STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM YORK COUNTY
Court of General Sessions
Honorable John C. Hayes, Circuit Court Judge

Appellate Case No. 2016-002433

THE STATE, ...RESPONDENT,

v.

DAJLIA SYMONE TORBIT, ...APPELLANT.

RESPONDENT'S RETURN TO PETITION FOR REHEARING

On November 7, 2018, this Court issued an opinion affirming Appellant's conviction for resisting arrest. Pursuant to Rule 221(a), SCACR, Appellant petitioned this Court for rehearing, and this Court requested that Respondent ("the State") file a return to the petition. For the following reasons, Appellant's petition for rehearing should be denied.

No Right to Resist a Search, Lawful or Unlawful, Exists in South Carolina

Pursuant to S.C. Code Ann. § 16-9-320(B) (2015):

> It is unlawful for a person to knowingly and willfully 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. A person who violates the provisions of this subsection is guilty of a felony and, upon conviction, must be fined not less than one thousand dollars nor more than ten thousand dollars or imprisoned not more than ten years, or both.

Under past South Carolina law, a person had the right to resist an unlawful arrest, even to the extent of taking the life of the aggressor if it was necessary in order to regain her liberty. State v. McGowan, 347 S.C. 618, 622, 557 S.E.2d 657, 659 (2001) (emphasis added). The person resisting arrest could resist with equal and opposite force, but was not permitted to "use force disproportionate to the injury threatened." Id. at 623–24, 557 S.E.2d at 660.

The United States Supreme Court has fashioned a judicially-created remedy, the exclusionary rule, which is a deterrent sanction by which the prosecution is barred from introducing evidence obtained in violation of the Fourth Amendment." (citation omitted)). Importantly though, the exclusion of evidence following an unconstitutional search "is 'not a personal constitutional right,' nor is it designed to redress the injury occasioned by an unconstitutional search." Davis v. United States, 564 U.S. 229, 236 (2011) (citations omitted).

Initially, the State notes that Appellant is incorrect in her assertion that South Carolina currently recognizes a right to resist an arrest. Under the original version of § 16-9-320, persons could only be prosecuted for resisting lawful arrests. S.C. Code Ann. § 16-9-320 (1980). However, the legislature amended the statute in 1990, removing the "lawful" language and making it illegal for citizens to resist any arrest. S.C. Code Ann. § 16-9-320 (1990). As noted by this Court, individuals are now only permitted to resist the use of excessive force by an arresting officer; citizens are not permitted otherwise resist an arrest. State v. Williams, 367 S.C. 192, 199, 624 S.E.2d 443, 446–47 (Ct. App. 2005).

Regardless, Appellant is unable to cite to a single situation in which South Carolina courts have ever recognized the right to resist an unlawful search. In the past, South Carolina law allowed individuals to use force to resist an unlawful arrest because such an action "stands upon the same footing as any other non-felonious assault, or as a common assault and battery."

See McGowan, 347 S.C. at 623, 557 S.E.2d at 660 (quoting State v. Francis, 152 S.C. 17, 34–39, 149 S.E. 348, 355–56 (1929). However, an unlawful search is not similarly viewed under the law; a person was never permitted to use force "to prevent a mere trespass . . . unaccompanied by any imminent danger of great bodily harm or felony." Id.

By definition, lawful resistance requires a degree of force reasonable in the situation. Id. at 622, 557 S.E.2d at 659. In situations involving unlawful searches, no use of force is reasonable because the injury threatened, a search of immediate vicinity, is not an attempt to injure someone or illegally restrain her freedom. Because the search, unlike an unlawful arrest, does not involve the use of force against a person, any use of physical force by the person resisting the search is an inherently disproportionate response to the actions of the officers. While Appellant opines physical force was needed to protect her privacy interests, victims of unlawful searches are not without a legal remedy. Both federal and state law use the exclusionary rule to bar prosecution based on evidence discovered during an unlawful search. See, e.g., Davis, 564 U.S. at 236. If officers' had uncovered anything during an unlawful search, the exclusionary rule would prevent such evidence from being used in Appellant's criminal prosecution.

Origin of Resisting Arrest Charge

"When ruling on a motion for a directed verdict, the trial court is concerned with the existence or nonexistence of evidence, not its weight." State v. Weston, 367 S.C. 279, 292, 625 S.E.2d 641, 648 (2006). A defendant is entitled to a directed verdict when the State fails to produce evidence of the offense charged. Id. When reviewing a denial of a directed verdict, the appellate court must view the evidence and all reasonable inferences in the light most favorable to the State. State v. Cherry, 361 S.C. 588, 593–94, 606 S.E.2d 475, 477–78 (2004). "If there is

any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused, an appellate court must find the case was properly submitted to the jury." Id. (emphasis added). A circuit judge should grant a directed verdict motion only when the evidence merely raises a suspicion the accused is guilty. State v. Odems, 395 S.C. 582, 586, 720 S.E.2d 48, 50 (2011).

To determine whether a defendant could have lawfully resisted arrest, a court must consider whether, at the moment the arrest was made, the officers had probable cause to make it. Accordingly, the court must decide whether the facts and circumstances known to the officers constituted reasonably trustworthy information sufficient to warrant a prudent person believing the person committed or was committing an offense. State v. Maybank, 352 S.C. 310, 318, 573 S.E.2d 851, 855–56 (Ct. App. 2002).

Despite Appellant's claims to the contrary, her charge resisting arrest stemmed from her physical assault of Officer Schurig and not from a forceful attempt to enter the apartment. Officers Revels testified Appellant began shoving Officer Schurig immediately following the latter's verbal request to talk to her inside the apartment about the marijuana smoke he saw and smelled. Similarly, Officer Schurig testified Appellant began shoving him when he was near the front door, prior to any attempt to forcibly gain entry to the premises. Accordingly, because there was direct evidence Appellant's charge for resisting arrest stemmed from her physical assault against Officer Schurig, the trial judge did not err in denying the motion for a directed verdict.

Exigent Circumstances

A warrantless search may be proper under the Fourth Amendment if it falls within one of the well-established exceptions to the warrant requirement." See State v. Brown, 401 S.C. 82,

89, 736 S.E.2d 263, 266 (2012) (recognizing the following exceptions to the warrant requirement: (1) search incident to a lawful arrest, (2) hot pursuit, (3) stop and frisk, (4) automobile exception, (5) the plain view doctrine, (6) consent, and (7) abandonment). "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 exists." State v. Abdullah, 357 S.C. 344, 351, 592 S.E.2d 344, 348 (Ct.App.2004); see State v. Brown, 289 S.C. 581, 587, 347 S.E.2d 882, 886 (1986) (acknowledging the exigent circumstances doctrine as an exception to the warrant requirement).

"Under the 'plain view' exception to the warrant requirement, objects falling within the plain view of a law enforcement officer who is rightfully in a position to view the objects are subject to seizure and may be introduced in evidence." State v. Beckham, 334 S.C. 302, 317, 513 S.E.2d 606, 613 (1999). To satisfy the "plain view" exception, two elements must be met: "(1) the initial intrusion which afforded the authorities the plain view was lawful and (2) the incriminating nature of the evidence was immediately apparent to the seizing authorities. State v. Wright, 391 S.C. 436, 443, 702 S.E.2d 324, 327 (2011); Brown, 289 S.C. at 587-88, 347 S.E2d 882. See also State v. Abdullah, 357 S.C. 344, 351-52, 592 S.E.2d 344, 348-49 (Ct. App. 2004).

Another exigent circumstance is the imminent destruction of evidence. In Schmerber v. California, 384 U.S. 757 (1966), the United States Supreme Court found the exigency created by the dissipation of alcohol in a defendant's blood stream combined with the necessity of securing the scene of an accident justified an officer's decision to obtain a blood draw from a defendant without obtaining a warrant. Noting the test was a common, minimally invasive procedure

which was performed in a reasonable manner, the Court found the Constitution "does not forbid the States minor intrusions into an individual's body under stringently limited conditions." To determine whether a law enforcement officer faced an emergency that justified acting without a warrant, a court must look to the totality of the circumstances. See Brigham City v. Stuart, 47 U.S. 398, 406 (2006). The fact-specific nature of such an inquiry demands a court evaluate each case of alleged exigency based on its own facts. Missouri v. McNeely, 133 S.Ct. 1552, 1559 (2013).

Should this Court find Appellant's arrest was inextricably linked to Officer Schurig's request to speak with her inside of the apartment and that such action constituted a search, the State asseverates Officer Schurig's actions were justified by the exigencies of the situation. Officer Schurig smelled marijuana and saw marijuana smoke inside the apartment. Thus, evidence of the marijuana was in his plain view—and "plain smell"—and would justify his warrantless search of the interior of the home. See Beckham, 334 S.C. at 317, 513 S.E.2d at 613.

Moreover, as noted by the trial judge, the potential destruction of the marijuana further justified a warrantless search of the premises. Petitioner claims the various cases cited in his brief stand for the proposition that the smell of drugs, alone, does not create the presumption that the evidence will be destroyed unless officers take immediate action. However, South Carolina courts recognize the destructibility of drug evidence and the inherent exigency that creates. See State v. Dobbins, 420 S.C. 583, 594, 803 S.E.2d 876, 881 (Ct. App. 2017) (citing U.S. v. Grissett, 925 F.2d 776 (4th Cir. 1991)). Tolley admitted that due to the fight, he was able to enter the apartment, go to the restroom, and flush the toilet. Taking the time to obtain a warrant would have allowed individuals inside more than enough time to destroy any marijuana evidence.

CONCLUSION

Based upon the foregoing, the State respectfully requests that this Court deny rehearing in this case.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT

December 7, 2018

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PROOF OF SERVICE

I, Destiny Blue, certify that I have served the within Return to the Petition for Rehearing in the above-referenced case by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Taylor D. Gilliam, Esquire
S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, SC 29211

I further certify that all parties required by Rule to be served have been served this 7th day of December, 2018.

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ALAN WILSON
ATTORNEY GENERAL

December 7, 2018

The Honorable Jenny A. Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

RE: State v. Dajlia Symone Torbit – Appellate Case No. 2016-002433

Dear Ms. Kitchings:

Enclosed please find the original and six copies of my Return to the Petition for Rehearing in the above-referenced case, along with proof of service, for filing in the above-referenced appeal.

Sincerely,

William F. Schumacher, IV
Assistant Attorney General
S.C. Bar No. 100231

WFS/
Enclosures

cc: Taylor D. Gilliam, Esquire
Victim Advocacy Division