STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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S.C. Supreme Court

Certiorari to Berkeley County

Stephanie P. McDonald, Circuit Court Judge

Opinion No. 5314 (S.C. Ct. App. filed 4/22/15)

12-GS-08-01823-01824

THE STATE,

RESPONDENT,

V.

WALTER M. BASH

PETITIONER

APPENDIX

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Appellant,

v.

Walter M. Bash, Respondent.

Appellate Case No. 2013-001430

Appeal From Berkeley County
Stephanie P. McDonald, Circuit Court Judge

Opinion No. 5314
Heard March 3, 2015 – Filed April 22, 2015

REVERSED AND REMANDED

Attorney General Alan McCrory Wilson and Assistant Attorney General Mark Reynolds Farthing, both of Columbia; and Solicitor Scarlett A. Wilson, of Charleston, for Appellant.

Appellate Defender Susan Barber Hackett, of Columbia, for Respondent.

KONDUROS, J.: The State appeals the circuit court's decision granting Walter M. Bash's motion to suppress drug evidence relating to charges against him for trafficking in cocaine greater than 400 grams and trafficking in cocaine base. We reverse and remand.

FACTS/PROCEDURAL BACKGROUND

Officers in the Berkeley County Sheriff's Office received an anonymous tip that drug activity was occurring in the backyard of a particular home on Nelson Ferry Road in Moncks Corner. Narcotics officer Sergeant Lee Holbrook and his partner, Sergeant Kimberly Milks, were in the area and decided to go to the location. According to the officers' testimonies at the suppression hearing, they went to the property to speak with the owner and investigate the tip. Sergeant Milks testified she radioed to other officers in the area that she and Sergeant Holbrook were going to the location. She also testified she and Sergeant Holbrook put on their hats and vests marked "Sheriff" prior to approaching the scene.

Sergeant Holbrook testified he and Sergeant Milks drove to the property and observed the home was surrounded by a chain link fence.[1] They turned onto Shine Bash Road, a public road beside the house that provided a view into the backyard. Sergeant Holbrook testified they observed several people along with an old shed in a grassy area immediately outside the fence. A black truck, owned by Bash, was parked there as well.

Sergeant Holbrook pulled his vehicle, an unmarked brown Ford Expedition, off the road into the grassy area behind Bash's truck. As he and Sergeant Milks exited their vehicle, he observed one of the men drop a baggie containing a white powdery substance. He testified another man exited the passenger side of Bash's truck and fled toward the adjacent wooded area. That individual was chased by the other officers present while Sergeant Holbrook remained at the scene with the other individuals. Bash exited the driver's side of his truck, and Sergeant Holbrook asked him to step to the tailgate area of the vehicle where the others were gathered. Sergeant Holbrook stated that upon the return of the other officers, law enforcement proceeded to arrest the man observed dropping the powdery substance. Sergeant Holbrook testified he looked in the window of Bash's truck to ensure no other occupants were hiding. When he looked through the window, he saw scales of the type typically used in weighing drugs and a large plastic baggie containing a white powdery substance.

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[1] Photographic exhibits depict the front gate being chained and padlocked. However, the photographs provided were taken approximately two years after the subject incident. Neither party was able to confirm at oral argument if the gate was locked at the time of police entry onto the property.

At trial, Bash moved to suppress the drug evidence found in his vehicle, arguing officers entered and searched the curtilage of the property without a warrant and without meeting any of the exceptions to the warrant requirement. The State contended the grassy area outside the fence was not within the curtilage of the property but was an open field, thereby falling without the protection of the Fourth Amendment. The State further argued even if the grassy area beyond the fence was within the curtilage of the property, police had the right to enter to conduct a "knock and talk"[2] and their further actions were justified once they observed one of the men drop what appeared to be drugs and another fled the scene.

The circuit court granted Bash's motion to suppress the drug evidence seized from his truck. The circuit court concluded "the tip was not enough to roll up in the backyard solely to search for drugs. And there's no reasonable interpretation of the officers' testimony other than that's why they were there." This appeal followed.[3]

STANDARD OF REVIEW

"In criminal cases, appellate courts sit to review errors of law only, and are therefore bound by the trial court's factual findings unless clearly erroneous." *State v. Robinson*, 410 S.C. 519, 526, 765 S.E.2d 564, 568 (2014). "Because the admission of evidence is within the sound discretion of the trial court, appellate courts should not reverse the decision of the trial court absent an abuse of discretion." *Id.* "An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support." *State v. Hawes*, 411 S.C. 188, 191, 767 S.E.2d 707, 708 (2015) (internal quotation marks omitted). "On appeals from a motion to suppress based on Fourth Amendment grounds, [an appellate court] applies a deferential standard of review and will reverse if there is clear error." *State v. Adams*, 409 S.C. 641, 647, 763 S.E.2d 341, 344 (2014) (internal quotation marks omitted). "However, [an appellate court] reviews questions of law de novo." *Id.*

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[2] "A knock and talk . . . is a procedure used by police officers to investigate a complaint where there is no probable cause for a search warrant. The police officers knock on the door, try to make contact with persons inside, and talk to them about the subject of the complaints." *State v. Dorsey*, 762 S.E.2d 584, 588 n.6 (W.Va. 2014) (alteration by court) (internal quotation marks omitted).

[3] The issue of whether Bash had an expectation of privacy on someone else's property was briefly raised to the circuit court but was never fully developed and was never ruled upon by the circuit court. The issue is not raised on appeal.

LAW/ANALYSIS

The State contends the circuit court erred in finding the police conduct in this case violated the Fourth Amendment prohibition against unreasonable searches and seizures and suppressing the drug evidence against Bash.[4] We agree.

The Fourth Amendment guarantees "[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. "The Fourth Amendment does not proscribe all contact between police and citizens, but is designed to prevent arbitrary and oppressive interference by enforcement officials with the privacy and personal security of

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[4] After reviewing the record, it is unclear whether the circuit court ruled on whether the grassy area at issue was part of the curtilage of the subject property. While such a finding was arguably implicit in its ultimate decision, the circuit court indicated "[t]his isn't an open field's question." Additionally, the circuit court failed to address any of the *Dunn* factors used in a curtilage analysis. *U.S. v. Dunn*, 480 U.S. 294, 301 (1987) ("[C]urtilage questions should be resolved with particular reference to four factors: the proximity of the area claimed to be curtilage to the home, whether the area is included within an enclosure surrounding the home, the nature of the uses to which the area is put, and the steps taken by the resident to protect the area from observation by people passing by."). Finally, the circuit court cited to a non-curtilage Fourth Amendment case, *State v. Taylor*, in ultimately suppressing the drug evidence against Bash. 401 S.C. 104, 106-13, 736 S.E.2d 663, 664-67 (2013) (finding an investigatory stop and frisk of a defendant riding a bicycle on a public road based on an anonymous tip and police observations did not violate the Fourth Amendment). Because we conclude the conduct of police in this case did not violate the Fourth Amendment even if the grassy area was part of the curtilage, we decline to address the curtilage issue. *See Spartanburg Cnty. Dep't of Soc. Servs. v. Little*, 309 S.C. 122, 126, 420 S.E.2d 499, 502 (1992) (declining to address the appellant's additional reasons for reversal when the first issue compelled reversal and was dispositive of the appeal); *Ringer v. Graham*, 286 S.C. 14, 20, 331 S.E.2d 373, 377 (Ct. App. 1985) ("Because a new trial is granted, discussion of the other issues raised by the [appellants] is unnecessary."). Our remaining analysis assumes arguendo that police entered the curtilage of the property.

individuals." *State v. Corley*, 383 S.C. 232, 240, 679 S.E.2d 187, 191 (Ct. App. 2009) (internal quotation marks omitted), *aff'd as modified*, 392 S.C. 125, 708 S.E.2d 217 (2011). "We should construe the Fourth Amendment in a manner which will conserve public interests as well as the interests and rights of individual citizens." *Covey v. Assessor of Ohio Cnty.*, 777 F.3d 186, 194 (4th Cir. 2015) (alteration omitted) (internal quotation marks omitted).

"A policeman may lawfully go to a person's home to interview him. . . . *In doing* so, he obviously can go up to the door. . . . A police officer without a warrant is privileged to enter private property to investigate a complaint or a report of an ongoing crime." *State v. Wright*, 391 S.C. 436, 444, 706 S.E.2d 324, 328 (2011) (alterations by court) (citation and internal quotation marks omitted).

In *Wright*, police received an anonymous tip dogfighting was occurring at a particular location. *Id.* at 440, 706 S.E.2d at 325. Because the tip came in close to time for a shift change, officers were instructed to stay and congregate in a church parking lot near the subject property. *Id.* Two deputies drove past the location and observed lights shining next to a mobile home located at the address as well as a number of vehicles. *Id.* Law enforcement then paired up in several cars and drove to the address to investigate further. *Id.* at 440, 706 S.E.2d at 326. The deputies initially had their car headlights off as they drove down the private road toward the mobile home. *Id.* When deputies turned their lights on, they saw people and dogs running away from the mobile home, a portable dogfighting ring, and other indicia of dogfighting. *Id.* at 440-41, 706 S.E.2d at 326.

In finding the initial entrance of the officers onto the property did not violate the Fourth Amendment, the Supreme Court of South Carolina stated:

> [T]he deputies responded to an anonymous tip by first driving by the residence on a public road. From this road, deputies observed a large number of vehicles at the mobile home and saw spotlights shining next to the mobile home. These observations were not subject to any Fourth Amendment protection because they were knowingly exposed to the public. Moreover, these observations would give a reasonable police officer in the deputies' position cause to go forward. *However, even absent these observations, the police had the*

> *investigative authority to approach the front door of the mobile home in order to investigate the anonymous tip.* . . . If the deputies could properly drive up the dirt driveway to get to the front door, then their observations of the dogfighting pit and fleeing people and dogs did not exceed their investigative authority.

Id. at 445, 706 S.E.2d at 328 (emphasis added).

In the present case, officers' observations of several individuals in the backyard at the subject property corroborated the anonymous tip. This is less corroboration than the lights and cars observed in *Wright*. Nevertheless, *Wright* indicates police had investigatory authority to enter the property, even in the absence of corroboration, and go to the front door to investigate the tip.

Here, police did not approach the front door but instead drove into the grassy area behind the residence where they had observed the individuals. While no South Carolina cases have addressed this point, the Fourth Circuit has adopted the position police may bypass the front door of a residence and proceed to the backyard or other entrance for a knock and talk provided they have reason to believe the person they are attempting to contact will be found there.

"The textual touchstone of the Fourth Amendment is reasonableness." *Alvarez v. Montgomery Cnty.*, 147 F.3d 354, 358 (4th Cir. 1998) (internal quotation marks omitted). "When applying this basic principle, the [United States] Supreme Court has consistently eschewed bright-line rules, instead emphasizing the fact-specific nature of the reasonableness inquiry." *Id.* (internal quotation marks omitted).

"In line with this reasonableness approach, [the Fourth C]ircuit has permitted law enforcement officers to enter a person's backyard without a warrant when they have a legitimate law enforcement purpose for doing so." *Id.* An agent does not exceed "the scope of his legitimate purpose for being there by walking around to the back door when he was unable to get an answer at the front door." *Id.* (internal quotation marks omitted). Furthermore, an officer may "bypass the front door (or another entry point usually used by visitors) when circumstances reasonably

indicate that the officer might find the homeowner elsewhere on the property." *Covey*, 777 F.3d at 193.[5]

In *Alvarez*, police received a complaint of underage drinking at a party. 147 F.3d at 356. Officer Romack approached the front door of the residence to make contact with the homeowner, but, before knocking, another officer noticed a sign indicating the party was in the back of the house. *Id.* at 356-57. The officers proceeded to the backyard, where Officer Romack asked to speak with the host and encountered an underage drinker whom he asked for identification. *Id.* at 357. In determining whether the warrantless entry into the backyard violated the Fourth Amendment, the Fourth Circuit stated:

> The officers' entry into the backyard satisfied the Fourth Amendment's reasonableness requirement. They were responding to a 911 call about an underage drinking party and, based on the alcohol containers and the awkwardly parked cars, believed they had found the party. They entered the Alvarezes' property simply to notify the homeowner or the party's host about the complaint and to ask that no one drive while intoxicated. Thus, like the agents in *Bradshaw*[6], the officers in this case had a

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[5] "Other circuits likewise have found that the Fourth Amendment does not invariably forbid an officer's warrantless entry into the area surrounding a residential dwelling even when the officer has not first knocked at the front door." *Alvarez*, 147 F.3d at 358.

[6] In *U.S. v. Bradshaw*, law enforcement officers entered defendant's property to ask him about an abandoned car near his property. 490 F.2d 1097, 1100 (4th Cir. 1974). After knocking on the front door of the residence and receiving no response, one officer proceeded to the rear of the residence to knock on a back door. *Id.* at 1099. While en route, the officer noticed Bradshaw's truck exuded a strong odor of moonshine. *Id.* He peered through a crack in the closed, rear, swinging doors of the truck and saw multiple gallon jugs containing a white liquid which was in fact moonshine. *Id.* at 1099-100. The court stated: "[T]he agents had a legitimate reason for this incursion unconnected with a search of such premises directed against the accused. They were clearly entitled to go onto defendant's premises in order to question him concerning the abandoned vehicle near his property. Furthermore, we cannot say that [the officer] exceeded the scope of his legitimate purpose for being there by walking around to the back door

> legitimate reason for entering the Alvarezes' property unconnected with a search of such premises. . . . In furtherance of this purpose, they obviously could approach the front door in an attempt to contact the Alvarezes. And in light of the sign reading "Party In Back" with an arrow pointing toward the backyard, it surely was reasonable for the officers to proceed there directly as part of their effort to speak with the party's host.

Id. at 358-59 (second alteration by the court) (citations and internal quotation marks omitted).

In this case, Sergeant Holbrook and Sergeant Milks testified they saw several individuals in the backyard as they arrived at the property. That observation provided a reasonable basis for believing they would find the homeowner in the backyard. Therefore, we conclude entering the grassy area behind the house to investigate the anonymous tip did not violate the Fourth Amendment.

Finally, the circuit court concluded the officers' stated intent of going to the property simply to talk to the homeowner was implausible and therefore police entry onto the property violated the Fourth Amendment as a warrantless search.[7] However, the Supreme Court of South Carolina has recognized "[t]he Fourth Amendment's concern with reasonableness allows certain actions to be taken in certain circumstances, *whatever* the subjective intent." *Wright*, 391 S.C. at 444, 706 S.E.2d at 328 (internal quotation marks omitted). "Moreover, a police officer's subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis." *State v. Vinson*, 400 S.C. 347, 352, 734 S.E.2d 182, 184 (Ct. App. 2012) (internal quotation marks omitted). "'[E]venhanded law enforcement is best

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when he was unable to get an answer at the front door." *Id.* at 1100 (footnote omitted). Nevertheless, the court ultimately suppressed because the moonshine was not in the officer's plain view and the warrantless search of the truck was not necessitated by any other circumstances. *Id.* at 1101-04.

[7] We recognize findings of credibility are generally left to the circuit court. *See Gowdy v. Gibson*, 381 S.C. 225, 233, 672 S.E.2d 794, 798 (Ct. App. 2008) (acknowledging while this court is not bound by credibility determinations, "we generally defer to the findings of the trial judge in that regard") *aff'd* 391 S.C. 374, 706 S.E.2d 495 (2011).

achieved by the application of objective standards of conduct, rather than standards that depend upon the subjective state of mind of the officer.'" *Wright*, 391 S.C. at 443, 706 S.E.2d at 327 (quoting *Horton* v. *California*, 496 U.S. 128, 138 (1990)). "An action is reasonable under the Fourth Amendment, regardless of the individual officer's state of mind, as long as the circumstances, viewed objectively, justify [the] action." *State v. Herring*, 387 S.C. 201, 210, 692 S.E.2d 490, 494 (2009) (alteration by court) (internal quotation marks omitted).

We conclude the circuit court's injection of the officers' subjective intent into its analysis was an error of law.[8] While the circuit court may have found the officers' underlying intent was to search the premises, that intent is not impermissible provided the officers had a reasonably objective basis for their actual conduct. Sergeant Holbrook and Sergeant Milks testified they entered the grassy area because they saw several individuals there, they exited their vehicles, and they began to speak to the individuals based on an anonymous tip.[9] Therefore, we are

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[8] We share the learned circuit court's apparent concern regarding the lack of specificity as to the source and manner of conveyance of the anonymous tip in this case. Additionally, we recognize the use of the knock and talk procedure is sometimes pretextual. Nevertheless, we confine our review to the relevant case law and specific facts in the record before us.

[9] The record is unclear as to how many officers were ultimately on the scene, when those officers arrived, or where they were located when Sergeant Holbrook and Sergeant Milks parked in the grassy area. Sergeant Holbrook testified "quite a few" officers chased after the fleeing individual and Sergeant Milks testified they "let the other agents" know on the radio they were going to investigate this tip. Notably, in *Wright*, the opinion indicates that after receiving an anonymous tip, "law enforcement gathered at [a nearby] church, paired up in several cars, and drove to the address to investigate further." 391 S.C. at 440, 706 S.E.2d at 326. This suggests the number of officers involved is not dispositive of whether police contact is a knock and talk or a de facto search. Additionally, Sergeant Milks testified the officers put on their vests and hats indicating they were part of the Sheriff's Office. The circuit court found this conduct to be "suiting up" and that it undercut the nature of this encounter as a knock and talk. However, it is a more open policy for officers to identify themselves during such an investigatory encounter, and it is not unreasonable for officers to consider their own safety in such circumstances.

compelled to reverse the circuit court's finding the initial police entry onto the property violated the Fourth Amendment.[10]

The circuit court did not reach the issues of whether the discovery of drug evidence in Bash's truck violated the Fourth Amendment (1) because no exigent circumstances existed or (2) because it was not in plain view. However, because the suppression of the evidence could still be upheld based on these points, we will address them. *See Solanki v. Wal-Mart Store No. 2806*, 410 S.C. 229, 235, 763 S.E.2d 615, 618 (Ct. App. 2014) ("According to Rule 220(c), SCACR, an appellate court may affirm the lower court's judgment for any reason appearing in the record on appeal.").

"A warrantless search is justified under the exigent circumstances doctrine to prevent a suspect from fleeing or where there is a risk of danger to police or others inside or outside a dwelling. In such circumstances, a protective sweep of the premises may be permitted." *Herring*, 387 S.C. at 210, 692 S.E.2d at 495 (citation omitted). The plain view doctrine justifies seizure of evidence when the seizing officer is lawfully present at the place from which the evidence can be plainly viewed and the evidence's incriminating character is immediately apparent. *Wright*, 391 S.C. at 443, 706 S.E.2d at 327.

Once in the backyard, Sergeant Holbrook observed an individual drop a baggie containing a white powdery substance. Next, the officers observed another individual jump out of Bash's truck and flee the scene. The person did not simply leave or request to go but ran toward a wooded area. These occurrences, coupled with the anonymous tip, gave officers probable cause to believe criminal activity was ongoing and the individuals might flee or otherwise attempt to evade law enforcement. According to Sergeant Holbrook's testimony, in securing the scene, he looked inside the window of Bash's truck and observed drug weighing scales and cocaine. The photographic exhibits in the record support this testimony. Additionally, the incriminating nature of the evidence was readily apparent to an experienced narcotics officer like Sergeant Holbrook. Because we have concluded Sergeant Holbrook was in a place he was lawfully permitted to be, the

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[10] Had officers entered the grassy area and demanded to search the individuals or their vehicles, it would have exceeded the parameters of a knock and talk type encounter. Likewise, had the individuals asked the officers to leave, any continuing police presence on the property would have gone beyond the scope of a knock and talk.

incriminating evidence was in plain view, and its criminal nature was readily apparent, we conclude its seizure did not violate the Fourth Amendment.

CONCLUSION

Assuming arguendo, police entered the curtilage of the property at issue, we conclude that conduct did not violate the Fourth Amendment prohibition against unreasonable searches and seizures. Police were permitted to enter the property to investigate an anonymous tip and had reason to believe they would locate the owner in the grassy area at the rear of the property. Even if the officers hoped to find evidence of drug activity upon entry, that subjective intent does not convert the police conduct in this case into a Fourth Amendment violation. Once at the scene, the actions of the individuals present gave officers probable cause to believe criminal activity was ongoing and that the suspects might flee or otherwise try to avoid police action. Sergeant Holbrook's looking into Bash's truck window was permissible as part of a protective sweep of the area, and the drug evidence was in plain view and readily identifiable as contraband. Consequently, we reverse the circuit court's grant of Bash's motion to suppress and remand this matter to the circuit court for trial.

REVERSED AND REMANDED.

THOMAS and GEATHERS, JJ., concur.

THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

THE STATE,

APPELLANT,

V.

WALTER M. BASH,

RESPONDENT

Appellate Case No. 2013-001430

Appeal from Berkeley County

Stephanie P. McDonald, Circuit Court Judge

Opinion No. 5314

PETITION FOR REHEARING

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 (4th Cir. 1998). Although Alaverez is easily distinguished from the present case, the Fourth Circuit's opinion in Alvarez pre-dated 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.

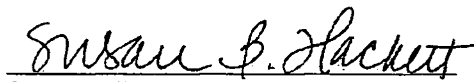
"The scope of a licenses – express or implied – is limited not only to a particular area but also to a specific purpose." Jardines, 133 S.Ct. at 1416. Where the question is "*whether* the officer's conduct was an objectively reasonable search," the reviewing court must determine "the officers had an 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,



Susan B. Hackett
Appellate Defender

This 7th day of May, 2015.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Berkeley County

Stephanie P. McDonald, Circuit Court Judge

THE STATE,

APPELLANT,

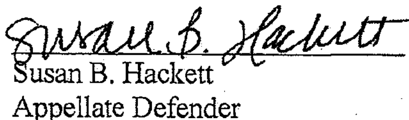
V.

WALTER M. BASH,

RESPONDENT

CERTIFICATE OF SERVICE

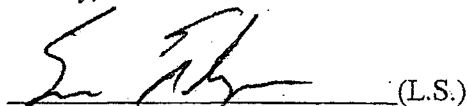
The undersigned attorney hereby certifies that a true copy of the Petition for Rehearing in the above-entitled case has been served upon Mark R. Farthing, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Mr. Walter M. Bash, 230 Nero Lane, Moncks Corner,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



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

The South Carolina Court of Appeals

The State, Appellant,

v.

Walter M. Bash, Respondent.

Appellate Case No. 2013-001430

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

Paula H. Thomas, J.

[signature], J.

John D. Geathers, J.

JUN 24 2015

Columbia, South Carolina

cc:
Alan McCrory Wilson, Esquire
Mark Reynolds Farthing, Esquire
Susan Barber Hackett, Esquire
Scarlett Anne Wilson, Esquire
The Honorable Stephanie P. McDonald

FILED
June 24, 2015