ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Richland County

William Jeffrey Young, Circuit Court Judge

Opinion No. 2012-UP-580 (S.C. Ct. App. filed 10/24/2012)

10-GS-40-10167.

THE STATE,

RESPONDENT,

V.

KENDRICK DENNIS,

PETITIONER

Appellate Case No. 2013-000398

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

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CERTIFICATE OF COUNSEL

Counsel for petitioner certifies that the petition for rehearing was made and finally ruled on by the Court of Appeals on January 25, 2013. App. 9.

QUESTION PRESENTED

Did the Court of Appeals err in affirming Petitioner's conviction and sentence where the lower court erred in denying his motion for directed verdict because the evidence showed the property on which the arrest took place was private property and therefore the arrest for public disorderly conduct was unlawful to which Petitioner had a right to resist?

STATEMENT OF THE CASE

A Richland County Grand Jury indicted Petitioner for resisting arrest in violation of S.C. Code Ann. § 16-9-320(A). R.135 (Indictment). The state, represented by Ricardo Bunge and Foster Mathews, called the case for trial on February 3, 2011. R. 4. James Cooper and Clark Newton represented Petitioner. R. 1. The jury returned its verdict of guilty. R. 124 lines 19-25. The Honorable William J. Young sentenced Petitioner to one year imprisonment, the maximum permitted under the statute. R. 133 lines 20-23.

Petitioner filed a timely notice of appeal, which was perfected. On October 24, 2012, the Court of Appeals affirmed Petitioner's conviction and sentence. App. 1-2. On November 5, 2012, Petitioner filed a petition for rehearing. App. 3-8. On January 25, 2013, the Court of Appeals denied the petition for rehearing. App. 9.

ARGUMENT

The Court of Appeals erred in affirming Petitioner's conviction and sentence where the lower court erred in denying his motion for directed verdict because the evidence showed the property on which the arrest took place was private property and therefore the arrest for public disorderly conduct was unlawful to which Petitioner had a right to resist.

Senior Corporal James Gore of the Richland County Sheriff's Department testified on behalf of the prosecution. R. 21 lines 3-4. On October 25, 2009, Gore responded to Spring Valley Apartments located at 127 Sparkleberry Lane to investigate a vehicle accident. R. 22 line 25 – R. 23 line 16. When Gore arrived at the apartment complex he observed a damaged vehicle. R. 23 line 23 – R. 24 line 4. Gore saw Petitioner in the apartment complex and approached him. R. 24 line 23 – R. 25 line 8. Gore noticed that Petitioner was "staggering or staggering his speech or his footsteps." R. 25 lines 18-20. Gore described Petitioner's speech as "very slurred," R. 25 lines 22-24, and his demeanor as "just loud, boisterous," R. 26 line 2. Upon further questioning, Gore stated Petitioner's "feet were shuffling," R. 26 line 15, and he was speaking above normal volume, R. 26 lines 16-17. Gore interacted with Petitioner next to the sidewalk within ten feet of an apartment. R. 27 line 5. Gore asked Petitioner for identification, R. 27 lines 9-10, and then placed him in custody for "being drunk in public, disorderly conduct," R. 27 lines 18-20; R. 34 line 22. Gore asked Petitioner to place his arms behind his back. R. 28 lines 12-14. Gore handcuffed one arm, but Petitioner jerked his arm around. R. 28 lines 14-16. Gore then executed a "straight-arm bar or a take-down." R. 29 line 3. This maneuver forced Petitioner and Gore to the ground. R. 29 lines 9-17. Both of Petitioner's arms were beneath him. R. 29 lines 20-22. Gore then stunned Petitioner with his taser. R. 30 line 17-21. Gore testified that Petitioner "yelled out and said, Ouch" and then

placed his arms behind his back. R. 32 lines 5-7. Gore placed the handcuffs on Petitioner and walked him to the patrol car. R. 32 lines 17-21.

The prosecution also called Master Deputy Steven Oliphant with the Richland County Sheriff's Department as a witness. R. 5 line 16. Oliphant testified that he went to Spring Valley Apartments on October 25, 2009 in response to a call regarding a single car accident. R. 7 lines 10-23. While responding to the call, Oliphant made contact with Petitioner and Gore. R. 10 lines 2-6. Oliphant noticed Petitioner was stumbling and had a "strong odor of alcohol about his person." R. 10 lines 10-13. As Oliphant drew closer to Petitioner, he noticed Petitioner "was slurred in his speech." R. 11 line 10. He further described Petitioner as "loud and ... getting louder." R. 11 lines 16-18. Oliphant estimated they were ten or fifteen feet from the apartments and other people could have heard Petitioner. R. 11 lines 20-24. Oliphant testified that Gore instructed Petitioner to place his hands behind his back. Petitioner responded by placing one hand behind his back, but when Gore attempted to handcuff him, Petitioner pulled away. R. 12 lines 8-15. Oliphant stated "we got into a struggle and we fell to the ground" and Petitioner placed both of his harms under his chest. R. 12 lines 16-18. Gore then deployed his taser and shot Petitioner. R. 13 lines 1-2. Thereafter, Petitioner placed his hands behind his back and officers handcuffed him. R. 13 lines 4-6. According to Oliphant, Gore did not have a chance to tell Petitioner that he was under arrest. R. 16 lines 13-14.

On cross-examination, Gore identified a photograph of the entrance to Spring Valley Apartments. The photograph included a sign identifying the apartment complex as private property. R. 49 lines 6-9. This photograph was admitted into evidence without objection. R. 49 lines 14-19. Additionally, Gore testified that the location was in the interior of the complex, R. 41 lines 6-9, and not on a main highway, R. 41 lines 10-12. On re-direct, Gore stated that there were no gates at the

apartment complex and anybody could get in as no code was required. R. 51 lines 20-24. Gore estimated that other residents could hear Petitioner. R. 52 lines 14-16. Gore also testified that there were no other people around, "it was just him." R. 52 lines 23-24.

At the conclusion of the state's case, Petitioner moved for a directed verdict on the basis that if Petitioner resisted arrest at all, he had a right to do so as it was an unlawful arrest in light of the fact that he was on private property and the arrest was for public disorderly conduct. R. 53 line 22 – R. 54 line 19. Petitioner argued that the prosecution offered no evidence that it was a public place. R. 55 lines 20-22. Judge Young denied Petitioner's motion for directed verdict. R. 61 line 25 – R. 62 line 3.

At the conclusion of the presentation of his case, Petitioner renewed his motion for directed verdict heard earlier by the court. R. 106 lines 22-24. Again, Judge Young denied the motion. R. 107 lines 4-11. During deliberations, the jury sent a note to the judge asking for the police report and the testimony of the three witnesses who testified. R. 121 lines 21-22; R. 122 line 1; R. 122 line13. The judge responded that the police report was not in evidence, R. 122 lines 2-4, and that the jurors would have to rely upon their memories for the testimony because "[t]hat would be basically retrying the case." R. 122 lines 11-17.

A person engages in public disorderly conduct when he is "found on any highway or at any public place or public gathering in a grossly intoxicated condition or otherwise conducting himself in a disorderly or boisterous manner." S.C. Code Ann. § 16-17-530(a). Clearly, Petitioner was not found on any highway or at a public gathering; therefore, the question is whether he was found at any public place. This Court held the following definition was "proper and satisfactory":

> A place to which the general public has a right to resort; not necessarily a place devoted solely to the uses of the public, but a place which is in point of fact public rather than private, a place visited by many persons and usually accessible to the

> neighboring public. Any place so situated that what passes there can be seen by any considerable number of persons, if they happen to look. Also, a place in which the public has an interest as affecting the safety, health, morals, and welfare of the community. A place exposed to the public, and where the public gather together or pass to and for."

State v. Williams, 280 S.C. 305, 306-307, 312 S.E.2d 555, 556 (1984)(internal citations omitted). In Williams, this Court held that the lobby of the Austin Wilkes Society Home was a public place because it was common knowledge that the Homes, which received financial assistance often from United Way and governmental grants, were not private residences. Id. at 307, 312 S.E.2d at 556.

Answering a certified question from the United States District Court for the District of South Carolina, this Court Court cited with approval a prior district court case, Cooke v. Allstate Management Corp., 741 F.Supp. 1205 (D.S.C. 1990), when determining the duties owed by landlords to tenants. Cramer v. Balcor Property Management, 312 S.C. 440, 443, 441 S.E.2d 317, 318 (1994). In Cramer, this Court held that landlords did not owe an affirmative duty to protect tenants from criminal activity merely by reason of the relationship. Id. at 443, 441 S.E.2d at 318-319. Holding that "[t]enants in a huge apartment complex ... do not live where the world is invited to come," this Court reasoned that "[a]n apartment building is not a place of public resort where one who profits from the very public it invites must bear what losses that public may create. It is of its nature private and only for those specifically invited." Id. at 443, 441 S.E.2d at 318.

The South Carolina Court of Appeals relied upon Cramer, supra, to determine that an apartment complex owner owed no duty to a social guest of a tenant to protect that guest from an assault. Goode v. St. Stephens United Methodist Church, 329 S.C. 433, 442-444, 494 S.E.2d 827, 831-832 (Ct. App. 1997). The Court of Appeals determined the guest was not a public invitee because "an apartment complex is not a place held open to the public and is instead a private place for only people who are specifically invited." Id. at 442, 494, S.E.2d at 831.

At trial, the prosecution cited State v. McGowan, 347 S.C. 618, 557 S.E.2d 657 (2001) to support its position that the apartment complex was a public area. R. 56 line 7. While intoxicated, McGowan called police to his home to file a false complaint. Id. at 620-621, 557 S.E.2d at 659. The responding officer found McGowan waiting in his driveway. Id. at 621, 557 S.E.2d at 659. McGowan, who was loud and boisterous, used profanity toward the officers on the scene. Id. The officer decided to arrest McGowan for disorderly conduct when he began "'ranting and raving'" for the third or fourth time. Id. When the officer attempted to place handcuffs on him, McGowan ran toward his home. Id. The officer caught McGowan and the two struggled. Id. McGowan retrieved a shotgun. Id. The officer attempted to subdue McGowan with mace, but this was not successful. Ultimately, the officer fired three shots: one warning shot, one shot hitting McGowan in the hand, and one shot grazing McGowan. Id. On appeal, McGowan claimed the underlying arrest for disorderly conduct was unlawful, permitting him to resist the arrest and entitling him to a directed verdict on the resisting arrest charge. Id. at 624, 557 S.E.2d at 661. This Court held there was sufficient evidence from which a jury could find McGowan guilty of disorderly conduct where there was testimony that "McGowan was intoxicated, was acting in a loud and boisterous manner and cursing at police, that his language was loud enough to disturb the neighborhood, and that at some point during the incident, there was a car load of teenagers on the cul-de-sac across the street." Id. at 625-626, 557 S.E.2d at 661.

The instant case is easily distinguished from McGowan. The key fact in determining that the evidence presented against McGowan satisfied the elements of disorderly conduct was the car load of teenagers on the cul-de-sac across the street. Id. at 625-626, 557 S.E.2d at 661. The evidence presented at Petitioner's trial was clear: there was no one else around. There was no evidence that Petitioner was loud or boisterous prior to the officer's arrival. The officers arrived at

the scene due to a dispatch call concerning an automobile accident. The record contains no evidence of any calls concerning loud noises or disruptive behavior at the apartment complex. The record contains no evidence that anyone other than the officers actually heard Petitioner. Finally, no one testified that Petitioner used abusive language or profanity to the officers or anyone else prior to his unlawful arrest. All of the evidence supports Petitioner's position that he was deep within the apartment complex, not exposed to any public thoroughfares.

According to the Court of Appeals, the trial judge correctly denied Petitioner's motion for directed verdict because the prosecution presented evidence that (1) the apartment was freely accessible by the public; (2) the driveway into and out of the apartment led to a main road; (3) the entrance and exit were not blocked by gates; and (4) the public could freely enter the area without passing through security or entering codes. App. 2. Relying upon State v. Williams, 280 S.C. 305, 306-307, 312 S.E.2d 555, 556 (1984) for the definition of a public place, the Court of Appeals held the apartment complex was a public place. The Court of Appeals erred in so finding. No one other than the officers and Petitioner were in the immediate area. The officers testified Petitioner was arrested deep within the apartment complex, not exposed to any public thoroughfares and the officers admitted the apartment complex was private property as indicated by a prominent sign on display at the entrance.

CONCLUSION

Petitioner respectfully requests this Court grant the petition for writ of certiorari and order full briefing on the issue presented. In the alternative, Petitioner requests this Court dispense with further briefing, reverse the decision of the Court of Appeals, and direct a verdict in Petitioner's favor because Petitioner had a right to resist his unlawful arrest for public disorderly conduct as he was on private property within the confines of a large apartment complex.

Respectfully submitted,

Susan B. Hackett

Susan B. Hackett
Appellate Defender

ATTORNEY FOR PETITIONER.

This 22nd day of April, 2013

STATE OF SOUTH CAROLINA

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THE STATE,

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CERTIFICATE OF SERVICE

I certify that a true copy of the petition for writ of certiorari and a copy of the appendix, in this case has been served on Megan Harrigan, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 and Kendrick Dennis, at 4443 Bethel Church Road,Unit 59, Columbia SC, 29206 and the S.C. Court of Appeals this 22nd day of April, 2013.

Susan B. Hackett

Susan B. Hackett
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 22nd day
of April, 2013.

(L.S.)

Notary Public for South Carolina
My Commission Expires: November 16, 2022