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S.C. Supreme Court

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

On Writ of Certiorari to the Court of Appeals
Appeal from Beaufort County
Carmen T. Mullen, Circuit Court Judge
Appellate Case No. 2013-0001119

THE STATE,

Respondent,

vs.

MARION BONDS,

Petitioner.

RETURN TO PETITION FOR WRIT OF CERTIORARI

ALAN WILSON
Attorney General

JOHN W. MCINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Senior Assistant Deputy Attorney General

JULIE KATE KEENEY
Assistant Attorney General
S.C. Bar No. 100145

Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ISSAC MCDUFFIE STONE, III
Solicitor, Fourteenth Judicial Circuit
PO Box 2226
Beaufort, SC 29901

ATTORNEYS FOR RESPONDENT

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STATEMENT OF THE CASE

Procedural History

On March 25, 2010, a Beaufort County Grand Jury indicted Petitioner for assault and battery with intent to kill, unlawful possession of a handgun by a person convicted of a crime of violence, attempted armed robbery, trafficking in crack cocaine (28 grams or more but less than 100 grams), trafficking in crack cocaine (more than 10 grams but less than 28 grams), and possession with intent to distribute crack cocaine within a one-half mile radius of a school. (R. pp. 557-564.)

On December 13, 2010, Petitioner proceeded to trial on all charges. The Honorable Carmen T. Mullen presided over the trial. (R. p. 1.) Ian Deysach represented Petitioner, and Angela Tanner represented the State. (R. p. 2.)

On December 16, 2010, the jury found Petitioner guilty of the following crimes: 1) assault and battery of a high and aggravated nature, 2) unlawful possession of a handgun by a person convicted of a crime of violence, 3) trafficking in crack cocaine (28 grams or more but less than 100 grams), and 4) possession with intent to distribute crack cocaine within a one-half mile radius of a school. (R. pp. 538-39.) The jury found Petitioner not guilty of the following crimes: 1) assault and battery with intent to kill, 2) trafficking in crack cocaine (10 grams or more but less than 28 grams), and 3) attempted armed robbery. (R. pp. 538-39.)

After the jury returned the verdict, Judge Mullen sentenced Petitioner to ten years of imprisonment for assault and battery of a high and aggravated nature, five years of imprisonment for unlawful possession of a handgun by a person convicted of a crime of violence, twenty years of imprisonment for trafficking in crack cocaine (28 grams or more but less than 100 grams), and fifteen years of imprisonment for possession with intent to

distribute crack cocaine within a one-half mile radius of a school. (R. pp. 555-56.) Judge Mullen ordered all sentences to run concurrently. Petitioner filed a notice of appeal on December 23, 2010.

On October 24, 2012, the Court of Appeals affirmed Petitioner's convictions and sentences. (App. pp. 1-2.) On November 8, 2012, Petitioner filed a petition for rehearing. (App. pp. 3-9.) On December 18, 2012, the Court of Appeals denied the petition for rehearing. (App. p. 10.) On March 21, 2013, Petitioner filed a petition for writ of certiorari. This return follows.

Factual History

On February 17, 2010, Petitioner went to his cousin's, Reginal Holmes ("Holmes"), residence and shot Holmes. (R. p. 172; R. p. 178; R. p. 181; R. p. 187.)

At trial, Holmes testified that on February 17, 2010, a little before 7:00 a.m., Petitioner and another individual showed up at Holmes' residence, pointed a gun at Holmes, and demanded money. (R. pp. 175-76; R. pp. 177-78.)

Around 7:00 a.m. that morning, Corporal Paul Green and Investigator John Kelleher responded to a "shots fired" call at Holmes' residence. (R. pp. 152-153; R. pp. 239-240.) When Corporal Green arrived at the scene, he saw Holmes' gunshot wound. (R. p. 155.) Eventually, Holmes took an ambulance to the hospital. (R. p. 183.)

Approximately 9:00 a.m. that morning, Petitioner called Richard Lewis ("Lewis") to see if Petitioner could come over to Lewis' house ("residence") in order to "freshen up." (R. p. 187.) Lewis told Petitioner he could come over. (R. p. 187.) Around 9:30 a.m., Petitioner arrived at the residence. (R. p. 190.) Lewis had to let Petitioner inside the residence because Petitioner did not have key. (R. pp. 368-69.)

According to Lewis, Petitioner used to live with Lewis at the residence; however, Petitioner moved out a few months before the February 17, 2010 shooting. (R. p. 367.) Lewis' mother owned the residence. (R. p. 367.) On the day of the shooting, Lewis was the only person residing in the trailer. (R. p. 367.) On occasion, Petitioner would pay Lewis $40 a week to stay at the residence; however, Petitioner did not pay Lewis any money to stay at the residence on the day of the shooting. (R. p. 389.)

At trial, Investigator Jeremiah Fraser testified that he went to the hospital with Investigator Brian Chapman to interview Holmes on the day of the shooting. (R. pp. 312-13.) After questioning Holmes, the two investigators were able to determine two suspects in the shooting – Petitioner and Jason Thomas ("Thomas"). (R. pp. 313-14.) Moreover, Holmes gave the investigators a list of addresses where Petitioner and Thomas might be hiding. (R. p. 315.)

First, the investigators searched the area where the shooting occurred for Petitioner and Thomas. (R. p. 314.) Next, the investigators went to three different homes to look for Petitioner and Thomas. (R. pp. 314-15.) However, the investigators were unsuccessful in locating the two suspects at that point. (R. pp. 314-15.) Finally, around 10:00 a.m. on the day of the shooting, the investigators went to the residence. (R. p. 315.)

When the investigators arrived at the residence, they heard loud, heavy movement inside the trailer, which indicated to them that something was going on inside the trailer. (R. p. 316.) Thereafter, Investigator Fraser walked to the back door and made contact with Lewis. (R. p. 316.) Investigator Fraser asked Lewis if Petitioner and Thomas were inside the trailer. (R. p. 316.) Lewis told Investigator Fraser that Petitioner and Thomas were in the back bedroom. (R. pp. 316-17.)

At that time, Lewis told the investigators that he was the only one that lived in the residence. (R. p. 93.) Additionally, Lewis told the investigators that Petitioner moved out of the residence months ago; however, Petitioner stayed at the residence a week before the shooting. (R. p. 94.)

According to Investigator Fraser, Investigator Kelleher, and Investigator Chapman, Lewis gave the investigators consent to go inside the trailer to search for Petitioner and Thomas. (R. p. 38; R. p. 42; R. p. 317.) However, Lewis testified that he wanted to go inside and tell Petitioner and Thomas to come outside and talk to the police. (R. p. 390.) Before Lewis could go inside to mediate, everyone heard a loud crash from the back bedroom window. (R. pp. 390-91.) Thereafter, Investigator Fraser and Investigator Chapman entered the trailer. (R. p. 317; R. p. 391.) Police surrounded the trailer. (R. p. 317.) At trial, Lewis stated he gave Investigator Fraser "implied permission" to enter the residence in order to search for Petitioner and Thomas.(R. p. 397.)

When the investigators first entered the trailer, they walked to the back bedroom where they heard all of the commotion. (R. pp. 317-18.) Before the investigators got to the back bedroom, a man named Larry Holmes came out of the bathroom; Investigator Fraser detained him and passed him back to Investigator Chapman. (R. p. 318.) Thereafter, the investigators heard a window slam.

Once Investigator Fraser heard the window slam, he hit on the bedroom door. (R. p. 318.) As soon as the door opened, Investigator Fraser saw Thomas running towards him. (R. p. 319.) Investigator Fraser detained Thomas and passed him back to Investigator Chapman. (R. p. 319.) Investigator Fraser did not see Petitioner until Investigator Fraser yelled for Petitioner to show his hands. (R. p. 319.) Petitioner

displayed his hands on the closet floor. (R. p. 319.) Petitioner was lying on the closet floor on top of a camouflage jacket. (R. p. 323.) Because Holmes told the investigators that Petitioner was wearing a camouflage jacket when Petitioner shot him, Investigator Fraser removed the jacket from the floor to keep as evidence. (R. p. 320; R. p. 324.) Once Investigator Fraser moved the camouflage jacket, he saw a shoe that contained a large quantity of crack cocaine. (R. p. 320; R. p. 324.) In addition, the investigators found two pill bottles containing crack cocaine underneath the mattress in the bedroom where Petitioner was found. (R. p. 320.)

At 10:37 a.m., after the police detained Petitioner, Lewis signed a consent form, which allowed the investigators to search the house for a weapon. (R. p. 392; R. p. 396.)

After the investigators processed the residence, they returned to their office. (R. p. 328.) At that point, Petitioner was in jail and the investigators began listening to the phone calls Petitioner was making. (R. p. 328.) Petitioner called Lewis and asked Lewis to get Petitioner's drugs of the trash can. Petitioner told Lewis to hold on to the drugs. (R. p. 376; R. p. 424.) When Lewis looked in the trash can, he found crack cocaine. (R. p. 376.)

Thereafter, Investigator Fraser sent Corporal Green to the residence to secure the residence. (R. p. 329.) Once Investigator Fraser arrived at the residence, he immediately spoke with Lewis. (R. p. 329.) At that time, Lewis gave Investigator Fraser consent to enter the residence. (R. p. 329; R. p. 396.) Lewis took Investigator Fraser inside the residence and showed him the crack cocaine that Lewis hid underneath the bathroom sink. (R. p. 329.)

On February 18, 2010, the day after the shooting, Investigator Kelleher prepared a photo line-up and presented it to Holmes. (R. p. 329.) Holmes identified Petitioner and Thomas from the photo line-up. (R. p. 329.)

During the suppression hearing, Petitioner's trial counsel moved to suppress the drugs found in both searches of the residence. In addition, Petitioner's trial counsel objected to the introduction of the photo line-up identification made by Holmes.

At the suppression hearing, Petitioner testified he stayed at the residence a week before the February 17, 2010 shooting. (R. p. 98.) Most of the time, Petitioner stayed at his girlfriend's house. Although Lewis testified at trial that Petitioner did not pay him any money to stay at the residence on February 17, 2010, Petitioner claimed he paid Lewis $40 to stay the week of February 17, 2010. (R. p. 98.) Furthermore, Petitioner claimed he owned the clothes, toothbrush, deodorant, and lotion found in the back bedroom of the residence. (R. p. 99.) However, the address listed on Petitioner's license was his mother's address. Moreover, all of Petitioner's mail went to his mother's address. (R. p. 103.) Ultimately, the trial judge denied Petitioner's trial counsel's motion to suppress the evidence found during the searches of the residence and denied the motion to suppress the photo line-up identification.(R. p. 29; R. p. 117.)

After analyzing the crack cocaine found in the residence, Renata Berry ("Berry"), an expert in forensic chemistry, testified regarding the quantity of crack cocaine that was found in the residence. (R. pp. 348-59.) According to Berry, during the first search of the residence, the investigators found 43.04 grams of crack cocaine located in Petitioner's shoe, 5.80 grams of crack cocaine in a pill bottle located underneath a mattress, and 16.30 grams of crack cocaine in a pill bottle located underneath a mattress. In total, the investigators found 65.14 grams of crack cocaine in the back bedroom during the first

search. (R. pp. 353-59.) During the second search of the residence, the investigators found 20.40 grams of crack cocaine located underneath the bathroom sink. (R. pp. 356-57.)

ARGUMENT

I.

The Court of Appeals correctly determined that the investigators' search of the residence was performed with consent from a party with apparent authority over the premises. Additionally, exigent circumstances justified the search regardless of any obtained consent, and the evidence was discovered in plain view. Furthermore, Petitioner did not have a reasonable expectation of privacy in the residence searched.

Petitioner maintains the trial judge erred in not suppressing the evidence recovered in the search of the residence. Petitioner asserts that he had a reasonable expectation of privacy, and the officers could not have reasonably believed Lewis when he informed them that Petitioner no longer lived at the residence. However, the investigators had consent to search the home from a person with apparent authority over the residence. Additionally, the search was further justified by exigent circumstances, and the crack cocaine was discovered in plain view. The investigators' actions in searching the home were entirely reasonable. Moreover, the trial judge properly refused to suppress the evidence because Petitioner did not have a reasonable expectation of privacy in the residence. Therefore, the evidence found in the search was properly admitted at trial, and the trial judge's ruling is supported by the evidence. For these reasons, Petitioner's conviction should be affirmed.

Standard of Review

In Fourth Amendment search and seizure cases, the appellate court is limited to determining if there is *any* evidence to support the trial court's findings and can only reverse due to clear error. State v. Flowers, 360 S.C. 1, 5, 598 S.E.2d 725, 727 (Ct. App. 2004) (emphasis added). The appellate court will not reverse merely because it would have reached a different conclusion than the trial judge. State v. Rivera, 384 S.C. 356, 361, 682 S.E.2d 307, 310 (Ct. App. 2009). The reviewing court may conduct its own

review of the record to determine whether the trial judge's ruling is supported by the evidence. State v. Khingratsaiphon, 352 S.C. 62, 70, 572 S.E.2d 456, 460 (2002). The appellate court must affirm the trial court if there is any evidence in the record to support the ruling. State v. Pichardo, 367 S.C. 84, 96, 623 S.E.2d 840, 846 (Ct. App. 2005).

General Fourth Amendment Law

The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. This guarantee protects against unreasonable searches and seizures, including those involving only a brief detention. Pichardo, 367 S.C. at 97, 623 S.E.2d at 847. However, "[t]he purpose of the Fourth Amendment is not to eliminate all contact between the police and the citizenry, but 'to prevent arbitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals.' " United States v. Mendenhall, 446 U.S. 544, 553-554 (1980) (quoting United States v. Martinez-Fuerte, 428 U.S. 543, 554 (1976)).

Any evidence seized as the result of an unreasonable search and seizure must be excluded from trial. State v. Weaver, 374 S.C. 313, 319, 649 S.E.2d 479, 482 (2007). The well-settled rule is warrantless searches are unreasonable per se unless they fall under an exception to the Fourth Amendment's warrant requirement. State v. Peters, 271 S.C. 498, 501, 248 S.E.2d 475, 476 (1978). South Carolina courts have recognized several exceptions to the warrant requirement, including: (1) search incident to a lawful arrest; (2) "hot pursuit"; (3) stop and frisk; (4) the automobile exception; (5) the "plain view" doctrine; and (6) consent. State v. Bailey, 276 S.C. 32, 36, 274 S.E.2d 913, 915 (1981). Additionally, exigent circumstances can justify a warrantless search of a home

which would otherwise be unreasonable. State v. Herring, 387 S.C. 201, 209, 692 S.E.2d 490, 494 (2009).

A. Consent

Even if Petitioner had a reasonable expectation of privacy at the residence, Lewis, the primary tenant of the residence, gave the investigators consent to enter the residence to search for Petitioner and Thomas. (R. p. 38; R. p. 42; R. p. 317; R. p. 396.) When the investigators found Petitioner hiding in the closet, they saw Petitioner lying on top of a camouflage jacket and his shoe, which contained 43.04 grams of crack cocaine. (R. p. 320; R. p. 324.) Additionally, after the investigators detained Petitioner, Lewis gave the investigators consent to search the residence for a weapon. (R. p. 392; R. p. 396.) Thereafter, the investigators found two pill bottles containing crack cocaine underneath a mattress in the bedroom where Petitioner was found.[1] Furthermore, when the investigators returned to the residence later that day, Lewis gave the investigators consent to search the residence when he led the investigators to the crack cocaine that he hid underneath the bathroom sink. (R. p. 329; R. p. 396.) Moreover, because Lewis had common authority over the residence, his consent to both of the searches was valid. Therefore, the trial judge properly ruled Lewis consented to the search of the residence. (R. p. 117.)

[1] During the first search of the residence, the investigators found 43.04 grams of crack cocaine located in Petitioner's shoe, 5.80 grams of crack cocaine in a pill bottle located underneath a mattress, and 16.30 grams of crack cocaine in a pill bottle located underneath a mattress. In total, there was 65.14 grams of crack cocaine found in the bedroom during the first search. Although it is not entirely clear from the record whether or not the investigators found the two pill bottles containing crack cocaine before or after Lewis signed the consent form at 10:37 a.m. that morning, any error would be harmless. Petitioner was charged with trafficking in crack cocaine 28 grams or more but less than 100 grams. Therefore, the 43.04 grams of crack cocaine that was found in Petitioner's shoe was enough to find Petitioner guilty of trafficking in crack cocaine 28 grams or more but less than 100 grams. In other words, the 22.1 grams of crack cocaine found in the pill bottles underneath the mattress did not increase Petitioner's trafficking charge.

i. When the police first arrived at the residence, Lewis consented to a search of the residence in order to detain Petitioner and Thomas, and Lewis consented to the search of the residence in order to find the weapon used in the shooting.

A warrantless search may be justified based on consent obtained from a third party. Flowers, 360 S.C. at 5, 598 S.E.2d at 728. In order to give consent, the third party must have "common authority over or some other sufficient relationship to the premises or effects being searched." Id.; see United States v. Matlock, 415 U.S. 164, 171 (1974) ("These cases at least make clear that when the prosecution seeks to justify a warrantless search by proof of voluntary consent, it is not limited to proof that consent was given by the defendant, but may show that permission to search was obtained from a third party who possessed common authority over or sufficient relationship to the premises or effects sought to be inspected."). "Common authority is defined as mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable for officers to believe the person granting consent has the authority to do so." State v. Laux, 344 S.C. 374, 376, 544 S.E.2d 276, 277 (2001).

Furthermore, landlords and hotel managers may not validly consent to a search of a tenant or hotel guest's room. State v. Moultrie, 271 S.C. 526, 529, 248 S.E.2d 486, 487-488 (1978). However, where no landlord-tenant relationship exists, a host can validly consent to a search of premises occupied by a guest. Id. at 529, 248 S.E.2d at 488. Guests assume the risk home residents will allow others into the premises. Bailey, 276 S.C. at 36, 274 S.E.2d at 915-916. In the case at hand, Lewis gave the investigators consent to search the residence for Petitioner and Thomas. In addition, after the investigators detained Petitioner and Thomas, Lewis signed a consent form to allow the

investigators to search the residence for the weapon used in the shooting. (R. p. 392; (R. p. 396.)

During the trial, Investigator Fraser testified Lewis gave consent to search the residence for Petitioner and Thomas. (R. p. 317.) Moreover, Lewis testified at trial that he gave the investigators his "implied permission" to enter the residence to search for Petitioner and Thomas. (R. p. 397.) See United States v. Hylton, 349 F.3d 781, 786 (4th Cir. 2003) ("Consent may be inferred from actions as well as words.").

Moreover, because Lewis had common authority over the residence, his consent was valid. At most, Petitioner was Lewis' guest on the morning of the shooting. See Flowers, 360 S.C. at 6, 598 S.E.2d at 728 (noting that the defendant was a guest in his girlfriend's home. The defendant spent approximately five nights a week at the girlfriend's house. Furthermore, he kept a change of clothing at the girlfriend's house and occasionally paid rent); see also Moultrie, 271 S.C. at 529, 248 S.E.2d at 488 ("In this case there is no evidence that appellant was renting the room he shared with the owner's daughter. We hold that where no landlord-tenant situation exists, a host can validly consent to a search of the premises occupied by a guest.").

Furthermore, there was no evidence Petitioner had exclusive possession of the room where the investigators found Petitioner hiding. See Flowers, 360 S.C. at 6, 598 S.E.2d at 728; see also State v. Vaster, 24 Wash. App. 405, 601 P.2d 1292, 1294-95 (1979) (holding where a guest does not maintain exclusive control over any portion of the residence, even if the guest has a legitimate expectation of privacy, a homeowner's power to consent to a search of his own home overrides the objection of a guest to a search).

Here, Lewis resided in the trailer and occasionally allowed Petitioner to stay in the room where Petitioner was found. However, Petitioner did not rent the room that day.

He was just at the residence to "freshen up." As a guest, Petitioner assumed the risk that Lewis would allow others inside the residence. See Bailey, 276 S.C. at 36, 274 S.E.2d at 915-916. In summary, because there is evidence to support the trial judge's finding that Lewis consented to the search, this Court should affirm the trial judge's denial of Petitioner's motion to suppress.

ii. When the police went to the residence the second time, Lewis consented to the search by leading the police to the crack cocaine he hid underneath the bathroom sink.

As mentioned above, "[c]onsent may be inferred from actions as well as words." Hylton, 349 F.3d at 786. In the present case, Petitioner, called Lewis to get Petitioner's crack cocaine out of the trash can located inside the residence. (R. p. 376.) The police heard this entire conversation because Petitioner made the phone call while he was in jail; therefore, the conversation was recorded. Thereafter, Lewis removed the crack cocaine from the trash can and threw it underneath the bathroom sink cabinet. (R. p. 378.) While Lewis was on the phone with Petitioner, Corporal Green was already at the residence in order to secure the scene. (R. p. 377.) Corporal Green told Lewis to come outside. (R. p. 379.) When Investigator Fraser arrived at the residence for the second time that day, Lewis showed Investigator Fraser where he hid the crack cocaine. (R. p. 329.) According to Lewis' testimony, he willingly showed the investigators where he hid the crack cocaine. (R. p. 379.) Moreover, he stated he consented to the investigators searching the residence the second time. (R. p. 379.) Because Lewis consented to the second search of the residence, the trial judge properly admitted the crack cocaine into evidence.

B. Exigent Circumstances

When the investigators visited Holmes in the hospital, Holmes told them that Petitioner was the one that shot him. Furthermore, Holmes informed the investigators that Petitioner might be hiding at the residence. When the investigators arrived at the residence, they heard loud, heavy movement inside the trailer, which indicated to them that something was going on inside the residence. (R. p. 316.) Lewis told Investigator Fraser that Petitioner and Thomas were inside the residence. (R. pp. 316-17.) Lewis testified that he wanted to go inside himself and tell Petitioner and Thomas to come outside and talk to the police. (R. p. 390.) But before Lewis could go inside to mediate, everyone heard a loud crash from the back bedroom window. (R. pp. 390-91.) Faced with exigent circumstances, Investigator Fraser and Investigator Chapman justifiably entered the residence in order to protect their own lives and the lives of others. (R. p. 317; R. p. 391.)

The exigent circumstances doctrine permits law enforcement officers to act without a search warrant where the exigencies of the situation make the officers' course of action immediately imperative. State v. Abdullah, 357 S.C. 344, 351, 592 S.E.2d 344, 348 (Ct. App. 2004). "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." Id. "A fairly perceived need to act on the spot may justify entry and search under the exigent circumstances exception to the warrant requirement." Herring, 387 S.C. at 210, 692 S.E.2d at 494. Exigent circumstances justifying a warrantless search include an imminent risk of flight from the suspect or a risk of danger to officers or others. Id. at 210, 692 S.E.2d at 494-495. The imminent destruction of evidence can also constitute

exigent circumstances permitting a warrantless search. State v. Simmons, 384 S.C. 145, 174, 682 S.E.2d 19, 34 (Ct. App. 2009).

In Warden v. Hayden, 387 U.S. 294, 298 (1967), the United States Supreme Court considered whether the search of a residence in which a suspected armed robber was believed to have fled to was justified by the exigencies of the situation. Officers were alerted by a cab driver that an armed robbery suspect ran into a particular residence. Id. at 297. The officers responded to the scene within five minutes, entered the home, and searched for the suspect. Id. at 298. Hayden challenged the lawfulness of the search, and the Supreme Court found the search was reasonable and justified. Id. The Court concluded:

> The police were informed that an armed robbery had taken place, and that the suspect had entered [a home] less than five minutes before they reached it. They acted reasonably when they entered the house and began to search for a man of the description they had been given and for weapons which he had used in the robbery or might use against them. The Fourth Amendment does not require police officers to delay in the course of an investigation if to do so would gravely endanger their lives or the lives of others. Speed here was essential, and only a thorough search of the house for persons and weapons could have insured that Hayden was the only man present and that the police had control of all weapons which could be used against them or to effect an escape.

Id. at 298-299.

In the case at hand, Holmes informed the investigators that Petitioner shot him. Furthermore, when the investigators arrived at the residence, Lewis informed the investigators that Petitioner and Thomas were inside the residence. The investigators reasonably believed Petitioner was armed and dangerous at that time. Moreover, once the investigators heard the commotion inside the residence, there was an immediate need

to secure the premises and assist potential victims. Because the Fourth Amendment does not require the police to delay their investigation when doing so would cause a grave danger to their lives or the lives of others, the investigators search of the residence was reasonable.

C. Plain View

Furthermore, the crack cocaine the investigators discovered underneath Petitioner's camouflage jacket was properly found in plain view. See State v. Beckham, 334 S.C. 302, 317, 513 S.E.2d 606, 613 (1999) ("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 as evidence."). "In order for evidence to be seized under the plain view exception, three things must be shown: 1) the initial intrusion which afforded the authorities the plain view was lawful; (2) the discovery of the evidence was inadvertent; and (3) the incriminating nature of the evidence was immediately apparent to the seizing authorities." Id.

First, in the case at hand, the investigators obtained consent to search the residence and had exigent circumstances that justified their initial entry. Therefore, the initial intrusion which afforded the investigators the plain view was lawful.

Second, the discovery of the crack in the tennis shoe was inadvertent. Holmes told the investigators that Petitioner was wearing a camouflage jacket when Petitioner shot him. Therefore, when the investigators saw Petitioner lying on top of the camouflage jacket, the investigators properly seized the jacket under the plain view doctrine. Moreover, once the investigators removed the jacket, they saw, in plain view, what appeared to be crack cocaine located in Petitioner's shoe.

Finally, the incriminating nature of the evidence was immediately apparent to the seizing authorities. In Beckham, the court held that the latex gloves located in the defendant's home was in plain view of the officers. Id. The defendant's accomplice told the officers that the defendant wore gloves during the commission of the murder. Id. Therefore, the trial judge properly admitted the gloves into evidence. Id. Although a camouflage jacket in itself is not incriminating, the fact that the victim told the investigators that Petitioner was wearing the jacket when Petitioner shot the victim made the jacket incriminating. Moreover, once the investigators removed the jacket, they saw the crack cocaine in Petitioner's shoe.

In summary, the trial judge's decision to admit the evidence was supported by consent, exigent circumstances, and the plain view doctrine, and her ruling was supported by the evidence. See Abdullah, 357 S.C. 344, 349, 592 S.E.2d 344, 347 (Ct. App. 2004) ("On appeal from a suppression hearing, this court is bound by the circuit court's factual findings if any evidence supports the findings.")

D. Reasonable Expectation of Privacy

A criminal defendant asserting a challenge to an allegedly unreasonable search and seizure must establish his own personal Fourth Amendment rights were violated. State v. McKnight, 291 S.C. 110, 114, 352 S.E.2d 471, 473 (1987). "[C]apacity to claim the protection of the Fourth Amendment depends not upon a property right in the invaded place but upon whether the person who claims the protection of the Amendment has a legitimate expectation of privacy in the invaded place." Rakas v. Illinois, 439 U.S. 128, 143 (1978) (citing Katz v. United States, 389 U.S. 347, 353 (1967)). A subjective expectation of privacy can be considered legitimate if it is one society accepts and recognizes as reasonable. Minnesota v. Olsen, 495 U.S. 91, 95-96 (1990). "Although a

person present only intermittently or for a purely commercial purpose does not have a reasonable expectation of privacy, an overnight guest may have a reasonable expectation of privacy in the host's property." Flowers, 360 S.C. at 5, 598 S.E.2d at 728.

In State v. Missouri, this Court held that the defendant had a reasonable expectation of privacy. 361 S.C. 107, 115, 603 S.E.2d 594, 598 (2004). The police found the defendant in an apartment standing over a large quantity of crack cocaine. 361 S.C. at 110, 603 S.E.2d at 595. Although the defendant did not reside in the apartment, the defendant testified that the apartment was a "place of comfort and solace for him and that he felt a sense of privacy there." Id. The defendant did not stay at the apartment the night before the search took place, and the tenants of the apartment testified that they could not remember the last time the defendant stayed at their apartment. Id. The defendant would sometimes have a key to the apartment and kept clothes here. 361 S.C. at 115, 603 S.E.2d at 597. Furthermore, the defendant did not pay to stay at the apartment. Id. Moreover, the defendant was at the apartment for at least seven hours before the search occurred. Id. Because there were facts to support the trial judge's finding that the defendant had a reasonable expectation of privacy, the Court upheld the trial court's decision. 361 S.C. at 115, 603 S.E.2d at 598.

In the case at hand, Petitioner did not have a legitimate expectation of privacy in the residence. On the day of the shooting, Petitioner went to the residence to change clothes and freshen up; however, Petitioner was not spending the night. (R. p. 368.) Petitioner had only been at the residence for 30 minutes when the investigators arrived. Moreover, Petitioner did not have a key to the residence. (R. pp. 368-69.)

Although, Lewis' mother owned the residence, Lewis was the only person living in the residence on February 17, 2010. Additionally, Lewis told the investigators that

Petitioner moved out of the residence months before the shooting occurred. (R. p. 367.) Although Petitioner did have some clothing and toiletries at the residence, he testified during the suppression hearing that he primarily lived at his girlfriend's house. (R. p. 98.) Furthermore, the investigators went to three other residences before they found Petitioner at the residence. (R. p. 73-74.) Petitioner's aunt told the investigators that Petitioner stayed with her from time to time. (R. p. 74.)

Without a legitimate expectation of privacy in the residence searched, Petitioner cannot challenge the search on Fourth Amendment grounds. See Bailey, 276 S.C. at 36, 274 S.E.2d at 915-916 ("[Bailey] had no possessory or privacy interests in the premises. As a guest, he assumed the risk that the home resident would allow others into the area." (citations omitted)).

Therefore, because there is evidence to support the trial judge's ruling that Petitioner did not have a reasonable expectation of privacy, Petitioner's convictions and sentences should be affirmed.

II.

The Court of Appeals correctly found that the introduction of the photo line-up did not improperly bolster the victim's testimony. Moreover, even if the admission of the photo line-up amounted to improper bolstering, any error was harmless.

On February 18, 2010, the day after the shooting, Investigator Kelleher prepared a photo line-up and presented it to Holmes. (R. p. 247.) Holmes identified Petitioner from the photo line-up. (R. p. 247.) During the pretrial hearing, Petitioner's trial counsel objected to the introduction of the photo line-up because Holmes knew Petitioner. (R. pp. 27-28.) Furthermore, Petitioner's trial counsel argued that because Holmes knew Petitioner, the introduction of the photo line-up identification would amount to improper bolstering. (R. pp. 27-28.) The State argued that the photo line-up identification was not bolstering; it was just part of the investigation and "just another piece of evidence." (R. p. 28.) The trial judge properly ruled in favor of the State and allowed the State to introduce the photo line-up identification at trial. (R. p. 29.)

Standard of Review

"The admission or exclusion of evidence is within the discretion of the trial court and will not be reversed on appeal absent an abuse of that discretion. An abuse of discretion occurs when the trial court's ruling is based on an error of law." State v. Foster, 354 S.C. 614, 620-621, 582 S.E.2d 426, 429 (2003) (citations omitted).

A. Admitting the photo line-up identification did not amount to improper bolstering.

Black's Law Dictionary defines bolstering as the following: "To enhance (unimpeached evidence) with additional evidence. This practice is often considered improper when lawyers see to enhance the credibility of their own witnesses." Generally,

bolstering is a hearsay objection used when a party improperly offers evidence to support an unimpeached witness or to add credibility to earlier-introduced evidence. State v. Balderas, 915 S.W.2d 913, 919 (Tex. App.-Houston [1st Dist.] 1996, pet. ref'd.) Other times, bolstering objections occur when an attorney makes an implication that the testimony of a witness is corroborated by evidence known to the government but not known to the jury. United States v. Sanchez, 118 F.3d 192, 198 (4th Cir. 1997).

In Foster, this Court held that the witness' prior consistent statement was inadmissible hearsay, which improperly bolstered the witness' own testimony. 354 S.C. at 622-623, 582 S.E.2d at 430. On cross-examination, the defendant questioned the witness about her prior inconsistent statements. 354 S.C. at 619, 582 S.E.2d at 429. Trying to rehabilitate the witness' testimony, the State introduced the witness' prior consistent statement into evidence. Id. This Court looked at the plain language of Rule 801(d)(1)(B) and determined that the witness' prior consistent statement was inadmissible hearsay because the witness had not been charged with recent fabrication or improper motive or influence. 354 S.C. at 622, 582 S.E.2d at 430.

Unlike the statement in Foster, the photo line-up identification in this case is not hearsay. See Rule 801(d)(1)(C), SCRE (1976). Pursuant to Rule 801, prior consistent statements of a witness are not inadmissible hearsay if "[t]he declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is . . . one of identification of a person made after perceiving the person." Id; see also U.S. v. Jarrad, 754 F.2d 1451, 1456 (9th Cir. 1985) (holding one witness may testify regarding an identification made by another witness if the declarant also testifies and is available for cross-examination.).

Because Holmes, the declarant, testified at trial and was available for cross-examination, Investigator Kelleher's testimony regarding Holmes' identification of Petitioner during the photo line-up did not amount to impermissible hearsay.

Furthermore, because Holmes saw Petitioner multiple times a week and had a close personal relationship with Petitioner, his testimony did not need to be bolstered. Holmes' testimony as to the identity of the shooter was much stronger evidence than the photo line-up identification. The purpose of Investigator Kelleher's testimony regarding Holmes' successful photo identification of Petitioner was not to add credibility to Holmes' testimony, but rather to outline the steps the law enforcement officers took during the investigation. Moreover, Holmes' in-court testimony, where he identified Petitioner as the shooter, was more powerful than Investigator's Kelleher's testimony regarding the photo line-up procedure he prepared the day after the shooting occurred.

Moreover, this was not a situation where the solicitor implied that the testimony of a witness was corroborated by evidence known to the government but not known to the jury. In fact, the State did not even mention the photo line-up identification in its closing argument.

In summary, the introduction of the photo line-up identification did not amount to improper bolstering.

B. Even if admitting the victim's photo line-up identification amounted to improper bolstering, any error was harmless.

Error without prejudice does not warrant reversal on appeal. State v. McWee, 322 S.C. 387, 393, 472 S.E.2d 235, 239 (1996). Appellate courts will generally not set aside a judgment based on insubstantial errors not affecting the result. State v. Sherard, 303 S.C. 172, 176, 399 S.E.2d 595, 597 (1991). Error is harmless beyond a reasonable doubt

if it does not contribute to the verdict. State v. Fletcher, 379 S.C. 17, 25, 664 S.E.2d 480, 484 (2008). An admission of improper evidence is considered harmless when it is merely cumulative to other properly admitted evidence. State v. Blackburn, 271 S.C. 324, 329, 247 S.E.2d 334, 337 (1978). "When guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached, the Court should not set aside a conviction because of insubstantial errors not affecting the result." State v. Bailey, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989). When overwhelming evidence of guilt has been established, any trial error may be harmless. State v. Gathers, 295 S.C. 476, 480-481, 369 S.E.2d 140, 143 (1988).

Here, Holmes testified that Petitioner was the person that shot him. Furthermore, Holmes testified that he knew Petitioner very well and was even familiar with the teardrop tattoo on Petitioner's face. Although Holmes had doubts as to the identity of the second individual at his house during the shooting, Holmes never had any trouble identifying Petitioner as the shooter. Furthermore, the investigators testified the reason they went looking for Petitioner was because Holmes identified Petitioner as the shooter when they first arrived at the scene of the shooting. Therefore, the admission of the photo line-up identification was merely cumulative to the other properly admitted evidence. In summary, if the photo line-up identification improperly bolstered Holmes' testimony as to the identification of the shooter, Petitioner suffered no prejudice.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. MCINTOSH
Chief Deputy Attorney General

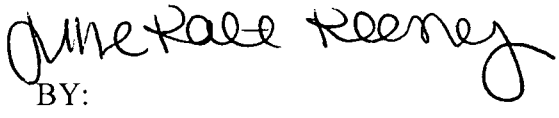
SALLEY W. ELLIOTT
Senior Assistant Deputy Attorney General

JULIE KATE KEENEY
Assistant Attorney General
S.C. Bar No. 100145

Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ISSAC MCDUFFIE STONE, III
Solicitor, Fourteenth Judicial Circuit
PO Box 2226
Beaufort, SC 29901

ATTORNEYS FOR RESPONDENT



BY:
Julie Kate Keeney
S.C. Bar No. 100145

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

April 22, 2013

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

On Writ of Certiorari to the Court of Appeals
Appeal from Beaufort County
Carmen T. Mullen, Circuit Court Judge
Appellate Case No. 2013-0001119

THE STATE,

Respondent,

vs.

MARION BONDS,

Petitioner.

PROOF OF SERVICE

I, Ellen R. DuBois, certify that I have served the within Return to Petition for Writ of Certiorari on Respondent by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Susan B. Hackett, 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 22nd day of April 2013.

Ellen R. DuBois

ELLEN R. DuBOIS
Legal Assistant

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727