STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

THE STATE,

RESPONDENT,

V.

JOHN WILLIAM DOBBINS,

APPELLANT

APPELLATE CASE NO

Appeal from Laurens County

Honorable Donald B. Hocker, Circuit Court Judge

Opinion No. 5496

PETITION FOR REHEARING

Pursuant to Rule 221(a), SCACR, Appellant John William Dobbins respectfully petitions this Court for a rehearing in the above-captioned matter after a published opinion, dated July 12, 2017, affirmed his convictions for manufacturing methamphetamine, possession with intent to distribute methamphetamine, unlawful disposal of methamphetamine waste, possession of a schedule-two controlled substance, and possession of a schedule-four controlled substance. In support of his petition, Appellant respectfully alleges that this Court overlooked or misapprehended the following arguments:

This Court erred in concluding that the distinctive smell of a drug alone is a sufficient basis to establish probable cause that exigent circumstances were present. Specifically, this Court held, based on State v. Lane, 271 S.C. 68, 72, 245 S.E.2d 114, 116 (1978), "[t]he distinctive odor of a drug alone is a sufficient basis to establish probable cause when a law enforcement official, familiar with the unique smell of that drug, recognizes its odor."

Respectfully, the Lane case differed factually from the matter *sub judice*: Dobbins' Fourth Amendment protections were heightened due to his presence in his own home. Since the enactment of the Fourth Amendment, the United States Supreme Court has stressed "the overriding respect for the sanctity of the home that has been embedded in our traditions since the origins of the Republic." Payton v. New York, 445 U.S. 573, 601, 100 S.Ct. 1371, 1387. See also Silverman v. United States, 365 U.S. 505, 511, 81 S.Ct. 679, 682, 5 L.Ed.2d 734 (1961); United States v. United States District Court, 407 U.S. 297, 313, 92 S.Ct. 2125, 2134, 32 L.Ed.2d 752 (1972). Oliver v. United States, 466 U.S. 170, 178, 104 S. Ct. 1735, 1741, 80 L. Ed. 2d 214 (1984).

"At the risk of belaboring the obvious, private residences are places in which the individual normally expects privacy free of governmental intrusion not authorized by a warrant, and that expectation is plainly one that society is prepared to recognize as justifiable. United States v. Karo, 468 U.S. 705, 714, 104 S. Ct. 3296, 3303, 82 L. Ed. 2d 530 (1984).

In Lane, a UPS deliveryman alerted the Beaufort County Sheriff's Department when he noticed an odor coming from two packages aboard his delivery van. 271 S.C. at 70, 245 S.E.2d at 115. A deputy opened one of the packages, which contained marijuana. Id. The package was resealed, and law enforcement **obtained a warrant** to search the delivery location. Id. (emphasis added). The Court in Lane held that "[p]robable cause having existed prior to the

opening of the first package, the warrant cannot be deemed a product of the illegal search of package number one nor can the search and seizure of package number two pursuant to the warrant be deemed a product of the illegal search of package one." Id. at 72, 245 S.E.2d at 116.

A warrant was never procured to search Dobbins' home. There was not an independent basis, other than the smell, to search Dobbins' home after he lawfully ceased contact with officers who knocked on his door in the early morning. Under Florida v. Royer, 460 U.S. 491, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983), an individual has a right to ignore the police and go about his business. Any "refusal to cooperate, without more, does not furnish the minimum level of objective justification needed for a detention or seizure." Florida v. Bostick, 501 U.S. 429, 437, 111 S.Ct. 2382, 115 L.Ed.2d 389 (1991).

This Court included Dobbins' behavior in its examination of the totality of the circumstances. Dobbins' behavior was reasonable, however: at 3:00 a.m., police officers knocked on his door searching for a woman who Dobbins knew was not there. They did not have an arrest warrant for her. Due to the fact that she was not there and the early morning hour, Dobbins' behavior was reasonable.

This Court also misapplied the plain view exception. An independent and detached magistrate did not make a finding of probable cause and issue a warrant. Similar to Horton v. California, the evidence seized in Dobbins' case was discovered while law enforcement was investigating a separate and distinct crime. 496 U.S. 128, 110 S.Ct. 2301, 110 L.E.2d 112 (1990). In Horton, officers secured a search warrant for the defendant's home in order to search for proceeds from an armed robbery. Id. at 130, 110 S. Ct. at 2304, 110 L. Ed. 2d 112. The stolen property was not found. Id. at 131, 110 S. Ct. at 2304, 110 L. Ed. 2d 112. However, while searching the home, officers found weapons in plain view. Id. Similar to the officers in

Dobbins' case, who testified that they began investigating the methamphetamine situation, law enforcement in Horton was admittedly interested in finding evidence not covered by any probable cause. Id.

In United States v. Sharpe, an agent with the Drug Enforcement Administration searched a camper without the owner's permission based on his suspicion that it contained marijuana. 470 U.S. 675, 679, 105 S. Ct. 1568, 1571–72, 84 L. Ed. 2d 605 (1985). The Supreme Court examined "whether the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly, during which time it was necessary to detain the defendant." Id. at 686, 105 S. Ct. at 1575, 84 L. Ed. 2d 605. "The question is not simply whether some alternative was available, but whether the police acted unreasonably in failing to recognize or to pursue it." Id. at 687, 105 S. Ct. at 1575, 84 L. Ed. 2d 605.

In Dobbins' case, one of the four officers could have attempted to procure a search warrant for Dobbins' home by driving to a magistrate's house in one of the four available police cars. Absent exigent circumstances or consent, the police cannot search for an individual in the home of a third party. Steagald v. United States, 451 U.S. 204, 101 S.Ct. 1642, 68 L.Ed.2d 38 (1981). Hodges testified that three officers could have stayed at Dobbins' home and apprehended Haines if she had walked out. Therefore, after Dobbins' denied a warrantless police officer entry to his home, a warrant should have been obtained. Exigent circumstances did not exist to search for Gaines.

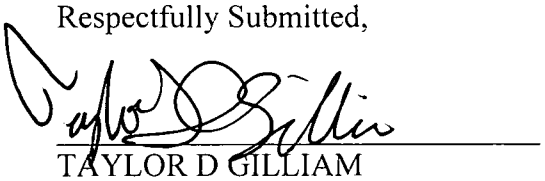
Finally, this Court held that the officers were faced with an immediate threat of evidence being destroyed, under United States v. Grissett, 925 F.2d 776, 778 (4th Cir. 1991) ("[Because] the police had identified themselves before smelling the marijuana, an officer could reasonable conclude that the occupants of the room would attempt to dispose of the evidence before the

police could return with a warrant. This is especially true in the case of an easily disposable substance like drugs."). However, this Court indicated that Deputy Hodges and Lieutenant Marlon Higginbotham noticed the smell of methamphetamine while walking to the front door of the camper, before identifying themselves to the occupants of the camper. The fear of evidence destruction, under Grissett, could have existed prior to the time when the police announced their presence. A warrant could have been obtained, according to Hodges and the policy of the Laurens County Sheriff's Department.

Officers did not have a lawful right of access to Dobbins' home. They had time to obtain a warrant but did not do so. Therefore, the evidence which was allegedly in plain view and seized without a warrant should have been suppressed.

In light of the factors listed above that were overlooked and/or misapprehended by this Court in reaching its opinion, Appellant respectfully requests this Court rehear the matter and dismiss the charges against him.

Respectfully Submitted,



TAYLOR D GILLIAM
Appellate Defender

This 27th day of July, 2017.

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THE STATE,

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a copy of the Petition for Rehearing in the above-entitled case has been served upon David Spencer, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and John William Dobbins, #338485, at Lee Correctional Institution, 990 Wisacky Hwy., Bishopville, SC 29010, this 27th day of July, 2017.

Taylor D Gilliam
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO BEFORE
ME this 27th day of July, 2017.

_____ (L.S)
Notary Public for South Carolina
My Commission Expires: