-22. He also referenced his meeting and conversation with Tenaja Minick. R. 380, ll. 16-17. He explained Tenaja initially said she did not know Terrance, but after being shown a picture, she identified him by a nickname. R. 380, ll. 20-23. Cain then went into great detail regarding Tenaja's statement to him. Allegedly, she told Cain that Terrance and her boyfriend, Taquan Morrison, were friends, that she owned a white Chevrolet Impala, and that on the night of the shooting, Terrance was in possession of her car. R. 381, ll.

21-25. According to Stokes, Tenaja also said "Rah," who was from New York, was staying with her and Johnson at the time of the shooting. R. 382, ll. 2-15. After discussing his learning of an individual receiving treatment at Lexington Medical Center for a gunshot wound, Cain discussed his interviews at hotels around the hospital, including his learning that an individual who "matched" his suspect had stayed at the Hampton Inn. R. 383, ll. 1-19.

When Cain determined that the individual who received treatment in the hospital was not Emanuel Ayer, he asked the New York police to assist him in locating Emanuel's family members and "individuals by the name of Rah or Rah Rah." R. 385, ll. 7-12. Using the information he received from New York, Cain developed Rodsheen Ayer as a suspect. R. 385, ll. 14-18.

Cain claimed that Sherrell Counts, Terrance's friend, "advised" him that she and others took Terrance to Mississippi shortly after the shooting. R. 386, ll. 9-18.

At the conclusion of Cain's testimony, trial counsel placed the substance of the bench conference on the record. Trial counsel objected to the testimony of Stokes and Cain based on hearsay and State v. King, 412 S.C. 403, 772 S.E.2d 189 (Ct. App. 2015), cert. granted Mar. 28, 2016. R. 391, ll. 12-14.

> Our position was that essentially the officer is testifying regarding the content of out-of-court statements. And those statements are being offered for the truth of the matter asserted. Based on our position, we didn't think that that was - - even though he is the lead investigating officer. Also, subsequently with Corporal Cain we had the same issue. With Sergeant Stokes, the state argued State v. Brown, [317 S.C. 55, 451 S.E.2d 888 (1994),] in response to say it was in the course of the investigation. Our position is even if it's in the course of the investigation, you still can't testify to the content of an out-of-court statement for the truth of the matter asserted. And that was essentially the basis of our argument. We were overruled. Our understanding was that it was going to be a continuing objection. I just wanted to make sure that we're on the same page. And, again, we came across this similar – actually, some of the same issue with Corporal Cain. We objected on the same basis. Our understanding again was that it was going to be

> for him as well as Sergeant Stokes, it was to be a continuing objection based upon that same hearsay problem from our perspective.

R. 391, l. 8 – R. 392, l. 9.

The solicitor argued the testimony "was being offered for the limited purposes of a government investigation." R. 392, ll. 11-13. According to the state, "it is allowable under the limited purposes for government investigation. In this instance, it was simply to get the name out so that the jury could hear how the investigation process and how those suspects were developed when the investigation went through as well as the white vehicle." R. 392, ll. 17-20. The state contended, essentially, that the testimony was hearsay, but was admissible as an exception – a government investigation. R. 392, ll. 20-22.

The judge agreed with defense counsel that he had objected and that the objection was a "continuing objection. R. 392, l. 25 – R. 393, l. 2. The judge permitted the testimony "based upon the investigation of both Corporal Cain and Investigator Stokes, that basically they were following the investigative process. They didn't testify to the truth of the matter asserted. They were told these people were convicted or and that they actually committed the crimes for which they were being prosecuted for." R. 393, ll. 2-9. As a result, the judge overruled trial counsel's objections. R. 393, l. 9.

Discussion

"Hearsay is not admissible." Rule 802, SCRE. "'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Rule 801(c), SCRE. In State v. Brown, 317 S.C. 55, 63, 451 S.E.2d 888, 894 (1994), the South Carolina Supreme Court held "an out of court statement is not hearsay if it is offered for the limited purpose of explaining why a government investigation was undertaken." In Brown, two officers testified about receiving information before establishing surveillance, receiving

complaints while in the neighborhood, and being familiar with the neighborhood. Id. According to the Court, the "statements were not offered for their truth but rather to explain why the officers began their surveillance." Id.

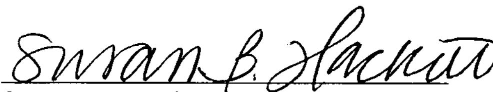
Officers testifying regarding what an investigation reveals must tread carefully so as not to testify to hearsay. See United States v. Hinson, 585 F.3d 1328 (10th Cir. 2009)(finding a detective's testimony that she began investigating a particular individual due to her suspicion that the individual was selling drugs and that in an interview someone indicated the source of the individual's drugs was the defendant was hearsay and had no purpose except to prove the truth of the matter asserted – that the defendant was a drug supplier); United States v. Benitez-Avila, 570 F.3d 364, 369 (1st Cir. 2009)(explaining "[a] prosecutor cannot justify the receipt of prejudicial, inadmissible evidence simply by calling it 'background' or 'context' evidence"); United States v. Shiver, 414 F.2d 461, 463 (5th Cir. 1969)(noting an officer's testimony that an investigation "revealed" that a particular car had been stolen was "pure hearsay" because the officer could not have personal knowledge of this "fact"); United States v. Reyes, 18 F.3d 65, 69-71 (2nd Cir. 1994)(holding testimony of a customs' agent concerning statements by others implicating the defendant in a drug conspiracy was inadmissible hearsay, not "context" or "background").

"Out-of-court statements can be admitted as background for an investigation only if they provide information that is necessary to explain the government's subsequent actions, and it is not likely that the jury will 'consider the statement[s] for the truth of what was stated with significant resultant prejudice.'" Hinson, 585 F.3d at 1336 (quoting United States v. Cass, 127 F.3d 1218, 1223-1224 (10th Cir. 1997)); see also United States v. Becker, 230 F.3d 1224, 1228 (10th Cir. 2000)(providing that testimony that is offered only for relevant context or background is not considered hearsay because it is not offered for the truth of the matter asserted).

The solicitor exceeded the bounds of Brown, supra, by eliciting hearsay testimony from Stokes and Cain. Both men specifically testified regarding their conversations with other witnesses, including detailed information regarding what the witnesses stated, when the witnesses provided the information, and how the police used the information to corroborate other information in the case. Stokes' and Cain's testimony was offered for the truth of the matter asserted as it could serve no other purpose. It bolstered and vouched for the testimony of the other witnesses, such and Tenaja and Sherrell, by placing the imprimatur of law enforcement on the information provided. The testimony went far beyond simply explaining why the police were investigating or providing context of the investigation. Rather, the testimony served to tell the jury what the investigation revealed, to whom the officers spoke, the content of those discussions, and how those discussions compared with other evidence in the case. Thus, the prosecutor presented inadmissible hearsay testimony that should have been excluded.

CONCLUSION

Appellant respectfully requests this Court reverse his conviction and sentence and remand for a new trial.



Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

This 27th day of April, 2017.

CERTIFICATE OF COUNSELPRIVATE

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

April 27, 2017

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