STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Charleston County

Honorable R. Markley Dennis, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

THERRON RENARD RICHARDSON,

APPELLANT.

APPELLATE CASE NO. 2019-000114

FINAL BRIEF OF APPELLANT

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2.

Whether the court erred in admitting evidence found in Appellant's residence where law enforcement exceeded the scope of a protective sweep by conducting a field test on white powder found in the bathroom, which was unrelated to the purpose of their initial entry, prior to obtaining a search warrant and the results of the field test were used as a basis for obtaining the search warrant, and therefore was not covered under the plain-view doctrine?

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Whether the court erred in admitting evidence found in Appellant's residence where law enforcement was responding to a domestic violence call and the evidence was not found in plain view in a room in which the police were "interviewing, detaining, or pursuing a suspect" under S.C. Code Ann. § 16-25-70(H)(1)(a), and therefore the evidence found was inadmissible under the statute?

STATEMENT OF THE CASE

Appellant was indicted by the Charleston County grand jury for trafficking cocaine, four counts of possession of a firearm by a person convicted of a crime of violence, and one count of possession of a weapon during the commission of a violent crime. R. 583-588. Appellant's first jury trial was held before the Honorable Stephanie McDonald on November 13 – 15, 2012. At that time, Appellant was represented by Donna K. Taylor and D. Lynn Bowley. The state was represented by Emmanuel Ferguson and Culver Kidd. Appellant was convicted as charged and sentenced to thirty years imprisonment for the trafficking cocaine offense and five years imprisonment for each of the weapons charges. One of the weapons sentences was ordered to be served consecutively to the cocaine sentence.

Appellant appealed his convictions and was represented by Robert Pachak of Appellate Defense. The Court of Appeals affirmed finding the issue was not preserved for appellate review. State v. Richardson, Op. No. 2014-UP-471 (S.C. Ct. App. filed Dec. 8, 2014). Appellant then filed a post-conviction relief action which was granted by the Honorable John C. Hayes, III. The state filed a petition for a writ of certiorari which was denied by the Supreme Court on May 24, 2018.

The state called Appellant's case for retrial on January 14 – 16, 2019 before the Honorable R. Markley Dennis, Jr., R. 193. At his retrial, Appellant was represented by Rodney D. Davis and Daniel Summa. The state was represented by J. Whitney Sowards and Lauren M. Frierson. Appellant was convicted as charged and again given an aggregate thirty-five years imprisonment.

This appeal follows.

STANDARD OF REVIEW

An appeal of a trial court's ruling on a motion to suppress evidence based on Fourth Amendment grounds is reviewed for clear error only. State v. Tindall, 388 S.C. 518, 521, 698 S.E.2d 203, 205 (2010). The appellate courts must affirm if there is any evidence to support the decision of the trial judge. State v. Provet, 405 S.C. 101, 107, 747 S.E.2d 453, 456 (2013). "However, this deference does not bar this Court from conducting its own review of the record to determine whether the trial judge's decision is supported by the evidence." Tindall, 388 S.C. at 521, 698 S.E.2d at 205 citing State v. Khingratsaiphon, 352 S.C. 62, 70, 572 S.E.2d 456, 459 (2002).

STATEMENT OF FACTS

On October 17, 2010, Jason Bowen and Julius Alexander, both with the Charleston County Sheriff's Department, were dispatched to an "in-progress domestic call." R. 25, ll. 6 – 22; R. 111, ll. 21 – 25. Specifically, the information they received was that "a female caller had locked herself in a bathroom and that a male subject was trying to get to her." R. 26, ll. 5 – 12. Although the caller gave an address located in West Ashley, the police knew that the phone call originated from a location in downtown Charleston which was not in the vicinity of the address given by the caller. R. 158, l. 15 – 159, l. 10. The 911 dispatcher contacted Charleston City Police Department to ask them to respond to the location in downtown Charleston where the cell phone call originated. R. 159, l. 11 – 160, l. 16.

When Bowen and Alexander arrived at the address that was reported in West Ashley by the 911 caller, Bowen approached the front door and knocked but did not get any response. R. 27, l. 8 – 28, l. 2. Bowen and Alexander both admitted that they did not see anyone else when they arrived at the residence nor did they hear any noise coming from inside. R. 29, l. 7 – 30, l. 7; R. 115, ll. 2 – 8. Alexander claimed that when he walked around to the back of the home, the back sliding-glass door was "slightly cracked open." R. 115, ll. 2 – 8.

Bowen and Alexander then made a warrantless entry into the home while announcing that they were with the Sheriff's Office. R. 31, ll. 9 – 13; R. 116, l. 23 – 117, l. 8. As the deputies entered the home, they swept the rooms to search for any people inside. R. 31, l. 21 – 32, l. 1. Bowen stated that the reason he felt it was necessary to enter the home was because "we didn't know if there might be a person harmed in the residence that needed aid or some type of harm actively occurring that we needed to put a stop to." R. 32, ll. 2 – 12. They did not locate anyone inside the home despite looking in all the rooms, closets and bathrooms. R. 32, l. 19 – 33, l. 16.

Bowen claimed that in one of the bathrooms there was a "drug-type scale that had some white residue on it." R. 33, ll. 20 – 22. He also said he found a safe in the closet that had "money strewn out on the floor in front of it" and that there was a bank bag with a "large number of cash bills in it." R. 33, l. 23 – 34, l. 1. Bowen further claimed that there were "guns laid out in a very particular fashion under the bed." R. 34, ll. 2 – 3. Bowen and Alexander's supervisor, Andrea Moniz, also responded to the scene. Moniz admitted that she performed a field test on the white residue which was presumptively positive for cocaine. R. 440, l. 4 – 441, l. 6; R. 444, l. 12 – 445, l. 10.

Thomas Plyler with the Charleston County Sheriff's Office prepared the search warrant in this case based on the information relayed to him from Bowen and Alexander. R. 133, l. 21 – 134, l. 9; R. 137, ll. 13 – 24. Plyler admitted that prior to getting the search warrant he was informed that a field test was performed on the white residue found in the bathroom of the home which came back presumptively positive for cocaine. R. 137, l. 25 – 138, l. 14. Plyler included the positive field test in his affidavit that he presented to the magistrate in order to obtain the search warrant. R. 137, l. 25 – 138, l. 14; R. 571. Upon executing the search warrant, officers discovered just over two kilograms of cocaine. R. 367, ll. 17 – 24.

ARGUMENT

1.

The court erred in admitting evidence found in Appellant's residence because law enforcement's warrantless entry was based solely on a 911 call reporting a domestic violence in progress and the officers observed no corroborating evidence when they arrived at the occupantless residence, and therefore the entry was not reasonable under the exigent-circumstances exception to the Fourth Amendment.

Relevant Facts for Issues 1 – 3

Defense counsel made a pre-trial motion to suppress all the evidence obtained in the search of Appellant's house. A hearing was held on January 10, 2019 before the Honorable Roger M. Young. R. 1 – 192.

At the end of the hearing defense counsel argued that the initial entry into Appellant's home was warrantless and unreasonable. R. 164, l. 24 – 165, l. 2. Specifically, what the officers independently observed when they arrived on scene and what they were told by dispatch was insufficient for a warrantless entry. R. 165, ll. 3 – 10. Counsel pointed out that when the officers arrived on scene there was nothing broken, and they did not hear any sounds coming from the house. R. 165, ll. 11 – 12. When they knocked on the door there was no response and they even took the time to get a phone number off a work truck parked outside and call it in. In other words, defense counsel argued that the officers' actions demonstrated that they were not in a rush to get inside. R. 165, ll. 12 – 15. Counsel further argued that the search was unreasonable both under the Fourth Amendment and the right to privacy under the South Carolina Constitution. R. 165, ll. 20 – 24.

Defense counsel then argued that even if the initial entry was not unreasonable, the officers exceeded the scope of a protective sweep by conducting a field test on the white residue.

R. 169, ll. 1 – 25. Counsel pointed out that the officers' stated reason for going into the house was to search for a possible victim in need of aid or a suspect. R. 169, ll. 6 – 10. However, after clearing the house and confirming that there were no victims or suspects present, the officers proceeded to do a field test on the white residue found in the bathroom which exceeded the scope of the protective sweep. R. 169, ll. 19 – 23.

The judge ruled that the officers' initial entry of the home was reasonable because of exigent circumstances. R. 171, l. 2 – 172, l. 11. Specifically, the court found that the 911 call from a woman who alleged she was hiding in the bathroom from her boyfriend which then got disconnected made it reasonable for the officers to make a warrantless entry under the exigent-circumstances exception. "[T]here could have been a dead body, or there could have been an unconscious body, somebody who couldn't respond. Maybe they were tied up or bound up or hidden in a closet or hidden in a room." R. 171, ll. 20 – 23.

The court also ruled that the money, guns, and white powder on the scale in the bathroom, were observed by the officers in plain view, and were enough for the officers to have probable cause to get a warrant. R. 173, ll. 8 – 18. Defense counsel agreed that if the court found that the officers' warrantless entry was reasonable under exigent circumstances that the money, guns, and white powder were all seen in plain view. R. 178, l. 21 – 179, l. 3. However, defense counsel argued that when the officers performed a field test on the white powder, they exceeded the scope of the protective sweep because it was unrelated to the purpose of their initial entry and they were beginning a new and unrelated drug investigation. R. 179, ll. 4 – 19.

Lastly, defense counsel argued that the evidence should have been suppressed based on S.C. Code Ann. § 16-25-70(H) because it was discovered during a warrantless search and the officers were not interviewing, detaining, or pursuing a domestic violence suspect. R. 183, l. 20 – 184, l. 13. The assistant solicitor responded that the officers' primary reason for the

warrantless entry was to render aid to a potential victim and not to pursue a domestic violence suspect. R. 187, ll. 11 – 19. The assistant solicitor further argued that the officers did not make entry pursuant to the domestic violence statute but instead made entry under the exigent-circumstances exception. R. 189, ll. 2 – 7.

Regarding the exigent-circumstances exception, the assistant solicitor maintained that the 911 call from a woman claiming to have locked herself in a bathroom in fear of her boyfriend was enough for the officers to enter the home without a warrant. R. 189, l. 8 – 190, l. 4. "I don't think they had the luxury of waiting for a search warrant at that point." R. 190, ll. 2 – 4. In response to defense counsel's argument about exceeding the scope of the protective sweep, the assistant solicitor argued that law enforcement needed to do a field test before getting a warrant:

> Detective Plyler testified that he would have insisted that they obtain a field test because he's not going to go to a magistrate and ask for a search warrant based on cocaine residue *unless he knows that's what it is*. Or at least with a high degree of certainty based on a field test that that's what that substance is.

R. 191, ll. 2 – 7 (emphasis added). Judge Young took the matter under advisement and ultimately denied defense counsel's motion to suppress. R. 570. Specifically, Judge Young ruled that exigent circumstances justified the initial warrantless entry and that the evidence which was seized after entry was not in violation of S.C. Code Ann. § 16-25-70(H) because the items "were not seized as a result of a warrantless search but rather were the result of a search warrant issued upon a finding of probable cause by a magistrate." R. 570.

During the state's case in chief in front of Judge Dennis, defense counsel renewed all his pretrial objections to the search of Appellant's residence prior to the testimony of Deputy Ferguson. R. 334, ll. 7 – 20. The reason for this was that all the items seized in the search of Appellant's home were to be admitted through Ferguson. The court noted defense counsel's objection and overruled it. R. 335, ll. 1 – 25. As the state sought to introduce the evidence

obtained from the search of Appellant's residence, including the cocaine that was found, defense counsel renewed his prior objections on the record. R. 349, l. 21 – 350, l. 15; R. 354, ll. 9 – 25; R. 357, ll. 1 – 5; R. 360, l. 8 – 361, l. 2; R. 364, l. 8 – 365, l. 16; R. 372, l. 22 – 373, l. 4. This evidence was introduced over counsel's objection.

Discussion

"The Fourth Amendment to the United States Constitution prohibits unreasonable searches and seizures." State v. Forrester, 343 S.C. 637, 643, 541 S.E.2d 837, 840 (2001). When evidence against a criminal defendant is obtained in violation of the Fourth Amendment it cannot be used against him in court. Weeks v. United States, 232 U.S. 383 (1914). The Supreme Court of the United States made this exclusionary rule applicable to the States in Mapp v. Ohio, 367 U.S. 643 (1961). "Therefore, all citizens enjoy this federal constitutional protection in every criminal proceeding." Forrester, 343 S.C. at 643, 541 S.E.2d at 840.

The South Carolina Constitution also contains a provision protecting people from unreasonable searches and seizures. S.C. Const. art. I, § 10. However, our State Constitution goes further than the United States Constitution by including an express right of the people against "unreasonable invasions of privacy." Id. "Thus, this Court can interpret the state protection against unreasonable searches and seizures in such a way as to provide greater protection than the federal Constitution." Forrester, 343 S.C. at 644, 541 S.E.2d at 840.

"It is a basic principle of Fourth Amendment law that searches and seizures inside a home without a warrant are presumptively unreasonable." Brigham City, Utah v. Stuart, 547 U.S. 398, 403 (2006) (internal quotations omitted). One exception to the warrant requirement of the Fourth Amendment is when "the exigencies of the situation make the needs of law enforcement so compelling that the warrantless search is objectively reasonable." Mincey v. Arizona, 437 U.S. 385, 393-394 (1978) (internal quotations omitted). The Supreme Court has

specifically applied this exigent-circumstances exception in holding that a warrantless entry of a home is constitutionally permissible if the officer has an objectively reasonable belief that an occupant is seriously injured or in imminent danger. Brigham City, Utah, 547 U.S. at 400.

In this case, the officers did not have an objectively reasonable belief that there was an injured person inside the residence in need of immediate aid. The officers only had information that a woman called 911 to report that she locked herself in a bathroom to get away from her boyfriend and the address that was given by the caller. However, when the officers arrived on scene, they saw nothing that corroborated the phone call. Both officers testified that they did not hear any noise coming from inside the house. R. 29, l. 7 – 30, l. 7; R. 115, ll. 2 – 8. They knocked on the door several times and did not get a response. R. 27, l. 8 – 28, l. 2.

Furthermore, and importantly, the 911 dispatcher was aware that the caller making these allegations had called from a phone which "pinged" off a cell tower in downtown Charleston, even though the address reported by the caller was in West Ashley, several miles away. The 911 dispatcher found this fact significant enough to report it to the Charleston City Police Department to ask them to investigate the location from which the call appeared to have originated. R. 158, l. 8 – 160, l. 8.

This demonstrates that the state, through the 911 dispatcher, was aware of the dubious nature of the call. They had enough reason to doubt the location given by the caller to send law enforcement officers to a different location several miles away. This fact negates any perceived exigency on the part of the state because they understood the call may have been phony.

In Brigham City, Utah v. Stuart, 547 U.S. 398 (2006), the Supreme Court found that officers' warrantless entry into a home was reasonable under the exigent-circumstances exception. When officers arrived on scene in Brigham City, they were responding to a call of a loud party at a residence. When they arrived, "they observed two juveniles drinking beer in the

backyard" and they also saw a fight break out inside the residence through the window. Specifically, one officer recalled: "[F]our adults were attempting, with some difficulty, to restrain a juvenile. The juvenile eventually broke free, swung a fist and struck one of the adults in the face." Id. at 401 (internal quotations omitted). After the officers witnessed this, they entered the residence and subsequently arrested some of the adults with contributing to the delinquency of minors, among other charges. Id.

The Brigham City Court held that an officer's subjective reasons for entering a house are irrelevant in determining whether their warrantless entry comports with the Fourth Amendment. Id. Instead, the Court found that the officers' warrantless entry was objectively reasonable there because, after witnessing the fight breaking out inside through the window, "the officers had an objectively reasonable basis for believing both that the injured adult might need help and that the violence in the kitchen was just beginning." Id. at 406.

The Supreme Court again dealt with the exigent-circumstances exception in Michigan v. Fisher, 558 U.S. 45 (2009). In that case, officers responded to a complaint of a disturbance and when they arrived, they were directed to a home where a man "was going crazy" and found the home to be in disarray. Id. at 45. Officers found a truck in the driveway with its front end smashed and blood on the hood as well as one of the doors to the house. Id. at 45-46. Officers observed a man inside the home through a window who was screaming, throwing things, and bleeding from a cut on his hand. Id. at 46. When an officer began making a warrantless entry into the home, he saw the man pointing a "long gun at him." Id.

The Fisher Court found the officer's warrantless entry reasonable:

> A straightforward application of the emergency aid exception, as in *Brigham City*, dictates that the officer's entry was reasonable. Just as in *Brigham City*, when they arrived on the scene they encountered a tumultuous situation in the house – and here they also found signs of a recent injury, perhaps from a car accident, outside. And just as in *Brigham City*, the officers could see violent

> behavior inside. Although Officer Goolsby and his partner did not see punches thrown, as did the officers in *Brigham City*, they did see Fisher screaming and throwing things. It would be objectively reasonable to believe that Fisher's projectiles might have a human target (perhaps a spouse or a child), or that Fisher would hurt himself in the course of his rage.

Id. at 48. See also State v. Herring, 387 S.C. 201, 692 S.E.2d 490 (2009) (finding officer's peeking into defendant's garage window was justified by exigent circumstances where a murder had just occurred at a bar and officers knew defendant's license tag number, home address, and when they arrived at his home they saw a light on in the garage); State v. Abdullah, 357 S.C. 344, 592 S.E.2d 344 (Ct. App. 2004) (finding that officer's entry of residence to render aid to possible victims was justified under exigent circumstances exception where they responded to a burglary in progress with shots fired and upon arrival they observed the defendant in the doorway who was uncooperative with their demands and also saw bullet holes in the walls of the apartment).

Unlike in Brigham City and Fisher, in this case there were no circumstances when the officers arrived on scene to corroborate what they had been told based on the 911 call. When officers arrived on the scene, they heard nothing coming from inside the residence, saw nobody present outside or inside the residence, and saw nothing to indicate a struggle had occurred or was occurring. In other words, the circumstances that the officers encountered at the residence negated the information they had from the 911 call. The officers could not have had an objectively reasonable belief that their entry was necessary to render aid to a person or to apprehend a suspect.

This case is more like U.S. v. Moss, 963 F.2d 673 (4th Cir. 1992), which concluded that the officer's warrantless entry into a rental cabin in the Nantahala Forest was not justified under the exigent-circumstances exception where the officer mistakenly believed the cabin had not been rented by anyone but saw a car parked outside. The officer in Moss claimed that his reason

for making a warrantless entry was to determine whether there had been a break-in, and to determine the identity of the people whose car was parked outside and render them aid if necessary. Id. at 679.

While the Moss Court acknowledged that these were legitimate concerns of the officer, it found that "there was nothing about the circumstances then confronting [the officer] (including his erroneous information) that warranted any perception of an emergency requiring immediate entry to attend to them." Id. Specifically, when the officer arrived on the scene, there was no indication that anyone was inside which negated any emergency of entering to determine whether it had been burglarized. Id. Also, there were no circumstances at the scene indicating that a lost or injured camper was present in need of immediate aid. Id. Like Moss, in this case, the circumstances which the officers were confronted with when they arrived on the scene indicated that nobody was inside at all, let alone that someone was inside in need of emergency assistance.

The court erred in finding that the officers' entry into the residence was objectively reasonable because their entry was based solely on a 911 call which made an apparent domestic violence allegation but then when the officers arrived on scene the circumstances, viewed objectively, negated the idea that there was an emergency. Furthermore, the police knew that the call originated from downtown, several miles away from the address given by the caller which was in West Ashley. Appellant's convictions should be reversed because the officers' entry into his residence was warrantless, unreasonable, and not justified under the exigent-circumstances exception. See Michigan v. Fisher, 558 U.S. 45 (2009); Brigham City, Utah v. Stuart, 547 U.S. 398 (2006); U.S. v. Moss, 963 F.2d 673 (4th Cir. 1992).

2.

The court erred in admitting evidence found in Appellant's residence because law enforcement exceeded the scope of a protective sweep by conducting a field test on white powder found in the bathroom, which was unrelated to the purpose of their initial entry, prior to obtaining a search warrant and the results of the field test were used as a basis for obtaining the search warrant, and therefore was not covered under the plain-view doctrine.

Discussion

Another exception to the Fourth Amendment's warrant requirement is the plain-view doctrine: "[I]n certain circumstances a warrantless seizure by police of an item that comes within plain view during their lawful search of a private area may be reasonable under the Fourth Amendment." Arizona v. Hicks, 480 U.S. 321, 323 (1987) citing Coolidge v. New Hampshire, 403 U.S. 443 (1971). "It is, of course, an essential predicate to any valid warrantless seizure of incriminating evidence that the officer did not violate the Fourth Amendment in arriving at the place from which the evidence could be plainly viewed." Horton v. California, 496 U.S. 128, 136 (1990). Furthermore, the incriminating character of the evidence which is seized must be immediately apparent. Id. "Any search following warrantless entry for emergency reasons . . . must then be limited by the type of emergency involved. It cannot be used as the occasion for a general voyage of discovery unrelated to the purpose of the entry." U.S. v. Moss, 963 F.2d 673, 678 (4th Cir. 1992).

In this case, Bowen and Alexander entered the residence in order to see if there was a person in need of aid or possible suspect of domestic violence. R. 32, ll. 2 – 12. Therefore, their protective sweep of the home was limited to looking in places where a person could reasonably be found. They were not permitted to begin a new drug investigation which was unrelated to the reason for their initial entry. Moss, 963 F.2d at 678.

However, upon seeing the white powder in the bathroom, the officers did exactly this; they expanded their protective sweep into a drug investigation by conducting a field test on the powder. Interestingly, although the plain-view doctrine requires that the incriminating character of the item seized be immediately apparent, both the trial court and the assistant solicitor in this case seemed to acknowledge that the officers could not know if the powder was incriminating until *after* conducting a field test.

In response to defense counsel's argument that the officers exceeded the scope of their protective sweep in conducting a field test on the white powder, the court said:

> Well, wouldn't that be something that you'd think would be . . . what a reasonable police officer would do, would be to do a field test on it before they wasted a magistrate's time?
>
> Because if they did a field test on it and it came back, no, this is just baby powder, then you would go, okay, well, we, you know, we would be wasting our time going and getting a magistrate to issue a search warrant.
>
> In fact, they would have to probably affirmatively misrepresent what they were putting on a search warrant in order to have a false report on a field test and then still go before a magistrate. So I would think they kind of have a duty to field test it.

R. 179, l. 21 – 180, l. 8. The assistant solicitor made a similar point in arguing that one of the officers testified that he would have insisted on doing the field test before wasting a magistrate's time requesting a search warrant because without the field test, they could not be sure what the white powder was. R. 191, ll. 2 – 7.

This argument from the assistant solicitor and the comments by the trial judge indicate that the incriminating character *was not* immediately apparent to the officers. This is exactly why the officers conducted a field test prior to getting the search warrant. Because the field test of the white powder was beyond the scope of the officers' initial protective sweep, which was to look for a person in need of aid, the seizure of the powder could not be justified under the plain-view doctrine.

In Arizona v. Hicks, 480 U.S. 321 (1987), the Supreme Court found that an officer violated the Fourth Amendment when, while conducting an exigent-circumstances search for a shooting suspect, he moved some of the components of stereo equipment which the officer believed to be stolen and recorded their serial numbers. The serial numbers were checked, and it was discovered that the stereo equipment was stolen in a prior robbery. Id. at 323-324.

The Hicks Court found that the officer's moving of the stereo equipment was a search that went beyond the initial purpose of their lawful entry into the residence to search for a shooter. Id. at 324-325. The officer's movement of the stereo equipment "exposed to view concealed portions of the apartment . . . unjustified by the exigent circumstance that validated the entry." Id. The Court went on to hold that probable cause is required in order to invoke the plain-view doctrine. Id. This comports with the requirement that the incriminating character of the item to be seized must be immediately apparent.

The Supreme Court again dealt with the scope of the plain-view doctrine in Minnesota v. Dickerson, 508 U.S. 366 (1993). In Dickerson, an officer was conducting a Terry[1] frisk of a drug suspect when he felt a small lump in the suspect's jacket at which time the officer stated: "I examined it with my fingers and it slid and it felt to be a lump of crack cocaine in cellophane." Id. at 369. While the Dickerson court expanded the plain-view doctrine to include "plain-feel," it found that because the officer had to manipulate the item with his fingers prior to his determination that it was crack meant that the incriminating character was not immediately apparent. The Court thus held that the search, i.e. the manipulation of the lump, was unconstitutional. Id. at 379. Compare State v. Wright, 391 S.C. 436, 445-446, 706 S.E.2d 324, 328 (2011) (finding that incriminating character of evidence was immediately apparent where officers observed "a dogfighting pit, dog muzzles, drugs, syringes, several injured dogs, and a dog suspension collar"); State v. Abdullah, 357 S.C. 344, 592 S.E.2d 344 (Ct. App. 2004)

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[1] Terry v. Ohio, 392 U.S. 1 (1968).

(distinguishing Hicks from case where the officer testified that the incriminating nature of bags of marijuana was apparent to him and that, unlike in Hicks, the officer did not have to touch or move the evidence before determining it was incriminating).

In this case, the officers manipulated the white powder that was discovered by conducting a field test on it. The reason they did this of course, as acknowledged by the trial court and the assistant solicitor, was because the incriminating character of the powder was not immediately apparent. Therefore, the court erred in failing to suppress the results of the unconstitutional search where the officers exceeded the scope of their initial entry in conducting a field test on the white powder. Appellant's convictions should be reversed. See Minnesota v. Dickerson, 508 U.S. 366 (1993); Arizona v. Hicks, 480 U.S. 321, 323 (1987).

3.

The court erred in admitting evidence found in Appellant's residence because law enforcement was responding to a domestic violence call and the evidence was not found in plain view in a room in which the police were "interviewing, detaining, or pursuing a suspect" under S.C. Code Ann. § 16-25-70(H)(1)(a), and therefore the evidence found was inadmissible under the statute.

Discussion

S.C. Code Ann. § 16-25-70(H)(1)(a) provides that:

> (H) Evidence discovered as a result of a warrantless search administered pursuant to a complaint filed under this article is admissible in a court of law:
>
> (1) if it is found:
>
> (a) in plain view of a law enforcement officer in a room in which the officer is interviewing, detaining, or pursuing a suspect; or
>
> (b) pursuant to a search incident to a lawful arrest for a violation of this article or for a violation of Chapter 3, Title 16; or
>
> (2) if it is evidence of a violation of this article.
>
> An officer may arrest and file criminal charges against a suspect for any offense that arises from evidence discovered pursuant to this section.
>
> Unless otherwise provided for in this section, no evidence of a crime found as a result of a warrantless search administered pursuant to a complaint filed under this article is admissible in any court of law.

S.C. Code Ann. § 16-25-70 (H).

In this case, Bowen and Alexander both stated that they were responding to a domestic violence call. The statute cited above provides for an exception to the warrant requirement to allow officers to enter a residence in certain limited situations. The statue further provides that

evidence discovered in such a warrantless entry is not admissible in any court of law unless it "is in plain view of a law enforcement officer in a room in which the officer is interviewing, detaining, or pursuing a suspect." Id.

Here, Bowen and Alexander were not interviewing, detaining, or pursuing a suspect because there were no persons present inside or outside of the residence when they arrived. Judge Young's ruling that the items were seized pursuant to a valid search warrant was erroneous because the search warrant itself was based on evidence that had been illegally seized. R. 570. Furthermore, the initial entry was not based on exigent circumstances but rather on the statute referenced above.

When a "statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the Court has no right to impose another meaning." Gay v. Ariail, 381 S.C. 341, 673 S.E.2d 418 (2009) citing State v. Gains, 380 S.C. 23, 667 S.E.2d 728 (2008). Judge Young attempted to side step the statute by ruling that the entry was based on exigent circumstances and that the evidence was seized pursuant to a warrant. However, the supposed exigent circumstances were a "domestic in progress" which implicated the domestic violence statute and the warrant was based on an unconstitutional field test which belied the contention that it could fall under the plain-view doctrine.

In State v. Cannon, 336 S.C. 335, 520 S.E.2d 317 (1999) the Supreme Court upheld the introduction of crack found during a search incident to arrest of a defendant for criminal domestic violence. In Cannon, the Court found that the officer's warrantless entry of the defendant's home was pursuant to his mother's consent as opposed to authority under the statute. For this reason, the Court found that the drugs were admissible. However, in a footnote, the Court said:

> We are concerned about the effect of § 16–25–70(H). The plain meaning of the statute precludes the admission of evidence of crimes, other than criminal domestic violence, seized as a result of

> a warrantless search conducted pursuant to § 16–25–70(C). In the case before us today, if the officer had entered respondent's home under the authority of § 16–25–70(C), the crack cocaine found in respondent's pocket would have arguably been inadmissible pursuant to § 16–25–70(H). Similarly, as noted by the amicus curiae, if the police make a warrantless entry into a home under the authority of § 16–25–70(C) and observe in plain view a weapon which is recognized as the weapon in an unrelated murder, the weapon could be inadmissible under § 16–25–70(H) since murder is not a violation of the Act.

State v. Cannon, 336 S.C. 335, 340, 520 S.E.2d 317, 319, n.4 (1999).

One year later in State v. Roberts, 340 S.C. 238, 530 S.E.2d 899 (Ct. App. 2000), this Court found that the domestic violence statute did not apply where the police responded to a reported "disturbance" instead of a domestic violence call. Once on scene, the officers arrested the defendant for public drunkenness, disorderly conduct, and domestic violence. When officers searched the defendant incident to arrest, they found crack cocaine. The Roberts Court found that the crack cocaine should not have been suppressed because the police did not use the statute in arresting or searching the defendant. Id.

Cannon and Roberts are both distinguishable from this case. Here, the officers did not have consent to enter, as was the case in Cannon, and they were explicitly responding to a "domestic in progress," unlike in Roberts where police were responding to a "disturbance." The officers' warrantless entry was ostensibly pursuant to S.C. Code Ann. § 16-25-70 because they were responding to a domestic violence call but when they observed the white powder they were not "in a room in which the officer [was] interviewing, detaining, or pursuing a suspect." S.C. Code Ann. § 16-25-70 (H). Therefore, the court erred in admitting the evidence over defense counsel's objection and Appellant's convictions should be reversed. See S.C. Code Ann. § 16-25-70 (H); State v. Roberts, 340 S.C. 238, 530 S.E.2d 899 (Ct. App. 2000); State v. Cannon, 336 S.C. 335, 520 S.E.2d 317 (1999).

CONCLUSION

By reason of the foregoing argument, Appellant's convictions should be reversed, and this case remanded to the Charleston County Court of General Sessions for a new trial.

Adam Sinclair Ruffin
Appellate Defender

ATTORNEY FOR APPELLANT

This 13th day of March, 2020.

CERTIFICATE OF COUNSEL

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

March 13, 2020

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