STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to York County

Honorable John C. Hayes, Circuit Court Judge

Opinion No. 2018-UP-417 (S.C. Ct. App. Filed November 7, 2018)

2016-GS-46-02343

THE STATE,

RESPONDENT,

V.

DAJLIA SYMONE TORBIT,

PETITIONER

APPELLATE CASE NO 2016-002433

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

TAYLOR D GILLIAM
Appellate Defender

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

ATTORNEY FOR PETITIONER

INDEX

CERTIFICATE OF COUNSEL

Counsel for petitioner certifies that the Petition for Rehearing was filed on November 21, 2018 and denied by the Court of Appeals on January 17, 2019. App. 17.

QUESTION PRESENTED

Did the Court of Appeals err in affirming Petitioner's conviction for resisting arrest and resulting sentence where Petitioner, twenty years old at the time, was acting to prevent a law enforcement officer from conducting an illegal warrantless search of her mother's apartment, where no exigent circumstances existed to justify the search and no serious crimes were believed to have been committed?

STATEMENT OF THE CASE

Petitioner was indicted on July 21, 2016 for resisting arrest. R. 127 – 128. She proceeded to a bench trial before the Honorable John C. Hayes on November 30, 2016. R. 1. B.J Barrowclough represented Petitioner, and Aaron Hayes appeared on behalf of the State.

Judge Hayes found Petitioner guilty as indicted and sentenced her to three years' incarceration suspended to three years of probation. R. 119, ll. 10 – 14; R. 125, ll. 4 – 7.

On November 7, 2018, the South Carolina Court of Appeals affirmed Petitioner's conviction and sentence. State v. Torbit, Op. No. 2018-UP-417 (S.C. Ct. App. filed November 7, 2018). App. 1 – 2. Petitioner filed a petition for rehearing on November 21, 2018. App. 3 – 7. The Court of Appeals issued an Order denying the petition for rehearing on January 17, 2019. App. 17.

This petition for a writ of certiorari to the South Carolina Court of Appeals follows.

ARGUMENT

The Court of Appeals err in affirming Petitioner's conviction for resisting arrest and resulting sentence where Petitioner, twenty years old at the time, was acting to prevent a law enforcement officer from conducting an illegal warrantless search of her mother's apartment, where no exigent circumstances existed to justify the search and no serious crimes were believed to have been committed.

Background

On April 15, 2016, Petitioner's mother, Disheika Torbit, was at work when law enforcement illegally attempted to search her home. R. 73, ll. 18 – 24. After her daughter called her to notify her that her son was injured, she left work and began driving home. It was not until later that she learned law enforcement officers were trying to enter her apartment without a warrant. Id. When she arrived home, "everybody was arrested and gone." Id. Notably, her apartment did not smell like marijuana, as law enforcement had previously claimed, when she got home. R. 74, ll. 3 – 5.

Petitioner, age twenty at the time, worked third shift at the Walmart in Tega Cay. R. 72, ll. 20 – 24; R. 89, ll. 9 – 24. She would regularly go by her mother's apartment to help take her siblings to school. R. 72, l. 25 – R. 73, l. 17. When her mother was not home, Petitioner was in charge of the household. Id.

On the date giving rise to Petitioner's arrest, her family was celebrating her niece's first birthday. R. 75, ll. 15 – 25. Petitioner's brother, Timothy Holley, recalled Petitioner woke up around noon. Petitioner called for a paramedic that afternoon when Holley injured himself after tripping over his daughter's bicycle, a birthday present. R. 76, ll. 14 – 20; R. 91, ll. 12 – 25.

Petitioner also placed a call to her mother's office to notify her that Holley had been injured. R. 92, ll. 1 – 9.

He woke up outside, sitting in a chair. R. 76, l. 14 – R. 77, l. 1. While waiting for an ambulance to arrive, "Officer Schurig said he smelled weed … in front of the neighbor[']s door," according to Holley. R. 77, ll. 5 – 9. Holley indicated that Schurig searched his brother, Quintavious Torbit, then "immediately came back to the house and said he needed to go in and search." R. 77, ll. 12 – 19. The door was closed at this time. Id.

Holley testified at trial that Petitioner "said he can go in and search but he [needed] to wait until [their] mom [got] there." R. 77, ll. 20 – 23. Virtually identical language was recited by Kaitlean Lumpkin, Petitioner's sister-in-law. R. 85, l. 11 – R. 86, l. 5. After hearing this, Schurig "said he didn't have to wait… he pulled the handcuffs out and he put them away and pulled out a taser and threatened to tase her." R. 78, ll. 4 – 9. Schurig "pointed it at her chest and he clicked it one time." R. 78, ll. 10 – 14. All of these events were described similarly by Lumpkin. R. 86, ll. 6 – 24. The door to the apartment was closed at this time. R. 78, ll. 18 – 20.

Schurig then put the taser away and pulled Petitioner's arm, "trying to move her from the door." R. 78, ll. 21 – 24. It was only at this point that the door was opened from the inside, and Schurig and Petitioner fell inside. R. 78, ll. 21 – 24. Petitioner never gave Schurig consent to enter the home. R. 78, l. 25 – R. 79, l. 2. Holley never observed Petitioner push Schurig, saying "she didn't make [any] actions at all." R. 79, ll. 3 – 5. Furthermore, Holley never heard Schurig advise Petitioner that she was under arrest. R. 79, ll. 6 – 9. Lumpkin did not hear him tell her, either. R. 86, l. 86 – R. 87, l. 2.

Schurig held Petitioner's arm, and the two "ended up outside in the breezeway." R. 79, ll. 10 – 15. As they walked toward the parking lot, Schurig pulled Petitioner's hair. Id. Petitioner was arrested soon thereafter. R. 80, ll. 2 – 9.

After the State rested, Petitioner moved for a directed verdict. R. 68, l. 22 – R. 69, l. 20. Because there was no warrant or factual circumstances justifying the claim of exigent circumstances, counsel argued, the officer was a trespasser. Id. Petitioner was therefore "entitled to use force to prevent a trespass or to eject a trespasser." Id. Because it was "clearly an illegal arrest," Petitioner had "a right to use force to resist that arrest." Id.

In response, the trial court questioned whether Petitioner shoved Schurig first. R. 69, l. 21 – R. 70, l. 19. The trial court then denied the motion. Id.

At the conclusion of the defense's case, counsel for Petitioner renewed the directed verdict motion and argued that "this was both an unlawful entry to which Ms. Torbit would be entitled to use force to eject the officer as a trespasser and as it morphed into an arrest that she would have the right to resist [an] unlawful arrest." R. 102, ll. 14 – 20. The trial court again denied the motion. R. 102, ll. 21 – 22.

Discussion

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 State v. Dickey, 394 S.C. 491, 716 S.E.2d 97 (2011).

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). In other words,

resisting arrest cannot apply when a law enforcement officer is not serving or executing a legal writ or process.

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). Because law enforcement did not have probable cause to arrest Petitioner at the time of the attempted warrantless entry into her mother's apartment, a directed verdict should have been granted.

It is axiomatic that the "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed." United States v. United States District Court, 407 U.S. 297, 313, 92 S.Ct. 2125, 2134, 32 L.Ed.2d 752 (1972). A principal protection against unnecessary intrusions into private dwellings is the warrant requirement imposed by the Fourth Amendment on agents of the government who seek to enter the home for purposes of search or arrest. See Johnson v. United States, 333 U.S. 10, 13-14, 68 S.Ct. 367, 368-369, 92 L.Ed. 436 (1948). The resulting basic principle is that "searches and seizures inside a home without a warrant are presumptive unreasonable." Payton v. New York, 445 U.S. 573, 586, 100 S.Ct. 1371, 1380, 63 L.Ed.2d 639 (1980).

The United States Supreme Court in Payton held that warrantless felony arrests in the home are prohibited by the Fourth Amendment absent probable cause and exigent circumstances. Id. at 583-590, 100 S.Ct. at 1378-1382. The burden is on the government to demonstrate existent circumstances that overcome the presumption of unreasonableness that attaches to all warrantless home searches. Id. at 586, 100 S.Ct. at 1380.

"When the government's interest is only to arrest for a minor offense, that presumption of unreasonableness is difficult to rebut, and the government usually should be allowed to make

such arrests only with a warrant issued upon probable cause by a neutral and detached magistrate. Welsh v. Wisconsin, 466 U.S. 740, 750, 104 S.Ct. 2091, 2098, 80 L.Ed.2d 732 (1984). In Welsh, a single witness "observed a car being driven erratically." Id. at 742, 104 S.Ct. at 2093. The car changed speeds and veered from side to side but came to a stop off the road without causing damage to any person or property. Id.

The Court in Welsh therefore concluded that "an important factor to be considered when determining whether any exigency exists is the gravity of the underlying offense for which the arrest is being made." Id. at 753, 104 S.Ct. at 2099. Notably and quite applicable to this case was the holding that "although no exigency is created simply because there is probable cause to believe that a serious crime has been committed ... application of the exigent-circumstances exception in the context of a home entry should rarely be sanctioned where there is probable cause to believe that only a minor offense, such as the kind at issue in this case, has been committed." Id.

In Petitioner's case, there were no exigent circumstances tending to allow law enforcement to bypass the warrant requirement. There were no allegations of harm to person or property in Petitioner's case. The smell of marijuana did not give rise to the belief that a serious crime had been committed. Under S.C. Code Ann. § 44-53-370(d)(4), a person who possesses one ounce or less or less of marijuana is guilty of a misdemeanor and may be eligible for pretrial intervention.[1] Had the apartment contained ten pounds or more of marijuana and therefore potentially been in violation of S.C. Code Ann. § 44-53-370(e)(1), the charge would have been trafficking in marijuana as the trial court imagined. R. 121, ll. 18 – 21. It hardly seems reasonable to suggest that ten pounds of marijuana could have been flushed down the toilet, and

[1] Petitioner did not have a criminal record as noted by counsel during sentencing. R. 123, ll. 6 – 13.

counsel for Petitioner clarified that "the Fourth Amendment requires the assumption that ... [law enforcement's] behavior is unreasonable unless they can prove otherwise." R. 122, ll. 1 – 12.

The United States Supreme Court has identified several exigencies that may justify a warrantless search of a home: emergency aid, hit pursuit, and the need to prevent imminent destruction of evidence. Kentucky v. King, 563 U.S. 452, 460, 131 S.Ct. 1849, 1856, 179 L.Ed.2d 865 (2011). The Fourth Circuit has enumerated five factors that trial courts should consider in determining whether an exigency existed at the time a search commenced:

> (1) the degree of urgency involved and the amount of time necessary to obtain a warrant; (2) the officers' reasonable belief that the contraband is about to be removed or destroyed; (3) the possibility of danger to police guarding the site; (4) information indicating the possessors of the contraband are aware that police are on their trail; and (5) the ready destructibility of the contraband.

U.S. v. Turner, 650 F.2d 526, 528 (4th Cir. 1981). The trial judge found that the first factor did not apply. R. 117, l. 15 – R. 118, l. 118, l. 22. The second factor was likewise found to be inapplicable ("I don't find that there is any evidence that there was any concern that it was actually about to be destroyed."). Id. Third, the officers did not testify about the possibility of danger to police guarding the site; there were children in the apartment for Petitioner's niece's first birthday party. The trial judge seemed to have skipped this factor. Id.

Regarding the fourth factor, the trial court appeared to adopt the State's position that marijuana had been present in the apartment even though Petitioner's mother never smelled it and none was recovered. The trial court indicated "[t]here is no question they knew the police were here because they tried – Ms. Torbit, the defendant, for whatever reason, made an effort to – or took what was her – I'll get to that in a minute. But [she] took the stand that she was not [going to] allow law enforcement without either her mother's okay or a warrant." Id. This finding is unsupported by the evidence: there was no testimony that the individuals inside the

apartment were even aware of law enforcement's presence. Whoever opened the door from the inside was seemingly unaware of the discussion taking place between Petitioner and Schurig.

The fifth and final factor was disposed of in ten words by the trial court. R. 118, ll. 13 – 14. The trial court then concluded:

> So I find based on those principles that here the officers had the right to make under the reasonable exigent circumstances to the need for a warrant to make a warrant less search and therefore had the right to effect an entry into the [apartment.] I believe it was in these apartments whether it was the address that's been testified to and that the defendant had no right to impede their right to effect a warrantless search.

R. 118, ll. 15 – 22. The trial court then discussed its "ruling on the Directed Verdict about [Petitioner] shoving first" and indicated that it was "not going to allow that." The trial court found there was "kind of a toss up in that." R. 119, l. 23 – R. 119, l. 9. Immediately thereafter the verdict was revealed.

During closing arguments, counsel for Petitioner articulated how the majority of witnesses did not mention her shoving Schurig:

> Your Honor, you heard testimony, you heard testimony from four defense witnesses; you also heard testimony from three firemen and not a single one of 'em said that Ms. Torbit pushed this officer. And ... Mr. Hamilton did acknowledge seeing the officer grab Ms. Torbit's wrist which the officer denied. ... The weight of the testimony again is that in that doorway that all Ms. Torbit did was passively resist what he was trying to do and that he was the one who initiated contact by putting his hand on her wrist. He was the one who [upped] the aggressiveness by pulling out both handcuffs and the taser and threatening to tase her.

R. 105, l. 22 – R. 106, l. 11. Petitioner did not push Schurig while the two were talking at the doorway to the apartment. R. 86, ll. 18 – 24. Rather, Schurig was trying to "force his way in." Id. Counsel noted that the *only person who denied Schurig's aggressiveness was Schurig himself.* R. 106, ll. 12 – 24. Petitioner's description of her initial interaction with Schurig not only confirms this but also illustrates a young woman's interaction with an overbearing officer:

Q: Okay. And after he [patted down] your brother what did he do next?

A: After that he came back over, he ask[ed] who all lived here; who was the adult on the scene and that's when I told him that I didn't live here but this was my mother's home and that I was the oldest.

Q: And then what happened?

A: After he said that he needed to go in and search because he smelled marijuana.

Q: What did you say?

A: I told him – I literally said no you can search once my mom got here she's literally on her way coming from the bridge and that's when he started to really walk towards the door to do in on his own after I told him no and that's when I got in front of the door and I blocked it. I had my hands up on the door frames like this.

Q: Okay. And then when you did that what did he do?

A: ... I was asking him for a search warrant telling him that he needed a search warrant to go in and that I knew my rights. He repeatedly stated that he did not need a search warrant. He also did not need to wait for my mom to come on the premises in which he constantly like tried to really try to get around me to reach for the door to touch the door handle.

R. 94, ll. 1 – 24. At that point, the officer grabbed Petitioner's wrist and pulled out his handcuffs. R. 95, ll. 4 – 12. Petitioner reiterated that she did not push Schurig while in the doorway, and he never advised her that she was under arrest. R. 97, ll. 18 – 22.

Because exigent circumstances did not apply, law enforcement could not have legally entered Petitioner's mother's apartment. Therefore, after she lawfully rebuffed an officer who was seeking to trespass, there existed no probable cause to arrest her for assault. Petitioner was therefore entitled to a directed verdict for resisting arrest

CONCLUSION

Based upon the foregoing, Petitioner Dajlia Torbit respectfully requests that this Court grant her petition for writ of certiorari to the Court of Appeals to allow for full briefing on the issue presented.

Respectfully Submitted,

Taylor D Gilliam
Appellate Defender

ATTORNEY FOR PETITIONER

This 1st day of March, 2019.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to York County
Honorable John C. Hayes, Circuit Court Judge

Opinion No. 2018-UP-417 (S.C. Ct. App. filed 11/7/2018)
2016-GS-46-02343

THE STATE,

RESPONDENT,

V.

DAJLIA SYMONE TORBIT,

PETITIONER

CERTIFICATE OF SERVICE

I certify that a copy of the Petition for Writ of Certiorari and a copy of the Appendix in this case has been served on William F. Schumacher, IV, 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 1st day of March, 2019.

Taylor D Gilliam
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO BEFORE
ME this 1st day of March, 2019.

(L.S)
Notary Public for South Carolina
My Commission Expires: May 2, 2027