STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Dorchester County

Honorable Maite Murphy, Circuit Court Judge

Opinion No. 5650 (S.C. Ct. App. Filed 5/15/2019)
2014-GS-18-1529; 2014-GS-18-1530

THE STATE,

RESPONDENT,

V.

FELIX KOTOWSKI,

PETITIONER

APPENDIX

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Felix Kotowski, Appellant.

Appellate Case No. 2016-000842

Appeal From Dorchester County
Maite Murphy, Circuit Court Judge

Opinion No. 5650
Heard October 9, 2018 – Filed May 15, 2019

AFFIRMED

Appellate Defender Lara Mary Caudy, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson and Assistant Deputy Attorney General David A. Spencer, both of Columbia, and Solicitor David Michael Pascoe, Jr., of Orangeburg, all for Respondent.

KONDUROS, J.: Felix Kotowski appeals his convictions for manufacturing methamphetamine and possession of less than one gram of methamphetamine, arguing the trial court erred in (1) denying his motion to suppress evidence seized during a "knock and talk," (2) denying his motion to suppress evidence seized during a protective sweep of a residence where Kotowski was an overnight guest, and (3) admitting National Precursor Log Exchange (NPLEx) records into evidence. We affirm.

FACTS/PROCEDURAL HISTORY

On June 13, 2014, Sergeant Frank Thompson from the Dorchester County Sheriff's Office received an anonymous tip about the possibility of a drug house at [redacted] Marsh Point Road. Sergeant Thompson immediately checked NPLEx, which is a system that provides data used by pharmacies and law enforcement to track sales of pseudoephedrine. Sergeant Thompson's search revealed several pseudoephedrine purchases by Michelle Vining, the homeowner, as well as some by Brian Edwards. Sergeant Thompson set up an alert to be notified for any subsequent pseudoephedrine purchases by these individuals.

Sergeant Thompson also began to conduct "spotty surveillance" of the residence, mainly consisting of drive-by viewings. From this surveillance, Sergeant Thompson confirmed Vining's vehicle was parked at the residence. On one occasion, Sergeant Thompson observed a vehicle belonging to William Cherry parked at the residence. Sergeant Thompson was familiar with Cherry because Cherry's father had been convicted of methamphetamine related offenses.

On October 29, 2014, Sergeant Thompson received three NPLEx notifications indicating Vining had attempted to purchase pseudoephedrine three separate times. Two of Vining's attempts were blocked because she would have exceeded the statutory threshold. Vining successfully purchased a smaller amount at a different store on her third attempt. Because of these three transactions, Sergeant Thompson decided to conduct a knock and talk at Vining's residence the following day.

Sergeant Thompson, along with Detectives Daniel Lundberg and Brandon Allen—all of the Dorchester County Metro Narcotics Unit—arrived at Vining's residence the following day wearing clothing indicating they were law enforcement. After knocking on the door, Sergeant Thompson saw someone looking through the blinds on the right side of the house. He requested the person come to the door to no response. After knocking a second time, Detective Lundberg observed an individual at a second story window on the right side. After a third knock, Sergeant Thompson spotted an individual at a second story window, this time on the left side. After the third knock, Kotowski opened the door, stepped outside, and closed the door behind him.

When Kotowski stepped outside, Sergeant Thompson was "immediately overwhelmed with the odor of ammonia" coming from Kotowski. When asked if he lived at the residence, Kotowski stated he did not and provided he was there with his girlfriend Lisa. Kotowski called for Lisa to come to the door and when

she did not, went inside the house to retrieve her. Kotowski attempted to close the front door behind him when he re-entered the residence, but Sergeant Thompson held the door open with his foot.

When Lisa came to the door, Sergeant Thompson asked her if she knew the location of Michelle Vining, to which Lisa answered she did not. As the conversation progressed, Lisa admitted to being Michelle Vining. Sergeant Thompson explained the officers received a tip concerning methamphetamine manufacturing occurring at the residence. Sergeant Thompson asked her if she would consent to a search of the residence, and Vining declined. Sergeant Thompson then asked if anyone else lived at the residence. According to Sergeant Thompson, Vining "was pretty deceptive about her answer and kind of hem hawing."

Believing something to be amiss, Sergeant Thompson ordered Detective Allen and Detective Lundberg to conduct a protective sweep of the residence while he contacted another officer to obtain a search warrant for the residence. During the protective sweep, Detective Lundberg and Detective Allen encountered a "heavy haze or a gaseous atmosphere" emanating from an upstairs bathroom and upon opening the door, were confronted by an overwhelming smell of ammonia. Based on evidence in plain sight during the protective sweep, a search warrant was issued, and Kotowski and Vining were arrested.

A grand jury indicted Kotowski on March 16, 2015, for manufacturing methamphetamine and possession of less than one gram of methamphetamine. Prior to trial, Kotowski moved to suppress the evidence seized in the house. The trial court denied Kotowski's motion. At the conclusion of trial, the jury found Kotowski guilty of both counts. The trial court sentenced Kotowski to concurrent terms of seven years' imprisonment for manufacturing and three years' imprisonment for possession of less than one gram of methamphetamine. This appeal followed.

STANDARD OF REVIEW

"In criminal cases, the appellate court sits to review errors of law only." *State v. Baccus*, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). "The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion." *State v. Gaster*, 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002). "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." *Clark v.*

Cantrell, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000). "On appeal from a motion to suppress on Fourth Amendment grounds, this [c]ourt applies a deferential standard of review and will reverse only if there is clear error." *State v. Counts*, 413 S.C. 153, 160, 776 S.E.2d 59, 63 (2015) (quoting *Robinson v. State*, 407 S.C. 169, 180-81, 754 S.E.2d 862, 868 (2014)).

LAW/ANALYSIS

I. Knock and Talk

Kotowski argues the trial court erred in denying his motion to suppress evidence found following the knock and talk and subsequent protective sweep of the house. He maintains the law enforcement officers did not have reasonable suspicion to conduct a knock and talk and therefore violated his right to privacy under Article I, Section 10 of the South Carolina Constitution. We disagree.

The Fourth Amendment to the United States Constitution protects a person's right to be free from unreasonable searches and seizures. U.S. Const. amend. IV. "Generally, the Fourth Amendment requires the police to have a warrant in order to conduct a search." *Counts*, 413 S.C. at 163, 776 S.E.2d at 65 (quoting *Robinson v. State*, 407 S.C. 169, 185, 754 S.E.2d 862, 870 (2014)). "In parallel with the protection of the Fourth Amendment, the South Carolina Constitution also provides a safeguard against unlawful searches and seizures." *Id.* at 164, 776 S.E.2d at 65 (quoting *State v. Forrester*, 343 S.C. 637, 643, 541 S.E.2d 837, 840 (2001)). "The relationship between the two constitutions is significant because '[s]tate courts may afford more expansive rights under state constitutional provisions than the rights which are conferred by the Federal Constitution.'" *Id.* (quoting *Forrester*, 343 S.C. at 643, 541 S.E.2d at 840). "Evidence seized in violation of the warrant requirement must be excluded from trial." *Id.* at 163, 776 S.E.2d at 65 (quoting *Robinson*, 407 S.C. at 185, 754 S.E.2d at 870). "However, a warrantless search may nonetheless be proper under the Fourth Amendment if it falls within one of the well-established exceptions to the warrant requirement." *Id.* (quoting *Robinson*, 407 S.C. at 185, 754 S.E.2d at 870).

The *Counts* court looked to other jurisdictions to determine what sort of procedure should be necessary to protect citizen's right to privacy. Specifically, the court analyzed "whether law enforcement needs to: (1) have probable cause or reasonable suspicion to approach the private residence; or (2) inform the citizen of his or her right to refuse consent to search." *Id.* at 171, 776 S.E.2d at 69. The court concluded, "rather than enunciating an unyielding rule or eliminating the

'knock and talk' technique in its entirety, we hold that law enforcement must have reasonable suspicion of illegal activity at a targeted residence prior to approaching the residence and knocking on the door." *Id.* at 172, 776 S.E.2d at 70.

Reasonable suspicion consists of "'a particularized and objective basis' that would lead one to suspect another of criminal activity." *State v. Lesley*, 326 S.C. 641, 644, 486 S.E.2d 276, 277 (Ct. App. 1997) (quoting *United States v. Cortez*, 449 U.S. 411, 417 (1981)). "Reasonable suspicion is more than a general hunch but less than what is required for probable cause." *State v. Willard*, 374 S.C. 129, 134, 647 S.E.2d 252, 255 (Ct. App. 2007). "An additional factor to consider when determining whether reasonable suspicion exists is the officer's experience and intuition." *State v. Taylor*, 388 S.C. 101, 116, 694 S.E.2d 60, 68 (Ct. App. 2010), *rev'd on other grounds*, 401 S.C. 104, 736 S.E.2d 663 (2013). "Nevertheless, 'a wealth of experience will [not] overcome a complete absence of articulable facts.'" *Id.* (quoting *United States v. McCoy*, 513 F.3d 405, 415 (4th Cir. 2008)). "Furthermore, an officer's impression that an individual is engaged in criminal activity, without confirmation, does not amount to reasonable suspicion." *Id.*

The trial court did not err in denying Kotowski's motion to suppress the evidence seized by law enforcement officers after conducting the knock and talk. Law enforcement relied on three pieces of information in arguing they had reasonable suspicion: (1) the anonymous tip Sergeant Thompson received on June 13, 2014; (2) the spotty surveillance Sergeant Thompson conducted of the house, which is where he recognized the vehicle belonging to the son of a convicted methamphetamine cook; and (3) the NPLEx records, showing what Sergeant Thompson referred to as "a substantial amount of purchases."

Here, we find the NPLEx records reflecting three attempted pseudoephedrine purchases in a single day, in conjunction with Sergeant Thompson's testimony he had received extensive training in methamphetamine labs and has been "clandestine meth lab certified" since 2004, adequate to raise reasonable suspicion. Sergeant Thompson has investigated over one hundred methamphetamine labs during his career. He testified he noticed Vining tended to go to different pharmacies to make pseudoephedrine purchases, which he provided is consistent with illicit drug manufacturers attempting to conceal their movement from law enforcement. Due to Sergeant Thompson's experience in cases involving methamphetamine manufacturing, along with the articulable facts listed above, the trial court did not err in finding law enforcement officers had reasonable suspicion to conduct a knock and talk. Accordingly, the trial court did not err in admitting the evidence discovered pursuant to the knock and talk.

II. Protective Sweep

Kotowski contends the trial court erred in admitting evidence of an active methamphetamine lab because law enforcement officers violated his Fourth Amendment rights when they conducted a protective sweep of a residence where he was an overnight guest without exigent circumstances and without a warrant. We disagree.

"The exigent circumstances doctrine provides an exception to the Fourth Amendment[']s protection against warrantless searches, but only where, from an objective standard, a compelling need for official action and no time to secure a warrant exists." *Counts*, 413 S.C. at 163, 776 S.E.2d at 65 (quoting *State v. Abdullah*, 357 S.C. 344, 351, 592 S.E.2d 344, 348 (Ct. App. 2004)). "For instance, 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." *Id.* (quoting *Abdullah*, 357 S.C. at 351, 592 S.E.2d at 348). "In such circumstances, a protective sweep of the premises may be permitted." *Id.* (quoting *Abdullah*, 357 S.C. at 351, 592 S.E.2d at 348). "The linchpin of the protective sweep analysis is not 'the threat posed by the arrestee, [but] the safety threat posed by the house, or more properly by unseen third parties in the house.'" *United States v. Jones*, 667 F.3d 477, 484 (4th Cir. 2012) (quoting *Maryland v. Buie*, 494 U.S. 325, 336 (1990)). "'[T]he Fourth Amendment's concern with "reasonableness" allows certain actions to be taken in certain circumstances, *whatever* the subjective intent.'" *State v. Wright*, 391 S.C. 436, 444, 706 S.E.2d 324, 328 (2011) (quoting *Whren v. United States*, 517 U.S. 806, 814 (1996)).

The trial court did not err in finding exigent circumstances justified a protective sweep. In its order, the trial court found:

> [T]here were exigent circumstances that warranted it. The overwhelming smell of ammonia certainly is a potentially dangerous type of situation that would risk not only officer safety but safety of the neighbors if there was to be an explosion and further there was activity which was described at different windows and the officers did not know for officer safety if there were other individuals located in the residence.

The record contains evidence supporting the trial court's finding, specifically the testimony of Sergeant Thompson, who provided "[d]epending on what method

you're cooking [with] . . . you're dealing with lithium metal and lithium metal reacts to the water." With one particular manufacturing method, "you're actually manufacturing water ammonia so you have an explosive hazard. Let alone it's in a bottle under pressure with a lot of fuel, white gas, so you have an explosive hazard."

Considering the totality of the circumstances, we find exigent circumstances developed as soon as Kotowski opened the front door and Sergeant Thompson was "immediately overwhelmed with the odor of ammonia." Given Sergeant Thompson's extensive training concerning methamphetamine labs, officers had objectively reasonable grounds to conduct a limited search of the premises not only for the protection of the responding officers, but for the safety of any neighbors in close proximity to a possibly active methamphetamine lab. Accordingly, the trial court did not err in finding exigent circumstances justified a protective sweep of the residence.

III. NPLEx Records

Kotowski asserts the trial court erred in admitting testimony concerning the NPLEx records because they constituted hearsay and the State failed to establish a sufficient foundation to satisfy the business records exception. He also maintains the records violated his Sixth Amendment right to confrontation because the State failed to present testimony from a records custodian. Finally, he contends the admission of the NPLEx records violated Rule 403, SCRE, because they are unfairly prejudicial and invited the jury to convict him on an improper basis. We disagree and address these arguments in turn.

A. Hearsay

"'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Rule 801(c), SCRE. "A 'statement' is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion." Rule 801(a), SCRE. Further, "[a] 'declarant' is a person who makes a statement." Rule 801(b), SCRE. However, Rule 803(6), SCRE, provides an exception to the rule against hearsay for business records.

This court recently decided a case looking at these same NPLEx records. We found "NPLEx logs are not created for litigation purposes and are admissible under the business records exception to the rule against hearsay." *State v. Mealor*, ___

S.C. ___, ___, 825 S.E.2d 53, 62 (Ct. App. 2019). "The NPLEx records were created to comply with state statutes, not to investigate a specific case or individual." *Id.* "[T]he main purpose of the NPLEx records is to enable the [National Association of Drug Diversion Investigators (NADDI)] to track and regulate the sale of non-prescription . . . pseudoephedrine. Accordingly, the main purpose of the NPLEx records is not to establish or prove some fact at trial." *Id.* (quoting *Montgomery v. State*, 22 N.E.3d 768, 775 (Ind. Ct. App. 2014)). These logs are prepared in the ordinary course of business in accordance with state law, not in anticipation of litigation or to address a specific individual. Accordingly, we find the trial court correctly found the NPLEx records fall under the business record exception to hearsay.

B. Foundation

"This court has held that before the trial court may admit a business record into evidence, a qualified witness must 'lay the foundation to meet the requirements of Rule 803(6) and section 19-5-510.'" *Id.* at 67 (quoting *Deep Keel, LLC v. Atl. Private Equity Grp., LLC*, 413 S.C. 58, 73, 773 S.E.2d 607, 615 (Ct. App. 2015)). "*Black's Law Dictionary* defines 'laying a foundation' as '[i]ntroducing evidence of certain facts needed to render later evidence relevant, material, or competent.'" *Id.* (quoting *Laying a Foundation*, *Black's Law Dictionary* (10th ed. 2014)).

The North Carolina Court of Appeals dealt with a foundation argument regarding NPLEx logs in *State v. Hicks*, 777 S.E.2d 341 (N.C. Ct. App. 2015), similar to the one made here. The court found nothing required NPLEx records be authenticated by the person who made them, and instead, a law enforcement officer could authenticate the records. *Id.* at 349. The court explained:

> [The] officer thoroughly demonstrated his understanding of the NPLEx database, the method by which the data was gathered, transmitted, and stored, and the underlying basis for the report admitted into evidence. [The officer's] testimony provided a sufficient foundation for the admission of the computer report from the NPLEx database as a business record.

Id.

In the present case, Kotowski contends the State was required to present testimony from someone associated with Appriss—the company responsible for maintaining

the database—regarding the methods used to collect, maintain, and review the data in the NPLEx database to ensure its accuracy. However, because Sergeant Thompson was able to testify about his knowledge of and familiarity with the NPLEx database, he falls under the "other qualified witness" portion of Rule 803(6), SCRE.

Sergeant Thompson testified he and other law enforcement officers regularly consult the NPLEx database for pseudoephedrine purchases when investigating individuals suspected of manufacturing methamphetamine. Sergeant Thompson further stated because of his familiarity with the system, Appriss has asked him to teach seminars on how to use it. Sergeant Thompson thoroughly demonstrated his understanding of the NPLEx database, the method by which the data was gathered, transmitted, and stored, and the underlying basis for the report, and therefore provided a sufficient foundation for the admission of the computer report from the NPLEx database as a business record. Thus, we find the trial court did not abuse its discretion in finding Sergeant Thompson a qualified witness.

C. Confrontation Clause

Evidence admissible under a hearsay exception must not violate the accused's rights under the Confrontation Clause. "The Sixth Amendment's Confrontation Clause guarantees that '[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.'" *State v. Ladner*, 373 S.C. 103, 111, 644 S.E.2d 684, 688 (2007) (quoting U.S. Const. amend. VI). "In *Crawford v. Washington*[1], the United States Supreme Court . . . held that the admission of testimonial hearsay statements against an accused violates the Confrontation Clause if: (1) the declarant is unavailable to testify at trial, and (2) the accused has had no prior opportunity to cross-examine the declarant." *Id.*

While South Carolina has not addressed whether logs such as these violate the confrontation clause, many other jurisdictions have. The Seventh Circuit Court of Appeals has looked at some of those cases. That court noted:

> [I]n *Towns*, the Fifth Circuit concluded that NPLEX records did not present a Confrontation Clause issue because

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[1] 541 U.S. 36 (2004).

> [t]he pharmacies created these purchase logs *ex ante* to comply with state regulatory measures, not in response to an active prosecution. Additionally, requiring a driver's license for purchases of pseudoephedrine deters crime. The state thus has a clear interest in businesses creating these logs that extends beyond their evidentiary value.
>
> *United States v. Towns*, 718 F.3d 404, 411 (5th Cir. 2013); *see also United States v. Collins*, 799 F.3d 554, 585-86 (6th Cir. 2015) (observing that "the MethCheck reports at issue in this case were not made to prove the guilt or innocence of any particular individual, nor were they created for solely evidentiary purposes" and therefore holding that the district court had "not commit[ted] plain error in violation of the Confrontation Clause by allowing their admission at trial").

United States v. Lynn, 851 F.3d 786, 792-93 (7th Cir. 2017) (all alterations except for first by court).

The Seventh Circuit further explained:

> NPLEX logs are regularly maintained and updated each time an individual purchases an over-the-counter cold medicine that includes pseudoephedrine. And, as the Fifth Circuit noted, state regulatory bodies may have legitimate interests in maintaining these records that far exceed their evidentiary value in a given case. For example, requiring identification for each pseudoephedrine purchase may deter misuse or pseudoephedrine-related drug offenses. The NPLE[x] logs therefore are nontestimonial, and the Confrontation Clause poses no barrier to their introduction.

Id. at 793 (footnote omitted).

The Sixth Circuit Court of Appeals has also considered the admission of similar logs. *Collins*, 799 F.3d at 586. In *Collins*, that court determined:

> [T]he MethCheck reports at issue in this case were not made to prove the guilt or innocence of any particular individual, nor were they created for solely evidentiary purposes. Although law enforcement officers may use MethCheck records to track pseudoephedrine purchases, the MethCheck system is designed to prevent customers from purchasing illegal quantities of pseudoephedrine by indicating to the pharmacy employee whether the customer has exceeded federal or state purchasing restrictions. *See Towns*, 718 F.3d at 411 ("Because the [pseudoephedrine] purchase logs were not prepared specifically and solely for use at trial, they are not testimonial and do not violate the Confrontation Clause."). Furthermore, it is improbable that a pharmacy employee running a standard identification check of a customer would have anticipated that the records of that transaction would later be used against these particular defendants at trial. Because the MethCheck records at issue in this case are not clearly testimonial in nature, the district court did not commit plain error in violation of the Confrontation Clause by allowing their admission at trial.

Id. (second alteration by court).

Kotowski argues the admission of the NPLEx records violated his right to confrontation. However, as stated above, NPLEx records were created to comply with state regulatory measures, not to investigate a specific case or individual. Sergeant Thompson testified as to the state's reasons for requiring creation of the records. He testified:

> [T]o reduce methamphetamine labs[,] [C]ongress enacted laws to where certain things were restricted, pseudoephedrine being that. It was required that you record any purchase of pseudoephedrine on a log, and at the time it was a paper log. So if you were to go and buy pseudoephedrine from any pharmacy or any gas station

> . . . you're required to sign a log with your name, your date of birth, what was purchased, the brand name, and the amount of the purchase, however [many] grams of pseudoephedrine or Sudafed.

Because the NPLEx records are kept to comply with state regulatory measures, we find they are nontestimonial. Thus, we agree with the conclusion in *Towns* that the Confrontation Clause poses no barrier to their introduction.

D. Unfair Prejudice

Pursuant to Rule 402, SCRE, all relevant evidence is generally admissible. A trial court has a great amount of discretion in deciding whether or not evidence is admitted, and such a determination will not be overturned unless it abuses that discretion. *State v. Adams*, 354 S.C. 361, 377, 580 S.E.2d 785, 793 (Ct. App. 2003). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." *State v. Wise*, 359 S.C. 14, 21, 596 S.E.2d 475, 478 (2004).

"Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Rule 403, SCRE. "A trial judge's decision regarding the comparative probative value and prejudicial effect of evidence should be reversed only in exceptional circumstances. We review a trial judge's decision regarding Rule 403 pursuant to the abuse of discretion standard and are obligated to give great deference to the trial court's judgment." *State v. McLeod*, 362 S.C. 73, 81-82, 606 S.E.2d 215, 220 (Ct. App. 2004) (citations omitted).

"Unfair prejudice means an undue tendency to suggest decision on an improper basis." *State v. Wiles*, 383 S.C. 151, 158, 679 S.E.2d 172, 176 (2009). "Unfair prejudice does not mean the damage to a defendant's case that results from the legitimate probative force of the evidence; rather it refers to evidence which tends to suggest decision on an improper basis." *State v. Dennis*, 402 S.C. 627, 636, 742 S.E.2d 21, 26 (Ct. App. 2013) (quoting *State v. Gilchrist*, 329 S.C. 621, 630, 496 S.E.2d 424, 429 (Ct. App. 1998)). "Evidence is unfairly prejudicial if it has an undue tendency to suggest a decision on an improper basis, such as an emotional one." *State v. Cheeseboro*, 346 S.C. 526, 547, 552 S.E.2d 300, 311 (2001). "All evidence is meant to be prejudicial; it is only *unfair* prejudice which must be

avoided." *Gilchrist*, 329 S.C. at 630, 496 S.E.2d at 429 (brackets omitted) (quoting *United States v. Rodriguez-Estrada*, 877 F.2d 153, 156 (1st Cir. 1989)).

In this case, the NPLEx records were highly probative to show an objective basis for the reasonable suspicion standard to conduct the initial knock and talk. Sergeant Thompson testified the multiple purchase attempts by Michelle Vining in a short time frame alerted him that some illegal activity might be occurring. Therefore, we find the danger of unfair prejudice does not substantially outweigh the probative value of the records. Thus, the trial court did not abuse its discretion by allowing them into evidence.

CONCLUSION

Based on the foregoing, the trial court did not err in denying Kotowski's motion to suppress any evidence obtained as a result of the knock and talk. Further, the trial court did not err in finding exigent circumstances justified a protective sweep. Finally, the trial court did not err in admitting the NPLEx records into evidence. Thus, the trial court is

AFFIRMED.

MCDONALD and HILL, JJ., concur.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

THE STATE,

RESPONDENT,

V.

FELIX KOTOWSKI,

APPELLANT

APPELLATE CASE NO. 2016-000842

Appeal from Dorchester County

Honorable Maite Murphy, Circuit Court Judge

Opinion No. 5650

PETITION FOR REHEARING

On May 15, 2019, this Court affirmed Appellant's convictions for manufacturing methamphetamine and possession of less than one gram of methamphetamine. State v. Kotowski, Op. No. 5650 (S.C. Ct. App. filed May 15, 2019). Pursuant to Rule 221(a), SCACR, Appellant respectfully requests this Court rehear the matter based upon the significant points overlooked and/or misapprehended by this Court in arriving at its conclusions.

On appeal, Appellant argued the trial judge erred by (1) denying his motion to suppress evidence seized by law enforcement after officers conducted a "knock and talk" without reasonable suspicion in violation of Appellant's right to privacy under Article I, Section 10 of the

South Carolina Constitution and State v. Counts, 413 S.C. 153, 776 S.E.2d 59 (2015); (2) denying his motion to suppress evidence seized by law enforcement when officers conducted a protective sweep of a residence where Appellant was an overnight guest without exigent circumstances and without a warrant in violation of Appellant's Fourth Amendment rights; and (3) admitting National Precursor Log Exchange (NPLEx) records into evidence since the evidence was hearsay, violated Appellant's Sixth Amendment right to confrontation, and the probative value of the evidence was substantially outweighed by the danger of unfair prejudice.

In its published opinion, this Court found the NPLEx records reflecting Michelle Vining's three attempted pseudoephedrine purchases[1] in a single day, in conjunction with Sergeant Thompson's testimony he had received extensive training and experience in "methamphetamine labs" adequate to raise reasonable suspicion to conduct a knock and talk. As to the protective sweep, this Court held exigent circumstances based on the overwhelming smell of ammonia on Appellant's person justified the warrantless entry of the residence for the protection of the responding officers and the safety of any nearby neighbors. Lastly, the Court held the NPLEx records were admissible because they fall under the business record exception to the hearsay rule, they were properly authenticated by Sergeant Thompson, they are nontestimonial therefore the Confrontation Clause poses no barrier to their introduction, and the danger of unfair prejudice did not substantially outweigh the probative value of the records.

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[1] Sergeant Frank Thompson claimed Vining attempted to make two separate purchases of 2.4 grams of pseudoephedrine at Walgreens at 9:11 pm and that both were blocked. However, he admitted that these attempts were made *fifteen seconds* apart, meaning it was likely that the same cashier had simply entered the information into the log twice for whatever reason. R. 31, ll. 13-18; R. 47, l. 16 – R. 48, l. 16. Consequently, the evidence supports Vining made one unsuccessful attempt to purchase pseudoephedrine at 9:11 pm and sixteen minutes later at 9:27 pm actually purchased pseudoephedrine. See R. 31, ll. 12-22.

Knock and Talk

The Fourth Amendment to the United States Constitution prohibits unreasonable searches and seizures. U.S. Cont. amend. IV. "In parallel with the protection of the Fourth Amendment, the South Carolina Constitution also provides a safeguard against unlawful searches and seizures." State v. Forrester, 343 S.C. 637, 643, 541 S.E.2d 837, 840 (2001) (citing S.C. Cont. art. I. § 10). "In addition to language which mirrors the Fourth Amendment, S.C. Cont. art. 1 § 10 contains an express right to privacy: The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures and *unreasonable invasions of privacy* shall not be violated." Id. at 644, 541 S.E.2d at 840-841 (emphasis in original).

In State v. Forrester, our Supreme Court concluded, "The South Carolina Constitution, with an express right to privacy provision included in the article prohibiting unreasonable searches and seizures, favors an interpretation offering a higher level of privacy protection than the Fourth Amendment." Id. at 645, 541 S.E.2d at 841. "By articulating a specific prohibition against 'unreasonable invasions of privacy,' the people of South Carolina have indicated that searches and seizures that do not offend the federal Constitution may still offend the South Carolina Constitution." State v. Weaver, 374 S.C. 313, 322, 649 S.E.2d 479, 483 (2007) (citing Forrester, 343 S.C. at 644-45, 541 S.E.2d at 841).

Recognizing that "the privacy interests in one's home are the most sacrosanct," our Supreme Court held in State v. Counts "that law enforcement must have reasonable suspicion of illegal activity at a targeted residence prior to approaching the residence and knocking on the door." 413 S.C. 153, 172, 776 S.E.2d 59, 69-70 (2015).

Applying this rule to the facts presented in Counts, the Supreme Court held law

enforcement had reasonable suspicion of illegal activity prior to conducting the "knock and talk" at Counts' residence. Id. at 173, 776 S.E.2d at 70. The police "received two separate anonymous tips from citizens who alleged that Counts was selling drugs. These tips also identified vehicles driven by Counts, his phone number, and his use of multiple identities." Id. The police had "confirmed that Counts had two false identification cards on record and had prior drug convictions." Id. The Court held the specificity of the anonymous tips and the corroboration by law enforcement of the tips indicated "the officers were not randomly knocking on Counts' door but had reasonable suspicion to support their decision to approach Counts' residence and conduct the 'knock and talk.'" Id.

The "reasonable suspicion" language from Counts invokes the standard enunciated by the United States Supreme Court in Terry v. Ohio, 392 U.S. 1, 30 (1968), where the Court held that in the absence of probable cause for arrest, a police officer may stop and briefly detain a person for investigative purposes, so long as the officer has a reasonable suspicion supported by articulable facts that criminal activity "may be afoot."[2] "The term 'reasonable suspicion' requires a particularized and objective basis that would lead one to suspect another of criminal activity." State v. Woodruff, 344 S.C. 537, 546, 544 S.E.2d 290, 295 (Ct. App. 2001).

Recently, the Fourth Circuit Court of Appeals addressed the issue of reasonable suspicion in an unreasonable seizure case. United States v. Slocumb, 804 F.3d 677 (4th Cir. 2015). The Fourth Circuit emphasized that a seizure for a brief investigatory stop is proper only where the police observe "unusual conduct which leads [the officer] reasonably to conclude in light of his experience that criminal activity may be afoot." Id. at 681 (internal quotation marks omitted).

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[2] In Reid v. Georgia, 448 U.S. 438, 440 (1980), the Court explained that before an officer can stop and frisk a citizen, the officer must have "reasonable and articulable suspicion that the person seized is engaged in criminal activity."

The officer "must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." Id. at 682 (internal quotation marks omitted). "The level of suspicion must be a particularized and objective basis for suspecting the particular person stopped of criminal activity." Id. (internal quotation marks omitted).

In this case, law enforcement did not have reasonable suspicion supported by articulable facts that criminal activity was afoot prior to knocking on Vining's door. The anonymous tip Thompson received on June 13, 2014 was wholly unreliable because the tip was from an anonymous source, contained third party information, and provided no information that could be corroborated. The unknown caller told Thompson that he "heard about a possible drug house" at [redacted] Marsh Pointe Road. Thompson conceded the caller provided "very little information" and that the man merely "overheard people talking about that address and really didn't have anything to go on." R. 25, ll. 18-24; R. 44, ll. 4-11.

Obviously, the credibility and the reliability of the caller were unknown and unknowable.[3] The tip was vague except to the extent it provided the address of the alleged "drug house" or where "drug activity" was allegedly occurring.[4] The tip did *not* provide any names of individuals allegedly involved. The tip did *not* disclose the types of drugs allegedly involved or the nature of the drug activity. The tip did *not* disclose whether any cars frequented the house

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[3] See Alabama v. White, 496 U.S. 325 (1990) (holding that in determining whether the informant's tip establishes sufficient probable cause, "the informant's veracity, reliability, and the basis of knowledge are highly relevant."); see also State v. Green, 341 S.C. 214, 532 S.E.2d 896 (Ct. App. 2000) (providing that reasonable suspicion requires that the tip be reliable in its assertion of illegality, not just in its tendency to identify a determinate person).

[4] During the suppression hearing, Thompson testified that the unknown caller said he "heard about a possible drug house" at the identified address. R. 25, ll. 18-21. However, during his testimony before the jury, Thompson testified the caller said he heard "there was possibly drug activity" at the address. R. 124, ll. 7-10.

and if so, any information about those cars. "Drug activity" is an extremely vague term. It could refer to growing, cultivating, and harvesting marijuana plants, creating methamphetamine from raw materials, preparing drugs for sale, such as measuring and dividing cocaine or crack for individual sales, drug transactions between a buyer and a seller, or individuals using drugs inside the home.

Comparing the anonymous tip in this case with the anonymous tips in Counts illustrates the point. The tip here was devoid of ***any*** specifics unlike the tips in Counts. The police had received two anonymous complaints that Counts was selling drugs. The first tip indicated Counts was selling marijuana and crack cocaine out of two specific residences. The first "tipster provided Counts' names and aliases, the location of the alleged drug deals, Counts' girlfriend's name, a vehicle license plate number for a white Chevy Malibu, the make and model of the car used by Counts' girlfriend, and Counts' phone number." Counts, 413 S.C. at 157, 776 S.E.2d at 62. When two attempted controlled buys were unsuccessful, the police discontinued their investigation until a second anonymous tip arrived. Id.

The second tipster alleged Counts was selling drugs out of his residence, "provided Counts' name and phone number, the name and phone number of Counts' girlfriend, and identified Counts' vehicle." Id. This second tipster explained that Counts had obtained two false forms of identification through a contact at the Department of Motor Vehicles. Id. Additionally, the second tipster claimed Counts was selling drugs at a specific address and at his girlfriend's apartment. Finally, the tipster warned that Counts carried guns. Id. at 158, 776 S.E.2d at 62.

The police reviewed Counts' criminal record and learned he had two prior charges of distribution. The police also confirmed he had two identification cards on record. Id. The police then conducted surveillance on Counts' residence and observed Counts driving into and

entering the residence. Id. Only then did the officers attempt a "knock and talk." Id. Our Supreme Court held that in light of the specificity of the tips and the confirmation of the tips through the investigation, "the officers were not randomly knocking on Counts' door but had reasonable suspicion to support their decision to approach Counts' residence and conduct the 'knock and talk.'" Id. at 173, 776 S.E.2d at 70.

Here, the *unknown* caller merely supplied Sergeant Thompson with an address and claimed he heard "*from other people*" "that there was possibly drug activity at" the residence. Thompson admitted, "He [the unknown caller] didn't have any names. He didn't have any specific information. He was just relaying the information that he was told." R. 124, ll. 7-14. Because of the lack of any specifics, there was little, if anything, Thompson could do to corroborate the allegation of drug activity and he admitted so during his testimony. R. 124, ll. 14-16. He claimed he "did some spotty surveillance," which he said meant he drove by the house "a couple times." R. 30, ll. 13-14. On one occasion, *more than four months* before he conducted the "knock and talk," Thompson saw a car belonging to a man whose father had been convicted of manufacturing methamphetamine parked at the home. This fact is completely inconsequential and did absolutely nothing to corroborate the allegation in the tip.

Thompson also entered the provided address into NPLEx and learned that Michelle Vining, who he stated was the homeowner, made a single purchase of pseudoephedrine in March 2014, two purchases in April 2014, and two purchases in May 2014. R. 46, ll. 6-9; R. 28, ll. 24-25. While claiming he considered this to be a "substantial amount of purchases," Thompson provided no explanation as to why. R. 29, ll. 4-5. Besides conducting "some spotty surveillance," and checking the NPLEx log, Thompson made no further efforts to corroborate the

tip and arguably could do nothing else to corroborate the tip due to its vagueness and lack of any specifics.

The tip itself was "stale" by the time law enforcement conducted the "knock and talk." Thompson received the tip alleging "drug activity" *more than four months* before he knocked on Vining's front door. Just as stale information may not be relied upon to establish probable cause to obtain a search warrant, it should not be used to establish reasonable suspicion to conduct a "knock and talk." See State v. Beckham, 334 S.C. 302, 316, 513 S.E.2d 606, 613 (1999) ("A probable cause affidavit must state facts so closely related to the time of the issuance of the warrant as to justify a finding of probable cause at that time.").

Because of the obvious unreliability of the anonymous tip and the significant length of time that passed since Thompson received the tip and when he conducted the "knock and talk," the tip did not and could not support reasonable and articulable suspicion that the occupants at [redacted] Marsh Pointe Road were engaged in criminal activity.

What remains is Vining's blocked attempt to purchase pseudoephedrine and her eventual successful purchase of pseudoephedrine on October 29, 2014.[5] As defense counsel argued below, a single blocked attempt to purchase pseudoephedrine is insufficient to create reasonable and articulable suspicion that the individual is engaged in criminal activity and subject the person to a "knock and talk." "[T]here needs to be something more than that" before law enforcement can go knocking on someone's door. R. 96, ll. 12-16. Once Thompson received the alert from the NPLEx "watch list" on October 29, 2014, he should have continued to investigate by either conducting additional surveillance, reviewing Vining's criminal record to determine whether she

[5] Notably, Sergeant Thompson did absolutely nothing to further investigate the case from June 26, 2014 when he drove by the house until he received the alert from NPLEx on October 29, 2014. That is more than four months with zero investigation.

had any prior drug convictions or arrests, or any number of other options. If his attempts to further investigate were unsuccessful, then Thompson should have waited to obtain additional evidence, such as another blocked attempted purchase or a reliable tip that could be corroborated before conducting the "knock and talk." See Counts, 413 S.C. at 157-158, 776 S.E.2d at 62 (After receiving a detailed anonymous tip that Counts was selling marijuana and crack cocaine out of his mother's house and an apartment in Allen Benedict Court, the police ultimately discontinued its investigation of Counts after two controlled buys were unsuccessful. Only after law enforcement received a second detailed complaint from an anonymous tipster and corroborated that tip did they knock on Counts' door.).

Law enforcement lacked reasonable suspicion based on articulable facts to believe the occupants at [redacted] Marsh Pointe Road were engaged in criminal activity to approach the residence and conduct a "knock and talk." Therefore, law enforcement's conduct violated Appellant's right to privacy under Article I, Section 10 of the South Carolina Constitution. Respectfully, this Court should grant rehearing, hold the trial court erred by denying Appellant's motion to suppress, and reverse his convictions and sentence.

Protective Sweep

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."[6] U.S. Const. amend. IV.

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[6] To claim protection under the Fourth Amendment, a defendant must show he has a legitimate expectation of privacy in the place searched. State v. Missouri, 361 S.C. 107, 112, 603 S.E.2d 594, 596 (2004) (citing Rakas v. Illinois, 439 U.S. 128, 143 (1978)). In Minnesota v. Olsen, 495 U.S. 91 (1990), the United States Supreme Court found an overnight guest had a reasonable expectation of privacy in another's home. While the Court did not articulate what constituted an overnight guest, it stated generally, "From the overnight guest's perspective, he seeks shelter in another's home precisely because it provides him with privacy, a place where he and his possessions will not be disturbed by anyone but his host and those his host allows inside." Id. at 99. In Missouri, our Supreme Court held the defendant had a reasonable expectation of privacy in the searched

"As the [United States] Supreme Court has recognized, the 'physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed.'" United States v. Jones, 667 F.3d 477, 482 (4th Cir. 2012) (quoting Welsh v. Wisconsin, 466 U.S. 740, 748 (1984)). "Thus, it is a basic principle of Fourth Amendment law that searches and seizures inside a home without a warrant are presumptively unreasonable." Id. (quoting Payton v. New York, 445 U.S. 573, 586 (1980)) (internal quotation marks and alterations omitted).

"[T]he underlying command of the Fourth Amendment is always that searches and seizures be reasonable." Wilson v. Arkansas, 514 U.S. 927, 931 (1995). "Warrantless searches and seizures are unreasonable absent a recognized exception to the warrant requirement." State v. Wright, 391 S.C. 436, 442, 706 S.E.2d 324, 327 (2011). "[T]he burden is upon the State to justify a warrantless search." State v. Abdullah, 357 S.C. 344, 350, 592 S.E.2d 344, 348 (Ct. App. 2004) (citing State v. Bailey, 276 S.C. 32, 35, 274 S.E.2d 913, 915 (1981)).

"The exigent circumstances doctrine provides an exception to the Fourth Amendment's protection against warrantless searches, but only where, from an objective standard, a compelling need for official action and no time to secure a warrant exist." Abdullah, 357 S.C. at 351, 592 S.E.2d at 348 (citing State v. Brown, 289 S.C. 581, 587, 347 S.E.2d 882, 886 (1986)). The United States Supreme "Court has identified several exigencies that may justify a warrantless

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apartment when he (1) was good friends with the owner, (2) frequently visited the apartment, (3) occasionally spent the night, (4) at times had a key, and (5) kept a change of clothes there. Missouri, 361 S.C. at 115, 603 S.E.2d at 597-598. The Court held the defendant demonstrated a subjective expectation of privacy in the apartment and therefore was entitled to challenge the search under the Fourth Amendment. Id. at 115, 603 S.E.2d at 597-598. Here, it is clear, as Judge Murphy found, that Appellant was an overnight guest and had a reasonable expectation of privacy in Vining's home. R. 23, l. 15 – 24, l. 2; See State v. Robinson, 410 S.C. 519, 528-530, 765 S.E.2d 564, 569-570 (2014). Appellant testified pretrial that he and Vining were in "a romantic relationship," that he worked out of town, but spent the night at her house on the weekends, that he kept clothing at her house, and that he had a key to the residence. R. 12, l. 11 – 14, l. 43. Judge Murphy relied on this testimony in support of her ruling. R. 23, l. 15 – 24, l. 2.

search of a home." Kentucky v. King, 563 U.S. 452, 460 (2011) (citing Brigham City v. Stuart, 547 U.S. 398, 403 (2006)). "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." State v. Bash, 412 S.C. 420, 772 S.E.2d 537 (Ct. App. 2015) (quoting State v. Herring, 387 S.C. 201, 210, 692 S.E.2d 490, 495 (2009) (internal citation marks omitted); Minnesota v. Olsen, 495 U.S. 91, 100 (1990). "A 'protective sweep' is a quick and limited search of premises, incident to an arrest and conducted to protect the safety of police officers or others." State v. Johnson, 410 S.C. 10, 19, 763 S.E.2d 36, 41 (Ct. App. 2014) (quoting Maryland v. Buie, 494 U.S. 325, 327 (1990)) (internal quotation marks omitted). Additionally, the United States Supreme Court has held that a warrantless search is permitted "to prevent the imminent destruction of evidence." King, 563 U.S. at 460 (quoting Brigham City, 547 U.S. at 403) (internal quotation marks omitted).

Sergeant Thompson admitted he "believed that something more was going on" inside Vining's residence, which is why he instructed Detective Allen and Detective Lundberg to enter the house without a warrant after Vining refused to consent to a search of the home. He later claimed he had Allen and Lundberg conduct the protective sweep "to make sure nobody else was inside, to preserve any evidence that was inside there, and also to make sure there was no active methamphetamine lab in progress." R. 38, ll. 5-12.

Again, "the underlying command of the Fourth Amendment is always that searches and seizures be reasonable." Wilson, 514 U.S. at 931. Further, "the subjective intentions of an officer 'play no role in ordinary, probable-cause Fourth Amendment analysis.'" State v. Corley, 383 S.C. 232, 241, 679 S.E.2d 187, 192 (Ct. App. 2009) (quoting State v. Banda, 371 S.C. 245,

252 n. 3, 639 S.E.2d 36, 40 n.3 (2006)). Here, it was objectively unreasonable for Thompson to believe there was any risk of danger to the officers that would have justified a warrantless entry or that there were any other occupants inside the home that posed a threat. Thompson admitted the three separate movements the officers observed inside the home while he was knocking on the door did not occur simultaneously. It was likely that these movements were performed by the same person who was monitoring the officers at the door while Thompson was knocking. Additionally, after Appellant answered the door, he told Sergeant Thompson that the only other person inside the home was "his girlfriend Lisa." R. 36, ll. 11-12. When Appellant went back inside the house to get "Lisa," Thompson "held the door open so [he] could see what was going on." R. 36, ll. 13-15. While the door was open, Thompson did not see anyone else inside the house or hear any noises that would have led him to believe someone else was inside.

Additionally, while Thompson claimed Vining "was pretty deceptive about her answer and kind of hem hawing" when he asked "her if anybody else was inside the house," he earlier admitted that Vining "said she was [at the house] with her boyfriend." R. 37, ll. 1-2. Her statement was consistent with Appellant's statement that the only other person inside the house was his girlfriend. R. 36, ll. 11-12.

Moreover, Sergeant Thompson admitted that no weapons were found on either Appellant or Vining when they were detained and patted down prior to the protective sweep. Significantly, the anonymous tip Thompson received in June did not mention anything about weapons or the occupants of the residence being armed.

In Counts, the defendant "voluntarily opened the door" after officers knocked to investigate two anonymous tips that he was selling drugs from his home. Counts, 413 S.C. at 166, 776 S.E.2d at 67. One of the tipsters also warned that "Counts carried guns everywhere he

went." Id. at 158, 776 S.E.2d at 62. When Counts opened the door, officers observed a silver automatic gun in his hand. After disarming and detaining Counts, the officers "performed a protective sweep of the residence." Id. at 158, 776 S.E.2d at 62. At trial, Counts challenged the warrantless search of his home. Emphasizing that Counts "opened the door armed with a handgun," our Supreme Court ultimately held, "Because there was a risk of danger to the officers, the officers were justified under the exigent circumstances doctrine to detain Counts and conduct a protective sweep of his residence." Id. at 166, 776 S.E.2d at 67.

In State v. Abdullah, two uniformed officers responded to a call regarding a burglary in progress at a specific apartment. Abdullah, 357 S.C. at 348, 592 S.E.2d at 346. While en route, the officers also received a report of "shots fired" at the apartment. When the officers arrived, they found Abdullah standing in the doorway of the apartment. He refused to cooperate and instead moved towards a bedroom door where he stood in a manner such that his left side was shielded from the officers' view. Id. The officers detained him, and after observing bullet holes outside the apartment door and inside the apartment, they conducted a protective sweep of the apartment. Id. at 348-349, 592 S.E.2d at 347. During the sweep, the officers observed marijuana and drug paraphernalia. Id. at 349, 592 S.E.2d at 347. This Court held the warrantless search was justified under the exigent circumstances exception. The Court stated:

> [T]he totality of the circumstances, including Abdullah's unsettling behavior and the evidence of a violent crime and gunfire, gave the officers highly reasonable grounds from an objective standard for searching the premises with the dual goals of securing the scene against perpetrators and facilitating assistance to possible victims. Moreover, the immediate need to secure the premises and assist potential victims provided no time for the officers to obtain a warrant before conducting their sweep of the crime scene.

Id. at 352, 592 S.E.2d at 348.

In both Counts and Abdullah, law enforcement had an *immediate* need to search the premises due to concerns for officer safety and absolutely no time to secure a warrant. Counts opened the door armed with a handgun knowing the police were outside. In Abdullah, officers arrived at an apartment in response to a burglary in progress and encountered an uncooperative individual and evidence of gunfire. No such safety concerns existed in this case. Again, Thompson admitted that when Appellant and Vining were detained before the protective sweep, both were patted down for weapons and no weapons were found. R. 58, ll. 2-7. Further, the anonymous tip Thompson received in June did not mention anything about the occupants of the home being armed. The only claim Thompson made regarding fear for his safety was that he saw three movements inside the house before Appellant answered the door and that he suspected methamphetamine was currently being manufactured inside. R. 53, l. 18 – 54, l. 12. These circumstances did not justify a warrantless entry into the home. From an objective standard, there was not "a compelling need for official action and no time to secure a warrant" as required under the exigent circumstances exception. See Abdullah, 357 S.C. at 351, 592 S.E.2d at 348 (citing Brown, 289 S.C. at 587, 347 S.E.2d at 886).

In fact, law enforcement had time to secure a search warrant. Both Appellant and Vining had been detained. There was no reason why, while the two were detained by Sergeant Thompson, that Detective Strickland, who ultimately obtained the warrant in this case, could not have attempted to get a warrant.

A comparison with Illinois v. McArthur, 531 U.S. 326 (2001) demonstrates the point. Two officers accompanied McArthur's estranged wife to the trailer where the two lived "so that they could keep the peace while she removed her belongings." Id. at 328. His wife went inside where McArthur was present, while the officers waited outside. When his wife "emerged after

collecting her belongings," she told the officers that McArthur "had dope in there" and that she had seen him "slide some dope underneath the couch." Id. at 329 (internal quotation marks and alternations omitted). The officers knocked on the door, told McArthur what his wife said, and asked for consent to search the trailer. When McArthur refused, the officers told McArthur, who by now was on the front porch, that he could not reenter the trailer unless a police officer accompanied him. In less than two hours, officers obtained a search warrant and searched the premises. They found marijuana and paraphernalia inside.

The United States Supreme Court held law enforcement's temporary seizure of McArthur was reasonable under the Fourth Amendment. In so holding, the Court emphasized that "the police made reasonable efforts to reconcile their law enforcement needs with the demands of personal privacy. They neither searched the trailer nor arrested McArthur before obtaining a warrant." Id. at 332.

Here, because there were no exigent circumstances that warranted a protective sweep of the house, the police should have merely detained Appellant and Vining and attempted to obtain a warrant from a magistrate before entering. This would have prevented any destruction of evidence, which Thompson claimed was one of his main concerns. Like in McArthur, this temporary seizure would have been reasonable under the Fourth Amendment.

Law enforcement violated Appellant's Fourth Amendment rights by conducting a protective sweep of the house where he was an overnight guest without exigent circumstances and without a warrant. Respectfully, this Court should grant rehearing, hold the trial court erred by denying Appellant's motion to suppress, and reverse his convictions and sentence.

Admissibility of NPLEx Records

The trial court erred by admitting evidence of Appellant and Vining's alleged pseudoephedrine purchases obtained by Sergeant Thompson from NPLEx because the evidence is hearsay and the state failed to establish a sufficient foundation to satisfy the business records exception to the hearsay rule. Moreover, the testimony violated Appellant's Sixth Amendment right to confrontation since the state failed to present testimony from a records custodian at Appriss or from a representative of the pharmacy where the pseudoephedrine was allegedly purchased. Appellant had no opportunity to cross-examine or otherwise confront the source of the NPLEx data. Finally, the evidence of Appellant's alleged pseudoephedrine purchases should have been excluded because its probative value was substantially outweighed by the danger of unfair prejudice to Appellant.

Inadmissible Hearsay

"'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Rule 801(c), SCRE. Rule 802, SCRE provides that hearsay testimony is inadmissible unless it falls under one of the exceptions to the hearsay rules or by other rules prescribed by our Supreme Court or by statute. The information Sergeant Thompson obtained from NPLEx was hearsay because, despite what the state argued at trial, it was being offered "to prove the truth of the matter asserted." More specifically, the state offered the evidence to prove Appellant and Michelle Vining had purchased pseudoephedrine, a precursor to methamphetamine, on various occasions.

The information Sergeant Thompson obtained from NPLEx was not admissible under Rule 803(6), SCRE. This rule states, "A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, or diagnoses, made at or near the time by, or from

information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, **all as shown by the testimony of the custodian or other qualified witness . . .**" Rule 803(6), SCRE (emphasis added).

In order for the state to offer evidence retrieved from NPLEx as a business record, it must lay a proper foundation by providing testimony from a records custodian from Appriss, the company who manages the NPLEx database, who could authenticate the records and testify as to the manner in which Appriss obtains, compiles, and stores the information contained in the database. Because Sergeant Thompson had no information regarding the Appriss software and database, its accuracy, reliability, data collection technique, among other factors, he did not qualify under Rule 803(6), SCRE as a qualified witness to substitute in place of Appriss's records custodian.

The facts in State v. Burgdorf, 861 N.W.2d 273 (Iowa Ct. App. 2014) are similar to the facts in this case. In Burgdorf, the prosecution introduced records obtained from NPLEx through two law enforcement agents at trial. The Iowa Court of Appeals held the evidence from NPLEx was inadmissible because the prosecution offered no testimony "to authenticate or lay a foundation for the NPLEx records," and did not offer testimony certifying that the NPLEx "records were what they purported to be." Id. at 276-277. The two witnesses the state called "admitted to lacking foundational knowledge of the NPLEx records" and acknowledged they were not custodians of the records. Id. at 277. The court held the "erroneous admission of the NPLEx records requires reversal and remand for a new trial." Id. at 279.

In Embrey v. State, 989 N.E.2d 1260, 1267 (Ind. Ct. App. 2013), the Indiana Court of Appeals held records of Embrey's pseudoephedrine purchases obtained from NPLEx were

admissible under the business records exception to the hearsay rule. However, Embrey differs from this case because the records in Embrey were introduced along with a "Business Records Affidavit" from the custodian of records for Appriss. Id. at 1266-1267.

Here, the trial court relied on S.C. Code Ann. §§ 44-53-398 and 23-3-1200 in support of its ruling. The court found the requirements of § 44-53-398 created "the indicia of trustworthiness" and, consequently, Thompson's testimony concerning evidence of Appellant and Vining's alleged pseudoephedrine purchases obtained from NPLEx was admissible. This was error. Neither § 44-53-398 nor § 23-3-1200 create an exception to the hearsay rule or state that NPLEx records are admissible without the proper foundation or authentication being laid. If the legislature intended to make such an exception, it would have explicitly said so in the statute.

The trial court also maintained that § 44-53-398 "basically just create[s] a rebuttal presumption that the person whose name appears in the logs is the person whose transactions are recorded in the logs." R. 121, ll. 2-10. This was also error. The statute contains no language related to a "rebuttal presumption." The court erroneously added a provision to the statute that is simply not there.

In the State's Response to Defendant's Motion for New Trial, the state cited State v. Cady, 425 S.W.3d 234 (Mo. Ct. App. 2014) in support of its argument. In Cady, the defendant challenged the admission of NPLEx records because the state failed to establish a sufficient foundation for their admission under the business records exception to the hearsay rule. Id. at 243. The Missouri Court of Appeals held the defendant's argument was not "on point" "because subsection 21 of section 195.017 states, 'Logs of transactions required to be kept and maintained by this section and section 195.417 *shall create a rebuttable presumption* that the person whose

name appears in the logs is the person whose transactions are recorded in the logs.'" Id. at 244 (emphasis in original). The court continued:

> This evidentiary presumption is established by the "[l]ogs of transactions required to be kept and maintained by" sections 195.017 and 195.417. Therefore, under the clear and plain language of this statute, so long as a foundation is laid establishing that the records at issue are "[l]ogs of transactions required to be kept and maintained by" sections 195.017 and 195.417, those records are admissible in evidence to "create a rebuttable presumption" as to the identity of the purchaser in the transactions shown in those records.

Id. at 244-245.

Again, no similar provision creating a "rebuttable presumption" exists in S.C. Code Ann. §§ 44-53-398 and 23-3-1200. Therefore, this Court should not be persuaded by the Missouri Court of Appeal's decision in Cady. If our legislature intended to create a "rebuttable presumption" it would have explicitly said so in the statute.

Therefore, the trial court erred by admitting Thompson's testimony related to Appellant and Vining's alleged pseudoephedrine purchases obtained from NPLEx because the state failed to authenticate the records and establish a proper foundation for their admission through a records custodian from Appriss. Respectfully, this Court should grant rehearing, hold the trial judge erred in admitting this evidence, and remand for a new trial.

Confrontation Clause Violation

"The Sixth Amendment's Confrontation Clause guarantees that '[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him.'" State v. Ladner, 373 S.C. 103, 111, 644 S.E.2d 684, 688 (2007) (quoting U.S. Const. amend. VI.). In Crawford v. Washington, 541 U.S. 36 (2004), the United States Supreme Court held "testimonial, out-of-court statements" were inadmissible "unless two conditions are met: the witness is unavailable at trial and the defendant had a prior opportunity to cross-examine the

witness." State v. Brockmeyer, 406 S.C. 324, 342, 751 S.E.2d 645, 654 (2013) (citing Crawford, 541 U.S. at 68).

"[T]he Confrontation Clause analysis turns on whether the challenged out-of-court statement is testimonial." Id. at 342, 751 S.E.2d at 654. "Under the primary purpose analysis required by the Confrontation Clause, where the primary purpose of an out-of-court statement is to serve as evidence or 'an out-of-court substitute for trial testimony,' the statement is considered testimonial." Id. "However, 'where no such primary purpose exists, the admissibility of a statement is the concern of state and federal rules of evidence, not the Confrontation Clause.'" Id. at 342, 751 S.E.2d at 654-655 (quoting Michigan v. Bryant, 562 U.S. 344, 359 (2011)) (internal alternation omitted).

The evidence Thompson obtained from NPLEx regarding Appellant and Vining's alleged pseudoephedrine purchases was testimonial. The information collected by Appriss and stored in the NPLEx database is used by law enforcement to track pseudoephedrine purchases and purchases of other precursors used in the manufacture of methamphetamine to investigate and prosecute crimes. After Thompson received the anonymous tip complaining of alleged "drug activity" at [redacted] Marsh Pointe Road, he accessed NPLEx to compile a report of all pseudoephedrine purchases made by individuals using that address. As the investigation continued, Thompson compiled additional reports related to Vining's and Appellant's alleged pseudoephedrine purchases.

Thompson had no personal knowledge of Appellant and Vining's alleged purchases. His testimony was based solely upon the information he gathered from NPLEx. Because the evidence was collected and prepared for the purpose of Thompson's investigation and the ultimate prosecution of Vining and Appellant, the NPLEx records contained in Thompson's

report were testimonial. Appellant had no opportunity to cross-examine or otherwise confront the source of the NPLEx data because the state failed to call a records custodian from Appriss who could testify about the NPLEx software and database, its accuracy, reliability, data collection technique, and other factors, or a witness from the pharmacy who allegedly sold Appellant and Vining pseudoephedrine. Therefore, the trial court erred by admitting Thompson's testimony related to Appellant and Vining's alleged pseudoephedrine purchases obtained from NPLEx in violation of his Sixth Amendment right to confrontation. Respectfully, this Court should grant rehearing, hold the trial judge erred in admitting this evidence, and remand for a new trial.

Rule 403, SCRE

Under Rule 403, SCRE, relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." Evidence of *Appellant's* alleged pseudoephedrine purchases was highly prejudicial in this manufacturing methamphetamine case and should have been excluded under Rule 403. As defense counsel below emphasized, "there is nothing wrong with buying sudafed [pseudoephedrine]." R. 115, ll. 22-23. Sergeant Thompson's testimony regarding Appellant's alleged purchases was unduly prejudicial because it suggested to the jury that Appellant bought pseudoephedrine "for the wrong reason." R. 116, ll. 11-15. Individuals buy pseudoephedrine every day for various legitimate reasons and there is nothing suspicious about purchasing pseudoephedrine from a pharmacy. Admitting evidence of Appellant's purchases invited the jury to convict him on an improper basis, namely that he had a history of buying pseudoephedrine.

In its opinion, this Court held "the NPLEx records were highly probative to show an objective basis for the reasonable suspicion standard to conduct the initial knock and talk."

However, evidence of *Appellant's* alleged pseudoephedrine purchases was not used to justify why Sergeant Thompson initially conducted the knock and talk at Vining's residence. Appellant was not even known to law enforcement before October 30, 2014. Consequently, there was no probative value whatsoever in the admitting evidence of Appellant's alleged purchases. Instead this evidence was unfairly prejudiced because it invited the jury to convict Appellant on an improper basis, namely that he had a history of buying pseudoephedrine.

Therefore, the trial court erred by admitting Thompson's testimony related to Appellant's alleged pseudoephedrine purchases obtained from NPLEx because the danger of unfair prejudice substantially outweighed any probative value of the records. Respectfully, this Court should grant rehearing, hold the trial judge erred, and remand for a new trial.

Based on the foregoing, Appellant respectfully requests this Court rehear his case pursuant to Rule 221(a), SCACR, due to the significant legal and factual points overlooked and/or misapprehended by this Court in affirming Appellant's convictions for manufacturing methamphetamine and possession of less than one gram of methamphetamine.

Respectfully Submitted,

Lara M. Caudy

LARA M. CAUDY
Appellate Defender

ATTORNEY FOR APPELLANT

This 30th day of May, 2019.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Dorchester County

Honorable Maite Murphy, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

FELIX KOTOWSKI,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a copy of the Petition for Rehearing in the above captioned case has been served upon David Spencer, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Felix Kotowski, at [redacted] Ruth Ann Drive, Summerville, SC 29483, this 30th day of May, 2019.

Lara M. Caudy
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO BEFORE ME this 30th day of May, 2019.

(L.S)

Notary Public for South Carolina
My Commission Expires: September 27, 2028.

The South Carolina Court of Appeals

The State, Respondent,

v.

Felix Kotowski, Appellant.

Appellate Case No. 2016-000842

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.

_____ J.

_____ J.

_____ J.

Columbia, South Carolina

cc:
Alan McCrory Wilson, Esquire
Lara Mary Caudy, Esquire
David A. Spencer, Esquire
David Michael Pascoe, Jr., Esquire
The Honorable Maite Murphy