


THE STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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SC Court of Appeals

THE STATE,

APPELLANT,

V.

WALTER M. BASH,

RESPONDENT

Appellate Case No. 2013-001430

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Appeal from Berkeley County

Stephanie P. McDonald, Circuit Court Judge

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Opinion No. 5314

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PETITION FOR REHEARING

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On April 22, 2015, this Court reversed the decision of then-Circuit Court Judge Stephanie McDonald to suppress evidence seized by police during a warrantless entry into a homeowner's backyard. State v. Bash, Op. No. 5314 (S.C. Ct. App. filed April 22, 2015). Pursuant to Rule 221(a), SCACR, Petitioner respectfully requests this Court rehear the matter in light of the significant points overlooked and/or misapprehended by this Court discussed below.

In this Court's discussion of the facts, this Court stated that "the Berkeley County Sheriff's Office received an anonymous tip that drug activity was occurring in the backyard of a particular home." However, the trial transcript is ambiguous on this point. Holbrook testified that **an unknown agent** received "a phone call stating that there was drug activity **at a particular**

**residence.**” R. 20, lines 12-17. This tip was then relayed by the unknown agent to Holbrook via Holbrook’s cell phone, not the police radio. When asked to be more specific about the tip, Holbrook said: “The - - the tip was actually, if I’m not mistaken, that there was drug activity occurring at that exact time, and **it was at XXX Nelson Ferry Road.** And it - - just specifically, that there was drug activity occurring **at that incident.**” R. 21, lines 19-23. Even when asked for greater specificity about “where this drug activity was taking place,” Holbrook said “[i]t was **on the property of XXX or on it.**” Tr. 22, lines 1-4. Only later did Holbrook make any type of claim that the drug activity “was supposed to be happening in the - - **in the rear of the property.**” Tr. 29, lines 6-8. The actual exchange was as follows:

Q (By Mr. Patterson) What was your reason for pulling on to the grass?

A My reason for that was because I was - - received a tip that there was some type of active drug activity going on at that time. As I approached the house, I didn’t see anybody around it, and that just caught my attention. So I just simply drove back there, and that activity was supposed to be happening in the - - **in the rear of the property**; so that was my reasoning for - - when I saw those individuals back there, it - - I just didn’t feel the need to actually make contact with the actual house. I just went down the Shine Bash Lane.

R. 28, line 25 – R. 29, line 12. This was the first time Holbrook made the claim that the tip referred to alleged drug activity in the backyard. The ambiguity of the tip was further demonstrated when Holbrook testified, “I **believe** the tip said it was behind the residence.” R. 47, lines 5-6. Detective Milks was not privy to the conversation Holbrook had about the tip with an unknown agent via Holbrook’s cell phone. Instead, her entire testimony regarding the tip was based upon what Holbrook told her. R. 54, lines 13-17. Milks claimed “the tip had said that it was going to be black males in the yard - - **I believe the tip was rear yard**, is what Sergeant Holbrook had explained.” R. 54, line 24 – R. 55, line 2. In light of this ambiguous testimony regarding the actual nature of the

tip, Appellant respectfully requests this Court reconsider its opinion in which the anonymous tip is characterized as “drug activity was occurring in the backyard.”

After construing the tip as affirmatively alleging drug activity in the backyard, this Court used that erroneous construction to find that the “officers’ observations of several individuals in the backyard at the subject property corroborated the anonymous tip.” When the anonymous tip is viewed in the correct light – the officers were equivocal about the nature of the location of where the tip claimed alleged drug activity was occurring, especially where neither officer involved in the search actually spoke to the tipster – it becomes clear that such equivocation could not form the basis for a violation of the Fourth Amendment. The equivocation regarding the particulars of the tip could not be used to corroborate the officers’ observations. Further, those observations were simply that black males were in the backyard of a residence. There can be nothing suspicious at all about black males socializing in the backyard.

Perhaps the most glaring point overlooked by this Court’s opinion was the United States Supreme Court’s opinion in Florida v. Jardines, \_\_\_ U.S. \_\_\_, 133 S.Ct. 1409 (2013). Jardines formed the basis of the trial judge’s decision and was the chief argument presented in the briefs and during oral argument by both sides. This Court failed to consider, or even mention, the impact of Jardines on the illegality of the officers’ conduct. Further, this Court relied upon cases decided prior to the Supreme Court’s decision in Jardines. Specifically, this Court relied upon the Fourth Circuit’s decision in Alvarez v. Montgomery County, 147 F.3d 354 (4<sup>th</sup> Cir. 1998). Although Alvarez is easily distinguished from the present case, the Fourth Circuit’s opinion in Alvarez predated the Supreme Court’s opinion in Jardines, wherein the Court resurrected the trespass test for Fourth Amendment jurisprudence.

In Alvarez, officers were investigating a complaint about underage drinking at a house party. 147 F.3d at 356. When an officer approached the front door to knock, a second officer observed a sign affixed to a lamppost in the front driveway directing guests to the party in the backyard. Rather than knocking on the front door, the officers went to the backyard. Once in the backyard, the officers observed teenagers drinking. Id. at 357. The officer's entry into the backyard was reasonable because they were responding to a call about underage drinking, they entered the property simply to notify the homeowner of the complaint – which was a legitimate reason to enter the property unconnected with a search of the premises. Id. at 358. In light of the sign directing guests to the party in the backyard, it was reasonable for the officers to proceed directly there. Id. at 359. In the present case, there was no sign directing anyone to the backyard in order to make contact with the homeowner. Further, the officers were entering the property in Alvarez to notify the owner of the complaint; whereas, in the present case, the officers were entering the property to search, which was a factual finding made by the trial judge. These distinctions are important because the sign manifested an expressed license for guests to enter the backyard and the subjective intent of the officers was not to conduct a search.

This Court held then-Circuit Court Judge McDonald erred as a matter of law by considering the officers' subjective intent. According to this Court, the officers' subjective intent to search the premises "is not impermissible provided the officers had a reasonably objective basis for their actual conduct." The Jardines Court distinguished the line of cases stating that "the subjective intent of the officer is irrelevant," which were relied upon by this Court in arriving at its conclusion. See Id. at 1416-17. According to the Supreme Court, subjective intent is not considered unless the police conduct is objectively unreasonable. Id. at 1416. Jardines explicitly asked the question of "whether the officers had an implied license to

enter the porch, which in turn depends upon the purpose for which they entered.” Id. at 1417. Jardines concluded that “no one is impliedly invited to enter the protected premises of the home in order to do nothing but conduct a search.” Id. at 1416 n.4. Here, the conduct was objectively unreasonable and the court’s finding that the officers intended to search is amply supported in the evidence. Judge McDonald specifically found the intention of the officers when they arrived was to search for drugs.

What the instant case concerns is the scope of the implied license and how the scope of the implied license is to be determined. Based upon the habits of Americans, the Court has recognized an implied license for trespass on property: “the knocker on the front door is treated as an invitation or license to attempt an entry, justifying ingress to the home by solicitors, hawkers and peddlers of all kinds.” Jardines, 133 S.Ct. at 1415 (quoting Breard v. Alexandria, 341 U.S. 622, 626 (1951)). This implied license “permits the visitor to approach the home by the front path, knock promptly, wait briefly to be received, and then (absent invitation to linger longer) leave.” Id. “[T]he right of a man to retreat into his own home and there be free from unreasonable governmental intrusion ... would be significantly diminished if the police could enter a man’s property to observe his repose from just outside the front window.” Id. at 1414 (internal quotations omitted).

The Jardines Court reaffirmed the holding in Kentucky v. King, 563 U.S. \_\_\_, 131 S.Ct. 1849, 1862 (2011) that due to the theory of implied license, which is what permits a Girl Scout or trick-or-treater to approach one’s home, “a police officer not armed with a warrant may approach a home and knock, precisely because that is ‘no more than any other private citizen might do.’” Id. at 1416. “[T]he background social norms that invite a visitor to the front door do not invite him there

to conduct a search.” Id. The theory of implied license is what gives rise to the ability of officers to engage in so-called “knock and talk” interactions.

The Supreme Court of Kentucky provided a lengthy discussion of “knock and talk” procedures and the interplay between those procedures and curtilage in Quintana v. Commonwealth, 276 S.W.3d 753 (Ky. 2009). After noting that most “knock and talks are typically conducted at the front door” and that the front door is “the main entrance to the home,” the Kentucky Court explained that the homeowner’s consent to approach the main entrance to the home is assumed. Id. at 758. As long as the officer has legitimate business, he may approach the front door of a residence. Id. When there has been no finding of probable cause to grant a warrant, “the knock and talk is limited to only the areas which the public can reasonably expect to access.” Id. at 759. While noting “[t]he back door of a home is not ordinarily understood to be public accessible,” the court explained that a side or back door used as primary access by the resident may be appropriate for a “knock and talk” if the officer was aware of the resident’s prior use of the door. Id.

The officers in the Kentucky case approached the front door of Quintana’s residence for a “knock and talk.” When the officers received no answer, one officer walked the length of the driveway and into the back yard to look for a back door. Id. at 760. When the officer found no back door, he continued to walk across the back yard until he found a window with an air conditioning unit in it where he claimed to smell marijuana. Id. The court held that when the officer “moved beyond the public entrance of the home, he went beyond the limits of a proper knock and talk.” Id. After noting that “[a] backyard is not normally an area that the general public would perceive as public access,” the court explained that rarely would a backyard not be considered curtilage. Id. Due to the backyard’s status as curtilage and the officer’s veering from

the area in which he had an implied license to be, the Kentucky Supreme Court suppressed the evidence found pursuant to a search warrant obtained based upon the officer's sniffing in the backyard. Id. at 761.

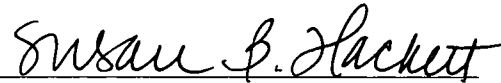
"The scope of a licenses – express or implied – is limited not only to a particular area but also to a specific purpose." Jardines, 133 S.Ct. at 1416. Where the question is "*whether* the officer's conduct was an objectively reasonable search," the reviewing court must determine "the officers had an implied license to enter [the area], which in turn depends upon the purpose for which they entered." Id. at 1416-1417 (emphasis in original). In Jardines, the Court held the officers' "behavior objectively revealed a purpose to conduct a search, which is not what anyone would think he had license to do." Id. at 1417. In the instant matter, the police exceeded the scope of the implied license for a "knock and talk" by immediately proceeding to and entering the backyard with the intent to search. Judge McDonald made the factual finding that the officers intended to search when they intruded upon the backyard. Based upon her view of Holbrooks and Milks as witnesses and in judging their credibility, Judge McDonald found the officers went into the backyard, not with the purpose of interviewing the occupants of the home. The evidence that the officers "suited up," drove directly into the backyard of a residence without any attempt to knock on the front door supports the trial court's logical conclusions.

Finally, Appellant objects to this Court's ruling on whether exigent circumstances existed or whether the items seized were in plain view. As explained by this Court, those issues were not reached by the circuit court judge and as such, the matters are not appropriate for consideration on appeal. In fact, the record before this Court is inadequate to make a determination of whether exigent circumstances existed or whether the items seized were in plain view. The motion to suppress was based upon the officers' illegal entry into the backyard of a

residence in order to conduct a search. The parties did not develop the record in order for these issues to be addressed. This Court's decision to go beyond the scope of the issues raised on appeal and decided by then-Circuit Court Judge McDonald exceeds this Court's appellate authority.

Based upon the specific points overlooked and/or misapprehended by this Court in its opinion discussed above, Appellant requests this Court rehear the matter.

Respectfully submitted,

A handwritten signature in cursive script that reads "Susan B. Hackett". The signature is written in black ink and is positioned above a horizontal line.

Susan B. Hackett  
Appellate Defender

This 7th day of May, 2015.

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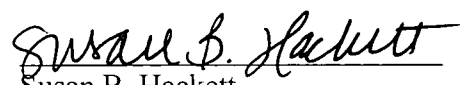
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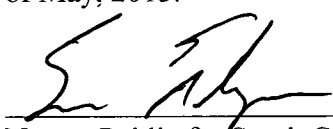
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CERTIFICATE OF SERVICE  
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The undersigned attorney hereby certifies that a true copy of the Petition for Rehearing in the above-entitled case has been served upon Mark R. Farthing, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Mr. Walter M. Bash, 230 Nero Lane, Moncks Corner, SC 29461, this 7th day of May, 2015.

  
Susan B. Hackett  
Appellate Defender

ATTORNEY FOR APPELLANT

SWORN TO BEFORE ME this 7th day  
of May, 2015.

  
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(L.S.)  
Notary Public for South Carolina  
My Commission Expires: October 30, 2022.