STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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SC Court of Appeals

Appeal from Charleston County
Honorable Kristi Lea Harrington, Circuit Court Judge
Appellate Case No. 2016-002470

THE STATE,

Respondent,

vs.

ADRIAN LESSTON,

Appellant.

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

The trial judge properly denied Appellant's suppression motion after finding Appellant failed to meet his burden of establishing he had a legitimate expectation of privacy in the apartment and the pants resting on the floor of the apartment's master bedroom because the testimony presented during the suppression hearing, which did not include any testimony from Appellant, established he was merely a temporary guest in the apartment and left his pants on the floor of another person's bedroom such that they were exposed to and could be readily accessed by the apartment's lessee and her children. However, even if the trial judge somehow erred in finding Appellant failed to meet his burden of establishing a legitimate expectation of privacy in the apartment and the pants, the trial judge nonetheless properly denied the suppression motion because the officers' actions in entering the apartment and searching the pants were constitutionally proper under the provisions of both the United States Constitution and South Carolina Constitution in light of the exigent circumstances that existed based on the discovery of minors who were reportedly unattended and the consent to search provided by the lone individual who actually resided in the master bedroom where the pants were found.

STATEMENT OF THE CASE

In March of 2014, Appellant Adrian Lesston was arrested after law enforcement officers conducted a welfare check at an apartment and ultimately found crack cocaine and other incriminating evidence in some pants located in one of the apartment's bedrooms. In August of 2014, the Charleston County Grand Jury indicted Appellant for possession of cocaine base with intent to distribute. On August 29, 2016, Appellant filed a motion to suppress. On August 30, 2016, a pre-trial hearing was held on Appellant's motion in the Charleston County Court of General Sessions with the Honorable Kristi Lea Harrington, circuit court judge, presiding. On September 12, 2016, Judge Harrington issued a written order denying the suppression motion. Thereafter, on September 16, 2016, a bench trial was conducted in the Charleston County Court of General Sessions with Judge Harrington again presiding. At the conclusion of the trial, Judge Harrington convicted Appellant as indicted. Subsequently, on December 5, 2016, a sentencing hearing was held in the Charleston County Court of General Sessions, and, at the conclusion of the hearing, Judge Harrington sentenced Appellant to a five-year term of imprisonment. Appellant then timely filed a notice of appeal.

STATEMENT OF FACTS

On the afternoon of March 14, 2014, Officer Tom Bilancione of the North Charleston Police Department responded to the Greentree Apartments apartment complex located in North Charleston, South Carolina, in order to investigate a report of an incident involving malicious damage to a vehicle.[1] (Pre-Trl. Tr. p. 10; pp. 34-35). During the course of his investigation, a witness to the incident approached Officer Bilancione, reported she had followed a fleeing suspect into a nearby apartment building, and advised the officer she saw two juveniles alone inside an unsecured apartment while she was searching for the suspect. (Pre-Trl. Tr. pp. 34-35; p. 43). Concerned about the welfare of the unattended minors, Officer Bilancione then quickly contacted Detective Charles Benton of the North Charleston Police Department, shared the information provided by the witness, and asked him to conduct a welfare check on the children. (Pre-Trl. Tr. pp. 9-10; pp. 35-36).

Thereafter, Detective Benton proceeded to the apartment complex, made contact with two of the complex's management employees, and was led by them to the apartment identified by the witness. (Pre-Trl. Tr. pp. 10-11; p. 24; p. 44). Once there, one of the employees knocked on the door, checked the door handle, and verified the apartment was unlocked while Detective Benton loudly identified himself as a law enforcement officer. (Pre-Trl. Tr. pp. 11-12; p. 25). A short time later, an eight-year-old boy opened the apartment door, and the detective asked him several times if anyone else was inside the apartment. (Pre-Trl. Tr. pp. 12-13; p. 25). Each time, the boy assured Detective Benton no one else was inside other than his six-year-old sister. (Pre-Trl. Tr. pp. 12-13; pp. 26-27). However, while answering the detective's questions, the boy diverted his eyes, looked behind himself, and behaved in a "bizarre" manner that suggested

[1] In the suppression motion, defense counsel indicated the investigation into the reported property damage took place at approximately 3:00 p.m. (Motion to Suppress, p. 1).

something "was not okay," which caused Detective Benton to become concerned. (Pre-Trl. Tr. pp. 12-14; pp. 26-27; pp. 32-33).

Based on his concerns, Detective Benton entered the apartment to make sure the children were safe and again loudly announced his presence. (Pre-Trl. Tr. pp. 13-15; p. 27). Once inside, he received no responses to his announcement, but he found a six-year-old girl on a couch. (Pre-Trl. Tr. p. 14). The detective then took out his weapon and conducted a brief protective sweep of the rooms in the apartment. (Pre-Trl. Tr. p. 15). During the sweep, he did not find anything inside the children's bedroom, a closet, a utility room, or a bathroom. (Pre-Trl. Tr. p. 15). However, inside the master bedroom, he observed a lump underneath the covers on the bed that appeared to be a person. (Pre-Trl. Tr. pp. 15-16). Detective Benton then removed the covers and found Appellant Adrian Lesston, who was only wearing boxer shorts, staring back at him. (Pre-Trl. Tr. p. 16; pp. 21-22; pp. 27-28). In response, the detective ordered Appellant, who had one of his hands concealed underneath a pillow, to reveal his hands, but Appellant refused to comply. (Pre-Trl. Tr. p. 16). Detective Benton then pulled Appellant towards him, ordered him to roll over and put his hands behind his back, handcuffed him, and escorted him into the kitchen area of the apartment. (Pre-Trl. Tr. pp. 16-17; pp. 28-29).

Upon Appellant being escorted out of the bedroom, the children in the apartment did not indicate in any manner they knew Appellant. (Pre-Trl. Tr. p. 17). Detective Benton then spoke with Appellant and attempted to determine his identity. (Pre-Trl. Tr. pp. 17). During their conversation, Appellant indicated he did not have any form of identification, but he did provide the detective with his name and date of birth. (Pre-Trl. Tr. pp. 17). Detective Benton then contacted dispatch to conduct a records check on Appellant and also requested assistance from Officer Bilancione. (Pre-Trl. Tr. p. 17).

Shortly thereafter, the children's mother ("Mother") returned to the apartment, and Officer Bilancione arrived at that location a few moments later. (Pre-Trl. Tr. p. 17; p. 36). Upon arriving, Officer Bilancione spoke with Detective Benton, and Detective Benton alerted him of Appellant's furtive and uncooperative actions in the bedroom. (Pre-Trl. Tr. p. 38). Additionally, Officer Bilancione learned Appellant was out on bond at that time in connection to "significant" drug charges. (Pre-Trl. Tr. p. 38). Officer Bilancione then spoke with Mother in the kitchen area, and, during the ensuing conversation, the officer explained to Mother why Detective Benton had initially come to the apartment. (Pre-Trl. Tr. p. 19; pp. 36-37; p. 50). In response, Mother claimed Appellant was the father of one of the children, and she asserted the children were not unattended based on his presence.[2] (Pre-Trl. Tr. p. 19; p. 46). However, Mother, who was the apartment's lessee, stated Appellant did not live at the apartment, was merely a guest that day, and had just been napping there. (Pre-Trl. Tr. pp. 19-20; pp. 37-38; p. 45).

Concerned Appellant may have been attempting to conceal drugs or a firearm, Officer Bilancione asked Mother for consent to search her bedroom after verifying with her she was the person who, in fact, lived in the master bedroom where Appellant was detained, and Mother granted the officer's request. (Pre-Trl. Tr. p. 20; pp. 38-39). Officer Bilancione then conducted a search of Mother's bedroom. (Pre-Trl. Tr. p. 39). During the search, the officer did not find anything hidden in the bed. (Pre-Trl. Tr. p. 39). However, he located some men's pants next to the bed, searched the pockets, and found a bag containing 3.49 grams of crack cocaine, a bag containing marijuana, over five-hundred dollars in cash, and a cell phone. (Pre-Trl. Tr. p. 21; pp. 39-40; Court's Ex. # 1 (Forensic Report)). Following that discovery, he advised Mother of what he had found and ascertained the pants belonged to Appellant. (Pre-Trl. Tr. p. 40). Appellant

[2] During the pre-trial suppression hearing, the solicitor indicated Mother had advised him Appellant was not actually the father of either of her children. (Pre-Trl. Tr. p. 55).

was then arrested, and he asked to be allowed to put on his pants before he was taken to jail. (Pre-Trl. Tr. p. 41).

Subsequently, Appellant was indicted for possession of cocaine base with intent to distribute. (Indictment). Prior to trial, defense counsel moved for the crack cocaine and other incriminating evidence to be suppressed, and the trial judge conducted a pre-trial hearing on the motion.[3] (Pre-Trl. Tr. pp. 5-7; Motion to Suppress, pp. 1-4). During the hearing, only Detective Benton and Officer Bilancione presented any testimony, and each recounted the details of the welfare check and search that led to the discovery of Appellant's drugs and other incriminating evidence. (Pre-Trl. Tr. pp. 9-51). Specifically, Detective Benton confirmed he only entered Mother's apartment to conduct a welfare check on the children inside after Mother's eight-year-old son reported he was alone in the apartment with his younger sister. (Pre-Trl. Tr. pp. 11-14; pp. 32-33). Likewise, Officer Bilancione testified he only conducted a search inside the apartment after obtaining Mother's consent, and he stated he believed he could search the pants he found in Mother's bedroom based on Mother's consent. (Pre-Trl. Tr. pp. 38-39; pp. 50-51). However, Officer Bilancione conceded he believed the pants belonged to Appellant when he found them. (Pre-Trl. Tr. p. 49).

Following the presentation of that testimony, the solicitor asserted the officers' entry into the home was proper for the purpose of conducting a welfare check and the ensuing search was lawfully conducted with Mother's valid consent. (Pre-Trl. Tr. pp. 51-53; pp. 55-56; p. 58). Furthermore, the solicitor contended Appellant could not properly raise a constitutional

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[3] Specifically, in the suppression motion, defense counsel argued the initial entry into Mother's apartment and the search of Appellant's pants were unconstitutional pursuant to the Fourth Amendment of the United States Constitution and "the corresponding provisions of the South Carolina Constitution." (Motion to Suppress, pp. 2-3). In response to that motion, the solicitor filed an opposing return in which he contended Appellant did not have standing to challenge the evidence discovered during the search and, even if he did, the search that resulted in the discovery of the evidence was entirely proper in light of the fact it was conducted with valid third-party consent from Mother, who was the lone lessee of the apartment. (State's Opposition to Suppression Hearing, pp. 1-4).

challenge in his case in light of the fact he was merely a casual guest in the apartment and had no reasonable expectation of privacy under those circumstances. (Pre-Trl. Tr. p; pp. 53-55). In rebuttal, defense counsel conceded Appellant was not a lessee of the apartment and had no belongings there other than his clothing and personal effects, but he contended Appellant nonetheless had a reasonable expectation of privacy at that location in light of the fact he was sleeping there. (Pre-Trl. Tr. pp. 65-69). Additionally, defense counsel conceded Detective Benton's initial entry to the apartment "may have been appropriate" but asserted the officer should have left as soon as he realized an adult was present. (Pre-Trl. Tr. pp. 70-71). Furthermore, after conceding there was a distinction between pants being worn by a person and pants resting on a floor, defense counsel argued the subsequent search of Appellant's pants was improper because Mother allegedly could not validly provide consent for such a search. (Pre-Trl. Tr. p. 62; pp. 76-77). For those reasons, defense counsel argued the evidence discovered in Appellant's case should be suppressed pursuant to the state and federal constitutions. (Pre-Trl. Tr. p. 75).

After considering the arguments of counsel, the trial judge denied defense counsel's motion.[4] (Pre-Trl. Tr. p. 84; Trl. Tr. p. 3, Order, pp. 1-4). In denying the motion, the trial judge found Detective Benton's initial entry into Mother's apartment was proper based on exigent circumstances in light of the fact it was reasonable for the detective to believe there were unattended minors inside the apartment at the time he made entry. (Order, p. 2). Similarly, the trial judge found Officer Bilancione properly conducted a search of the pants located in Mother's bedroom after Mother, who "had valid authority to consent to the search of her own bedroom and the items within it," provided him with consent. (Order, pp. 3-4). Moreover, the trial judge

[4] In the written order denying the suppression motion, the trial judge solely referenced the Fourth Amendment of the United States Constitution and made no reference to any provisions of the South Carolina Constitution. (Order, pp. 1-4).

found Appellant failed to demonstrate he had a reasonable expectation of privacy in the premises as he "did not reside in the house, pay rent, or conduct activity sufficient to demonstrate a subjective expectation of privacy which would be recognized as reasonable." (Order, pp. 2-3).

Subsequently, Appellant proceeded forward to trial, and a bench trial was conducted at defense counsel's request. (Trl. Tr. p. 3). During the trial, a forensic report was presented to the trial judge confirming the substance found in Appellant's pants was, in fact, crack cocaine, and Appellant stipulated to the facts presented through the officers' testimony from the pre-trial hearing. (Trl. Tr. p. 5). At the conclusion of trial, the trial judge convicted Appellant as indicted, and she noted she overruled defense counsel's objections to the admission of the evidence found during the search. (Trl. Tr. p. 9; pp. 12-13).

Following the verdict, a sentencing hearing was conducted. (Sent. Tr. p. 4). During the course of the hearing, Appellant candidly admitted to the trial judge he had been distributing crack cocaine.[5] (Sent. Tr. p. 8). The trial judge then sentenced Appellant to a five-year term of imprisonment. (Sent. Tr. p. 12).

[5] Furthermore, Appellant also candidly acknowledged he was actively using cocaine and marijuana while awaiting sentencing. (Sent. Tr. pp. 9-11).

ARGUMENT

The trial judge properly denied Appellant's suppression motion after finding Appellant failed to meet his burden of establishing he had a legitimate expectation of privacy in the apartment and the pants resting on the floor of the apartment's master bedroom because the testimony presented during the suppression hearing, which did not include any testimony from Appellant, established he was merely a temporary guest in the apartment and left his pants on the floor of another person's bedroom such that they were exposed to and could be readily accessed by the apartment's lessee and her children. However, even if the trial judge somehow erred in finding Appellant failed to meet his burden of establishing a legitimate expectation of privacy in the apartment and the pants, the trial judge nonetheless properly denied the suppression motion because the officers' actions in entering the apartment and searching the pants were constitutionally proper under the provisions of both the United States Constitution and South Carolina Constitution in light of the exigent circumstances that existed based on the discovery of minors who were reportedly unattended and the consent to search provided by the lone individual who actually resided in the master bedroom where the pants were found.

Appellant contends the trial judge erred by refusing to grant his motion to suppress the drugs discovered during the search of his pants. In support of that contention, Appellant argues Officer Bilancione's search of his pants, which he maintains he had a reasonable expectation of privacy in, was conducted without valid consent in violation of his constitutional rights under the United States Constitution and South Carolina Constitution.[6] Furthermore, although he has not raised an appellate challenge to the trial judge's finding he had no expectation of privacy in the apartment, Appellant appears to potentially be arguing the officers' entry into the apartment constituted an unreasonable invasion of his privacy pursuant to the South Carolina Constitution.[7]

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[6] In her order denying the suppression motion, the trial judge made no reference whatsoever to the South Carolina Constitution or to its provision regarding unreasonable invasions of privacy. (Order, pp. 1-4). Therefore, to the extent Appellant is challenging the trial judge's suppression motion ruling on state constitutional grounds, that particular argument is not properly preserved for appellate review because it was not actually ruled upon by the trial judge. See State v. Watts, 321 S.C. 158, 167, 467 S.E.2d 272, 278 (Ct. App. 1996) ("To be preserved for appellate review, an issue must be both presented to and passed upon by the trial court. **If the issue is raised but not ruled on, it is not preserved for appeal.**" (emphasis added)); see also State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 693 (2003) ("In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial judge."); State v. Gee, 262 S.C. 373, 379, 204 S.E.2d 727, 729 (1974) ("Only matter that has been ruled on below can be reviewed[.]").

[7] Through the statement of the issues on appeal in his appellate brief, Appellant has solely raised challenges to the constitutionality of the search of his pants. (App. Br. p. 4). Notably, an appellate court in South Carolina generally will not consider an issue unless it is properly set forth in the statement of the issues on appeal. See Rule

Contrary to Appellant's arguments, the trial judge committed no error in refusing to grant the suppression motion for several different reasons. Initially, the trial judge properly denied the suppression motion because she correctly found Appellant failed to establish he had a legitimate expectation of privacy in Mother's apartment or in his pants, which were on the floor of Mother's bedroom as opposed to being on Appellant at the time of the search. Critically, Appellant did not testify during the suppression hearing in order to establish he had any expectation of privacy in the apartment and the pants, and nothing was presented during trial to establish Appellant had any special connection or right to privacy in the apartment or had done anything to ensure his pants would remain private when he left them on the floor of Mother's bedroom. As a result, the trial judge correctly concluded Appellant could not properly raise a constitutional challenge to the officers' entry into the apartment or the consent-based search of the pants. However, even assuming the trial judge somehow erred by finding Appellant failed to meet his burden of establishing a legitimate expectation of privacy in the apartment and the pants, the trial judge nonetheless correctly concluded the officers' entry into the apartment was constitutionally proper in light of the exigent circumstances that existed at the time of their entry. Likewise, the trial judge correctly concluded Mother had the authority to consent to a search of a bedroom that was solely hers along with a search of the items on the floor of that bedroom, and her ruling was fully supported by the evidence. Appellant's conviction should be affirmed.

STANDARD OF REVIEW

In criminal cases, appellate courts sit to review errors of law only. State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). In search and seizure cases, an appellate court in South Carolina is limited to determining if there is any evidence to support the trial court's findings and

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208(b)(1)(B), SCACR ("Ordinarily, no point will be considered which is not set forth in the statement of the issues on appeal."); see also Allen v. Pinnacle Healthcare Sys., LLC, 394 S.C. 268, 277-278, 715 S.E.2d 362, 367 (Ct. App. 2011) (finding an issue to be unpreserved because it was not included in the statement of the issues on appeal).

can only reverse due to clear error. State v. Flowers, 360 S.C. 1, 5, 598 S.E.2d 725, 727 (Ct. App. 2004); see State v. Brockman, 339 S.C. 57, 66, 528 S.E.2d 661, 666 (2000) ("[W]e will review the trial court's ruling like any other factual finding and reverse if there is clear error. We will affirm if there is any evidence to support the ruling."). The reviewing court may conduct its own review of the record to determine whether the trial judge's ruling is supported by the evidence. State v. Khingratsaiphon, 352 S.C. 62, 70, 572 S.E.2d 456, 460 (2002). However, the appellate court must affirm the trial court if there is any evidence supporting the ruling. See State v. Moore, 415 S.C. 245, 251, 781 S.E.2d 897, 900 (2016) ("[A]ppellate courts must affirm if there is any evidence to support the trial court's ruling."); State v. Morris, 411 S.C. 571, 578, 769 S.E.2d 854, 858 (2015) (" 'When reviewing a Fourth Amendment search and seizure case, an appellate court must affirm if there is any evidence to support the ruling.' " (citation omitted)). Critically, the appellate court will not reverse merely because it would have reached a different conclusion than the trial judge. State v. Rivera, 384 S.C. 356, 361, 682 S.E.2d 307, 310 (Ct. App. 2009); see Khingratsaiphon, 352 S.C. at 70, 572 S.E.2d at 459 ("In State v. Brockman, . . . [w]e concluded the appellate court would not review the trial judge's ultimate determination de novo but, rather, would apply a deferential standard of review.").

ANALYSIS

A. Appellant's Failure to Establish a Legitimate Expectation of Privacy in the Apartment and the Pants at the Time of the Officers' Entry and Search

Importantly, the rights protected by the Fourth Amendment of the United States Constitution are personal rights and cannot be vicariously asserted. Alderman v. United States, 394 U.S. 165, 174 (1969). Likewise, the rights protected by Article I, Section 10 of the South Carolina Constitution are necessarily based on an individual's own personal privacy interests. See State v. Counts, 413 S.C. 153, 172, 776 S.E.2d 59, 69 (2015) (instructing the South Carolina

constitutional provision protecting against unreasonable invasions of privacy "*necessarily requires* some analysis of the privacy interests involved"); see also State v. Weaver, 374 S.C. 313, 326, 649 S.E.2d 479, 485 (2007) (Pleicones, J., concurring) ("Analysis of the facts of this case with our privacy provision in mind reveals no state constitutional violation. Although one's expectation of privacy in his automobile increases when that automobile is parked in the backyard of his private residence, [Weaver] in this case was not the owner of the Jeep that was seized. More importantly, the vehicle was not parked at [Weaver]'s residence. Our 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. However, [Weaver] cannot show he had a reasonable expectation of privacy in the seized Jeep.").

Because the rights protected by the Fourth Amendment and Article I, Section 10 are inherently personal in nature, a criminal defendant asserting a challenge to an allegedly unreasonable search or seizure must establish his or her own personal constitutional rights were violated by that search or seizure in order to be entitled to the benefits of the exclusionary rule. State v. McKnight, 291 S.C. 110, 114, 352 S.E.2d 471, 473 (1987); see Rakas v. Illinois, 439 U.S. 128, 132, n. 1 (1978) ("The proponent of a motion to suppress has the burden of establishing that his own Fourth Amendment rights were violated by the challenged search or seizure."). Capacity to claim constitutional protection in a particular case is necessarily dependent on whether the individual attempting to raise the claim had a legitimate expectation of privacy in the invaded space that was both subjective and objective in nature and not on whether the person merely had a property right in the invaded space. See Rakas, 439 U.S. at 143 ("[C]apacity to claim the protection of the Fourth Amendment depends not upon a property right

in the invaded place but upon whether the person who claims the protection of the Amendment has a legitimate expectation of privacy in the invaded place."); see also State v. Missouri, 361 S.C. 107, 112, 603 S.E.2d 594, 596 (2004) ("A legitimate expectation of privacy is both subjective and objective in nature[.]").

In order to establish a legitimate expectation of privacy, an individual must show: (1) the individual had a subjective expectation the area searched would remain free from intrusion; and (2) the individual's subjective expectation is one society recognizes as reasonable. Missouri, 361 S.C. at 112, 603 S.E.2d at 596; see Minnesota v. Olson, 495 U.S. 91, 95-96 (1990) (instructing a subjective expectation of privacy can be considered legitimate if it is one society accepts and recognizes as reasonable). Significantly, things a person seeks to preserve as private may be constitutionally protected while things a person knowingly exposes to others – even inside the person's own home or office – are not constitutionally protected. Katz v. United States, 389 U.S. 347, 351-352 (1967). If a defendant fails to meet his or her burden of establishing a legitimate expectation of privacy in the invaded space, that defendant cannot properly raise a constitutional challenge to a particular search or seizure. See United States v. Salvucci, 448 U.S. 83, 85 (1980) ("[D]efendants charged with crimes of possession may only claim the benefits of the exclusionary rule if their own Fourth Amendment rights have in fact been violated."); see also State v. Robinson, 396 S.C. 577, 583, 722 S.E.2d 820, 823 (Ct. App. 2012) ("For Robinson to establish a Fourth Amendment violation, he must show a legitimate expectation of privacy on the porch.").

In the case sub judice, the testimony presented during the suppression hearing established Appellant was merely, at most, a temporary invited guest in the apartment Mother lived in solely with her young children and had left his pants on the floor of Mother's – as opposed to his –

bedroom. Notably, no testimony was presented establishing Appellant had any special connection to the apartment, and neither Appellant nor anyone else testified as to the frequency or regularity of Appellant's visits to that particular location, as to whether Appellant regularly kept items of personal property there, as to whether Appellant possessed a key to the apartment, or as to whether Appellant had a right to grant or deny entry to others. Similarly, nothing was presented in regard to the status of Appellant's relationship with Mother, the lessee of the apartment, at the time of the officers' entry into that location. Likewise, nothing was presented about the extent of the privileges, if any, that had been extended to Appellant by Mother in regard to the apartment and her bedroom. Moreover, nothing was presented establishing Appellant had taken any precautions of any kind to prevent Mother, the children, or anyone else from accessing the pants he simply left on the floor of Mother's bedroom, which, significantly, was not his own bedroom despite the fact he was temporarily using it to take a nap. Furthermore, nothing was presented suggesting Appellant had forbidden either Mother or the children from accessing the pants after he removed them and placed them on the floor, and no testimony was presented in regard to any restrictions of any kind being placed on Mother's ability to access property, including Appellant's pants, that was left on the floor of a bedroom that was hers and hers alone. In fact, Appellant elected not to present any testimony at all during the suppression hearing, and, thus, no testimony was offered suggesting he subjectively held an expectation of privacy in regard to the apartment or the pants resting on the floor inside it.

Under those circumstances, Appellant failed to meet his burden of establishing he had a reasonable expectation of privacy in Mother's apartment. See Rawlings v. Kentucky, 448 U.S. 98, 104 (1980) ("Petitioner, of course, bears the burden of proving not only that the search of Cox's purse was illegal, but also that he had a legitimate expectation of privacy in that purse.").

That is true because, as a casual intermittent guest at the apartment with no special relationship to that location, Appellant did not have a sufficient connection to the apartment such that it would be reasonable for him to entertain either an objective or subjective expectation of privacy at that location.[8] See Flowers, 360 S.C. at 5, 598 S.E.2d at 728 (instructing an intermittent guest to a residence does not have a legitimate expectation of privacy there); see also Olson, 495 U.S. at 98 (recognizing an **overnight** guest can possess a legitimate expectation of privacy in a host's home).

Likewise, in light of the testimony establishing Appellant's pants were not on his person and, instead, were on the floor of Mother's bedroom with nothing done to prohibit or prevent access to them by Mother or her children, Appellant did not meet his burden of establishing a legitimate expectation of privacy in his pants. See Katz, 389 U.S. at 351 (instructing a person cannot retain a reasonable expectation of privacy in things the person knowingly exposes to others); see generally United States v. Thomas, 864 F.2d 843, 845 (D.C. 1989) (recognizing a person can relinquish a reasonable expectation of privacy in an object while still retaining a property interest in the object). That is true because, by leaving the pants on the floor of another person's bedroom, Appellant exposed his pants to the risk Mother would pick them up off the floor of her own bedroom, look into the pockets, or move them in a manner that could result in the items in the pockets falling out. Similarly, by leaving the pants on the floor of an apartment containing young children without taking any steps to prevent access to them, Appellant assumed the risk the children could also access the pants, and, thus, he could not reasonably expect for the pants to remain entirely private. Therefore, because Appellant exposed the pants to others in the

[8] Notably, Appellant has not challenged the trial judge's conclusion regarding his failure to establish an expectation of privacy in the apartment itself on appeal, and, thus, the trial judge's ruling on that particular issue is the law of the case even if it somehow had been incorrect. See State v. Sampson, 317 S.C. 423, 427, 454 S.E.2d 721, 723 (Ct. App. 1995) (explaining unchallenged and unappealed rulings are the law of the case).

apartment without restriction by openly leaving them on the floor, Appellant relinquished any expectation of the privacy he had in the pants while they were on the floor of Mother's bedroom. See State v. Garner, 340 N.C. 573, 592, 459 S.E.2d 718, 728 (N.C. 1995) (finding the trial judge correctly concluded Garner had no reasonable expectation of privacy in his jacket when it was left on the floor of another person's residence); State v. Jones, 161 N.C. App. 615, 621, 589 S.E.2d 374, 377 (N.C. Ct. App. 2003) (holding the trial judge correctly found Jones had no reasonable expectation of privacy in a jacket he left on the seat of someone else's car he had just been riding in); see also Rakas, 439 U.S. at 143 (instructing the capacity to raise a constitutional challenge to a search or seizure is **not** dependent upon possession of a property right in the invaded place).

Absent some unusual circumstances, Appellant clearly would have had a legitimate expectation of privacy in his pants if he had been wearing them at the time of the search. See generally Terry v. Ohio, 392 U.S. 1, 9 (1968) (recognizing no right is more sacred than a person's right to control over his or her own person). Furthermore, the presentation of additional testimony or evidence could have potentially established Appellant had a legitimate expectation of privacy in the apartment or in the pants even after he left them on the bedroom floor if that additional testimony or evidence established an objectively-reasonable and subjectively-reasonable basis for Appellant to expect to retain his privacy there. See generally Missouri, 361 S.C. at 112, 603 S.E.2d at 596 ("A legitimate expectation of privacy is both subjective and objective in nature: the defendant must show (1) he had a subjective expectation of not being discovered, and (2) the expectation is one that society recognizes as reasonable."). However, Appellant was not wearing the pants at the time of the search, and he did not present any testimony to establish a legitimate expectation of privacy in them or Mother's apartment. Cf. id.

at 115, 603 S.E.2d at 597 (finding a legitimate expectation of privacy existed based on testimony presented by the defendant and a residence of the property establishing the legitimacy of that privacy expectation). Therefore, based on the testimony and evidence that was actually presented during the suppression hearing, Appellant failed to meet his burden of establishing a legitimate expectation of privacy in both Mother's apartment and the pants resting on the floor there. See McKnight, 291 S.C. at 114, 352 S.E.2d at 473 ("One who seeks to have evidence suppressed on this basis must establish that his *own* Fourth Amendment rights were violated."). As a result, the trial judge committed no error by denying Appellant's suppression motion after finding he failed to meet his burden of establishing a legitimate expectation of privacy at the time of the officers' entry and search, and her ruling was supported by the evidence available to her. See State v. Jones, 364 S.C. 51, 59, 610 S.E.2d 846, 850 (Ct. App. 2005) ("In the case at hand, there is evidence to support the trial judge's findings and we cannot say his findings are clearly erroneous. We therefore find no abuse of discretion."); see also Rivera, 384 S.C. at 361, 682 S.E.2d at 310 (instructing an appellate court will not reverse a trial judge's findings on a search and seizure issue merely because it would have decided the case differently). Appellant's conviction should be affirmed.

B. Propriety of the Trial Judge's Denial of the Suppression Motion Based on the Existence of Exigent Circumstances and the Consent to Search Provided by the Apartment's Lessee

The Fourth Amendment of the United States Constitution protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. Similarly, the South Carolina Constitution provides its own protections to the state's citizens against unreasonable searches and seizures. State v. Forrester, 343 S.C. 637, 643, 541 S.E.2d 837, 840 (2001); see S.C. Const. art. I, § 10 ("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[.]”). Furthermore, primarily in order to guard against invasive technological advancements, the South Carolina Constitution also includes additional language protecting our citizens from “unreasonable invasions of privacy.” S.C. Const. art. I, § 10; see Forrester, 343 S.C. at 647, 541 S.E.2d at 842 (“[T]he drafters of our state constitution’s right to privacy provision were principally concerned with the emergence of new electronic technologies that increased the government’s ability to conduct searches.”).

Importantly, based on the express language of the United States Constitution and the South Carolina Constitution, only **unreasonable** searches, seizures, and invasions of privacy are constitutionally forbidden. S.C. Const. art. I, § 10; see State v. Foster, 269 S.C. 373, 378, 237 S.E.2d 589, 591 (1977) (“It is only unreasonable searches and seizures that are prohibited.”); see also Maryland v. Buie, 494 U.S. 325, 331 (1990) (“It goes without saying that the Fourth Amendment bars only unreasonable searches and seizures[.]”). As a result, the touchstone of the search and seizure protections afforded by both the federal constitution and state constitution is reasonableness. See Florida v. Jimeno, 500 U.S. 248, 250 (1991) (“The touchstone of the Fourth Amendment is reasonableness.”); see also Heien v. North Carolina, __ U.S. __, 135 S. Ct. 530, 536 (2014) (“To be reasonable is not to be perfect, and so the Fourth Amendment allows for some mistakes on the part of government officials, giving them ‘fair leeway for enforcing the law in the community’s protection.’ ” (citation omitted)).

Generally speaking, warrantless searches are considered to be unreasonable per se unless they fall under an exception to the warrant requirement, and any evidence seized as the result of an unreasonable search must be excluded from trial. Weaver, 374 S.C. at 319, 649 S.E.2d at 482; see State v. Peters, 271 S.C. 498, 501, 248 S.E.2d 475, 476 (1978) (instructing searches

conducted without a warrant are per se unreasonable unless an exception to the warrant requirement is applicable). However, "warrantless searches are allowed when the circumstances make it reasonable . . . to dispense with the warrant requirement." Kentucky v. King, 563 U.S. 452, 462 (2011). Regarding the situations where a warrantless search is considered to be constitutionally reasonable, South Carolina courts have recognized several exceptions to the warrant requirement, including: (1) the search incident to lawful arrest exception; (2) the hot pursuit exception; (3) the stop and frisk exception; (4) the automobile exception; (5) the plain view exception; (6) the consent exception; (7) the abandonment exception; and (8) the exigent circumstances exception. State v. Brown, 401 S.C. 82, 89, 736 S.E.2d 263, 266 (2012); see State v. Herring, 387 S.C. 201, 209, 692 S.E.2d 490, 494 (2009) ("A fairly perceived need to act on the spot may justify entry and search under the exigent circumstances exception to the warrant requirement.").

One of the recognized exceptions to the warrant requirement is the exigent circumstances exception. Herring, 387 S.C. at 210, 692 S.E.2d at 494. Pursuant to the exigent circumstances exception, a law enforcement officer is constitutionally permitted to act without a warrant where the exigencies of the situation facing the officer make the officer's course of action immediately and objectively imperative and there is no time for the officers to obtain a warrant. State v. Abdullah, 357 S.C. 344, 351, 592 S.E.2d 344, 348 (Ct. App. 2004). Notably, recognized exigencies justifying warrantless searches and seizures include: (1) an imminent risk a suspect will flee; (2) a risk of danger to the officers or to others; (3) an imminent risk evidence will be destroyed or removed; and (4) a need to provide aid in an emergency situation. See Mincey v. Arizona, 437 U.S. 385, 392 (1978) ("We do not question the right of the police to respond to emergency situations."); Herring, 387 S.C. at 210, 692 S.E.2d at 494-495 ("The likelihood a

suspect will imminently flee is also an exigency warranting such an intrusion. Protecting the safety of police officers has also been held an exigent circumstance. A warrantless search is justified under the exigent circumstances doctrine to prevent a suspect from fleeing or where there is a risk of danger to police or others inside or outside a dwelling. In such circumstances, a protective sweep of the premises may be permitted." (citations omitted)); State v. Simmons, 384 S.C. 145, 174, 682 S.E.2d 19, 34 (Ct. App. 2009) (recognizing the imminent destruction of evidence constitutes an exigency justifying immediate warrantless action).

Another of the recognized exceptions to the warrant requirement is the consent exception. See Palacio v. State, 333 S.C. 506, 514, 511 S.E.2d 62, 66 (1999) ("The constitutional immunity from unreasonable searches and seizures may be waived by valid consent."); see also Birchfield v. North Dakota, __ U.S. __, 136 S. Ct. 2160, 2185 (2016) ("It is well established that a search is reasonable when the subject consents[.]"). Pursuant to the consent exception, an officer can validly conduct a warrantless search of a constitutionally-protected area when he or she receives consent from an individual with authority **or** apparent authority to grant such consent and the consent is provided freely and voluntarily. See State v. Adams, 377 S.C. 334, 339, 659 S.E.2d 272, 275 (Ct. App. 2008) (holding warrantless searches and seizures are constitutionally permissible when conducted under the authority of voluntary consent); see also State v. Laux, 344 S.C. 374, 377, 544 S.E.2d 276, 277 (2001) (recognizing consent may be valid if the person granting consent reasonably appeared to have the apparent authority to grant the consent). Such consent can be provided by a third party with either actual or apparent "common authority" over or some other "sufficient relationship" to the premises or effects for which consent to search is sought. State v. Pressley, 288 S.C. 128, 130, 341 S.E.2d 626, 627 (1986); see United States v. Matlock, 415 U.S. 164, 171 (1974) ("[W]hen the prosecution seeks to justify a warrantless

search by proof of voluntary consent, it is not limited to proof that consent was given by the defendant, but may show that permission to search was obtained from a third party who possessed common authority over or sufficient relationship to the premises or effects sought to be inspected."); see also Illinois v. Rodriquez, 497 U.S. 177, 188-189 (1990) (recognizing consent based on apparent authority can be valid if the facts available to the officer at the time consent was sought would lead a person of reasonable caution to believe the consenting party had authority over the property for which consent was provided). Notably, common authority does **not** rest upon the possession of a common property interest in the premises or effects but, instead, rests upon mutual use of the property by individuals generally having joint access or control for most purposes such that it would be reasonable to recognize any one of the individuals has the right to inspection and the others have assumed the risk another might permit the property to be searched. Matlock, 415 U.S. at 171, n. 7; see Laux, 344 S.C. at 376, 544 S.E.2d at 277 ("Common authority is defined as mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable for officers to believe the person granting consent has the authority to do so.").

In the case at bar, Detective Benton's warrantless entry into Mother's apartment was entirely reasonable and proper under the exigent circumstances exception to the warrant requirement. Critically, prior to entering the apartment, Detective Benton had been advised minor children were alone inside Mother's apartment, and, after arriving at that location, one of the children directly confirmed to him several times he and his younger sister were the only people inside the apartment in a manner the officer perceived to be concerning and "bizarre." Based on the fact the detective reasonably believed young minor children were alone inside the apartment, it was entirely reasonable for Detective Benton to believe the children's safety and

well-being were potentially and imminently in jeopardy, particularly in light of the concerning manner in which Mother's son responded to the detective's questions. See United States v. Bradley, 321 F.3d 1212, 1215 (9th Cir. 2003) ("The possibility of a nine-year-old child in a house in the middle of the night without the supervision of any responsible adult is a situation requiring immediate police assistance."); State v. Peterson, 273 Ga. 657, 659-660, 543 S.E.2d 692, 696 (Ga. 2001) ("Knowledge or the reasonable belief that minor children in a residence are without adult supervision is an exigent circumstance that authorizes police entry to help those believed to be in need of immediate aid."); Jones v. State, 54 N.E.3d 1033, 1038 (Ind. Ct. App. 2016) ("[T]he reasonable belief that minor children in a residence are without adult supervision is an exigent circumstance that authorized police entry to help those believed to be in need of immediate aid."). As a result, Detective Benton was constitutionally permitted to enter the apartment to ensure and protect the children's safety due to the existence of exigent circumstances. See United States v. Taylor, 624 F.3d 626, 632 (4th Cir. 2010) ("Simply as a general matter, 'the absence of responsible adult supervision of children is an exigent circumstance justifying a warrantless entry.' " (citation omitted)). Furthermore, after entering the apartment based on Mother's son's representation no adults were inside, exigent circumstances continued to exist when Detective Benton found Appellant, an adult man, hiding under the covers in one of the bedrooms, and, as a result, it remained entirely proper for Detective Benton to temporarily detain Appellant to determine who he was, what he was doing there, and whether he posed a danger to the children. See State v. Jones, 45 Or. App. 617, 621, 608 P.2d 1220, 1222 (Or. Ct. App. 1980) (finding exigent circumstances justified a law enforcement officer's warrantless entry into **and search of** an apartment where the officer observed four young unattended children inside an apartment, could not see any adults present,

and was informed by one of the children their mother was not at home); see also Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 607 (1982) ("[S]afeguarding the physical and psychological well-being of a minor . . . is a compelling [interest].").

Similarly, Officer Bilancione's warrantless search of the pants he found on the floor of Mother's bedroom was entirely reasonable and proper under the consent exception to the warrant requirement. That is true because, prior to conducting the search, Officer Bilancione obtained consent to search the master bedroom area of the apartment from Mother, who had indicated she lived alone in the apartment with her children, had claimed the master bedroom as her own bedroom, and had identified Appellant merely as a temporary guest to the apartment as opposed to a resident or tenant. See State v. Moultrie, 271 S.C. 526, 529, 248 S.E.2d 486, 488 (1978) ("[W]here no landlord-tenant situation exists, a host can validly consent to a search of his premises occupied by a guest."); see also Payton v. State, 326 Ga. App. 846, 850, 755 S.E.2d 261, 264-265 (Ga. Ct. App. 2014) ("Since the trial court found that Payton was a guest in Odom's house, Odom, as the resident homeowner, was authorized to consent to the search of Payton's bedroom, regardless of whether Payton was an adult, locked his door, or kept Odom out of his bedroom."). Because the master bedroom was Mother's own bedroom, she possessed the valid authority to consent to a search of that room and any of the items left unsecured on the floor of that room. See Moultrie, 271 S.C. 526, 529, 248 S.E.2d at 487 ("As a guest in Evans' home, [Moultrie] assumed the risk the homeowner would allow others into the area."). Likewise, since she resided in the apartment, Mother obviously had the right to and could have entered her own bedroom at any time she pleased, and nothing precluded her from picking up items left on the floor of that room. By leaving his pants openly on the floor of another person's bedroom without placing any restriction or limitations on others' access to those pants, Appellant

assumed the risk the pants would be moved, accessed, or otherwise manipulated by Mother, her children, or anyone she allowed into the area. See State v. Bailey, 276 S.C. 32, 36-37, 274 S.E.2d 913, 915-916 (1981) ("Moore clearly had authority to consent to the search of the residence premises. Appellant had no possessory or privacy interests in the premises. As a guest, he assumed the risk that the home resident would allow others into the area. Likewise, the consent given for the search and seizure of [the appellant's] truck was valid. The truck was left on the premises without instructions or restrictions on its use. . . . Under the circumstances, it was reasonable for the officers to believe and the inference is amply supported that the resident had authority to consent to the search[.]" (citations omitted)); see also Frazier v. Cupp, 394 U.S. 731, 740 (1969) (refusing to engage in "metaphysical subtleties" in determining whether third-party consent was valid and finding the petitioner assumed the risk the third party would have allowed someone to look inside his bag by leaving it in his house); State v. Fountain, 534 N.W.2d 859, 866 (S.D. 1995) ("A defendant is not automatically entitled to expect that the contents of articles left behind at another's premises will remain private and, should he leave such articles behind, he assumes the risk that the other person may consent to a search of the articles. Items which do not in and of themselves have a high degree of privacy, such as articles of clothing, are not entitled to the privacy accorded opaque, closed containers, such as a suitcase or overnight bag." (citations omitted)). Therefore, Mother's consent to search her bedroom, which was given without any express limitations being placed upon it, validly covered any unsecured items left in that area, including the pants Appellant left on the floor, and Officer Bilancione reasonably relied on that consent to search the pants without violating Appellant's constitutional rights. See Jimeno, 500 U.S. at 251 ("The question before us . . . is whether it is reasonable for an officer to consider a suspect's general consent to a search of his car to include consent to examine a paper bag lying

on the floor of the car. We think that it is. . . . Respondent granted Officer Trujillo permission to search his car, and did not place any explicit limitation on the scope of the search. . . . We think that it was objectively reasonable for the police to conclude that the general consent to search respondent's car included consent to search containers within that car which might bear drugs."); Jones, 161 N.C. App. at 621, 589 S.E.2d at 377 ("We conclude that Jiggetts had the authority to consent to a search of his vehicle which encompassed items found lying around in the car, such as [Jones]'s jacket."); see also United States v. Shelton, 337 F.3d 529, 535-536 (5th Cir. 2003) ("When A allows B to intrude on A's expectation of privacy, A is essentially granting B a particular level of access and control over A's area of privacy, and is thereby assuming the risk of B's exposing A's interest to others."); cf. United States v. Buckles, 495 F.2d 1377, 1381 (8th Cir. 1974) (finding a search of two jackets that the homeowner indicated were not hers was proper where the homeowner provided consent for a search of the home and "had the primary right to the occupation of the premises").

Because the officers' entry into the apartment was supported by exigent circumstances and the search of the pants was supported by consent, those actions were constitutionally reasonable and proper. See King, 563 U.S. at 460 (instructing a warrantless search conducted due to exigent circumstances is constitutionally reasonable); Jimeno, 500 U.S. at 250-251 ("[I]t is no doubt reasonable for the police to conduct a search once they have been permitted to do so."); see also Foster, 269 S.C. at 378, 237 S.E.2d at 591 (recognizing only unreasonable searches and seizures are constitutionally forbidden). Accordingly, the trial judge correctly denied Appellant's suppression motion, and her ruling was supported by the evidence.[9] See

[9] Moreover, in light of Appellant's candid admission to the trial judge he was distributing as opposed to using the crack cocaine, Appellant readily admitted his guilt for the indicted offense during the sentencing proceedings, which rendered appellate review of the trial judge's ruling on the suppression motion entirely unnecessary. See Whetsell v. State, 276 S.C. 295, 297, 277 S.E.2d 891, 892 (1981) ("[R]eview of a trial error is unnecessary where a defendant

State v. Provet, 405 S.C. 101, 107, 747 S.E.2d 453, 456 (2013) ("South Carolina appellate courts review Fourth Amendment determinations under a clear error standard. We affirm if there is any evidence to support the trial court's ruling." (citations omitted)); State v. Wright, 391 S.C. 436, 442, 706 S.E.2d 324, 326 (2011) (instructing "an appellate court must affirm if there is any evidence to support the ruling" in a case involving a search and seizure issue); see also Fountain, 534 N.W.2d at 866 ("It cannot be said that the trial court abused its discretion in concluding that the jacket in Ms. Ugalde's living room could be searched, despite the fact the officers knew it was not owned by Ms. Ugalde and that it was the property of Fountain."). Appellant's conviction should be affirmed.

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admits in open court after his conviction that he is guilty."); State v. Sroka, 267 S.C. 664, 665, 230 S.E.2d 816, 817 (1976) (finding further review was unnecessary where the defendant admitted his guilt in open court after his conviction).

CONCLUSION

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

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT

June 23, 2017

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Charleston County
Honorable Kristi Lea Harrington, Circuit Court Judge
Appellate Case No. 2016-002470

RECEIVED
JUN 27 2017
SC Court of Appeals

THE STATE,

Respondent,

vs.

ADRIAN LESSTON,

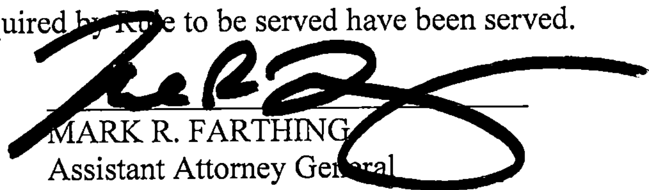
Appellant.

PROOF OF SERVICE

I, Mark R. Farthing, certify that I have served the within Initial Brief of Respondent and Designation of Matter on Appellant by sending two copies of the same to:

Christopher R. Geel, Esquire
102 Broad St., Suite C
Charleston, SC 29401

I further certify that all parties required by Rule to be served have been served.
This 23rd day of June, 2017.



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RECEIVED
JUN 27 2017
SC Court of Appeals

June 23, 2017

Christopher R. Geel, Esquire
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Charleston, SC 29401

RE: State v. Adrian Lesston – Appellate Case No. 2016-002470

Dear Mr. Geel:

I am enclosing two copies of the Initial Brief of Respondent and Designation of Matter in the above-referenced case.

Sincerely,

Mark R. Farthing
Assistant Attorney General
Bar Number 76901

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Enclosures

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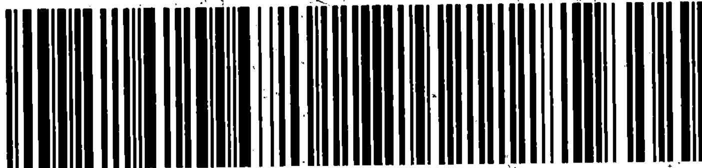

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