STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

ORIGINAL

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THE STATE,

RESPONDENT,

V.

DAJLIA SYMONE TORBIT,

APPELLANT

APPELLATE CASE NO 2016-002433

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Appeal from York County

Honorable John C. Hayes, Circuit Court Judge

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Opinion No. 2018-UP-417

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PETITION FOR REHEARING

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Pursuant to Rule 221(a), SCACR, Appellant Dajlia Symone Torbit respectfully petitions this Court for a rehearing in the above-captioned matter after an unpublished opinion, dated November 7, 2018, affirmed her conviction for resisting arrest. In support of her petition, Appellant respectfully alleges that this Court overlooked or misapprehended the following arguments:

This court erred in concluding that Appellant's actions constituted resisting arrest under S.C. Code Ann. § 16-9-320(B). Under that provision, it is unlawful for a person to 1) "knowingly and willfully assault, beat, or wound a law enforcement officer engage in serving,

executing, or attempting to serve or execute a legal writ or process" or 2) "to assault, beat, or wound an officer when the person is resisting an arrest being made by" a law enforcement officer.

In State v. Brannon, this Court held that a fleeing police officer's demand to stop did not constitute resisting arrest; there was no allegation the defendant opposes or reisted an officer in serving, executing, or attempting to serve or execute legal writ or process. 379 S.C. 487, 666 S.E.2d 272 (Ct. App. 2008), aff'd, 388 S.C. 498, 697 S.E.2d 593 (2010). This Court therefore reversed Brannon's conviction.

Appellant neither opposed nor resisted a law enforcement officer who was engaged in serving, executing, or attempting to serve or execute a *legal* writ or process, the first half of subsection (B) of S.C. Code Ann. § 16-9-320.

Nor is the second part of that provision applicable. An "arrest" is defined by *Black's Law Dictionary* as "1. A seizure or forcible restraint. 2. The taking or keeping of a person in custody by legal authority, esp. in response to a criminal charge." Black's Law Dictionary 104 (7th ed.1999). There was no seizure for Fourth Amendment purposes at the time law enforcement arrived at Appellant's mother's apartment. Further, a lawful arrest could not have taken place, as Appellant was protecting her mother's apartment against an unlawful search from law enforcement officers who had neither consent nor a warrant.

Unlike law enforcement in State v. Maybank, police officers in Appellant's case did not have probable cause to arrest her. 352 S.C. 310, 573 S.E.2d 851 (Ct. App. 2002). In Maybank, officers saw Maybank and a woman "lying in bed and marijuana lying on a table." Id. at 313, 573 S.E.2d at 853. After officers told Maybank he was under arrest for possessing drugs, he then shoved one of the officers and ran. Id. As Maybank attempted to escape, two officers engaged

in "several brief fights" with them. Id. at 314, 573 S.E.2d at 853. This Court concluded that Maybank was not permitted to resist arrest because officers had probable cause to arrest him.

Appellant's case can be distinguished from Maybank in a number of ways. Christopher Revels testified that he advised Appellant that she was under arrest after she prevented law enforcement from entering her mother's apartment. R. 13, ll. 1 – 22. The alleged marijuana smell did not give law enforcement probable cause to arrest Appellant. Marijuana was not seen in the apartment, as the door was closed. Appellant was not in any way connected with any marijuana, either. In fact, Revels admitted that the door to the apartment was closed while he was there and Appellant was never observed inside the apartment. R. 12, l. 21 – R. 13, l. 5.

Officer Schurig admitted that he was unable to see anything inside the apartment when the door opened. R. 55, ll. 23 – 25. He was only able to her "low conversations but nothing distinctive that stood out." R. 56, ll. 1 – 4. After he was denied consent to search the apartment, he stepped closer to both Appellant and the door to the apartment. R. 56, ll. 8 – 18. According to Schurig, Appellant shoved him away from the door which prompted a request from him that she not do so. Id. Appellant's obvious refusal to allow law enforcement consent to search the apartment notwithstanding, Schurig once more stepped towards the door. Id. Schurig conceded that he did not have consent, a search warrant, or an arrest warrant. R. 65, ll. 18 – 25.

No marijuana was ever recovered from the apartment. R. 67, ll. 18 – 20.

Appellant's motion for a directed verdict at the conclusion of the State's case-in-chief should have been granted. As articulated by defense counsel, "[t]here was no consent and ... therefore Ms. Torbit would be entitled to use force to prevent a trespass or to eject a trespasser." R. 68 l. 25 – R. 69, l. 20. Schurig admitted that he wanted to get inside the apartment and that he attempted to do just that. R. 66, ll. 1 – 5. He refused to be rebuffed by a citizen even though he

did not have consent or a warrant. In addition to the illegal search, law enforcement illegally arrested Appellant, and "she's got a right to use force to resist that arrest." R. 69, ll. 14 – 20.

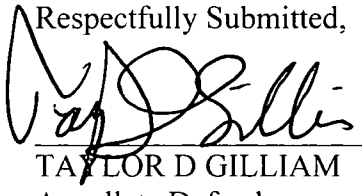
In denying Appellant's directed verdict motion, the trial judge questioned whether law enforcement had a right to arrest Appellant after "she shoved him when he simply ask[ed] to enter the house." R. 69, ll. 21 – 22. Upon information and belief, Appellant was not arrested or charged with assault. She reasonably believed that preventing illegal entry into her mother's apartment was necessary, and she began acting with force to prevent an illegal search.

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). In Appellant's case, law enforcement repeatedly provoked Appellant, approaching her and the entrance to the apartment without her consent or the existence of a warrant. Appellant was allowed to defend herself from unlawful arrest.

Schurig's repeated and unlawful attempts to perform a warrantless search of the apartment was a likely Fourth Amendment violation following Appellant's refusal to consent to the search.

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 her.

Respectfully Submitted,



TAYLOR D GILLIAM
Appellate Defender

This 21st day of November, 2018.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS



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CERTIFICATE OF SERVICE

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The undersigned attorney hereby certifies that a copy of the Petition for Rehearing in the above-entitled case has been served upon William F. Schumacher, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Dajlia Symone Torbit, at 966 Eastwood Drive, Rock Hill, SC 29730, this 21st day of November, 2018.

Taylor D Gilliam
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO BEFORE
ME this 21st day of November, 2018.

(L.S)
Notary Public for South Carolina
My Commission Expires: May 12, 2027.