STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from York County

Lee S. Alford, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JOMAR ANTAVIS ROBINSON,

PETITIONER

APPELLATE CASE NO. 2012-212042

REPLY BRIEF OF PETITIONER

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ARGUMENT IN REPLY

The State makes two primary arguments in its brief. First, the State repeatedly asserts that police officers are allowed to act as any ordinary person would act. This uncontroversial principle is the basis for "knock and talk," which the State contends decides this case. While the State's legal argument is certainly reasonable in the abstract, the behavior of the police officers on the night of the search was manifestly unreasonable. Because the officers did not act as any ordinary person would act, knock and talk does not apply. Second, the State continues to claim that any argument regarding the marijuana is unpreserved because the marijuana was introduced into evidence by the defense. A trial lawyer's first objective is to win the case. Appellate rules of issue preservation do not exist to punish trial lawyers for making reasoned strategic choices. The preservation rules exist to ensure that issues are squarely presented to the lower court so the trial judge has the first opportunity to rule. The State makes no serious contention that the trial judge had no opportunity to rule on the constitutionality of this search.

"Knock and Talk" Does Not Apply

The State wants the Court to believe that the police in this case acted reasonably and that knock and talk applies. The State makes more than ten references to policemen acting like ordinary citizens. In the State's version, the officers stroll on to the porch and helpfully illuminate their badges, reassuring the porch's occupants. The officers must have been welcomed because no one left or asked the officers to leave. The State's portrayal of the night's events is, respectfully, a fantasy.

The police rousted these young men on their porch. "Roust" was even the solicitor's description for what the police did. R. 61, ll. 14 – 16. They did not act as ordinary citizens.

As Justice Scalia observed, "[T]he background social norms that invite a visitor to the front door do not invite him there to conduct a search." Florida v. Jardines, 133 S.Ct. 1409, 1416 (2013). Here, the police did not say hello and did not ask permission. They drove up to the men, shined their headlights in their face, and stormed onto the porch, demanding identification. R. 24, l. 21 – 25, l. 4. R. 16, ll. 15 – 25. R. 29, ll. 7 – 17.

The State cites Jardines for several longstanding boiler-plate principles of Fourth Amendment law, but fails to provide any analysis of how Jardines applies to this case. Its lone attempt to distinguish Jardines was specifically rejected by the Supreme Court in the opinion. The State submits that Jardines does not apply because the police did not use a drug dog or "other perception enhancing device unavailable to the average citizen but used only the normal senses of sight and smell just like any other citizen would do." Brief of Respondent at 21. Justice Scalia dispatched this distinction:

> The dissent insists that our argument must rest upon "the particular instrument that Detective Bartelt used to detect the odor of marijuana"—the dog. It is not the dog that is the problem, but the behavior that here involved use of the dog. We think a typical person would find it "a cause for great alarm" . . . to find a stranger snooping about his front porch *with or without* a dog.

Id. at n.3 (emphasis in original). Jardines provides the correct framework for deciding this case.

The State tries to move the battlefield to "knock and talk" with repeated retreats to Kentucky v. King, 131 S.Ct. 1849 (2011). King provides no sanctuary in this case. King decided the narrow question of whether police impermissibly created an exigency circumventing the requirement for a warrant to enter a home. Id. at 1862-63. In King, police officers were lawfully in an apartment complex after successfully completing a

controlled drug buy. Id. at 1854. Police followed the man who sold the drugs into an apartment complex, but lost him before he entered one of two neighboring apartments. Id. At the door of one of the apartments, the police smelled burning marijuana. Id. The police knocked on the door and heard noises consistent with the destruction of evidence. Id. They kicked in the door and found drugs. Id.

The Kentucky Supreme Court reversed, holding that the police deliberately created the exigency. Id. at 1855. The United States Supreme Court reversed and clarified the rules regarding police-created exigent circumstances. Id. at 1858-61. The key factor in King was that "the exigent circumstances rule justifies a warrantless search when the conduct of the police **preceding** the exigency is reasonable in the same sense." Id. at 1858 (emphasis added).

King's discussion of exigent circumstances does not apply to this case. The State has not contended—nor could it contend—that exigent circumstances existed that justified the officers' entry on to the porch. No evidence was in danger of being destroyed like in King. Furthermore, King rested on the officers' reasonable actions prior to the search. Unwelcome, without consent, and unreasonably, the officers in this case trespassed on this porch to conduct warrantless searches after their massive surveillance operation failed to yield any results.

The State contends that discussions of economic class are not germane to this appeal, but the trial judge's comments about public housing and that "certain people" were allowed to live there certainly indicate that class played a role in this case. R. 48, l. 5 – 48, l. 8. Unreasonable police action targeting minorities and poor citizens is unacceptable. The Fourth Circuit recently reversed in a Fourth Amendment case because of overbearing police

conduct in United States v. Robertson, 736 F.3d 677 (4th Cir. 2013). New York City's "stop-and-frisk" policy was held unconstitutional because it targeted minorities, largely from poor neighborhoods. Floyd v. City of New York, 959 F.Supp.2d 540 (S.D.N.Y. 2013). As Judge Scheindlin noted in the New York City case, "Many police practices may be useful for fighting crime—preventative detention or coerced confessions for example—but because they are unconstitutional they cannot be used, no matter how effective." Id. at 556. The surveillance operation in this case that targeted people in public housing and used admittedly pretextual searches of vehicles produced nothing more than observations of a group of young black men standing on a porch and talking to visitors. What the State contends is drug activity can be viewed as innocent social encounters between citizens of limited means forced to live in public housing. The pretextual searches of cars departing the scene did not find any drugs. The search in this case falls under Jardines and, because it is warrantless and unreasonable, violates the Fourth Amendment.

The State is Playing "Gotcha"

The State makes two noxious procedural bar arguments that amount to the game of "gotcha" condemned by Chief Justice Toal in Atlantic Coast Builders and Contractors, LLC v. Lewis, 398 S.C. 323, 332-33, 730 S.E.2d 282, 287 (2012). First, the State asserts that the challenge to this search is somehow unpreserved because appellant's petition for rehearing, which spends nearly seven pages contesting the search on the porch, does not raise the issue of the Court of Appeals refusing to consider the search on the porch. Brief of Appellant at 24. App. 7-14. This contention is clearly without merit and should be disregarded by this Court.

Second, the State also contends that appellant cannot contest the search because he introduced the marijuana into evidence after receiving an unfavorable final ruling from the trial judge. R. 64, l. 21 – 65, l. 15. The State failed to distinguish the sound principles from State v. Mueller, 319 S.C. 266, 267-68, 460 S.E.2d 409, 410-11 (Ct. App. 1995). "To force a defendant to choose between challenging an incorrect final ruling on appeal or minimizing the impact of damaging evidence would be fundamentally unfair." Id. at 269, 460 S.E.2d at 411. As Chief Justice Toal explained, the reason for our issue preservation rules is to ensure that lower courts have an opportunity to rule and "that an issue cannot be raised for the first time on appeal." Atlantic Coast Builders at 332-33, 730 S.E.2d at 287. These rules do not exist to present trial lawyers with the dilemma of choosing between trial strategy and preserving a record for appeal.

The South Carolina cases cited by the State do not hold that a strategic choice by an attorney after a final ruling by the trial judge waives the issue for appeal. In State v. Washington, 315 S.C. 108, 432 S.E.2d 449 (1992), no pretrial ruling was made regarding the evidence at issue. The attorney's elicitation of the evidence was the result of incompetent examination of a witness, not reasoned trial strategy. Id. at 109-110, 432 S.E.2d at 449. The other two cases involved the failure to object to evidence introduced by the prosecution, not a strategic decision by an attorney. State v. Dicapua, 373 S.C. 452, 455, 646 S.E.2d 150, 152 (Ct. App. 2007) ("Once the State moved to enter the videotape into evidence and publish it to the jury, however, Dicapua's counsel specifically stated he had 'no objection.'"); State v. Bullock, 235 S.C. 356, 111 S.E.2d 657 (1959) ("When the State offered the dress in evidence, counsel for the appellant stated 'We have no objection except to the container which has the name upon it.' The

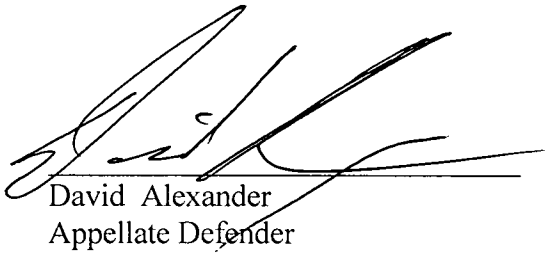
appellant is not in position to complain of the introduction of the slip and dress as evidence when he expressly consented thereto, as the above quote shows.").

The other case cited by the State, Ohler v. United States, 529 U.S. 753 (2000), is a 5-4 United States Supreme Court decision dealing with federal rules of issue preservation and has been widely disregarded by state courts. "The majority of state appellate courts to consider the issue, after Ohler, rejected the reasoning of the Ohler Majority." Cure v. State, 26 A.3d 899, 908 (Md. 2011) (citing numerous cases). "Although Ohler is binding on federal courts, it is not binding on state courts because the waiver does not implicate federal constitutional principles that are mandatory upon state courts." Id. Ohler has only been cited once by the Court of Appeals and never by this Court. See State v. Dunlap, 346 S.C. 312, 325, 550 S.E.2d 889, 896 (Ct. App. 2001). Indeed, this Court rejected the majority opinion's in Dunlap and modified its reasoning, impliedly rejecting Ohler. State v. Dunlap, 353 S.C. 539, 579 S.E.2d 318 (2003). This Court should explicitly reject Ohler, reject the Court of Appeals' acquiescence in the State's game of "gotcha," and refuse to hamstring trial lawyers who make reasonable strategic decisions during the course of trial with hypertechnical interpretations of our rules of issue preservation.

CONCLUSION

For the reasons stated in this reply brief and in the brief of appellant, this Court should reverse the decision of the Court of Appeals and reverse appellant's convictions.

Respectfully submitted,



David Alexander
Appellate Defender

ATTORNEY FOR PETITIONER.

This 11th day of April, 2014.

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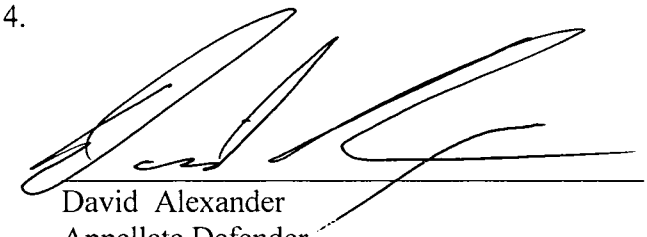
CERTIFICATE OF SERVICE

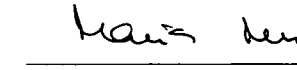
The undersigned attorney hereby certifies that a true copy of the Reply Brief of Petitioner in the above referenced case has been served upon Salley Elliott, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Jomar Robinson, #281722, Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 11th day of April, 2014.



David Alexander
Appellate Defender

ATTORNEY FOR PETITIONER.

SUBSCRIBED AND SWORN TO before me
this 11Th day of April, 2014.



(L.S.)
Notary Public for South Carolina
My Commission Expires: July 3, 2023.