STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. Supreme Court

On Writ of Certiorari to the Court of Appeals
Appeal from Richland County
Honorable Alison Renee Lee, Circuit Court Judge
Appellate Case No. 2013-000086

THE STATE,

Respondent,

vs.

RUSHAN COUNTS,

Petitioner.

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

STATEMENT OF ISSUE ON APPEAL

I.

The Court of Appeals properly affirmed Petitioner's sentence and conviction because the officers did not need reasonable suspicion to conduct a "knock and talk."

STATEMENT OF THE CASE

On July 15, 2009, a Richland County Grand Jury indicted Petitioner for possession with intent to distribute marijuana, third offense, in violation of section 44-53-370 of the South Carolina Code.

On August 3, 2009, Petitioner proceeded to trial before the Honorable Alison Renee Lee. Assistant Solicitors Seth Rose and Drelton Carson represented the State, and Wes Kirkland represented Petitioner. On August 6, 2009, a jury found Petitioner guilty of possession with intent to distribute marijuana. Judge Lee sentenced Petitioner to ten years of imprisonment. Thereafter, Petitioner appealed his conviction and sentence.

On October 4, 2012, the South Carolina Court of Appeals heard arguments on the matter. On October 31, 2012, the South Carolina Court of Appeals affirmed Petitioner's conviction and sentence in an unpublished *per curiam* opinion. State v. Counts, Op. No. 2012-UP-585 (S.C. Ct. App. Filed October 31, 2012). On November 15, 2012, Petitioner filed a petition for rehearing, and on December 13, 2012, the South Carolina Court of Appeals issued an order denying the petition for rehearing.

On February 4, 2013, Petitioner served a petition for writ of certiorari. On January 8, 2014, this Court granted certiorari. This brief follows.

STATEMENT OF FACTS

During the suppression hearing, Officer Dave Navarro testified he received an anonymous tip that Petitioner was selling drugs out of his residence. (R. p. 31; R. p. 33.) Thereafter, Officer Navarro pulled Petitioner's rap sheet and discovered that Petitioner had other drug charges on his record. (R. p. 33.) Further, Officer Damon Robinson testified that an anonymous tipster spoke with him prior to the knock and talk. (R. p. 60.) The tipster told Officer Robinson that Petitioner was using his girlfriend's car, a Kia Spectra, to make drug deliveries. (R. p. 60.)

After receiving the anonymous tips, the officers decided to conduct a "knock and talk" investigation. (R. p. 34.) Officer Navarro testified that the purpose of the knock and talk was to allow Petitioner to explain the allegation against him. (R. p. 48.) However, after the officers knocked on the door, everything went "south." (R. p. 48.) When the officers knocked on Petitioner's door, they informed Petitioner that they were with the Richland County Sherriff's Department. (R. p. 10.) Petitioner told the officers to stand in front of the door. (R. p. 10.) The officers complied. (R. p. 10.) Thereafter, Petitioner voluntarily opened the door. (R. p. 10.)

However, when Petitioner opened the door, the officers immediately smelled a strong odor of marijuana coming from Petitioner's residence. (R. p. 10; R. p. 35.) Petitioner stood in a bladed position like he was holding something behind his back. (R. p. 10; R. p. 12; R. p. 35.) Moreover, one of the officers observed a blunt on Petitioner's living room table. (R. p. 10.) Furthermore, another officer saw Petitioner holding a silver automatic gun in his hand. (R. pp. 11-12; R. p. 36.) The officers believed that Petitioner was about to shoot them. (R. p. 13.) Thereafter, the officers drew their weapons and

detained Petitioner. (R. p. 13.) When the officers searched Petitioner for more weapons, they found a bag of marijuana in Petitioner's pocket. (R. p. 41.)

Thereafter, the officers conducted a protective sweep of Petitioner's residence. (R. p. 39.) In plain view, the officers saw a bag of marijuana and a scale in the kitchen. (R. pp. 39-41.)

After hearing testimony and argument, the trial judge denied Petitioner's motion to suppress. (R. pp. 148-160.)

ARGUMENT

I.

The Court of Appeals properly affirmed Petitioner's sentence and conviction because the officers did not need reasonable suspicion to conduct a "knock and talk."

Petitioner argues that this Court should reverse his sentence and conviction because the police officers needed reasonable suspicion to knock on Petitioner's door. However, this Court should affirm Petitioner's sentence and conviction because the knock and talk did not violate the Fourth Amendment. In other words, the knock and talk was merely a type of consensual communication between the officers and Petitioner, which involved no coercion or detention. Thus, the Court of Appeals properly affirmed the trial court's denial of Petitioner's motion to suppress.

STANDARD OF REVIEW

In criminal cases, appellate courts sit to review errors of law only. State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). In Fourth Amendment search and seizure cases, the appellate court is limited to determining if there is any evidence to support the trial court's findings and can only reverse due to clear error. State v. Flowers, 360 S.C. 1, 5, 598 S.E.2d 725, 727 (Ct. App. 2004); see State v. Brockman, 339 S.C. 57, 66, 528 S.E.2d 661, 666 (2000) ("[W]e will review the trial court's ruling like any other factual finding and reverse if there is clear error. We will affirm if there is any evidence to support the ruling."). The reviewing court may conduct its own review of the record to determine whether the trial judge's ruling is supported by the evidence. State v. Khingratsaiphon, 352 S.C. 62, 70, 572 S.E.2d 456, 460 (2002). However, the appellate court must affirm the trial court if there is any evidence supporting the ruling. State v.

Pichardo, 367 S.C. 84, 96, 623 S.E.2d 840, 846 (Ct. App. 2005). Critically, the appellate court will not reverse merely because it would have reached a different conclusion than the trial judge. State v. Rivera, 384 S.C. 356, 361, 682 S.E.2d 307, 310 (Ct. App. 2009).

ANALYSIS

The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. This guarantee protects against unreasonable searches and seizures, including those involving only a brief detention. Pichardo, 367 S.C. at 97, 623 S.E.2d at 847. Notably, "[t]he touchstone of the Fourth Amendment is reasonableness." Florida v. Jimeno, 500 U.S. 248, 250 (1991). Thus, only unreasonable searches and seizures are prohibited. State v. Foster, 269 S.C. 373, 378, 237 S.E.2d 589, 591 (1977); see Maryland v. Buie, 494 U.S. 325, 331 (1990) ("It goes without saying that the Fourth Amendment bars only unreasonable searches and seizures[.]").

"A 'search' occurs when an expectation of privacy that society is prepared to consider reasonable is infringed." United States v. Jacobsen, 466 U.S. 109, 113 (1984).

"A person has been seized within the meaning of the Fourth Amendment at the point in time when, in light of all the circumstances surrounding an incident, a reasonable person would have believed that he was not free to leave." Robinson v. State, 407 S.C. 169, ___, 754 S.E.2d 862, 868 (2014).

Generally, there are three tiers of police-citizen encounters: 1) communications between police and citizens involving no coercion or detention, which do not fall within the compass of the Fourth Amendment; 2) brief seizures, which must be supported by

reasonable suspicion and; 3) full-scale arrests, which must be supported by probable cause. United States v. Berry, 670 F.2d 583, 591 (5th Cir. 1982).

In the context of a residence, a person is not generally permitted to enter the private property of another. Flordia v. Jardines, ___ U.S. ___, 133 S. Ct. 1409, 1415 (2013). However, based on the implicit license customary in the United States permitting visitors to approach another person's home, an officer is constitutionally permitted to approach a home in an attempt to speak with or question an occupant if the officer approaches the home in a reasonable manner consistent with the manner any private citizen might approach the home. Id. at 1415-1416. Importantly, the act of approaching a home pursuant to the implicit license does **not** constitute a search for Fourth Amendment purposes. See Id. at 1417, n. 4 ("[I]t is not a Fourth Amendment search to approach the home in order to speak with the occupant, *because all are invited to do that.*" (italics in original)).

Thus, pursuant to the implicit license, a law enforcement officer is typically permitted "to approach the home by the front path, knock promptly, wait briefly to be received, and then (absent invitation to linger longer) leave." Id. at 1415.

In Kentucky v. King, the Supreme Court of the United States held that "[w]hen law enforcement officers who are not armed with a warrant knock on a door, they do no more than any private citizen might do. And whether the person who knocks on the door and requests the opportunity to speak is a police officer or a private citizen, the occupant has no obligation to open the door or to speak." Kentucky v. King, ___ U.S. ___, 131 S. Ct. 1849, 1862 (2011). Moreover, the Court noted that "even if an occupant chooses to

open the door and speak with the officers, the occupant need not allow the officers to enter the premises and may refuse to answer any questions at any time." Id.

Further, in State v. Wright, this Court held that the police officers "had the investigative authority to approach the front door of the [residence] in order to investigate the anonymous tip[.]" State v. Wright, 391 S.C. 436, 445, 706 S.E.2d 324, 328 (2011). In Wright, the police drove by the residence because they received an anonymous tip that there was dog fighting activity occurring at the residence. Id. Moreover, the police saw from a public road a large number of vehicles at the residence. Id. In its reasoning, this Court stated that the police officers' observations were not subject to any Fourth Amendment protection, and the observations would give a reasonable police officer cause to go forward. Id. However, this Court also stated that "***even absent these observations***, the police had the investigative authority to approach the front door of the [residence] in order to investigate the anonymous tip." Id. (emphasis added).

Additionally, the Fourth Circuit addressed the knock and talk issue in United States v. Cephas, 254 F.3d 488, 493 (4th Cir. 2001). The Cephas court noted: "A voluntary response to an officer's knock at the front door of a dwelling does not generally implicate the Fourth Amendment, and thus an officer generally does not need probable cause or reasonable suspicion to justify knocking on the door and then making verbal inquiry." Id. In Cephas, the Fourth Circuit held that there was no evidence that the defendant's act of initially opening the door to the police officer was anything but voluntary. Id. at 494. Moreover, the court noted that when the defendant opened his apartment door, he "voluntarily exposed to the public any odors and such a view as one standing at the door could perceive. None of [the officer's] conduct up to that point, at

which he smelled 'a strong smell of marijuana coming from the apartment' . . . constituted a search within the meaning of the Fourth Amendment." Id. [1]

[1]Notably, all of the other circuits follow the Fourth Circuit's view on the knock and talk technique.

First Circuit- see United States v. Daoust, 916 F.2d 757, 758 (1st Cir. 1990) ("A policeman may lawfully go to a person's home to interview him. In doing so, he obviously can go up to the door[.]") (citations omitted).

Second Circuit- see United States v. Lucas, 462 F. App'x 48, 50 (2d Cir. 2012) ("Contrary to Lucas's assertion, Officer Klein did not create the exigency by not identifying himself as a police officer when he conducted the 'knock and talk.' Officer Klein did not threaten to engage in conduct that violates the Fourth Amendment because he made no threat to enter the apartment when he conducted the 'knock and talk.'").

Third Circuit- see United States v. Claus, 458 Fed. Appx. 184, 188 (3d Cir. 2012) ("We, like other courts, recognize a 'knock and talk' exception to the warrant requirement. Pursuant to this exception, "officers are allowed to knock on a residence's door or otherwise approach the residence seeking to speak to the inhabitants just as any private citizen may . . . [T]he recognized purposes behind the 'knock and talk' procedure is to either speak with occupants or ask for consent to search. As a result, no objective level of suspicion is required.) (citations omitted).

Fifth Circuit- see United States v. Albarado, 2014 WL 465702 (5th Cir. Feb. 6, 2014) ("We note initially, however, that the defendants do not challenge the officers' use of a 'knock and talk' strategy, which we have recognized as a valid investigatory technique, not requiring a warrant, when law enforcement officials seek to gain consent to search or reasonably suspect criminal activity.").

Sixth Circuit- see United States v. Thomas, 430 F.3d 274, 277 (6th Cir. 2005) ("Consensual encounters do not lose their propriety, moreover, merely because they take place at the entrance of a citizen's home. A number of courts, including this one, have recognized 'knock and talk' consensual encounters as a legitimate investigative technique at the home of a suspect or an individual with information about an investigation.").

Seventh Circuit- see United States v. Jerez, 108 F.3d 684, 691–92 (7th Cir.1997) (recognizing that a knock and talk is ordinarily consensual unless coercive circumstances exist); United States v. Ellis, 499 F.3d 686, 692 (7th Cir. 2007) ("It is perfectly lawful for the government to knock on the front door of home and ask to come in.").

Eighth Circuit- see United States v. Wells, 648 F.3d 671, 679 (8th Cir. 2011) (noting that "no Fourth Amendment search occurs when police officers who enter private property restrict their movements to those areas generally made accessible to visitors, such as driveways, walkways, or similar passageways. This principle permits police officers —consistent with the Fourth Amendment — to 'approach . . . the front door to announce their presence', make "inquir[ies]', and 'request consent to search the remainder of the property', 'commonly referred to as a knock and talk.'" (citations omitted)).

Ninth Circuit- see United States v. Cormier, 220 F.3d 1103, 1108-1109 (9th Cir. 2000)("[N]o suspicion needed to be shown in order to justify the 'knock and talk.').

Application

This Court should affirm Petitioner's sentence and conviction because the officers' knock and talk technique did not violate the Fourth Amendment; therefore, the officers did not need reasonable suspicion or probable cause to knock on Petitioner's door.

First, even assuming the police officers did not have reasonable suspicion to believe that criminal activity was afoot, there was no Fourth Amendment violation because the police officers did not need reasonable suspicion to merely knock on Petitioner's front door in order to investigate the tips they received. See King, 131 S. Ct. at 1862 ("When law enforcement officers who are not armed with a warrant knock on a door, they do no more than any private citizen might do. And whether the person who knocks on the door and requests the opportunity to speak is a police officer or a private citizen, the occupant has no obligation to open the door or to speak."); Wright, 391 S.C. at 445, 706 S.E.2d at 328 (holding that the police officers "had the investigative authority to approach the front door of the [residence] in order to investigate the anonymous tip"); Cephas, 254 F.3d at 493 ("A voluntary response to an officer's knock at the front door of

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Tenth Circuit- see United States v. Cruz-Mendez, 467 F.3d 1260, 1264 (10th Cir. 2006) ("Mr. Cruz–Mendez first contends that the officers lacked reasonable suspicion for the initial approach to the apartment to conduct a so-called 'knock and talk' investigation. But reasonable suspicion was unnecessary. As commonly understood, a 'knock and talk' is a consensual encounter and therefore does not contravene the Fourth Amendment, even absent reasonable suspicion.").

Eleventh Circuit- see United States v. Taylor, 458 F.3d 1201, 1204 (11th Cir. 2006) ("The Fourth Amendment, which prohibits unreasonable searches and seizures by the government, is not implicated by entry upon private land to knock on a citizen's door for legitimate police purposes unconnected with a search of the premises.").

a dwelling does not generally implicate the Fourth Amendment, and thus an officer generally does not need probable cause or reasonable suspicion to justify knocking on the door and then making verbal inquiry."); Rogers v. Pendleton, 249 F.3d 279, 289-290 (4th Cir. 2001) (noting that an officer may approach a home and conduct a knock and talk unless the homeowner tells the officer to leave).

Second, Petitioner criticizes the fact that Officer Elliott agreed with the following question/statement that defense counsel made: "[B]est case scenario, the person opens the door and there's drugs present . . . ***from your perspective***?" (R. pp. 15-16.) (emphasis added). However, the police officer's subjective intent was irrelevant to the Fourth Amendment analysis. See United States v. Mendenhall, 446 U.S. 544, 554 n.6 (1980) ("[T]he subjective intention [of law enforcement] to detain ... is irrelevant except insofar as that may have been conveyed to the respondent."); United States v. Waldon, 206 F.3d 597, 603 (6th Cir. 2000) ("Whether an encounter between a police officer and a citizen is consensual depends on the officer's objective behavior, not on any subjective suspicion of criminal activity.").

Third, the police officers used the least intrusive means to investigate the tip they received. They merely knocked on Petitioner's door and identified themselves as police officers. They did not try to coerce or deceive Petitioner. Petitioner knew exactly who was at the door when he voluntarily opened the door.

Fourth, Petitioner's reliance on United States v. Johnson, 170 F.3d 708 (1st Cir. 1999), is misplaced. In Johnson, the First Circuit held that the officers lacked reasonable suspicion to stop the defendant and detain him at the moment he emerged from the apartment. Id. at 720. The officers received a tip that there might be drug activity

occurring in an apartment building. Id. at 711. The police officers ***prepared*** to conduct a knock and talk. Id. However, right before they knocked on the door, the defendant opened the door. Id. When the defendant tried to walk past the officer, the officer stuck out his hand to ***stop*** the defendant, and the officer directed the other officer to take ***control*** of the defendant. Id. In its reasoning, the court stated that "[w]ithout reasonable suspicion, [the police] cannot detain a person just because the individual walks out of an apartment . . . even if some unspecified individual . . . thinks something fishy is . . . going on there." Id. at 720. Thus, Johnson was ultimately not a knock and talk case. Contrary to Petitioner's assertion, Johnson did not hold that the police needed reasonable suspicion to conduct the knock and talk. Rather, the court held that the police needed reasonable suspicion to actually detain the defendant. Id.[2]

Fifth, the police in this case did not impermissibly create an exigency because they did not violate the Fourth Amendment or threaten to do so prior to the point when the seizure occurred. See King, 131 S. Ct. at 1863 ("In this case, we see no evidence that the officers either violated the Fourth Amendment or threatened to do so prior to the

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[2] In addition, Petitioner's reliance on the following cases is misplaced for the following reasons:

1) Coolidge v. New Hampshire, 403 U.S. 443 (1971)- This was not a knock and talk case.
2) Keenom v. State, 80 S.W.3d 743(Ark. 2002)- The court did not hold that police needed reasonable suspicion to conduct a knock and talk.
3) Hayes v. State, 794 N.E.2d 492 (Ind. Ct. App. 2003)- The court did not hold that police needed reasonable suspicion to conduct a knock and talk. In fact, the court stated: "The prevailing rule is that, absent a clear expression by the owner to the contrary, police officers, in the course of their official business are permitted to approach one's dwelling and see permission to question an occupant." Id. at 496.
4) United States v. Morgan, 743 F.2d 1158 (6th Cir. 1984)- In this case, nine officers surrounded the defendant's home, positioned a police car in the driveway in front of the defendant's home blocking any movement of the defendant's car, flooded the defendant's home with spotlights, and summoned the defendant from his home with the blaring call of a bullhorn. Id. at 1161. The court concluded that this coercive activity could not "be characterized as a brief investigatory stop. On the contrary, the record provides ample proof that 'as a practical matter, [the defendant] was under arrest . . . as soon as the police surrounded the [defendant's] home.'" Id. at 1164. Accordingly, "[t]he police show of force and authority was such that a 'reasonable person would have believed he was not free to leave.'" Id.

point when they entered the apartment. Officer Cobb testified without contradiction that the officers "banged on the door as loud as [they] could" and announced either " 'Police, police, police' " or " 'This is the police.' " . . . This conduct was entirely consistent with the Fourth Amendment, and we are aware of no other evidence that might show that the officers either violated the Fourth Amendment or threatened to do so (for example, by announcing that they would break down the door if the occupants did not open the door voluntarily)."); see also Albarado, 2014 WL 465702 ("Finally, the defendants argue that the agents' decision to knock on the door of the residence created any exigent circumstances. This argument is foreclosed by the Supreme Court's decision in Kentucky v. King . . . ." (citation omitted)).

Sixth, Petitioner conceded during oral argument that the seizure did not occur until after the officer's drew their guns, which was after they smelled the marijuana and after they saw the gun, at which point the officer's had reasonable suspicion and most likely probable cause to seize Petitioner.

Finally, the police officers did not violate Petitioner's right to privacy. Although the South Carolina Constitution contains an express protection of the right to privacy,[3] there is no evidence in this case that the police officers violated Petitioner's right to privacy by knocking on Petitioner's door.

As this Court pointed out in Weaver, "[t]he focus in the state constitution is on whether the invasion of privacy is reasonable[.]" In the case at hand, the police officers did no more than what an average citizen was entitled to do. The police officers merely

[3] See State v. Weaver, 374 S.C. 313, 321-322, 649 S.E.2d 479, 483 (2007) (noting that "[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 [area] to be searched.").

knocked on Petitioner's door. Petitioner looked through the peep-hole of his door, noticed that the police were at the door, armed himself, and opened his door voluntarily. Nothing about the police officers' conduct was unreasonable. There was no evidence that the police demanded or coerced Petitioner to open the door. The police officers were simply doing their jobs. They received multiple tips that there might be drug activity occurring at Petitioner's house; therefore, the police officers investigated the tips. Thus, the police officers did not violate Petitioner's right to privacy by merely knocking on Petitioner's front door.

In summary, the police officers' knock and talk technique did not violate the Fourth Amendment; therefore, the police officers did not need reasonable suspicion or probable cause to knock on Petitioner's door. Further, the police officers did not violate Petitioner's right to privacy under our state constitution by conducting the knock and talk.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the decision of the Court of Appeals and the judgment and conviction of the trial court should be affirmed.

Respectfully submitted,

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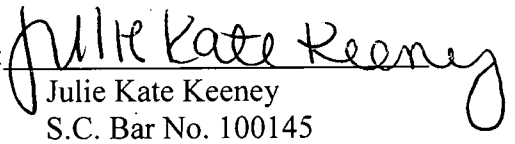
BY: 
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April 21, 2014

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CERTIFICATE OF COUNSEL

The undersigned certifies that this Brief of Respondent complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

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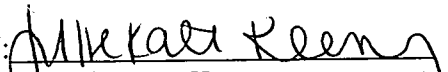
BY: 
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PROOF OF SERVICE

I, Ellen R. DuBois, certify that I have served the within Brief of Respondent on Petitioner by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

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I further certify that all parties required by Rule to be served have been served. This 21st day of April, 2014.

Ellen R. DuBois

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