STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from York County

Honorable John C. Hayes, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

DAJLIA SYMONE TORBIT,

APPELLANT

APPELLATE CASE NO 2016-002433

FINAL BRIEF OF APPELLANT

ROBERT M. PACHAK
Appellate Defender

JOHN H. STROM
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR APPELLANT

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STATEMENT OF THE CASE

Appellant Dajlia Torbit was indicted by the York County Grand Jury. R. 127 - 128. On November 20, 2016, Appellant proceeded to a bench trial before the Honorable John C. Hayes, III. B.J. Barrowclough represented Appellant. Assistant Solicitors Aaron Hayes represented the State. Judge Hayes found Appellant guilty of resisting arrest and sentenced Appellant to three years imprisonment suspended on the service of three years of probation. R. 114, l. 15 – 125, l. 11. This appeal follows.

STATEMENT OF FACTS

The salient facts of this case are not in dispute. Sometime after 11:00 on April 15, 2016, Appellant, age twenty with no prior criminal record, called 911 requesting that emergency medical services come to her mother's Rock Hill apartment to treat her brother, Timothy Holley. R. 90, l. 8 – 93, l. 4. April 15th was Holley's daughter's first birthday. Appellant's family had gathered at her mother's apartment to celebrate and open presents. They planned to go to Chucky Cheese later that day. R. 83, l. 2 – 84, l. 18.

Holley injured himself by inadvertently tripping over one of the birthday presents and hitting his head on the corner molding of a doorway. *Id.* The impact was hard enough to render Holley briefly unconscious and leave a visible knot on Holley's head. R. 90, l. 8 – 93, l. 4. While waiting for the emergency medical personnel to arrive Appellant, Kaitlin Lumpkin (Holley's girlfriend), and Quantavious Torbit (Appellant's younger brother) carried Holley outside to the apartment complex's exterior breezeway so that he could get fresh air. They brought a chair from inside the apartment for Holley to sit on. *Id.*

Appellant then briefly went inside to check on the children, who were crying because of Holley's injuries. *Id.* When she returned to the outdoor breezeway, Rock Hill Police Officer Mark Schurig was standing in the apartment hallway watching Holley, Lumpkin, and Quantavious. *Id.* Schurig did not offer to help Holley. He simply stood near the group.

Schurig, a member of the Rock Hill drug squad, testified that he was dispatched to the apartment complex "to assist EMS" as part of a medical call and to "make sure that no other kind of behavior is occurring." R. 54, ll. 4-18. When he reached the apartment, emergency medical personnel and the firefighters had yet to arrive. *Id.*

A short time after Schurig's arrival, members of the fire department and emergency medical personnel showed-up and began treating Holley's injuries. R. 93, l. 1 – 95, l.25. While Holley was receiving medical attention, Schurig frisked Quantavious, without explanation. R. 93, ll. 16-25. A second Rock Hill police drug squad officer, Christopher Revels arrived four minutes after Schurig. R. 20, l. 18 – 22, l. 22. After being treated, Holley declined the offer of an ambulance ride to the hospital. R. 35, l. 3 – 36, l. 19.

With the medical personnel and fire fighters preparing to leave, Revels and Schurig briefly conferred. R. 55, l. 2 – 56, l. 24. Both officers would testify that, while standing on the outdoor breezeway of the apartment complex, they smelled an "overwhelming" odor of marijuana coming from the apartment. *Id.*; *see also* R. 21, l. 1 – 23, l. 25.

After standing in the apartment breezeway for several minutes, the two officers decided that they needed to investigate the marijuana smell. *Id.* Officer Schurig asked Appellant and the others in the breezeway who lived at the apartment. *Id.* Appellant explained that her mother lived there, but that Appellant was in charge while she was at work. R. 55, l. 2 – 57, l. 24; *see also* R. 63, l. 4 – 66, l. 25. R. 93, l. 3 – 96, l. 21.

Officer Schurig demanded to be allowed in the apartment:

> Once the medical evaluation of Mr. Holley had ceased there were people coming in and out of [Appellant's Mother's apartment] while we were there. Every time the door opened there was an overwhelming and you can actually see smoke of smoked marijuana coming from that particular location, coming out of the door. . . . I discussed with Officer Revels and I said there is a lot of marijuana smoke coming out of that apartment let's go see what that's about and that's when I began my encounter with [Appellant]. . . .
>
> When I spoke with [Appellant] who stated it was her mother's apartment I ask[ed] "I'd like to step in and talk to you about all the marijuana smoke coming out of your apartment. She said no,

> which is fine. When I stepped closer to the door she shoved me and said you're not coming inside.

R. 55, l. 4 – 56, l. 18. Alone among the witnesses, Schurig claimed that people coming and going from the apartment while Holley was being treated. *Id.* Schurig was also the only witness who reported seeing smoke. *Id.*

No other witness whether from law enforcement, the fire department, emergency medical services, or Appellant's family, recalled the apartment door opening while Holley was receiving medical treatment. Even when the door was open Schurig admitted that he could not see anything suspicious from his vantage point on the breezeway. R. 55, l. 4 – 56, l. 25. Moreover, Schurig could only hear "low conversation" coming from inside the apartment, but "nothing distinctive." *Id.*

Appellant refused to consent to the officers entering the apartment without a warrant or her mother's permission. R. 63, l. 1 – 66, l. 7. Appellant explained that her mother was expected home soon and that Schurig could ask her for consent to enter the apartment when she arrived. R. 94, l. 1 – 96, l. 21.

Schurig told Appellant that he did not need a warrant or consent because of the marijuana odor and that he was going to go inside the apartment. R. 63, l. 1 – 66, l. 7. Despite having been on the breezeway for a significant period of time prior to taking action, Schurig claimed that the marijuana odor combined with evidence that there were people inside the apartment now constituted exigent circumstances risking the imminent destruction of evidence. *Id.*

On cross-examination at trial, Schurig reiterated that he had the right to enter the apartment without a warrant and without consent:

> Q: [Y]ou do acknowledge arguing back and forth with [Appellant] about whether or not you could enter the apartment or whether you had to wait until the mother got home; right?

A: Yes.

Q: And you did tell her you didn't need a warrant to go inside the house?

A: To secure it? No I did not.

Q: You don't think you need a search warrant to go inside of a house just based on the odor of marijuana?

A: No, sir, I did not because the door . . . there were people coming in and out of the apartment and I believe that its possible that contraband could have been destroyed while I was outside. . . .

R. 65, ll. 1-25. Officer Revels recalled that Schurig, "advised [Appellant] that we had probable cause [*sic*] to that there was marijuana in there we'd like to talk just speak to her about it and she continued to block us said we had no right." R. 12, ll. 7-22. Revels did not recall the apartment door ever opening. R. 37, ll. 12-17.

When confronted by defense counsel, Schurig denied threatening Appellant with his Taser if she did not let him into the apartment and denied putting his hands on her prior to her shoving him. R. 56, l. 1 – 57, l. 15. Schurig claimed that he drew his Taser at a later point in the altercation. When asked if Schurig drew his Taser or grabbed Appellant first, Revels answered "I don't recall." R. 22, l. 2 – 23, l. 25. These were the only events of the altercation that Revels could not remember.

Both officers admitted that, prior to arriving at the apartment, they had no suspicion of any criminal activity there. R. 20, l. 15 – 21, l. 15; R. 62, l. 23 – 64, l. 25. Nor did they have any evidence that Appellant was involved in the drug trade or that anyone inside the apartment was armed or a drug dealer. *Id.* The police officers, both members of the department drug squad, claimed that they were simply at the apartment complex to support the firefighters and emergency medical personnel. *Id.*

Firefighter Brian Hamilton, who treated Holley, was in the breezeway about to leave when he heard Schurig tell Appellant he wanted to go inside the apartment and interrogate her about the marijuana odor. R. 28, l. 3 – 32, l. 18. Hamilton stated that the door to the apartment was closed the entire time he was treating Holley. *Id.* When Appellant refused to let the police in, Hamilton watched as Schurig dew his Taser while standing in front of Appellant and telling her that he did not need a warrant or Appellant's consent to enter. *Id.*

Firefighter Michael Bioletti also witnessed Schurig confront Appellant. He stated that Appellant and Schurig argued over whether Schurig needed a search warrant to enter the apartment. R. 35, l. 3 – 43, l. 12. Schurig claimed he did not need a warrant and Appellant refused to let him in without one. *Id.* From his vantage point, Bioletti could not see if Schurig drew his Taser or who initiated the physical altercation. *Id.*

Rock Hill fire department Captain Anthony Baker, like every other witness except Schurig, recalled that the door to the apartment was closed the entire time he was there. R. 46, ll. 5-25. After walking to the parking lot to let the ambulance know that Holley did not want to be taken to the hospital, Baker returned to find Schurig trying to enter the apartment with Appellant blocking him. R. 47, l. 1-15. Baker did not see Appellant strike Schurig. Baker also did not notice any marijuana odor and did not recall hearing anything from inside the apartment.

After Appellant refused to let the police in, "[a] scuffle ensued" and the apartment's door opened. R. 35, l. 3 – 43, l. 12. Baker stated that Schurig appeared to force his way into the apartment. R. 46, l. 5 – 49, l. 20. Schurig admitted that he moved closer to the door after Appellant refused to let him, but claimed that the door opened unexpectedly. R. 55, l. 2 – 57, l. 24. Appellant believed that someone from inside the apartment opened the door and that Schurig pushed his way in. R. 94, l. 1 – 96, l. 21.

Whatever the circumstances, Schurig ended up inside the apartment doorway struggling with Appellant. R. 56, l. 8 – 67, l. 11. As they grappled, Appellant and Schurig spilled out into the apartment complex's breezeway and then into the parking lot. *Id.* After the door opened, Revels, the firefighters and emergency medical personnel attempted to intervene and the scene became chaotic as people from inside the apartment responded to the struggle between Schurig and Appellant. *Id.*

Once the altercation reached the parking lot, Schurig grabbed Appellant by her hair and flung her to the ground. *Id.* In the process of throwing Appellant to the ground, Schurig lost his balance and also ended up on the ground. Appellant then briefly rolled on top of Schurig before firefighters pulled her off of him. *Id.*

Appellant was arrested without further incident. Holley, Lumpkin, and Quantavious were also arrested. **No marijuana was found in the apartment.** Schurig suffered scratches to his face and temporary damage to his vision. *Id.* Despite being equipped with personal microphones, neither Schurig nor Revels recorded the confrontation.

Appellant, Holley, and Lumpkin also testified at trial. All agreed that the door to the apartment was closed after Appellant returned to the breezeway. R. 77, l. 5 – 78, l. 20; R. 85, l. 3 – 87, l. 19. Each stated that Schurig asked Appellant for permission to search the apartment. Appellant declined telling Schurig that he would need to either get a search warrant or get consent from her mother. *Id.*

They all testified that Schurig threatened Appellant with his Taser if she did not allow him to search the apartment. *Id.* When Appellant continued to refuse to let Schurig in without a warrant or consent from her mother, Schurig told her that he did not need her consent or a

warrant and grabbed her to force her out of the way. After he grabbed Appellant, the door to the apartment opened and Schurig pushed Appellant inside. *Id.*

Bench Trial

Appellant elected a bench trial. At the close of the State's evidence, Appellant moved for a directed verdict on the grounds that she was entitled to use a reasonable amount of force to prevent Schurig from illegally entering the apartment. R. 68, l. 25 – 69, l. 20. Specifically, Appellant argued that:

> There was no arrest warrant; there was no search warrant; there was no factual circumstances fitting exigent circumstances. There was no consent and that therefore [Appellant] would be entitled to use force to prevent a trespass or to eject a trespasser. I would submit to the Court that it is unclear at what point in this altercation it switched from the officer trying to illegally enter the apartment with force being used to impose that effort versus him attempting to then place her under arrest.
>
> I submit that it is clearly an illegal arrest and she's got a right to use force to resist that arrest. It's kind of [a] continuing of action but either way through the Its entire process there are really no facts here in which the State can base a just verdict showing that this was a lawful arrest for anybody and that the use of force was not justified at any time.

R. 69, ll. 5-20.

Without taking argument from the State, the Court denied Appellant's motion for a directed verdict. R. 69, l. 21 – 70, l. 19. In denying Appellant's motion, the court concluded that "there [was] no unreasonable attempt, no real attempt to enter other than a verbal request and the response was she shoved him. I don't believe she had a right to shove him simply if he ask[ed] to enter her house." *Id.*

The court rejected Appellant's contention that no exigent circumstances were present to support the attempted warrantless entry into the apartment. Instead, the court believed that smell

of marijuana always constituted an exigent circumstance justifying a warrantless search of a person's residence:

> At this point I disagree with the United States Supreme Court in their opening case [*United States v. Johnson*, 333 U.S. 10, 68 S.Ct. 367, 92 L.Ed. 436 (1948) where] they found it is not exigent circumstances based on the smell of opium.
>
> I find that the smell of marijuana does rise to exigent circumstances to allow the entry into some's house without a search warrant because of - and again, I just can't phantom how the Supreme Court came up with the idea that only fumes would dissipate. Marijuana can be flushed down a toilet. It can be secreted. There are all kind of things that could happen if that creates exigent circumstances so I deny the motion for a Directed Verdict.

R. 70, ll. 8-19.

After the defense's case, Appellant renewed her motion for a directed verdict. R. 102, ll. 14 -23. Defense counsel reiterated that Schurig was attempting to illegally enter the apartment and that Appellant was entitled to use force to prevent his illegal entry. *Id.*

The renewal of the directed verdict motion blended into closing arguments before the court. Appellant argued that, "a search without a warrant demands exceptional circumstances absent some great emergency. The Fourth Amendment has interposed a magistrate between the citizens and the police. This is not a great emergency. As most, this is the odor of marijuana outside of an apartment; it's an apartment complex." R. 104, ll. 13-22.

Therefore, Schurig's threat to enter the apartment without a warrant and without consent was illegal. Defense counsel stressed that there was no marijuana found in the apartment. R. 105, ll. 9-20. Furthermore, a majority of the witnesses, whether first responders or members of Appellant's family, described Schurig as the aggressor who initiated physical contact. R. 105, l. 21 – 106, l. 24.

The State's closing emphasized that law enforcement officers "take significant risks" in their job and that Schurig had been "brutally assaulted" in the performance of his duty. R. 107, l. 7 – 114, l. 7. The State characterized the case as a vicious attack on Officer Schurig who was simply asking to be let into the apartment:

> I think the testimony is clear that on April 15th, 2016 the Rock Hill EMS Service and the Rock Hill Fire Department needed assistance with securing a location for investigating the injuries to Mr. Holley which appeared to be a cut on the face due to fall and so the police department responded. Mr. Holley dazed, confused, disoriented, doesn't want assistance and the Fire Department and EMS respect that but that brings the Rock Hill Police Department lawfully within the proximity of Apartment 104. And Officer Schurig and Officer Revels and several of the fire fighters all say marijuana is emanating from that apartment. They all testified to that.
>
> Then Officer Schurig has a duty to investigate further because marijuana and at various levels is illegal in South Carolina and ask clearly I need to get in that house, I need you to step into the house because we need to talk about this marijuana situation. And then as your Honor heard from Officer Schurig and from the other people who were present there is a shove at that point from Ms. Torbit to Officer Schurig.

R. 108, ll. 2-22.

The State contended that Schurig had the right to enter the apartment without a warrant or consent because the Supreme Court's opinion in *Kentucky v. King*, 563 U.S. 452, 131 S.Ct. 1849, 179 L.Ed. 2d 865 (2011), stood for the proposition that "destruction of evidence in a marijuana situation is an exigency in the Fourth Amendment situation as long as the police didn't create the exigency by being where they are." R. 111, ll. 15-20.

Therefore, since the police were legally in the breezeway, they could search the apartment without a warrant or consent once they smelled marijuana. The State further argued that, once the police smelled marijuana, they could perform a protective sweep of the apartment

because of exigent circumstances. R. 112, ll. 3-16. The State finally claimed that Appellant did not have standing since it was her mother's apartment. R. 113, l. 13 – 114, l. 7.

Court's Ruling on Renewed Directed Verdict and Court's Verdict

After closing arguments, the court stated that it was going to reconsider its directed verdict ruling in light of the closing arguments. R. 114, ll. 8-11. Ultimately, the Court denied the renewed directed verdict motion and found Appellant guilty.

In denying the directed verdict, the Court concluded that Schurig's demand to enter the apartment did not constitute a threatened Fourth Amendment violation and, thus, police conduct did not cause the exigent circumstance:

> [H]ere the officers had the right to make under the reasonable exigent circumstances exception to the need for a warrant to make a warrant less search and therefore had the right to effect an entry into the [apartment] to and that the defendant had no right to impede their right to effect a warrantless search. . . .
>
> I find Ms. Torbit is guilty for resisting arrest under Section (B) of the code based on her resistance to and altercation with and interfering with the officer's attempt to make a lawful warrant less search so I find her guilty.

R. 118, l. 15 – 119, l. 14. This appeal follows.

ARGUMENT

The trial court reversibly erred in denying Appellant a directed verdict of acquittal for resisting arrest where the uncontroverted evidence established that, at the time of her arrest, Appellant was acting to prevent Officer Schurig from undertaking an illegal warrantless search of her mother's apartment that was not justified by any exigent circumstances.

Introduction

The trial court erred in refusing to grant Appellant a directed verdict of acquittal for her resisting arrest charge. R. 118, l. 15 – 119, l. 14. Appellant shoved Officer Schurig in an attempt to prevent Schurig from conducting an unlawful warrantless search of Appellant's mother's apartment.

The trial court's erroneous denial of Appellant's directed verdict motion was based on two clear errors. First, the trial court erroneously held that Schurig was simply asking to talk to Appellant about the marijuana odor when Appellant shoved him. R. 69, l. 21 – 70, l. 19. Even taking the evidence in the light most favorable to the State, the trial court's conclusion was without any evidentiary support.

In actuality, the unconverted facts, as testified to by Schurig, established that Schurig asked Appellant to be allowed into the apartment. R. 55, l. 4 – 57, l. 6; R. 63, l. 1 – 66, l. 8; *see State v. Dickey*, 394 S.C. 491, 716 S.E.2d 97 (2011). The unconverted evidence also established that Appellant refused to consent to Schurig entering the Apartment and that Schurig nevertheless attempted for a second time to enter the apartment prior to Appellant shoving him. R. 73, l. 4 – 75, l. 6; R. 63, l. 1 – 66, l. 8.

Second, the trial court erroneously ruled that the odor of marijuana constituted a *per se* exigent circumstance justifying a warrantless search of a residence was an error of law. R. 114, l. 15 – 119, l. 14. This ruling was a legal error directly conflicting with United States Supreme

Court precedent and totally at odds with South Carolina case law governing warrantless searches based on exigent circumstances. *United States v. Johnson*, 333 U.S. 10, 68 S.Ct. 367, 92 L.Ed. 436 (1948); *see also State v. Abdullah*, 357 S.C. 344, 592 S.E.2d 344 (Ct. App. 2004) (exigent circumstances justified warrantless search of apartment where defendant was found; officers were responding to call about a burglary and gunfire, they arrived at apartment to discover defendant, who was being uncooperative, and officers observed bullet holes inside and outside the walls of the premises).

The Court's legal error was the result of a gross misapplication of the United States Supreme Court opinion, *Kentucky v. King*, 563 U.S. 452, 131 S.Ct. 1849, 179 L.Ed.2d 865 (2011). The odor of marijuana emanating from inside an occupied residence cannot, without specific evidence that the marijuana is being destroyed or about to be destroyed, constitute a *pre se* exigent circumstance justifying a warrantless search of the residence.

Directed Verdict of Acquittal

When reviewing a trial judge's denial of a motion for a directed verdict, the appellate court is required to consider "not whether there is 'any' evidence to support the conviction, but whether viewing the evidence in the light most favorable to the prosecution, there is sufficient evidence to justify a rational trier of fact to find guilt beyond a reasonable doubt." *State v. Stewart*, 278 S.C. 296, 295 S.E.2d 627 (1982), citing *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781 (1979); *see also, State v. Asbury*, 328 S.C. 187, 493 S.E.2d 349 (1997).

The accused is entitled to a directed verdict when the State fails to present evidence to support every element of the charged offense. *See State v. Brown*, 360 S.C. 581, 586, 602 S.E.2d 392, 395 (2004). "The trial court is concerned with the existence or non-existence of evidence, not its weight." *Id.* at 586, 602 S.E.2d at 395.

"When the State fails to produce substantial circumstantial evidence that the defendant committed a particular crime, the defendant is entitled to a directed verdict." *State v. Odems*, 395 S.C. 582, 720 S.E.2d 48 (2011). "Suspicion implies a belief or opinion as to guilt based upon facts or circumstances which do not amount to proof." *See State v. Buckmon*, 347 S.C. 316, 322, 555 S.E.2d 402, 404-05 (2001). A defendant is entitled to a directed verdict on the basis of an affirmative defense when "the uncontroverted facts" establish that defense as "a matter of law." *State v. Butler*, 407 S.C. 376, 381, 755 S.E.2d 457, 460 (2014) *citing Dickey*, 394 S.C. 491, 716 S.E.2d 97.

Appellant was charged with resisting arrest under S.C. Code Ann. § 16-09-320(B), which states that:

> It is unlawful for a person to knowingly and wilfully assault, beat, or wound a law enforcement officer engaged in serving, executing, or attempting to serve or execute a legal writ or process or to assault, beat, or wound an officer when the person is resisting an arrest being made by one whom the person knows or reasonably should know is a law enforcement officer, whether under process or not.

S.C. Code Ann. § 16-09-320(B). While it is unlawful for a person to resist a lawful arrest by a police officer, a person has the right to resist an unlawful arrest using whatever force is reasonably necessary under the circumstances. *State v. Bethune*, 112 S.C. 100, 99 S.E.2d 753 (1919) (holding that a person has a right to defend himself from unlawful arrest).

To determine whether a defendant could have lawfully resisted arrest, courts must consider whether, at moment arrest was made, officers had probable cause to make an arrest. *State v. Maybank*, 352 S.C. 310, 573 S.E.2d 851 (Ct. App. 2002) (denying directed verdict where police arrested defendant after observing drugs in his motel room during warrantless search conducted with defendant's consent).

Here, whether Appellant was entitled to a directed verdict of acquittal for resisting arrest turned on whether Schurig had probable cause to arrest her for assault. *State v. Poinsett*, 250 S.C. 293, 157 S.E.2d 570 (1967) (holding that defendant could not lawfully resist service of an arrest warrant for breach of the peace on a Sunday). The broadest of South Carolina's assault and battery offenses is assault and battery, third degree, which occurs when a person, "**unlawfully** injures another person, or offers or attempts to injure another person with the present ability to do so." S.C. Code Ann. § 16-3-600(E)(1).

Therefore, probable cause to arrest Appellant for assault existed if it was unlawful for Appellant to shove Schurig to prevent him from entering the apartment. Determining whether Appellant could lawfully shove Schurig depends on whether Schurig's attempted warrantless entry to the apartment violated the Fourth Amendment. If so, Appellant had the right to use force to prevent Schurig's illegal entry.

Warrantless Searches Based on Exigent Circumstances

The Fourth Amendment to the United States Constitution prohibits unreasonable searches and seizures: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const. amend. IV.

Generally, a warrantless search is *per se* unreasonable and thus violative of the Fourth Amendment's prohibition against unreasonable searches and seizures. *State v. Bultron,* 318 S.C. 323, 331, 457 S.E.2d 616, 621 (Ct.App.1995). However, a warrantless search will withstand constitutional scrutiny where the search falls within one of a few specifically established and well delineated exceptions to the Fourth Amendment exclusionary rule. *Id.,* 318 S.C. at 331-32,

457 S.E.2d at 621. In such cases, the burden is upon the State to justify a warrantless search. *State v. Bailey,* 276 S.C. 32, 35, 274 S.E.2d 913, 915 (1981).

Our courts have recognized that it may be reasonable in some instances to allow police to act without the permission of a magistrate when "the exigencies of the situation [have] made that course imperative." *McDonald v. United States,* 335 U.S. 451, 456, 69 S.Ct. 191, 93 L.Ed. 153 (1948). The exigent circumstances doctrine provides an exception to the Fourth Amendment's protection against warrantless searches, but only where, from an objective standard, a compelling need for official action and no time to secure a warrant exist. *State v. Brown,* 289 S.C. 581, 587, 347 S.E.2d 882, 886 (1986) (quoting *Michigan v. Tyler,* 436 U.S. 499, 98 S.Ct. 1942, 56 L.Ed.2d 486 (1978)).

For example, warrantless searches are reasonable when objectively necessary to prevent a suspect from fleeing or where there is an imminent risk of danger to police or the public. *State v. Herring*, 387 S.C. 201, 692 S.E.2d 490 (2009) (exigent circumstances justified looking into defendant's garage window where police were searching for defendant in connection to a fatal shooting earlier that night and had reason to believe defendant was armed and dangerous).

Exigent circumstances may also allow a warrantless search "to prevent the imminent destruction of evidence." *Brigham City v. Stuart,* 547 U.S. 398, 403, 126 S.Ct. 1943, 164 L.Ed.2d 650 (2006); *see also Georgia v. Randolph,* 547 U.S. 103, 116, n. 6, 126 S.Ct. 1515, 164 L.Ed.2d 208 (2006). To fit within this exception, "police action literally must be [taken] 'now or never' to preserve the evidence of the crime." *Roaden v. Kentucky,* 413 U.S. 496, 505, 93 S.Ct. 2796, 37 L.Ed.2d 757 (1973).

At Appellant's trial, the State claimed that exigent circumstances, based on possibility that marijuana might be destroyed by occupants of the apartment, rendered Schurig's attempted

warrantless entry into the apartment reasonable. R. 107, l. 7 – 114, l. 7. The State cited to Supreme Court of the United States opinion in *Kentucky v. King*, for the proposition that the odor of marijuana construes a *pre se* exigent circumstance based on the risk of the destruction of the evidence. *Id.*

The trial court adopted the State's argument in denying Appellant's motion for a directed verdict and held that Schurig could legally enter the apartment without consent or a warrant, rendering Appellant's resistance to Schurig unlawful. R. 114, l. 15 – 119, l. 14. The trial court also concluded that the smell of marijuana emanating from a residence is a *per se* exigent circumstance as "there are all kinds of things that could happen" to the drugs if police were required to seek a warrant. *Id.*; *see also* R. 69, l. 21 – 70, l. 19. The trial court and the State grossly misconstrued *King's* holding.

In *King*, the Supreme Court held that warrantless entry to prevent the destruction of evidence reasonable when the police do not create the exigency through an actual or threatened Fourth Amendment violation. 563 U.S. at 471, 131 S.Ct. at 18462, 179 L.Ed.2d 865. The officers in *King* were following a drug dealer into an apartment complex. Law enforcement lost sight of the drug dealer when he walked up a flight of stairs. *Id.* at 456, 131 S.Ct. at 1854, 179 L.Ed.2d 865.

The trailing officer heard the sound of a door shutting, however, by the time he climbed the stairs, the drug dealer was nowhere to be found. *Id.* The hallway the drug dealer was last seen walking towards had two apartments, one on the left side of the hallway and one on the right. *Id.*

Police smelled the odor of marijuana coming from the apartment on the right side of the hallway and decided to conduct a knock and talk. *Id.* After they knocked on the door and identified themselves as police, they heard people inside the apartment "moving around."

Fearing that drug-related evidence might be destroyed, the police forcibly entered the apartment. *Id.*

On appeal, the defendants argued that police caused the exigent circumstances by conducting a knock and talk. *Id.* at 458, 131 S.Ct. at 1855, 179 L.Ed.2d. 865. By electing to conduct a knock and talk, rather than conduct surveillance or seek a warrant, the police created the exigency that they then used to justify not seeking a warrant. *Id.*

The Supreme Court rejected the defendants' arguments holding that **as long as police conduct does not threaten a Fourth Amendment violation**, the police were not responsible for creating the exigent circumstances that excused them seeking a warrant. *Id.* at 470, 131 S.Ct. at 1862, 179 L.2d. 865. "Occupants who choose not to stand on their constitutional rights but instead elect to attempt to destroy evidence have only themselves to blame for the warrantless exigent-circumstances search that may ensue." *Id.*

Critically, the Supreme Court assumed for the sake of argument that an exigency existed. *Id.* at 471, 131 S.Ct. at 1862, 179 L.E.2d. 865. "We decide only the question on which the Kentucky Supreme Court rules and on which we granted certiorari: Under what circumstances do police impermissibly create an exigency?" *Id.*, 131 S.Ct. at 1862-1863, 179 L.Ed.2d 865. The Court then remanded *King* to the Kentucky Supreme Court to determine whether exigent circumstances, the imminent destruction of evidence, existed. *Id.*

On remand the Kentucky Supreme Court concluded that **no exigent circumstances existed:**

> [W]e conclude that the Commonwealth failed to meet its burden of demonstrating exigent circumstances justifying a warrantless entry. During the suppression hearing, [the lead officer] repeatedly referred to the "possible" destruction of evidence. He stated that he heard people moving inside the apartment, and that this was "the same kind of movements we've heard inside" when other

> suspects have destroyed evidence. [The lead officer] never articulated the specific sounds he heard which led him to believe that evidence was about to be destroyed.
>
> In fact, the sounds as described at the suppression hearing were indistinguishable from ordinary household sounds, and were consistent with the natural and reasonable result of a knock on the door. Nothing in the record suggests that the sounds officers heard were anything more than the occupants preparing to answer the door.
>
> The police officers' subjective belief that evidence was being (or about to be) destroyed is not supported by the record, and this Court cannot conclude that the belief was objectively reasonable. . . . Exigent circumstances do not deal with mere possibilities, and the Commonwealth must show something more than a possibility that evidence is being destroyed to defeat the presumption of an unreasonable search and seizure.
>
> Consistent with the instructions on remand from the United States Supreme Court, this Court concludes that exigent circumstances did not exist when police made a warrantless entry of the apartment occupied by Appellant King.

King v. Commonwealth, 386 S.W.3d 119, 123 (Ky. 2012).

Other jurisdictions mirror the Kentucky Supreme Court and hold that the smell of marijuana or other narcotics emanating from an occupied dwelling is not, without more, a *per se* exigent circumstance. *See United States v. Morales*, 171 F.3d 978 (5th Cir. 1999) (suppressing evidence seized during warrantless search of warehouse where no evidence that suggested contraband was about to be destroyed); *United States v. Ramirez*, 676 F.3d 755 (8th Cir. 2012) (holding no exigent circumstances existed to justify warrantless entry to hotel room as noises from inside room simply suggested people were inside); *United States v. Saafir*, 754 F.3d 262 (4th Cir. 2014) (suppressing evidence after officer lied about having probable cause to search without a warrant); *State v. Aguilar*, 228 Ariz. 401, 267 P.3d 1193 (Az. Ct. App. Div. 1 2011) (suppressing evidence of warrantless search where police had probable cause but no objective

evidence supporting claim that drug evidence was about to be destroyed).

In *United States v. Johnson*, the Supreme Court held that the smell of narcotics coming from a dwelling, standing alone, cannot justify a warrantless search. 333 U.S. 10, 68 S.Ct. 367, 92 L.Ed. 436. The narcotics officers' actions in *Johnson* are remarkably similar to Schurig's actions in Appellant's case. The trial court expressly refused to follow *Johnson* at Appellant's trial. R. 70, ll. 4-19.

In *Johnson*, police received information from a confidential informant that unknown people were smoking opium in a hotel room. 333 U.S. at 12-13, 68 S.Ct. at 369, 92 L.Ed. 436. The police went to the hotel and smelled burning opium coming from a specific room. *Id.* The police knocked on the hotel room door and identified themselves as law enforcement:

> There was a slight delay, some "shuffling or noise" in the room and then the defendant opened the door. The officer said, "I want to talk to you a little bit." She then, as he describes it, "stepped back acquiescently and admitted us." He said, "I want to talk to you about the opium smell in the room here." She denied that there was such a smell. Then he said, "I want you to consider yourself under arrest because we are going to search the room."

Id. The police then searched the room and, unlike in Appellant's case, found evidence of recent opium use.

In suppressing the evidence from the warrantless search, the Supreme Court concluded that the officer had probable cause to search, but that there were no "exceptional circumstances" such as the threat that the contraband would be removed or destroyed, excusing the failure to seek a warrant. *Id.* at 15-16, 68 S.Ct. at 370, 92 L.Ed. 436.

Like other jurisdictions, South Carolina courts restrict the imminent destruction of evidence exigent circumstances exception to emergencies that present an immediate risk to the public and to rapidly developing investigations into serious violent crimes where the suspect will

likely destroy the evidence if police fail to act immediately. *State v. Dobbins*, Op. No. 5496 (S.C. Ct. App. Filed July 12, 2017) (Shearouse Adv. No. 26 at 21) (smell of active methamphetamine and search for suspect in recent assault constituted exigent circumstances where defendant answered the door and slammed it in law enforcement's face and meth labs frequently explode); *see also Abdullah,* 357 S.C. 344, 592 S.E.2d 344.

There is simply no case law supporting the trial court's conclusion that the smell of marijuana emanating from an occupied dwelling constitutes a *per se* exigent circumstance justifying the failure to seek a warrant. R. 70, ll. 4-19.

Discussion

Looking at the evidence in the light most favorable to the State, Schurig – after being at the apartment complex for several minutes – asked to be let into the apartment so he could speak with Appellant about the marijuana odor. R. 55, l. 4 – 56, l. 25; R. 64, l. 2 – 66, l. 8. Appellant told Schurig that he could not come into the apartment unless he had a warrant or her mother's consent. While Schurig acknowledged that it was "fine" for Appellant to refuse to allow him into the apartment, Schurig testified that he had no intention of honoring Appellant's refusal and that he was going to enter the apartment regardless. *Id.*

Schurig claimed that as he moved closer to the apartment door, Appellant shoved him and reiterated that she was not consenting to Schurig entering the apartment. Schurig stated that he was not going to arrest Appellant for the first shove. "I ask her, don't put your hands on me, all I want to do is talk to you about it." *Id.*

Schurig then "stepped back towards the [apartment] door again" and Appellant shoved him for a second time. After the second show, Schurig decided to arrest her for assault. *Id.* As he tried to arrest her, the apartment door came open and a scuffle ensued between Appellant and

Schurig. During the struggle, Appellant struck Schurig in the face with her cell phone. No marijuana was found in the apartment.

Schurig's attempt to conduct a warrantless search of the apartment was a threatened Fourth Amendment violation once Appellant refused to consent to the search. Appellant was legally allowed to use force to prevent it. Schurig and Revels were not investigating a crime when they arrived at the apartment complex, they claimed they were simply there to assist the emergency medical personnel.

While the smell of marijuana may have given rise to probable cause, absent an exigent circumstance, that determination is reserved to a judge. *Johnson* 333 U.S. at14-15, 68 S.Ct. at 369, 92 L.Ed. 436 ("When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or Government enforcement agent"). As discussed *supra*, the smell of marijuana emanating from the apartment combined with indistinct "low conversation" inside the apartment cannot support a reasonable objective belief that the marijuana is at risk of imminent destruction in the absence of specific indicators that the occupants were taking steps to destroy the evidence.

Importantly, by the time Schurig decided that he wanted to search the apartment, he had been standing in the apartment breezeway just outside the apartment door for several minutes. R. 10, l. 2 – 13, l. 22. Schurig was simply not faced with a "now or never" circumstance where his failure to act immediately would have risked the loss of evidence. *Roaden,* 413 U.S. 496, 93 S.Ct. 2796, 37 L.Ed.2d 757.

The trial court reversibly erred in denying Appellant a directed verdict of acquittal for resisting arrest where the uncontroverted evidence established that, at the time of her arrest,

Appellant was acting to prevent Officer Schurig from undertaking an illegal warrantless search of her mother's apartment that was not justified by any exigent circumstances.

CONCLUSION

By reason of the foregoing arguments, Appellant Dajlia Torbit respectfully requests that this Court reverse her conviction for resisting arrest and remand her case to the York County Court of General Sessions for the issuance of an Order of Acquittal.

Robert M. Pachak
Appellate Defender

ATTORNEY FOR APPELLANT

This 1st day of December, 2017.

CERTIFICATE OF COUNSEL FOR APPELLANT

The undersigned certifies that to the best of my ability the Final Brief 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."

December 1, 2017

Robert M. Pachak

Robert M. Pachak
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, S. C. 29211-1589
(803) 734-1330