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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Laurens County
Honorable Frank R. Addy, Jr., Circuit Court Judge
Appellate Case No. 2018-002133

THE STATE,

Appellant,

vs.

SYLVESTER FERGUSON, III,

Respondent.

**REPLY TO RETURN TO
PETITION FOR REHEARING**

Following this Court’s issuance of its decision affirming the circuit court judge’s order granting Ferguson’s motion to suppress his illegal drugs and other incriminating items, the State filed a petition for rehearing raising several points it believes this Court misapprehended and overlooked in resolving the appeal. State v. Ferguson, Op. No. 5915 (S.C. Ct. App. filed June 1, 2022). After that, this Court asked Ferguson to file a return to the State’s petition, Ferguson complied with that request, and this Court then asked the State to file a reply to Ferguson’s return.

Through his return, Ferguson initially contends the State’s arguments in its petition for rehearing should be rejected because: (1) they would improperly require the Court to rule as a matter of law all “face-to-face anonymous tips” are sufficient to establish reasonable suspicion; and (2) they are based on an incorrect belief the decision in State v. Counts, 413 S.C. 153, 776

S.E.2d 59 (2015), imposed a requirement officers' actions must be indiscriminate in order to be deemed constitutionally unreasonable. Significantly, there are a number of problems with Ferguson's contentions in that regard.

First, although the State believes face-to-face tips like to one provided in Ferguson's case carry inherent reliability, the State's position is not that any and all face-to-face tips standing alone must *always* be found to establish reasonable suspicion no matter the contents, context, or circumstances involved. See Milbin v. State, 792 So. 2d 1272, 1274 (Fla. Dist. Ct. App. 2001) ("A witness who provides information to a police officer through 'face to face' communication is deemed to be sufficiently reliable."). Instead, the State's argument was and is the totality of the circumstances involved *in Ferguson's case* satisfied the low bar established by the reasonable suspicion standard when viewed collectively as required. See United States v. Arvizu, 534 U.S. 266, 273 (2002) (instructing courts are precluded from conducting a "divide-and-conquer analysis" when considering the totality of the circumstances). More specifically, the following circumstances when taken together combined to provide the officers with the *minimal* level of objective justification necessary for it to be constitutionally reasonable for them to undertake the limited investigative step of attempting to initiate contact with Ferguson by simply knocking on his door: (1) a concerned citizen informant provided a face-to-face tip to an officer in a public place such that anyone passing by or in the vicinity could have witnessed the encounter, and, by virtue of the face-to-face nature of the interaction, the officer was in a position to directly evaluate the credibility of the tip firsthand and to potentially find—in the small community of Joanna¹—the informant who he was now familiar with by sight if the tip proved to be false such

¹ According to the United States Census Bureau, Joanna had a total population of just over 1,500 people at the time of the national census in 2020. U.S. Census Bureau, Profile for Joanna CDP, South Carolina, <https://data.census.gov/cedsci/profile?g=1600000US4536790>. Meanwhile,

that the informant could be held to account; (2) the tip indicated Ferguson was at that time manufacturing methamphetamine inside a two-story apartment building located on a specific highway, which was something that would unmistakably constitute criminal activity in South Carolina; (3) the officers who responded to the tip were—just as this Court recognized—“aware that Ferguson was connected to methamphetamine activity,” which was fully consistent with and corroborative of what had been reported in the tip; and (4) the officers were further aware Joanna was a known area having a high level of both methamphetamine-related activity and drug trafficking, which was also fully consistent with and corroborative of the information relayed through the tip. See United States v. Sokolow, 490 U.S. 1, 7 (1989) (instructing the reasonable suspicion standard merely requires an officer to possess “a reasonable suspicion supported by articulable facts that criminal activity may be afoot” and noting what is required to satisfy that standard “is considerably less than *proof of wrongdoing* by a preponderance of the evidence” (emphasis added and citations and internal quotations omitted)); cf. Navarette v. California, 572 U.S. 393, 400 (2014) (finding an *anonymous* 911 call reporting erratic driving was sufficient to establish reasonable suspicion for a stop based, in part, on the fact the call provided “some safeguards against making false reports with immunity” since the caller *potentially* could have been traced and identified under the circumstances); State v. Fudge, 42 S.W.3d 226, 232 (Tex. App. 2001) (finding a law enforcement officer possessed sufficient reasonable suspicion to justify an investigatory detention based on the fact he received unsolicited information about criminal activity in a face-to-face manner from an individual who was neither connected to police nor a paid informant, which made the information provided “inherently reliable”). And,

Joanna spans only a little over three square miles of area in total. Wikipedia, “Joanna, South Carolina,” https://en.wikipedia.org/w/index.php?title=Joanna,_South_Carolina&oldid=1078097771.

the fact those circumstances were collectively sufficient to satisfy the minimal requirements of the reasonable suspicion standard was not in any way diminished by the possibility the officers could have potentially undertaken some further steps to investigate more fully prior to attempting to initiate contact with Ferguson. See United States v. Dale, 991 F.2d 819, 844 (D.C. Cir. 1993) (explaining even the higher probable cause standard does *not* require an officer to exhaust all possible leads, interview every possible witness, and accumulative overwhelming corroborative evidence in order for the standard to be met); cf. United States v. Shields, 458 F.3d 269, 280 (3d Cir. 2006) (“[W]e find unavailing the suggestion that probable cause was lacking because the FBI could have determined with certainty whether he actually downloaded illegal images. Whether the FBI could have provided more information is not the benchmark[.] . . . For purposes of our analysis, it is of no import that the FBI could have discovered more corroborating evidence, such as actual downloads, so long as the valid information it supplies satisfies the ‘fair probability’ standard[.]” (citations omitted)); United States v. Gourde, 440 F.3d 1065, 1072-1073 (9th Cir. 2006) (en banc) (“Gourde seeks to sidestep the ‘fair probability’ standard and elevate probable cause to a test of near certainty. In the face of the clear teaching of Gates, Gourde argues that probable cause was lacking because the government could have determined with certainty whether he had actually downloaded illegal images. . . . Whether the FBI could or would have found such data on the owner’s computer is not clear from the record, *nor is this inquiry the one demanded by precedent*. To be sure, this additional data would have transformed a ‘fair probability’ to a ‘near certainty’ that Gourde had received or possessed illegal images. Better yet, had the FBI caught him at his computer downloading the images, the certainty would have been 100 percent. Gates, however, does not compel the government to provide more facts than necessary to show a ‘fair probability’ that Gourde had committed a

crime.”); United States v. Miller, 753 F.2d 1475, 1481 (9th Cir. 1985) (finding the probable cause standard was met under the totality of the circumstances despite the fact the officers failed to undertake “simple steps” that could have been “easily accomplished” to obtain “[i]ndependent verification”).

Second, to the extent Ferguson maintains the State’s is arguing an officer’s actions must be indiscriminate in order to be deemed constitutionally unreasonable pursuant to Counts, Ferguson is mistaken about the nature of the State’s argument. The State’s argument is not premised on a contention Counts only prohibits indiscriminate action and, thus, the officers’ actions in Ferguson’s case were constitutional due to the fact they were clearly *not* indiscriminate. Instead, the State is arguing the officers’ actions in Ferguson’s case were constitutionally reasonable because they were supported by reasonable suspicion under the specific circumstances involved. Meanwhile, the State’s references to the fact officers’ actions were not indiscriminate were merely made to illustrate those actions, which were supported by reasonable suspicion, did not constitute the type of actions for which the reasonable suspicion standard was implemented to prohibit and deter. See State v. Counts, 413 S.C. 153, 172, 776 S.E.2d 59, 69 (2015) (“Because the privacy interests in one’s home are the most sacrosanct, we believe there must be some threshold evidentiary basis for law enforcement to approach a private residence. Otherwise, we foresee the potential for abuse if law enforcement targets a neighborhood and indiscriminately knocks on doors with the hope of discovering contraband without a search warrant.”); see also Terry v. Ohio, 392 U.S. 1, 28 (1968) (holding an officer’s actions in effectuating a detention and frisk search were constitutionally reasonable because they were not “the product of a volatile or inventive imagination” or “undertaken simply as an act of harassment” and, instead, were reasonably tempered based on the officer observing Terry and his

confederate repeatedly walk by and look in a store window in a manner that appeared suggestive of criminal activity to the officer).

Next, through his return, Ferguson contends the State's petition for rehearing should be denied in light of the applicable standard of review. As support for that position, Ferguson asserts this Court "recognized and applied the standard of review" in affirming the suppression ruling in his case, notes the circuit court judge granted his motion to suppress unlike the circuit court judges in many other cases in which suppression rulings have been affirmed on appeal, and cites to numerous decisions previously referenced by the State as examples of cases in which "the standard of review worked in favor of the trial court[.]" Importantly, there are a couple of problems with Ferguson's contentions in that regard.

First, this Court did *not* couch its decision as one in which it was affirming the circuit court judge's ruling based on any deference specifically owed or extended to the circuit court judge pursuant to the applicable standard of review. See, e.g., State v. Morris, 411 S.C. 571, 578, 769 S.E.2d 854, 858 (2015) ("When reviewing a Fourth Amendment search and seizure case, an appellate court must affirm if there is any evidence to support the ruling." (citation and internal quotations omitted)). Instead, this Court conducted its own review of the facts and appeared to conclude the information known to the officers "did not form the requisite reasonable suspicion to approach the apartment building in an attempt to conduct a knock and talk" as a matter of law based on the officers' failure to ask more questions of the tipster or conduct further independent investigation such as by surveilling the multi-family apartment building (which the officers had been told was being used at that very time for the incredibly volatile and dangerous act of methamphetamine production) or by researching a variety of different records. See generally Hatcher v. State, 762 N.E.2d 170, 173 (Ind. Ct. App. 2002)

(characterizing the manufacturing process used to produce methamphetamine as “inherently dangerous”). Meanwhile, in doing so, this Court pointed out the inaccuracy of Ferguson’s belief the citizen tip that led to the knock-and-talk was “purely anonymous,” which, notably, was a belief shared by the circuit court judge *and upon which the circuit court judge based his decision to suppress* in Ferguson’s case. (R. pp. 126-127). In fact, the circuit court judge even seemed to strongly imply he would have found the tip in Ferguson’s case sufficient to establish reasonable suspicion *but for* the fact it was anonymous, which—just as this Court has expressly and correctly found—it was not.² (R. p. 127). Therefore, since this Court *rejected* the circuit court judge’s view of the circumstances involved as inaccurate while nonetheless finding suppression was warranted for *other* reasons, Ferguson’s apparent suggestion the outcome of his case was controlled by a standard of review requiring deference to the circuit court judge’s determinations is not consistent with the analysis that was actually conducted by this Court.

² More specifically, the circuit court judge explained: “[W]e’re dealing with an anonymous tip, which, under the law is, for lack of a better explanation, inherently unreliable. It’s anonymous. It’s not as reliable as if you’ve got somebody’s name saying, ‘Hey, I’m Frank Addy. I just came from the apartment in Joanna where [defense counsel] has been staying for the last couple of days. And he’s up there cooking some meth in some two-liter bottles. Here’s my cell phone number if you ever need me.’ Okay. *That’s reliable, actionable information that would justify the knock-and-talk.*” (R. pp. 126-127) (emphasis added). Thus, this Court’s correct conclusion the tip in Ferguson’s case was *not* actually anonymous demonstrates precisely why the circuit court judge’s decision to suppress in Ferguson’s case was clearly erroneous since even the circuit court judge—based on his own explanation—seems likely to have reached a different conclusion on the suppression motion if he had correctly recognized and understood that fact along with its significance. See State v. Adams, 409 S.C. 641, 654, 763 S.E.2d 341, 348 (2014) (reversing the trial judge’s denial of a suppression motion where the trial judge’s ruling was clearly legally erroneous); see also United States v. Perkins, 363 F.3d 317, 323 (4th Cir. 2004) (“Where the informant is known or where the informant relays information to an officer face-to-face, an officer can judge the credibility of the tipster firsthand and thus confirm whether the tip is sufficiently reliable to support reasonable suspicion.”); cf. Giles v. Commonwealth, 529 S.E.2d 327, 329-330 (Va. Ct. App. 2000) (“Although Officer Devoti did not obtain the women’s names or addresses, their reports were not an anonymous tip. He stood face to face with them and listened to their accounts. He was able to assess their credibility and the reliability of their information.”).

Second, of the nineteen cases Ferguson holds out in his return as examples of cases in which “the standard of review worked in favor of the trial court[.]” all but the two South Carolina cases are cases in which a de novo standard of review in which no deference necessarily had to be extended to the trial judge’s ultimate conclusion was applied on appeal.³ See, e.g. United States v. Arvizu, 534 U.S. 266, 275 (2002) (“[T]he standard for appellate review of reasonable-suspicion determinations should be de novo, rather than for abuse of discretion.” (citation and internal quotations omitted)); United States v. Perkins, 363 F.3d 317, 320 (4th Cir. 2004) (“When considering on appeal a motion to suppress evidence, we review a district court’s factual findings for clear error and its legal determinations de novo.”); State v. Hudgins, 672 S.E.2d 717, 718 (N.C. Ct. App. 2009) (“A trial court’s conclusions of law regarding whether the officer had reasonable suspicion or probable cause to detain a defendant is reviewable de novo.” (citations, internal quotations, and brackets omitted)); Giles v. Commonwealth, 529 S.E.2d 327, 329 (Va. Ct. App. 2000) (“We review determinations of reasonable suspicion and probable cause de novo.”); cf. United States v. Harvey, 1 F.4th 578, 579-580 (8th Cir. 2021) (“We review determinations of reasonable suspicion de novo, taking care both to review findings of historical fact only for clear error and to give due weight to inferences drawn from those facts by local law enforcement officers.” (citations, internal quotations, and ellipses omitted)); Jenkins v. State, 978 So. 2d 116, 122 (Fla. 2008) (explaining “determinations of reasonable suspicion and probable cause should be reviewed de novo on appeal”). Therefore, to the extent Ferguson is equating “the standard of review work[ing] in favor of the trial court” in each and every one of those cases

³ Interestingly, our Supreme Court has recently and on its own initiative raised questions as to what the appropriate standard of review should be in South Carolina for purposes of reviewing a trial judge’s ultimate determination regarding the propriety of a search or seizure. Appellate Records for State v. Michael N. Frasier, Jr., South Carolina Appellate Court Public Index, <https://ctrack.sccourts.org/public/caseView.do?csIID=72846>.

with deference being extended to the ultimate determination reached by the trial judges involved, Ferguson's suggestion in that regard is respectfully just not correct.

Accordingly, for all the foregoing reasons, the arguments contained in Ferguson's return do not support the denial of the State's petition for rehearing. Therefore, for the reasons articulated in the State's brief, during oral argument before this Court, in the State's petition for rehearing, and in the State's reply, the State respectfully reiterates its request this Court reconsider this matter pursuant to Rule 221(a) of the South Carolina Appellate Court Rules, vacate its prior opinion, and issue a new opinion reversing the circuit court judge's erroneous suppression ruling upon finding Ferguson's constitutional rights were not violated under the specific facts and circumstances of his case.

Respectfully submitted,

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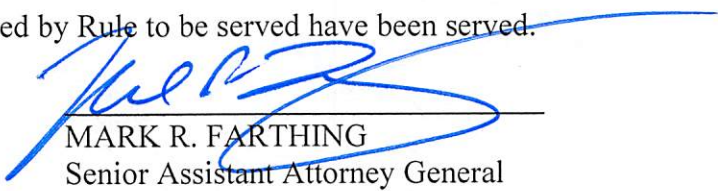
Respondent.

PROOF OF SERVICE

I, Mark R. Farthing, certify I have served the within Reply to Return Petition for Rehearing on Respondent by sending an electronic copy via email to the address listed in AIS for the following individual:

David Alexander, Esq.
S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, SC 29211

I further certify all parties required by Rule to be served have been served.
This 8th day of July, 2022.



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From: [Mark Farthing](#)
To: [David Alexander \(dalexander@sccid.sc.gov\)](mailto:dalexander@sccid.sc.gov)
Cc: [Leigh Ann Stone](#)
Subject: State v. Sylvester Ferguson, III -- Reply to Return to Petition for Rehearing (with Corrected Proof of Service)
Date: Friday, July 8, 2022 6:41:00 PM
Attachments: [Ferguson.Reply to Return to Pet for Rehearing \(03039573xD2C78\).pdf](#)
[image003.png](#)

David,

Attached is the State's reply to the return to petition for rehearing in the [State v. Sylvester Ferguson, III](#) appeal with a correctly-dated proof of service. I caught the error with my original proof of service when I went to attach the service email to the digital file. I will be submitting it to the Court of Appeals shortly through the electronic filing system. Sorry for my earlier error, and please let me know if you have any questions or need anything else. Thank.

Sincerely,
Mark

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