

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

ORIGINAL

Appeal from Greenville County

Honorable Daniel D. Hall, Circuit Court Judge

RECEIVED

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THE STATE,

RESPONDENT S.C. SUPREME COURT

V.

ANTONIO OCHOA-TAVERA,

APPELLANT

APPELLATE CASE NO. 2018-001115

ANDERS BRIEF OF APPELLANT  
PURSUANT TO WHITE V. STATE

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**STATEMENT OF ISSUE ON APPEAL**

Did the trial judge err by finding Appellant did not have a reasonable expectation of privacy in the apartment searched and by denying Appellant's motion to suppress the evidence seized by law enforcement when officers entered the apartment without exigent circumstances and without a warrant in violation of Appellant's Fourth Amendment rights?

## STATEMENT OF THE CASE

A. Greenville County Grand Jury indicted Appellant on November 25, 2014 for trafficking methamphetamine, two hundred grams or more, but less than four hundred grams. App. 504-505. His case was called to trial on February 9, 2015 before the Honorable Daniel D. Hall, and a jury. App. 1. He was tried jointly with his codefendant Manuel Cruz. App. 1. Assistant Solicitor Joyce Monts represented the state, Scott D. Robinson represented Appellant, and John Crangle represented Cruz. On February 11, 2015, the jury found Appellant guilty as indicted. App. 442, ll. 9-19. He was sentenced to the mandatory minimum of twenty-five years imprisonment. App. 445, ll. 12-19. Judge Hall granted a mistrial as to Manuel Cruz as the jury could not reach a unanimous verdict. App. 441, ll. 12-24.

On July 16, 2015, Appellant filed an application for post-conviction relief (PCR) seeking, *inter alia*, a belated direct appeal. App. 451-459. The state filed a return to this application dated January 29, 2016. App. 460-464. An evidentiary hearing was convened on April 16, 2018 before the Honorable J. Cordell Maddox, Jr. App. 465. Assistant Attorney General Deshawn H. Mitchell represented the state, and R. Mills Ariail, Jr. represented Appellant. App. 464. By order filed May 31, 2018, Judge Maddox granted Appellant a belated direct appeal pursuant to White v. State, 263 S.C. 110, 108 S.E.2d 35 (1974). App. 496-503.

This brief of appellant follows.

### **STANDARD OF REVIEW**

On appeal from a motion to suppress based on Fourth Amendment grounds, the appellate court reviews questions of law *de novo*. State v. Bash, 419 S.C. 263, 268, 797 S.E.2d 721, 723-724 (2017) (quoting State v. Adams, 409 S.C. 641, 647, 763 S.E.2d 341, 344 (2014)). As to a circuit court's finding of fact, this Court must affirm if there is any evidence to support it, and may reverse only for clear error. Id. (quoting State v. Brown, 401 S.C. 82, 87, 736 S.E.2d 263, 265 (2012)) (internal quotation marks omitted).

## ARGUMENT

The trial judge erred by finding Appellant did not have a reasonable expectation of privacy in the apartment searched and by denying Appellant's motion to suppress the evidence seized by law enforcement when officers entered the apartment without exigent circumstances and without a warrant in violation of Appellant's Fourth Amendment rights.

### **Relevant Facts**

Phillip Lewis was arrested on April 25, 2014 for trafficking methamphetamine, distribution of cocaine base, possession with intent to distribute marijuana, possession of a controlled substance, and possession of a weapon during the commission of a violent crime. App. 206, l. 15 – 207, l. 3; App. 234, ll. 8-9. He was facing fifty-six years imprisonment. App. 239, l. 23 – 243, l. 2. After he posted bond, Lewis contacted Special Agent Randy Smith with the Drug Enforcement Administration (DEA). He told Agent Smith he could “purchase ounce quantities of crystal methamphetamine from a Hispanic male.” App. 177, ll. 13-16. Lewis hoped by assisting the DEA he would “earn some leniency on [his] charges.” App. 207, ll. 4-8.

On July 1, 2014, Lewis called Mauricio Ramirez and arranged to purchase eight ounces of methamphetamine for eight thousand four hundred dollars. The two agreed to meet in the Wal-Mart parking lot off Whitehorse Road in Greenville the following day. App. 178, l. 17 – 179, l. 21. Law enforcement planned the operation as a “buy-bust,” meaning once Lewis saw the drugs, officers would move in and arrest Ramirez. App. 179, l. 22 – 180, l. 13. During a “buy-bust,” officers “do not allow the money to be brought out there for fear we could be robbed.” App. 179, l. 22 – 180, l. 1.

Shortly before the meeting, Lewis was outfitted with a “wire,” which provided officers with a live audio feed of the transaction. App. 180, ll. 2-8. He then drove to Wal-Mart in his

own vehicle where he met Ramirez. App. 181, ll. 8-22. Lewis demanded to see the methamphetamine to make sure it was of good quality. He told Ramirez “that his money man, the guy with the money, was located directly up the street at a bank” waiting on word from Lewis. App. 181, ll. 11-22. However, Ramirez admitted he did not have the drugs with him, but “was willing to show him the eight ounces” at a nearby apartment. App. 182, l. 2 – 183, l. 4. Lewis followed Ramirez to a convenience store down the road where Ramirez left his van and got into Lewis’ truck. Ramirez then directed Lewis to an apartment complex less than a minute away. App. 183, l. 10 – 186, l. 11.

Lewis claimed a man, who was later identified as Appellant, pulled into the apartment complex at the same time as he and Ramirez and joined them. App. 186, ll. 12-18. The three walked to an apartment. Manuel Cruz, who was later identified as the lessee, opened the door for them. App. 217, ll. 11-20. Lewis claimed Appellant led him into a bedroom, reached under a dresser, and pulled out a grocery bag containing what appeared to be nine ounces of methamphetamine. According to Lewis, Appellant took four “ziplock bags” of methamphetamine out of the grocery bag and placed them on the bed. After Lewis saw the drugs and Ramirez assured him the drugs were “good,” Lewis left telling Ramirez he was going to get the money and would return. App. 218, l. 2 – 223, l. 8.

Within minutes of Lewis leaving, officers entered the apartment without a warrant and detained Appellant, Ramirez, and Cruz. Investigator Jonathan Garrett with the Greenville County Sheriff’s Office eventually obtained a search warrant for the apartment and seized what was later confirmed to be 273.26 grams of methamphetamine. App. 309, l. 7 – 311, l. 18; App. 339, l. 25 – 343, l. 2.

Appellant, Ramirez, and Cruz were all charged with trafficking methamphetamine. Ramirez ultimately pled guilty and agreed to testify against Appellant. App. 257, ll. 3-20.

### **Motion to Suppress**

Appellant moved pretrial to suppress the drugs that were seized from the apartment without a warrant. He joined in this motion with his codefendant Manuel Cruz. He argued the police violated his Fourth Amendment rights by entering the apartment without exigent circumstances before the search warrant was obtained. App. 40, l. 3 – 44, l. 2. In response to this motion, the state presented the testimony of Special Agent Randy Smith with the DEA and Investigator Jonathan Garrett and Officer Chad Malby with the Greenville County Sheriff's Office. App. 45, l. 24 – 112, l. 7. The assistant solicitor argued there were exigent circumstances which warranted the police to enter the apartment without a warrant. Specifically, she maintained the police were reasonably concerned that the drugs would be destroyed or moved. App. 44, l. 9 – 45, l. 2.

Investigator Garrett testified *in camera* that he directed officers to enter the apartment and detain the suspects while he went to obtain a search warrant because there was “movement at the apartment.” Specifically, he was told over the radio that the “males that were inside are now leaving or going outside and looking around.” App. 91, ll. 2-5. Garrett claimed the warrantless entry was necessary “[t]o prevent the evidence from being destroyed or leaving the scene.” App. 92, ll. 4-19.

The trial judge found Appellant did not have “standing” or any expectation of privacy in the apartment in order to challenge the warrantless search pursuant to the Fourth Amendment. App. 113, ll. 12-21. He further found exigent circumstances justified the warrantless entry.

Specifically, he found the officers were reasonably concerned about the destruction of evidence given the alleged activity outside the apartment. App. 112, l. 14 – 114, l. 1.

### **Discussion**

The trial judge erred by denying Appellant’s motion to suppress the evidence seized by law enforcement when officers entered the apartment without exigent circumstances and without a warrant in violation of Appellant’s Fourth Amendment rights. Unlike the trial judge found, Appellant had a reasonable expectation of privacy in the apartment to challenge the search pursuant to the Fourth Amendment.

“The Fourth Amendment guarantees individuals the right to be free from unreasonable searches and seizures.” State v. Missouri, 361 S.C. 107, 112, 603 S.E.2d 594, 596 (2004) (citing U.S. Const. amend. IV and S.C. Const. art. I, § 10). “As the [United States] Supreme Court has recognized, the ‘physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed.’” United States v. Jones, 667 F.3d 477, 482 (4th Cir. 2012) (quoting Welsh v. Wisconsin, 466 U.S. 740, 748 (1984)). “Thus, it is a basic principle of Fourth Amendment law that searches and seizures inside a home without a warrant are presumptively unreasonable.” Id. (quoting Payton v. New York, 445 U.S. 573, 586 (1980)) (internal quotation marks and alterations omitted).

“[T]he underlying command of the Fourth Amendment is always that searches and seizures be reasonable.” Wilson v. Arkansas, 514 U.S. 927, 931 (1995). “Warrantless searches and seizures are unreasonable absent a recognized exception to the warrant requirement.” State v. Wright, 391 S.C. 436, 442, 706 S.E.2d 324, 327 (2011). “[T]he burden is upon the State to justify a warrantless search.” State v. Abdullah, 357 S.C. 344, 350, 592 S.E.2d 344, 348 (Ct. App. 2004) (citing State v. Bailey, 276 S.C. 32, 35, 274 S.E.2d 913, 915 (1981)).

“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 exist.” Abdullah, 357 S.C. at 351, 592 S.E.2d at 348 (citing State v. Brown, 289 S.C. 581, 587, 347 S.E.2d 882, 886 (1986)). The United States Supreme “Court has identified several exigencies that may justify a warrantless search of a home.” Kentucky v. King, 563 U.S. 452, 460 (2011) (citing Brigham City v. Stuart, 547 U.S. 398, 403 (2006)). “A warrantless search is justified under the exigent circumstances doctrine to prevent a suspect from fleeing or where there is a risk of danger to police or others inside or outside a dwelling. In such circumstances, a protective sweep of the premises may be permitted.” State v. Bash, 412 S.C. 420, 772 S.E.2d 537 (Ct. App. 2015) (quoting State v. Herring, 387 S.C. 201, 210, 692 S.E.2d 490, 495 (2009) (internal citation marks omitted); Minnesota v. Olsen, 495 U.S. 91, 100 (1990)). Additionally, the Supreme Court has held that a warrantless search is permitted “to prevent the imminent destruction of evidence.” King, 563 U.S. at 460 (quoting Brigham City, 547 U.S. at 403) (internal quotation marks omitted).

To claim protection under the Fourth Amendment, a defendant must show he has a legitimate expectation of privacy in the place searched. Id. (citing Rakas v. Illinois, 439 U.S. 128, 143 (1978)). “A legitimate expectation of privacy is both subjective and objective in nature: the defendant must show (1) he had a subjective expectation of not being discovered, and (2) the expectation is one that society recognizes as reasonable.” Id. (citing Oliver v. United States, 466 U.S. 170, 177 (1984)).

In Minnesota v. Olsen, 495 U.S. 91 (1990), the United States Supreme Court found an overnight guest had a reasonable expectation of privacy in another’s home. While the Court did not articulate what constituted an overnight guest, it stated generally, “From the overnight

guest's perspective, he seeks shelter in another's home precisely because it provides him with privacy, a place where he and his possessions will not be disturbed by anyone but his host and those his host allows inside." Id. at 99; Missouri, 361 S.C. at 113, 603 S.E.2d at 597.

In Missouri, our Supreme Court held the defendant had a reasonable expectation of privacy in the searched apartment when he (1) was good friends with the owner, (2) frequently visited the apartment, (3) occasionally spent the night, (4) at times had a key, and (5) kept a change of clothes there. Missouri, 361 S.C. at 115, 603 S.E.2d at 597-598. The Court held the defendant demonstrated a subjective expectation of privacy in the apartment and therefore was entitled to challenge the search under the Fourth Amendment. Id. at 115, 603 S.E.2d at 597-598.

In Kolle v. State, 386 S.C. 578, 590, 690 S.E.2d 73, 79 (2010), our Supreme Court held, "The fact that Kolle did not own or lease the apartment that was searched does not negate his standing to challenge the search and subsequent seizure." The Court emphasized its previous holding "that an overnight guest has a reasonable expectation of privacy, the legal prerequisite to confer standing on an individual." Id. (internal citations omitted). The Court concluded Kolle had a reasonable expectation of privacy in the searched apartment when the person who leased the apartment "befriended Kolle and permitted him to stay for an extended period of time at the residence." Id.

In Minnesota v. Carter, 525 U.S. 83, 90 (1998), the United States Supreme Court "held that the defendants did not have a reasonable expectation of privacy in the home of another when the nature of the defendant's visit was purely commercial, the visit was short, and there was no previous connection between the defendants and the lessee." Missouri, 361 S.C. at 114, 603 S.E.2d at 597 (citing Carter, 525 U.S. at 90).

Recently, in State v. Robinson, 410 S.C. 519, 528-530, 765 S.E.2d 564, 569-570, (2014), this Court held the following factors may be considered when determining whether a defendant has a reasonable expectation of privacy to challenge a search or seizure: (1) whether the defendant owned the home or had property rights to it; (2) whether he was an overnight guest at the home; (3) whether he kept a change of clothes at the home; (4) whether he had a key to the home; (5) whether he had dominion and control over the home and could exclude others from the home; (6) how long he had known the owner of the home; (7) how long he had been at the home; (8) whether he attempted to keep his activities in the home private; (9) whether he engaged in typical domestic activities at the home, or whether he treated it as a commercial establishment; (10) whether he alleged a propriety or possessory interest in the premises and property seized; and (11) whether he paid rent at the home.

Appellant had an expectation of privacy in the apartment rented by Manuel Cruz. There was evidence presented that many people lived in this apartment besides Cruz, the lessee. Appellant was at the apartment when officers entered without a warrant and was clearly friends with Cruz. Moreover, the evidence established that the apartment was used for domestic activities and was not a commercial establishment. Consequently, the trial judge erred by finding Appellant did not have an expectation of privacy in the apartment searched.

Appellant's Fourth Amendment rights were violated when officers entered the apartment without a warrant and without exigent circumstances. Law enforcement was aware of Ramirez's connection to this apartment at least two days before the "buy-bust" was to take place and were also aware that methamphetamine was stored at this apartment. However, for whatever reason, officers failed to secure a search warrant for the apartment prior to entry. Moreover, there were no exigent circumstances. Investigator Garrett testified that he was concerned the occupants of

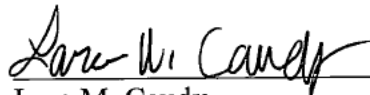
the apartment would leave or remove the drugs from the apartment before a warrant could be obtained. However, the apartment was under surveillance by numerous officers at the time and, there was no evidence the officers saw the occupants attempting to leave or carrying anything out of the apartment. If the occupants were seen leaving in a vehicle, officers could have pulled the car over to prevent any destruction of evidence. Consequently, the trial judge erred by denying Appellant's motion to suppress.

Because Appellant's Fourth Amendment rights were violated, this Court should reverse the ruling of the trial judge and suppressed the evidence unlawfully seized by law enforcement.

**CONCLUSION**

Based on the foregoing argument, Appellant respectfully requests this Court reverse his conviction and sentence and remand for a new trial.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Lara M. Caudy", is written over a horizontal line.

Lara M. Caudy  
Appellate Defender

ATTORNEY FOR APPELLANT

This 24th day of January, 2019.

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Appeal from Greenville County

Honorable Daniel D. Hall, Circuit Court Judge

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THE STATE,

RESPONDENT

V.

ANTONIO OCHOA-TAVERA,

APPELLANT

---

PETITION TO BE RELIEVED AS COUNSEL

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Counsel for Antonio Ochoa-Tavera states:

1. She is an appellate defender for the South Carolina Office of Appellate Defense, and was appointed to represent Appellant.
2. She has reviewed the record of Appellant's trial, which was held on February 9-11, 2015 before the Honorable Daniel D. Hall, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. She has, pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967), briefed an arguable legal issue which arose during the course of the trial.

WHEREFORE, she asks the Court to relieve her as counsel for Antonio Ochoa-Tavera.

Respectfully Submitted,



Lara M. Caudy  
Appellate Defender

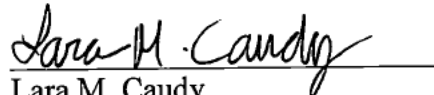
ATTORNEY FOR APPELLANT

This 24th day of January, 2019.

**CERTIFICATE OF COUNSEL**

The undersigned certifies that to the best of my ability this Anders Brief of Appellant Pursuant to White v. State 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."

January 24, 2019.

  
Lara M. Caudy  
Appellate Defender

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ATTORNEY FOR APPELLANT

STATE OF SOUTH CAROLINA  
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THE STATE,

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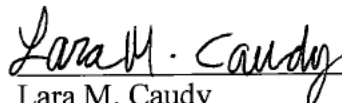
APPELLANT

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CERTIFICATE OF SERVICE

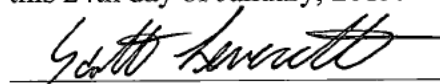
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The undersigned hereby certifies that a true copy of the Anders Brief of Appellant Pursuant to White v. State in the above referenced case has been served upon Megan Harrigan Jameson, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Anders Brief of Appellant Pursuant to White v. State has been served on Antonio Ochoa-Tavera, 363134, at Lee Correctional Institution, 990 Wisacky Highway, Bishopville, SC 29010, this 24th day of January, 2019.

  
Lara M. Caudy  
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me  
this 24th day of January, 2019.

  
(L.S)  
Notary Public for South Carolina  
My Commission Expires: September 27, 2028.