The South Carolina Court of Appeals

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August 24, 2022

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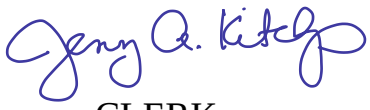
Re: City of Charleston Housing Authority v. Katrina Brown
Appellate Case No. 2018-002155

Dear Counsel:

Enclosed is the decision of the Court. The remittitur will be sent as provided by

Rule 221(b) of the South Carolina Appellate Court Rules.

Very truly yours,



CLERK

cc: The Honorable Alison Renee Lee

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

City of Charleston Housing Authority, Respondent,

v.

Katrina Brown, Appellant.

Appellate Case No. 2018-002155

Appeal From Charleston County
Alison Renee Lee, Circuit Court Judge

Opinion No. 5941
Heard June 9, 2021– Filed August 24, 2022

AFFIRMED IN PART, REVERSED IN PART, and REMANDED

Matthew M. Billingsley, of S.C. Legal Services, of N. Charleston, and Adam Protheroe, of S.C. Appleseed Legal Justice Center, of Columbia, both for Appellant.

Theodore Parker, III, of Parker Nelson & Associates, of Las Vegas, NV, and Jacqueline Dixon Phillips and Thomas Bacot Pritchard, both of Parker Nelson & Associates, of Charleston, all for Respondent.

PER CURIAM: Katrina Brown, a tenant of the City of Charleston Housing Authority (CHA), appeals the circuit court's order affirming her and her minor children's eviction from their home. We affirm in part, reverse in part, and remand for proceedings in accord with this opinion.

I.

The facts are not disputed. On December 16, 2015, Brown renewed her lease as a public housing tenant at CHA. Brown's minor son and daughter were named in the lease as residents and members of her household. On January 13, 2016, Brown's son—who was seventeen at the time—was arrested a mile away from his home carrying a gun. Two weeks after his arrest, CHA sent an official thirty-day notice of termination for Brown's lease. The notice informed Brown that her termination was based on the lease's prohibition against violent criminal behavior.

CHA then began eviction proceedings in magistrate's court to evict Brown and her family. At the hearing in front of the magistrate, CHA presented Detective Jason Jarrell from the Charleston Police Department who testified Brown's son confessed to an attempted armed robbery that occurred two days before his arrest and approximately a mile away from Brown's housing complex. CHA did not present any other evidence at the hearing.

Brown testified her son was being held in the Charleston County jail, and if he was able to make bond, the plan was for him to stay at her mother's (his grandmother's) house and no longer reside with her and her daughter. Brown testified neither of her son's crimes were alleged to have taken place on CHA grounds, and she had no knowledge of the alleged incidents until her son was arrested.

After finding "evictions based on criminal activity provisions of the housing lease agreements must be determined on a case-by-case basis," the magistrate considered the testimony as well as factors from federal law (specifically 24 C.F.R. § 966.4(l)(5) (2022)), and denied CHA's application for eviction. CHA appealed, and the circuit court remanded the case to the magistrate for further factual findings and analysis regarding whether Brown's eviction was warranted under 42 U.S.C. § 1437d(l)(6) (2012 & Supp. 2021), the federal statute governing public housing leases, which is colloquially known as the "One-Strike Rule."[1] In the

[1] The "One-Strike Rule" enacted by Congress in 1988 and expanded in 1996 requires federally-funded public housing authorities and private landlords renting their properties to tenants receiving federal housing assistance (Section 8) to include a provision in all leases stating that drug-related criminal activity, as well as criminal activity that threatens other tenants or nearby residents, are grounds for eviction, regardless of the tenant's personal knowledge of the criminal activity. § 1437d(l)(6). This strict-liability, no-fault rule was premised on the idea that public housing tenants are entitled to homes that are "decent, safe, and free from illegal drugs," *U.S. Dep't of Hous. & Urban Dev. v. Rucker*, 535 U.S. 125, 134 (2002)

remand order, the circuit court stated the magistrate "may conduct an additional evidentiary hearing or rely upon the previous record." The magistrate declined Brown's written request for another hearing but accepted memoranda of law regarding whether eviction was warranted under federal law. In her memorandum, Brown asserted her son's actions did not amount to good cause for her eviction under the One-Strike Rule, but even if they did, CHA acted arbitrarily by evicting her.

On May 15, 2017, the magistrate issued an order evicting Brown based on her son's actions. Relying specifically on *United States Department of Housing and Urban Development v. Rucker*, which upheld the constitutionality of the One-Strike Rule, the magistrate found there was good cause for Brown's eviction. 535 U.S. at 128. Brown appealed.

At the appeal hearing before the circuit court, Brown asserted under *Rucker*, § 1437d(l)(6), and 24 C.F.R. § 966.4(l)(5)(ii), non-drug related criminal activity can only be grounds for termination of a public-housing tenancy if the activity constitutes a present threat to the residents of the public housing authority and occurred in the immediate vicinity of the public housing authority. Brown asserted her son was not a threat to public housing tenants because his alleged criminal activity did not occur within the immediate vicinity of CHA and he would not be returning to her home if he were released from custody.

Brown also argued that, under the One-Strike Rule, both *Rucker* and § 1437d(l)(6) require local public-housing authorities to demonstrate they used discretion in evaluating the circumstances and alternatives to the eviction of an innocent tenant before evicting an entire household for the actions of one of its members. Brown asserted that, because CHA made no showing it exercised discretion by considering the mitigating circumstances of her case before pursuing eviction, the eviction was arbitrary and an abuse of the discretion conferred on CHA by Congress.

The circuit court affirmed Brown's eviction, issuing an order finding her son's actions warranted eviction under the One-Strike Rule but not addressing Brown's discretion argument. Brown filed a Rule 59(e), SCRCP motion asking the circuit court to reconsider the order and also seeking a ruling on her discretion argument. The circuit court denied Brown's motion for reconsideration, finding first, there was evidence CHA exercised its discretion because it was aware of the applicable

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(quoting 42 U.S.C. § 11901(1) (1994 ed.)), and to achieve this policy, the "rule for residents who commit crime and peddle drugs should be 'one strike and you're out.'" *See* 142 Cong. Rec. H768, H770 (daily ed. Jan. 23, 1996) (State of the Union Address by the President of the United States).

regulations when it proceeded with Brown's eviction, and second, the One-Strike Rule did not require the threat to tenants to be ongoing to be cause for eviction. Rather, the circuit court found, in order for the eviction to be proper under § 1437d(l)(6), Brown's son's alleged criminal activity need only have been a threat when it occurred. This appeal follows.

II.

In an eviction action first heard by the magistrate and affirmed by the circuit court, the court of appeals is without jurisdiction to reverse the findings of fact of the circuit court if there is any evidence supporting them. *Vacation Time of Hilton Head Island, Inc. v. Kiwi Corp*., 280 S.C. 232, 233, 312 S.E.2d 20, 21 (Ct. App. 1984). However, the court of appeals "retains de novo review of whether the facts show the circuit court's affirmance was controlled or affected by errors of law." *Bowers v. Thomas*, 373 S.C. 240, 245, 644 S.E.2d 751, 753 (Ct. App. 2007).

"It is axiomatic that judicial interference with the discretion accorded [by Congress to a public housing authority] is only warranted when a review of its actions reveals by clear and convincing evidence some arbitrary action outside the boundaries of the federal laws and regulations." *Greenville Hous. Auth. of City of Greenville by Carlton v. Salters*, 281 S.C. 604, 608, 316 S.E.2d 718, 720 (Ct. App. 1984).

III.

A. Good Cause

Brown contends her eviction lacked good cause. We disagree. Under § 1437d(l)(6) every public housing authority is required to use leases that:

> provide that any criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises by other tenants or any drug-related criminal activity on or off such premises, engaged in by a public housing tenant, any member of the tenant's household, or any guest or other person under the tenant's control, shall be cause for termination of tenancy . . . .

The regulations accompanying § 1437d(l)(6) further expound that a public-housing authority "may terminate the tenancy only" for the enumerated grounds in the regulation, and non-drug-related criminal activity is cause for termination of a public-housing lease if that activity "threatens the health, safety, or right to

peaceful enjoyment of their residences by persons residing in the immediate vicinity of the premises." 24 C.F.R. §§ 966.4(l)(2) and (5)(ii)(A) (2022).

The text of § 1437d(l)(6) and 24 C.F.R. § 966.4 (2022) is unambiguous. *See S.C. Dep't of Revenue v. Blue Moon of Newberry, Inc.*, 397 S.C. 256, 261, 725 S.E.2d 480, 483 (2012) (stating words of both statute and regulation are given their plain and ordinary meaning). Drug-related criminal activity is grounds for termination of a lease regardless of where the activity occurred, whereas non-drug related activity—even violent criminal activity—may only be grounds for termination if the activity "threatens the health, safety, or right to peaceful enjoyment" of other tenants or "persons residing in the immediate vicinity of the premises." § 1437d(l)(6); 24 C.F.R. § 966.4(l)(2) and (5)(ii).

In *Lowell Housing Authority v. Melendez*, 865 N.E.2d 741 (Mass. 2007), the Massachusetts Supreme Court found while not all non-drug related crimes committed a mile outside of the premises of a public housing authority constitute cause for termination of a lease under the One-Strike Rule, a violent robbery certainly did. *Id.* at 744–45. In *Lowell*, the tenant of a public-housing authority robbed a convenience store a mile away from his apartment with a knife. *Id.* at 741–42. The question on appeal was whether this crime constituted a threat to the "health, safety, or right to peaceful enjoyment of the premises by other tenants." Reasoning that this type of crime could be a ground for termination of the public-housing lease, the *Lowell* Court found:

> Whether the criminal activity is cause for termination will depend largely on the facts of each case. It is enough to say here that certain criminal activity, such as assault by means of a dangerous weapon and armed robbery, is so physically violent, or associated with violence, that one who engages in it normally would pose a threat to, or reasonably inspire a significant level of fear on the part of tenants forced to live in close proximity to the offending tenant To hold otherwise would send a message that it is acceptable for persons to commit violent crimes elsewhere and continue to be entitled to live in public housing developments. Tenants of public housing developments . . . represent some of the most needy and vulnerable segments of our population, including low-income families, children, the elderly, and the handicapped. It should not be their fate, to the extent manifestly possible, to live in fear of their neighbors.

Id. at 744–45 (quoting § 1437d(l)(6)). We find this reasoning persuasive. Detective Jarrell's testimony that Brown's son was arrested carrying a gun and confessed to attempting to rob a victim at gunpoint a mile away from his home demonstrated his activities posed a threat to the "health, safety, or right to peaceful enjoyment of the premises by tenants," and therefore, CHA had good cause for terminating Brown's Lease under § 1437d(l)(6), its accompanying regulations, and *Rucker*.

We further hold § 1437d(l)(6) does not require the threat to be "ongoing" to justify terminating a public-housing lease. While the statute and its accompanying regulatory language are written in the present tense, the statute only requires the activity to have been a threat when it occurred. *See Blue Moon of Newberry, Inc.*, 397 S.C. at 261, 725 S.E.2d at 483 (stating words of both statute and regulation are given their plain and ordinary meaning). Accordingly, we find Brown's argument that her son is incarcerated and no longer physically able to threaten other public-housing tenants or neighbors does not weigh in the threshold showing of whether good cause exists to evict Brown's household under the One-Strike Rule. Rather, as discussed below, it is a factor that may be taken into consideration by CHA in discerning whether Brown and her minor daughter should be evicted for her son's actions.

B. Use of Discretion

As *Rucker* held, a violation of the One-Strike Rule does not automatically require a public-housing tenant's eviction. The federal regulations governing public-housing leases authorize the use of discretion when determining whether to evict under § 1437d(l)(6), stating:

> (B) Consideration of circumstances. In a manner consistent with such policies, procedures and practices, the [public-housing authority] may consider all circumstances relevant to a particular case such as the seriousness of the offending action, the extent of participation by the leaseholder in the offending action, the effects that the eviction would have on family members not involved in the offending activity and the extent to which the leaseholder has shown personal responsibility and has taken all reasonable steps to prevent or mitigate the offending action.

> (C) Exclusion of culpable household member. The [public-housing authority] may require a tenant to exclude a household member in order to continue to reside in the assisted unit, where that household member has participated in or been culpable for action or failure to act that warrants termination.

24 C.F.R. § 966.4(l)(5)(vii)(B), (C).

The discretionary nature of the decision to evict was key to *Rucker*, where, in a unanimous decision, the United States Supreme Court found Congress' rationale behind the One-Strike Rule was not absurd because "[t]he statute does not *require* the eviction of any tenant who violated the lease provision." *Rucker*, 535 U.S. at 133–34 (emphasis in original). Instead, the Supreme Court noted § 1437d(l)(6) "requires lease terms that give local public housing authorities the discretion to terminate the lease of a tenant when a member of the household or a guest engages in drug-related activity, regardless of whether the tenant knew, or should have known, of the drug-related activity." *Id*. at 136. In so reasoning, the Supreme Court noted Congress entrusted the decision to evict under § 1437d(l)(6) to local public-housing authorities because they "are in the best position to take account of, among other things, the degree to which the housing project suffers from 'rampant drug-related or violent crime,' 'the seriousness of the offending action,' and 'the extent to which the leaseholder has . . . taken all reasonable steps to prevent or mitigate the offending action.'" *Id*. at 134 (citations omitted).

In *Eastern Carolina Regional Housing Authority v. Lofton*, a North Carolina public-housing tenant was being evicted under § 1437d(l)(6) for her baby-sitter's marijuana possession. 789 S.E.2d 449, 451 (N.C. 2016). The supreme court of North Carolina found that under the clear language of § 1437d(l)(6), the baby-sitter's drug activity was cause for termination of Lofton's lease. *Id*. at 452. However, in finding Lofton's eviction was not proper, the *Lofton* Court recognized the policy interest of ensuring tenants of public housing have a home that is "decent, safe, and free from illegal drugs," included tenants whose lease may be terminated under § 1437d(l)(6). *Id*. at 452–53. *Lofton* held the public-housing authority was prohibited from evicting a tenant under § 1437d(l)(6) without exercising discretion in doing so. *Id*. at 454. Thus, it found before an eviction may occur under § 1437d(l)(6), a public housing authority must not only consider whether "the facts permitted eviction" but must also complete "the critical step of determining whether eviction should occur." *Id*. *Lofton* held eviction was not proper under the One-Strike Rule unless there is both: 1) cause for terminating the

lease and 2) use of discretion in deciding whether a lease should be terminated. The *Lofton* Court emphasized courts would not second-guess the exercise of discretion used by a public-housing authority in deciding to pursue eviction of a tenant under the One-Strike Rule, but the exercise of discretion must occur. *Id*.; *see also Hous. Auth. of Covington v. Turner*, 295 S.W.3d 123, 129 (Ky. Ct. App. 2009) (Moore, J., concurring) ("While much discretion rests with the local Housing Authority, *Rucker* does require some thresholds to be met or facts to be taken into consideration for the eviction of a tenant under 42 U.S.C. § 1437d(l)(6). In other words, discretion must be exercised, rather than a blind application of the law because 42 U.S.C. § 1437d(l)(6) does not *require* evictions." (emphasis in original)).

In South Carolina, we defer to a public housing authority's administration of its programs, knowing "the policy of delegating responsibility to the local housing authorities was expressly set forth at 42 U.S.C. Section 1437." *Salters*, 281 S.C. at 608, 316 S.E.2d at 720. Section 1437 states in relevant part:

> It is the policy of the United States . . . to vest in public housing agencies that perform well, the maximum amount of responsibility and flexibility in program administration, with appropriate accountability to public housing residents, localities, and the general public.

Accordingly, in a hearing on an application for an eviction subject to § 1437d(l)(6), once a public-housing authority has shown good cause for the eviction, the magistrate may only deny the application if there is clear and convincing evidence the public housing authority's decision to pursue the eviction was an "arbitrary action outside the boundaries of the federal laws and regulations." *Salters*, 281 S.C. at 608, 316 S.E.2d at 720. South Carolina courts have examined and explained "arbitrary" action in many contexts, stating:

> "Arbitrary" means based alone upon one's will, and not upon any course of reasoning and exercise of judgment; bound by no law; done capriciously or at pleasure, without adequate determining principle, nonrational; not governed by any fixed rules or standard.

Turbeville v. Morris, 203 S.C. 287, 315, 26 S.E.2d 821, 832 (1943); *see also In re Blue Granite Water Co.*, 434 S.C. 180, 187, 862 S.E.2d 887, 891 (2021); *Daufuskie Island Util. Co., Inc. v. S.C. Off. of Regul. Staff*, 427 S.C. 458, 464, 832 S.E.2d 572, 575 (2019); *Deese v. S.C. State Bd. of Dentistry*, 286 S.C. 182, 184–

85, 332 S.E.2d 539, 541 (Ct. App. 1985); *Hatcher v. S.C. Dist. Council of Assemblies of God, Inc.*, 267 S.C. 107, 117, 226 S.E.2d 253, 258 (1976).

Our courts have held a flat refusal to exercise discretion—or to not realize one has such discretion—is in itself an abuse of discretion. *See Fontaine v. Peitz*, 291 S.C. 536, 538, 354 S.E.2d 565, 566 (1987) ("When the trial judge is vested with discretion, but his ruling reveals no discretion was, in fact, exercised, an error of law has occurred."); *State v. Smith*, 276 S.C. 494, 498, 280 S.E.2d 200, 202 (1981) ("It is an equal abuse of discretion to refuse to exercise discretionary authority when it is warranted as it is to exercise the discretion improperly."); *id* ("[T]he mere recital of the discretionary decision is not sufficient to bring into operation a determination that discretion was exercised[; i]t should be stated on what basis the discretion was exercised."); *Richardson on Behalf of 15th Cir. Drug Enf't Unit v. Twenty-One Thousand & no/100 Dollars ($21,000.00) U.S. Currency & Various Jewelry*, 430 S.C. 594, 601, 846 S.E.2d 14, 17 (Ct. App. 2020) ("A court that does not use discretion—or recognize it has discretion—when discretion exists commits an error of law.").

As we have noted, Detective Jarrell was the sole witness for CHA at the original hearing on the application for eviction. Upon remand, the magistrate declined to conduct a further evidentiary hearing. As discussed above, Detective Jarrell's testimony demonstrates Brown's son's criminal activity was good cause for eviction under § 1437d(l)(6). CHA therefore had the right to evict Brown, but this does not answer the question of whether CHA knew it could refrain from invoking the One-Strike Rule in Brown's specific circumstances. As the record now stands, it is unclear whether CHA knew it had the discretion to call Brown out after the first strike. Without seeing that CHA considered some factors or policy, such as those outlined in 24 C.F.R. § 966.4(l)(5)(vii)(B), (C), or discussed in *Rucker* and *Lofton*, we cannot know whether CHA's decision to pursue the eviction of Brown and her daughter was the result of applied discretion or the rote, discretionless enforcement of the One-Strike Rule. Accordingly, the circuit court erred in concluding CHA demonstrated it exercised discretion simply by being "aware of the applicable regulations" when it chose to evict Brown's family for her son's actions. This finding is not supported by the record, nor could it be, as the record is silent as to CHA's exercise of discretion. We therefore reverse this finding, and remand this case to the magistrate for a hearing to determine whether CHA exercised discretion in deciding to pursue the eviction of Brown's entire household for the criminal actions of her son.

IV.

We find Brown's son's criminal activities were good cause for her eviction under § 1437d(l)(6). However, because there is no evidence in the record indicating CHA either knew it had discretion or exercised discretion before pursuing eviction of Brown's household for her son's actions, we remand for consideration of whether CHA did exercise this discretion.

We recognize reasonable minds may wonder how CHA could exceed its discretion if it had good cause under the statutory scheme to evict Brown. But to so conclude would be equivalent to saying eviction under the One-Strike Rule is always automatic, and Chief Justice Rehnquist, writing on behalf of the unanimous United States Supreme Court, rejected that very conclusion in *Rucker*. Because CHA was never given the opportunity to demonstrate whether it exercised discretion in deciding to evict Brown, we must remand to provide that opportunity. While we affirm there was good cause to evict Brown, on remand, the magistrate must conduct an evidentiary hearing to determine whether CHA exercised its discretion pursuant to *Rucker* when it chose to pursue Brown's eviction.

Accordingly, the circuit court's order affirming Brown's eviction is

AFFIRMED IN PART, REVERSED IN PART, and REMANDED.

WILLIAMS, C.J, THOMAS and HILL, JJ., concur.