STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

ORIGINAL

THE STATE,

RESPONDENT,

V.

WALTER M. BASH

PETITIONER

RECEIVED
JAN 17 2017
S.C. SUPREME COURT

APPELLATE CASE NO. 2015-001582

On Writ of Certiorari to the Court of Appeals
Appeal from Berkeley County
Stephanie P. McDonald, Circuit Court Judge

Opinion No. 27692

RETURN TO THE STATE'S PETITION FOR REHEARING

On December 21, 2016, this Court issued its unanimous opinion in State v. Bash, Op. No. 27692 (S.C. Sup. Ct. filed Dec. 21, 2016)(Shearouse Adv. Sh. 48 at 18). On January 10, 2017, the state filed a petition for rehearing pursuant to Rule 221(a), SCACR. Bash, through undersigned counsel, files this return. Bash urges this Court to deny the state's petition for rehearing as the opinion is a straight forward application of (1) the relevant standard of review regarding factual findings by the trial judge and (2) clearly established federal law governing

what constitutes an unreasonable search in violation of the Fourth Amendment to the United States Constitution.[1]

Introduction

In its petition for rehearing, the state posed two areas of concern: (1) "this Court misapprehended the facts by concluding 'all of the circumstances surrounding the officers' entry into the grassy area objectively demonstrate[d] their purpose was to conduct a search of the grassy area, not to speak to the homeowner'" and (2) "this Court misapplied the law in finding the officers' subjective intentions were pertinent to the analysis of whether their actions were in compliance with the implicit license." Rhg. at 2; Rhg. at 5. This Court neither misapprehended the facts nor misapplied the law.

Regarding the state's initial concern, this Court's factual findings, the state asks this Court to substitute its findings of fact for those of the trial court. This Court should reject the state's invitation, as the opinion issued by this Court simply applied the correct standard of review to the trial judge's findings of fact. From the outset, this Court made clear that as to the circuit court's findings of fact, the appellate court "must affirm 'if there is any evidence to support it,' and 'may reverse only for clear error.'" State v. Bash, Op. No. 27692 (S.C. Sup. Ct. filed Dec. 21, 2016)(Shearouse Adv. Sh. 48 at 18)(quoting State v. Wright, 391 SC. 436, 442, 706 S.E.2d 324, 327 (2011)). This standard of review guided this Court's opinion, as it must. See State v. Moore, 415 S.C. 245, 251, 781 S.E.2d 897, 900 (2016)("explaining that "[o]n appeals from a motion to suppress based on Fourth Amendment grounds, this Court applies a

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[1] If this Court grants the state's petition for rehearing and alters the opinion to permit the admission of the unconstitutionally seized evidence under the Fourth Amendment, Bash respectfully requests this Court consider his argument based on the South Carolina Constitution, which was an alternate sustaining ground. This Court had no need to reach this issue previously because this Court affirmed under the Fourth Amendment.

deferential standard of review and will reverse if there is clear error" and "[t]he 'clear error' standard means that an appellate court will not reverse a trial court's finding of fact simply because it would have decided the case differently. … Rather, appellate courts must affirm if there is any evidence to support the trial court's ruling")(internal quotations and citations omitted); Robinson v. State, 407 S.C. 169, 180-181, 754 S.E.2d 862, 868 (2014)(stating that "[o]n appeal from a motion to suppress on Fourth Amendment grounds, this Court applies a deferential standard of review and will reverse only if there is clear error"); State v. Adams, 409 S.C. 641, 647, 763 S.E.2d 341, 345 (2014)(same); State v. Brown, 401 S.C. 82, 87, 736 S.E.2d 263, 265 (2012)(holding that "[w]hen reviewing a Fourth Amendment search and seizure case, an appellate court must affirm the trial court's ruling if there is any evidence to support it; the appellate court may reverse only for clear error"); State v. Tindall, 388 S.C. 518, 521, 698 S.E.2d 203, 205 (2010)(stating that "[o]n appeals from a motion to suppress based on Fourth Amendment grounds, this Court applies a deferential standard of review and will reverse if there is clear error"); State v. Provet, 405 S.C. 101, 107, 747 S.E.2d 453, 456 (2013)(providing that "South Carolina appellate courts review Fourth Amendment determinations under a clear error standard. We affirm if there is any evidence to support the trial court's ruling"); State v. Missouri, 361 S.C. 107, 111, 603 S.E.2d 594, 596 (2004)(explaining that "[w]hen reviewing a Fourth Amendment search and seizure case, an appellate court must affirm the trial judge's ruling if there is *any* evidence to support the ruling. … The appellate court will reverse only when there is clear error")(internal citation omitted)(emphasis in original); State v. Brockman, 339 S.C. 57, 66, 528 S.E.2d 661, 666 (2000)(stating that in the Fourth Amendment context, the Court "review[s] the trial court's ruling like any other factual finding and reverse if there is clear error [and] will affirm if there is any evidence to support the ruling"). In rendering the facts of

the case, this Court looked at the facts elucidated by the trial judge and determined the record contained evidentiary support for those facts. The record clearly supported the circuit court's finding that the backyard was curtilage[2] and that the officers exceeded any implied license by approaching the backyard of the residence with intent to search.

The state's second concern is that this Court misapplied the law in determining the subjective intentions of the police officers were relevant to the Fourth Amendment analysis. On the contrary, this Court's reading and application of the law was absolutely correct. According to the state, the subjective intentions of the police officers play *no role whatsoever* in Fourth Amendment jurisprudence. In order to arrive at such a conclusion, the state must contort the clear and unambiguous language of Florida v. Jardines, 133 S.Ct. 1409 (2013). As discussed *infra*, the subjective intentions of the officers must be considered when determining whether officers conducted a search, which was the issue squarely presented by this case.

Factual findings

Each factual assertion stated in this Court's opinion is supported by ample evidence in the record. On November 10, 2011, an *unknown* person at the Beaufort County Sheriff's Office (BCSO) received a phone call from an *unknown* person "stating that there was drug activity at a particular residence." The unknown person at BCSO called Lee Holbrook on his cellular phone, not the police radio, with this information. Holbrook and Kimberly Milks, who "just happened to be in Moncks Corner," "drove over there and handled it." R. 20, lines 10-17; R. 44, line 4; R.

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[2] In its petition for rehearing, the state's main argument assumes "for argument's sake" that the area where the police intruded was "part of the curtilage of the adjacent residence." Rhg. at 2. However, in a footnote, the state "reasserts its position the open grassy area was an 'open field' as opposed to a part of the residence's curtilage." Rhg. at 2 n. 1. In light of the state's failure to put forward particular points regarding what is alleged this Court overlooked or misapprehended on this point, Bash offers no specific response. Rather, Bash's general response is this Court's factual and legal findings were absolutely correct regarding the curtilage issue.

44, lines 16-24; R. 46, lines 4-6; R. 54, lines 11-17; R. 60, lines 14-18. Holbrook had *no idea* who provided the alleged tip. R. 42, lines 11-21; R. 43, lines 1-11; R. 44, lines 13-15. Shockingly, Holbrook could not even provide the name of the person at BCSO who contacted him about the tip. R. 42, lines 11-21; R. 43, lines 1-11; R. 44, lines 13-15.

Holbrook, Milks, and a number of other unidentified police officers[3] put on their police vests and hats and arrived at the home in unmarked cars. R. 21, lines 13-16; R. 45, lines 14-18; R. 46, lines 7-10; R. 54, lines 18-22. No lights were on in the house, but "there were some males behind the house in a grassy area." According to Holbrook, "instead of actually approaching the house and conducting a knock-and-talk investigation, we just simply drove towards the backyard in a grassy spot behind the backyard where the individuals were – there were several individuals back there - - and simply got out of the vehicle to meet with those folks." R. 22, lines 8-16; R. 54, lines 22-24.[4] He saw no need to make contact with the house because he saw people in the backyard. R. 28, line 25 – R. 29, line 12.

Holbrook drove into the home's backyard without using a driveway or any other established access to the home. R. 27, lines 22-24; R. 28, lines 16-23; R. 45, line 22 – R. 46, line 1; R. 55, lines 3-11. Holbrook pulled his car "in behind where the truck was parked in the grass," and parked on the grass as well. He simply drove his car from the road directly into the home's yard. R. 28, lines 16-23.

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[3] See United States v. Berry, 468 F. Supp. 2d 870, 880 (N.D. Tex. 2006)(noting at least eight officers took cover positions around the house and the officers had a planned effort to evade the warrant requirement because such police action was "overkill" for a "knock and talk").

[4] See Quintana v. Commonwealth, 276 S.W.3d 753 (Ky. 2009)(providing that most "knock and talks are typically conducted at the front door" because the front door is "the main entrance to the home," where the homeowner's consent to approach is assumed and noting "[t]he back door of a home is not ordinarily understood to be public accessible").

Concluding "this one's not even close," Judge McDonald suppressed the evidence, relying upon Jardines, supra. She held that "[a]n anonymous tip is not enough to allow you to roll up in somebody's backyard when your sole purpose for going there is to search it." R. 65, lines 12-22. She found the backyard was part of the curtilage. R. 73, lines 8-11. Judge McDonald explained there were no exigent circumstances present and that Holbrooks and Milks did not observe anything suspicious from the street. R. 73, lines 3-7. Essentially, Judge McDonald found "they suited up and went into the curtilage of this lady's house based on an anonymous tip alone." R. 81, lines 9-11.

In arriving at her conclusion and in keeping with the dictates of Jardines, supra, Judge McDonald made a credibility determination as well: "[T]he 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. They were not there to politely ask the homeowner, Hey, are you selling drugs out of your house? They were there to see if they could find any." R. 73, lines 13-21.

The record evidence supported the trial judge's decision, to which this Court did, and must, afford great deference. Finding "any evidence" in the record to support the circuit court's factual findings on this point ends the inquiry. Nevertheless, some discussion of the law underscores this Court's factual findings as this case comes down to whether the police were engaged in a so-called "knock-and-talk" or whether the police were engaged in a search.

The so-called "knock-and-talk" is a product of an implied license to trespass on private property, which the United States Supreme Court has recognized: "'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. The Jardines Court reaffirmed the holding in Kentucky v. King, 563 U.S. 452, 469-470 (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.

Simply acknowledging that the theory of implied license exists and is extended to police officers for the purpose of a so-called "knock-and-talk" does not end the inquiry, however. It is necessary to determine whether the police were engaged in a search or a "knock-and-talk." This is where the second portion of this Court's opinion, and the second concern for the state, plays a crucial role.

Consideration of subjective intentions

Any police intrusion on private property for the purpose of obtaining information is a search under the Fourth Amendment. United States v. Jones, 565 U.S. ___, 132 S.Ct. 945, 949 (2012); see also McHam v. State, 404 S.C. 465, 477-80, 746 S.E.2d 41, 48-49 (2013)(finding officer's slight intrusion into a vehicle was a search under the Fourth Amendment). Reasoning "[t]here is no customary invitation to" introduce "a trained police dog to explore the area around the home in hopes of discovering incriminating evidence," the United States Supreme Court held the police engaged in an unreasonable search of Jardines' porch. Jardines, 133 S.Ct. at 1416. The Court compared the dog-sniff scenario to a "visitor exploring the front path with a metal detector, or marching his bloodhound into the garden before saying hello and asking permission." Id. "[T]he background social norms that invite a visitor to the front door do not invite him there to conduct a search." Id.

The Jardines Court distinguished the line of cases stating that "the subjective intent of the officer is irrelevant." Id. at 1416-17. Jardines explained the question of "whether the officers had an implied license to enter the porch," "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. The Court explained:

> The officers were gathering information in an area belonging to Jardines and immediately surrounding his house – in the curtilage of the house, which we have held enjoys protection as part of the home itself. And they gathered that information by physically entering and occupying the area to engage in conduct not explicitly or implicitly permitted by the homeowner.

Id. at 1414.

"The scope of a license – express or implied – is limited not only to a particular area but also to a specific purpose." Id. 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.

It is beyond question that the Jardines Court required examination of the subjective intent of the officer to determine the scope of a license to enter a homeowner's property. George M. Dery III, Failing to Keep "Easy Cases Easy": *Florida v. Jardines* Refuses to Reconcile Inconsistencies in Fourth Amendment Privacy Law By Instead Focusing on Physical Trespass, 47 Loy. L.A. L. Rev. 451, 474 (2014). Examining the facts of Jardines, Dery explained that "[w]alking a dog, even up to someone's porch, is perfectly reasonable" and "can only become

unreasonable using Jardine's intent analysis." Id. at 476. "The deeper inquiry – what, exactly, is the purpose for the dog's presence, and why did the person bring the dog to the door – unmasks the true nature of the government action." Id. Another commentator explained that "[t]he final element of the Jardines test turns on a police officer's subjective motivation for entering the property." Kit Kinports, The Dog Days of Fourth Amendment Jurisprudence, 108 Nw. U. L. Rev. Colloquy 64, 72 (2013). "[L]aw enforcement intent is only irrelevant in Fourth Amendment cases involving searches that are 'objectively reasonable.'" Id. at 73. However, in trespass cases the question is "*whether* the officer's conduct was objectively reasonable search," which requires examination of the officer's intent. Id. (internal quotation omitted). Jamesa J. Drake put it simply: "If the police were unambiguously within the curtilage, then the only remaining question is why they were there." Jamesa J. Drake, Knock and Talk No More, 67 Me. L. Rev. 25, 31 (2014).

This Court, and the trial court, correctly considered the subjective intent the officers upon entry onto the private property in determining whether the officers' actions were within the ambit of an implied license or a search.

Conclusion

In the present case, the officers were entering the property with the intent to search, which was a factual finding made by the trial judge. The police exceeded the scope of the implied license for a "knock and talk" by proceeding immediately 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, and those factual findings are supported by ample evidence in the record. 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.

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. Giving due deference to Judge McDonald's factual findings, this Court affirmed her ruling to suppress the evidence based upon the officers' violation of the Fourth Amendment by trespassing on the property in excess of the implied license to enter.

Bash respectfully requests this Court deny the state's petition for rehearing and permit the well-reasoned, unanimous decision of this Court stand.

Respectfully Submitted,

Susan B. Hackett

SUSAN B. HACKETT
Appellate Defender

This 17th day of January, 2017.

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a copy of the Return to the State's Petition for Rehearing in the above-entitled case has been served upon Mark Farthing, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Walter M. Bash, at 230 Nero Lane, Moncks Corner, SC 29461, this 17th day of January, 2017.

Susan B. Hackett
Susan B. Hackett
Appellate Defender
ATTORNEY FOR APPELLANT

SWORN TO BEFORE ME this 17th day of January, 2017.

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