

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. 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)

2015-GS-13-0837

THE STATE,

RESPONDENT,

V.

DAJLIA SYMONE TORBIT,

PETITIONER

APPELLATE CASE NO 2016-002433

APPENDIX

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INDEX

INDEX i

OPINION NO. 2018-UP-417 (S.C. Ct. App. filed November 7, 2018)1

PETITION FOR REHEARING.....3

RETURN TO PETITION FOR REHEARING9

ORDER DENYING PETITION FOR REHEARING17

THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Dajlia Symone Torbit, Appellant.

Appellate Case No. 2016-002433

Appeal From York County
John C. Hayes, III, Circuit Court Judge

Unpublished Opinion No. 2018-UP-417
Submitted September 1, 2018 – Filed November 7, 2018

AFFIRMED

Chief Appellate Defender Robert M. Dudek and
Appellate Defender Robert M. Pachak, both of
Columbia, for Appellant.

Attorney General Alan McCrory Wilson and Assistant
Attorney General William Frederick Schumacher, IV,
both of Columbia, and Solicitor Kevin Scott Brackett, of
York, for Respondent.

PER CURIAM: Affirmed pursuant to Rule 220(b), SCACR, and the following
authorities: *State v. Weston*, 367 S.C. 279, 292, 625 S.E.2d 641, 648 (2006)

("When ruling on a motion for a directed verdict, the trial court is concerned with the existence or nonexistence of evidence, not its weight."); *id.* at 292-93, 625 S.E.2d at 648 ("If there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused, [this c]ourt must find the case was properly submitted to the jury."); *State v. Butler*, 407 S.C. 376, 381, 755 S.E.2d 457, 460 (2014) ("On appeal from the denial of a directed verdict, this [c]ourt views the evidence and all reasonable inferences in the light most favorable to the State."); S.C. Code Ann. § 16-9-320(B) (2015) ("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 . . . 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.").

AFFIRMED.¹

HUFF, SHORT, and WILLIAMS, JJ., concur.

¹ We decide this case without oral argument pursuant to Rule 215, SCACR.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

THE STATE,

RESPONDENT,

V.

DAJLIA SYMONE TORBIT,

APPELLANT

APPELLATE CASE NO 2016-002433

Appeal from York County

Honorable John C. Hayes, Circuit Court Judge

Opinion No. 2018-UP-417

PETITION FOR REHEARING

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 resisted 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 hear “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

Appeal from York County

Honorable John C. Hayes, Circuit Court Judge

THE STATE,

RESPONDENT,

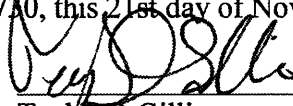
V.

DAJLIA SYMONE TORBIT,

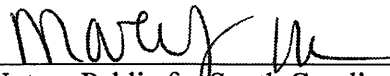
APPELLANT

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 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 29710, 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

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.E.2d 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,

ALAN WILSON
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Assistant Attorney General

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ATTORNEYS FOR RESPONDENT

December 7, 2018

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.

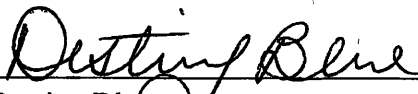
DAJLIA SYMONE TORBIT,APPELLANT.

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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The South Carolina Court of Appeals

The State, Respondent,

v.

Dajlia Symone Torbit, Appellant.

Appellate Case No. 2016-002433

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

Thomas C. Huff

J.

Paul E. Hoot, Jr.

J.

H. R. Co.

J.

Columbia, South Carolina

cc:

Alan McCrory Wilson
 William Frederick Schumacher, IV
 Robert M. Pachak
 Kevin Scott Brackett
 Robert Michael Dudek
 Taylor Davis Gilliam

FILED

January 17, 2019