THE STATE OF SOUTH CAROLINA
In the Supreme Court

ON CERTIORARI TO THE COURT OF APPEALS

APPEAL FROM HORRY COUNTY
In the Court of General Sessions

Larry B. Hyman, Circuit Court Judge

THE STATE,

PETITIONER,

V.

SYLVESTER FERGUSON III,

RESPONDENT.

Appellate Case No. 2022-001125

RETURN TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

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S.C. SUPREME COURT

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PETITIONER'S STATEMENT OF ISSUE ON CERTIORARI

Did the Court of Appeals err by affirming the trial judge's erroneous ruling granting Ferguson's motion to suppress illegal drugs and other incriminating evidence recovered from an individual unit in a multi-unit apartment building based on an alleged violation of Ferguson's constitutional rights when the law enforcement officers reasonably approached the apartment building and engaged in a consensual encounter with one of the apartment's occupants prior to entering the apartment's curtilage after obtaining reasonable suspicion of criminal activity from a face-to-face tip provided by a non-anonymous concerned citizen that was fully consistent with the officers' knowledge of both Ferguson's prior criminal history and the high-crime nature of the area where Ferguson was reported to be actively engaged in the dangerous act of manufacturing methamphetamine?

RESPONDENT'S COUNTERSTATEMENT OF THE ISSUE

Whether any evidence supports the trial judge's finding that an anonymous tip without any further investigation did not give the police reasonable suspicion to approach a residence under the South Carolina Constitution?

STATEMENT OF THE CASE

A Laurens County grand jury indicted appellant for possession of methamphetamine, possession of crack cocaine, and manufacturing methamphetamine and on November 26, 2018, the case was called before the Honorable Frank R. Addy, Jr. R. 1. C. Dale Scott and Margaret G. Boykin represented the State. R. 1. Joel T. Broome and Tristan M. Shaffer represented respondent. R. 1. Judge Addy granted respondent's suppression motion and the State filed this appeal.

On February 10, 2022, a panel of the Court of Appeals heard oral argument. Chief Judge Williams, Judge Konduros, and Judge Vinson sat on the panel. On June 1, 2022, the court affirmed Judge Addy's ruling in a published opinion. State v. Ferguson, 436 S.C. 596, 874 S.E.2d 234 (Ct. App. 2022). After denial of its petition for rehearing, the State seeks certiorari at this Court.

STANDARD OF REVIEW

This case involves review of a trial judge's decision to suppress evidence obtained in violation of the South Carolina Constitution's right to privacy. In this Court's right to privacy decision requiring reasonable suspicion before police may conduct a "knock and talk," no distinction was made between the standard of review used in Fourth Amendment cases versus state constitutional cases. State v. Counts, 413 S.C. 153, 161, 776 S.E.2d 59, 63 (2015). In Counts, this Court applied "a deferential standard of review" and stated it would reverse "only if there is clear error." Id.

This Court's recent decision in State v. Frasier, ___ S.C. ___, ___ S.E.2d ___, Op. No. 28117 (Sept. 28, 2022), clarified the standard of review in Fourth Amendment cases. A trial judge's factual findings are reviewed for any evidentiary support, but the ultimate question of law—the existence of reasonable suspicion—is reviewed *de novo*. Id. While the source of the underlying legal right may be different, the standard of review for both Fourth Amendment cases and our state right of privacy cases should be the same. While technically still an open question in the law, Respondent cannot articulate a cogent reason why the standards should be different. This Court need not grant certiorari simply to state that the Frasier standard also applies to Counts questions.

ARGUMENT

Evidence supports the trial judge's finding that an anonymous tip without more did not give the police reasonable suspicion to approach a residence under the South Carolina Constitution.

Certiorari Should be Denied

The State seeks certiorari in what is, at essence, a standard of review case. The trial judge found that the police failed to conduct any investigation in this case—including failing to get the name of the anonymous tipster—before approaching a residence to conduct a "knock and talk." These factual determinations are supported by the evidence and entitled to deference on appeal. The legal conclusion that approaching a residence with nothing more than an anonymous tip does not amount to reasonable suspicion under the South Carolina Constitution is correct. The Court of Appeals rejected the State's attempt to convert all face-to-face tips—even anonymous ones—into reasonable suspicion as a matter of law. Both the trial judge's decision and the Court of Appeals' Opinion are thoughtful and well-researched. Nothing remains for this Court to do and certiorari should be denied.

The Evidence at the Hearing

All the police had before they approached the residence in this case was an uncorroborated anonymous tip. R. 78, l. 25 – 79, l. 12. Officer Andrew Hall was at a convenience station in Joanna, South Carolina when a black male waved him down. R. 8, l. 22 – 9, l. 5. The man told Officer Hall that appellant was at an apartment "cooking dope." R. 17, l. 6 – 25. R. 9, l. 2 – 5. The officer did not know the black male who approached him at the convenience store. R. 9, l. 16 – 10, l. 2. The officer did not get the man's name, address, or any further information from the tipster. R. 21, l. 16 – 24, l. 8. Instead of getting any other scrap or

tidbit of information from the man, Officer Hall instead called Officer Charles Nations and "asked him if he was busy; if he'd like to come and try to [do] a knock-and-talk with me at the apartment." R. 10, l. 3 – 11.

The officers traveled to the apartment and conducted no further research or surveillance, but "decided, based upon this civilian complaint, to do a knock-and-talk at the residence." R. 26, l. 6 – 17. Officer Nations at first said he knocked on the door. R. 28, l. 7 – 9. Upon prompting from the solicitor, he said he saw the window open, heard the lock turn, and then said "the knock side of it did not occur." R. 28, l. 15 – 23.

A man named Henry Davis opened the door. R. 29, l. 1 – 7. The police asked if appellant was in the residence and Davis said he was. R. 29, l. 3 – 12. Davis made a motion indicating the police could enter the apartment, which they did. R. 29, l. 13 – 30, l. 14. Once inside the apartment, the police testified they found drugs "in plain view." R. 30, l. 15 – 34, l. 18.

The Trial Judge's Ruling

The trial judge intensively questioned the trial lawyers about Counts and its implications. R. 213, l. 10 – 241, l. 19. He distinguished the anonymous tip in this case from the face-to-face anonymous tips in cases given to him by the solicitor. R. 230, l. 21 – 234, l. 5. The court said in other face-to-face anonymous tip cases, "the one common theme in all of those is that even though the tipster was initially anonymous, there was always some way for the police to figure out who that person was or hold the person accountable for fraudulent or false or erroneous information." R. 231, l. 1 – 7. Judge Addy continued:

> But in this case we have no effort to ascertain the identity of the person who gives the tip. You know . . . it – it is a simple statement by the tipster: Person X is making meth in Location Y.

> There was never an: "Okay. Well, how do you know this? **Who are you?** When did this happen? Did you personally observe this? Did you hear it from somebody else? Are you – how are you getting your information?"

R. 233, l. 20 – 234, l. 5 (emphasis added). The solcitor replied, "I wish they had done that," but then said it was not required. R. 234, l. 6 – 8.

Judge Addy suppressed the drugs based on the South Carolina Constitution's right to privacy and Counts. R. 241, l. 21 – 245, l. 18. The court found the police did no independent confirmation of the anonymous tip, stating, "They could've done something." R. 245, l. 4 – 8. The judge found that "we do not know the identity of the individual who approached the officer at the filling station." R. 244, l. 2 – 4. The court pointed out that the State did not even present any evidence of when the tipster supposedly saw the illegal activity. R. 244, l. 10 – 17. He listed the minimal things the police could have done: surveillance, running a rap sheet, checking to see if Ferguson had been buying Sudafed, interrogating "druggies who were in the jail." R. 244, l. 23 – 245, l. 8. Judge Addy ultimately ruled, "But upon receiving the tip, the anonymous tip from an unknown individual, regrettably, as Counts requires them to do, the police did not follow up on those corroborative techniques. Twenty minutes later, they're at his door, seeking to engage the occupants of that house." R. 245, l. 9 – 14.

The Court of Appeals' Decision

The Court of Appeals conducted a thorough review of the South Carolina right to privacy, discussing both Counts and State v. Boston, 433 S.C. 177, 857 S.E.2d 27 (Ct. App. 2021) cert. granted Jan. 13, 2022. The court held, "Although we disagree with Ferguson that the tip was purely anonymous, the face-to-face encounter alone, or even coupled with the content and nature of the tip itself, is insufficient to create a reasonable suspicion that Ferguson was manufacturing methamphetamine at the apartment." Ferguson at 607, 874 S.E.2d at 239.

The court agreed with the core of Judge Addy's reasoning—that the police needed to do something more to meet the admittedly low bar of reasonable suspicion. The court wrote, "While courts generally find face-to-face tips sufficiently reliable due to an officer's ability to judge the tipster's credibility and demeanor, additional facts that allow an officer to evaluate the veracity of the tip are usually present." Id. at 607, 874 S.E.2d at 240. The court properly distinguished the cases upholding searches triggered by anonymous face-to-face tips but possessing some scintilla of corroborating information. Id. at 607-08, 874 S.E.2d at 240. The facts relied upon in the court's ultimate conclusion were not in dispute: "Because the informant's tip lacked any indicia of reliability and neither Deputy Hall nor Investigator Nations conducted independent investigations to corroborate the tip, we find the officers lacked the requisite reasonable suspicion to approach the apartment to conduct a knock and talk." Id. at 608, 874 S.E.2d at 240. The court followed this Court's precedent in Counts and reached the correct result.

Discussion

The State seeks certiorari by reading a requirement into Counts that does not exist: that police officers' actions be "indiscriminate." Pet. Cert. at 12, 15-16. The Counts Court legitimately feared indiscriminate police action in neighborhoods as a consequence of ruling in the State's favor. But Counts did not involve indiscriminate knocking on doors by police. The knock and talk in Counts was triggered by a very specific anonymous tip that the police diligently attempted to corroborate. Counts at 157-58, 776 S.E.2d at 61-62. This Court should pass on the State's attempt to limit Counts to indiscriminate police conduct.

The State also cites multiple cases upholding searches based on face-to-face tips and claims their existence shows clear error by the trial judge and the Court of Appeals. The State's

position here ignores the standard of review and that the majority of these cases upheld denials of defendants' motions to suppress by trial judges. Accepting the State's position in this case would mandate a finding of reasonable suspicion as a matter of law when the police receive an anonymous face-to-face tip even when they do no further work to corroborate it.

The State wants the low bar of reasonable suspicion converted to no bar at all. Under the State's position, police officers would be better off never even asking for the names of face-to-face tipsters. Getting tipsters' names would invite scrutiny from defense attorneys and the courts. Unscrupulous police officers might be tempted to make up an anonymous face-to-face tip if they know it can never be challenged. The rule the State seeks strips all discretion from trial judges and hands it to police officers. It certainly does nothing to uphold the right of privacy in the South Carolina Constitution. S.C. Const. Art. I, Section 10.

South Carolina's Constitution provides: "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures and unreasonable invasions of privacy shall not be violated." S.C. Const. Art. I, Section 10. "The South Carolina Constitution, with an express right to privacy provision included in the article prohibiting unreasonable searches and seizures, favors an interpretation offering a higher level of privacy protection than the Fourth Amendment." State v. Forrester, 343 S.C. 637, 645, 541 S.E.2d 837, 841 (2001). "[T]he federal Constitution sets the floor for individual rights while the state constitution establishes the ceiling." Id. at 647, 541 S.E.2d at 842. According to the Supreme Court, "[t]he focus in the state constitution is on whether the invasion of privacy is reasonable, regardless of the person's expectation of privacy" in the place searched. State v. Weaver, 374 S.C. 313, 322, 649 S.E.2d 479, 483 (2007). "By articulating a specific prohibition against 'unreasonable invasions of privacy,' the people of South Carolina have indicated that searches and

seizures that do not offend the federal Constitution may still offend the South Carolina Constitution." Id. (citing Forrester, 343 S.C. at 644-45, 541 S.E.2d at 841).

Counts enforced our citizens' right to privacy by holding "that law enforcement must have reasonable suspicion of illegal activity at a targeted residence **prior to approaching the residence** and knocking on the door." Counts at 172, 776 S.E.2d at 70 (emphasis added). The Court reasoned, "we find this rule safeguards the express constitutional right against unreasonable invasions of privacy and does not hamper law enforcement in their investigative efforts." Id.

The Court of Appeals properly rejected the State's contention—maintained in its petition to this Court—that the South Carolina Constitution was not triggered by what the State calls "the officers' mere approach of the residence." Pet. Cert. at 18. The State contends that a knock and talk never happened because Davis opened the door before the police knocked, but this attempt to circumvent Counts fails because of the above-emphasized language. The police must have reasonable suspicion before they approach a residence and here they did not. Accepting the State's loophole would invite police mischief and fails to respect the basis of Counts, which is the inherently coercive nature of the police targeting and approaching a residence.

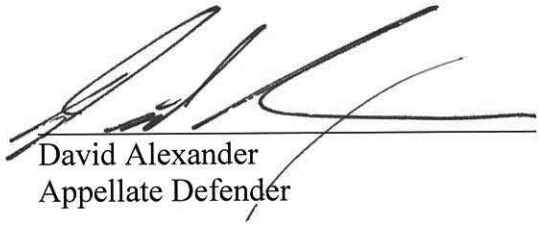
The State also includes (in a lengthy footnote) a claim that Terry v. Ohio, 392 U.S. 1 (1968) would be decided differently under the trial judge and Court of Appeals' holdings. Pet. Cert. at 21-22 n.10. The obvious point distinguishing Terry is that the police officer was patrolling downtown Cleveland and encountered the suspects on a public street. Terry at 5-6. Terry did not involve a search of a private home. Even under the federal constitution, residences are treated differently than encounters in public places. See Florida v. Jardines, 569 U.S. 1, 6 (2013) ("But when it comes to the Fourth Amendment, the home is first among equals.").

The South Carolina Constitution guarantees greater privacy in citizens' homes. The trial judge's factfinding cannot be disturbed on appeal and his legal conclusion was correct. The Court of Appeals properly applied South Carolina law in a thoughtful and well-researched opinion. Certiorari should be denied.

CONCLUSION

For the foregoing reasons, this Court should deny the State's petition for a writ of certiorari.

Respectfully Submitted,



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This 12th day of October, 2022.