STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Charleston County

R. Markley Dennis, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

WILLIAM HOLMES,

APPELLANT.

APPELLATE CASE NO. 2018-001642

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Did the Trial Court err by denying Appellant's motion to suppress evidence seized by law enforcement following a knock and talk where officers did not have reasonable suspicion of illegal activity at the targeted apartment in violation of Appellant's state constitutional right to be free from unreasonable invasions of privacy?

STATEMENT OF THE CASE

This is an appeal from Appellant William Holmes's convictions for manufacturing crack cocaine and possession of cocaine, third offense. Holmes and his friend Darell Boston were arrested by officers from the North Charleston Police Department on March 6, 2015. The Charleston County Grand Jury indicted Holmes for one count of manufacturing crack cocaine, one count of possession of crack cocaine with intent to distribute, and one count of possession of cocaine. Holmes and Boston each filed motions to suppress evidence. Following a pretrial suppression hearing, the Honorable R. Markley Dennis, Jr., issued a written order denying the suppression motions.

A three-day jury trial in this matter began on February 5, 2018, in the Charleston County Court of General Sessions. Judge Dennis presided over the trial, and Holmes and Boston were tried together. However, Holmes was tried *in absentia*. The jury ultimately convicted Holmes of manufacturing crack cocaine and possession of cocaine. After the verdict, Judge Dennis signed Holmes's sentencing sheet and sealed it in an envelope. (R. p. 544, lines 19-22). On August 29, 2018, Holmes attended a sentencing hearing where Judge Dennis unsealed the envelope and read the sentence to Holmes. (R. pp. 547-551). Holmes was sentenced to twenty years of imprisonment.[1] Thereafter, Holmes timely served and filed a Notice of Appeal.

[1] Holmes was sentenced to eight years for possession of cocaine, third offense, and twenty years for manufacturing crack cocaine, to be served concurrently.

STATEMENT OF FACTS

Incident

On March 6, 2015, at approximately 5:25 p.m., Patrolman Joseph Sherwood and two other law enforcement officers with the North Charleston Police Department were standing together in an apartment complex parking lot following an unrelated traffic stop when a taxi pulled into the parking lot. (R. p. 18, lines 14–p. 19, line 6; R. p. 55, line 25–p.56, line 3). Patrolman Sherwood and a superior officer watched as Appellant William Holmes and his friend Darell Boston exited the taxi, walked up to Apartment 2, and entered the apartment. (R. p. 210, lines 22-24; R. p. 362, line 24–p. 363, line 1). Neither officer saw the men carrying any weapons or contraband, and Patrolman Sherwood's superior officer later testified that there was nothing suspicious about how the two men got out of the cab and went into the apartment. (R. p. 252, lines 20-23; R. p. 362, line 24–p. 363, line 21; R. p. 375, lines 4-9). The officers watched the men enter the apartment and then resumed their conversation. (R. p. 19, lines 18-24).

The officers continued to talk for about fifteen minutes. (R. p. 73, lines 2-5). During that time, Patrolman Sherwood did not see or hear anything from Apartment 2 that suggested someone was committing a crime. (R. p. 55, lines 15-19; R. p. 73, lines 2-14). Nonetheless, the officers decided to perform a knock and talk at Apartment 2 after Patrolman Sherwood told his superior officer that he recognized Holmes and Boston from prior run-ins at another house known for drug activity. (R. p. 253, lines 2-13).

After Patrolman Sherwood knocked, the sole resident of Apartment 2–Denise Holman–opened the front door. (R. p. 20, lines 17-18). Patrolman Sherwood identified himself as a law enforcement officer and asked to enter the apartment to talk to her. (R. p. 20, lines 17-20; R. p. 22, lines 5-7). Holman then stepped back, and Patrolman Sherwood walked into the apartment.

(R. p. 20, lines 17-22). Patrolman Sherwood never told Holman that that she could refuse to let him enter her apartment. (R. p. 56, line 20–p. 57, line 1).

Upon entering the 400-square-foot, three-room apartment, Patrolman Sherwood observed Holmes and Boston standing in the kitchen near a running microwave and two plastic baggies containing white residue on the kitchen counter. (R. p. 27, lines 4-25). After Patrolman Sherwood stepped inside, Holmes and Boston opened the microwave and ran to the bathroom. (R. p. 29, line 23 –p. 30, line 5). Assuming the men were armed, Patrolman Sherwood approached the bathroom and demanded that they come out. (R. p. 30, lines 12-19; R. p. 32, lines 21-24). Both men immediately complied by walking into the main living room. (R. p. 32, lines 21-24). The officers sat the men down on the couch and searched them. (R. p. 33, lines 1-4). While searching Holmes, Patrolman Sherwood's superior officer found cocaine and a scale on his person. (R. p. 33, lines 1-4). While performing a protective sweep, Patrolman Sherwood discovered a Pyrex cup containing crack cocaine in the bathroom. (R. p. 33, lines 5-12).

After searching the apartment and both men, the officers placed Holmes and Boston in handcuffs, and Patrolman Sherwood left to get a search warrant. (R. p. 35, lines 11-15). Patrolman Sherwood returned with a signed search warrant approximately an hour and a half later. (R. p. 51, line 15–p. 52, line 10). He then executed the search warrant and re-discovered the Pyrex cup in the bathroom. (R. p. 52, lines 11-13). Holmes and Boston were subsequently arrested. However, the officers did not arrest Holman. (R. p. 52, lines 21-24).

Motion to Suppress

Both Holmes and Boston made pretrial motions to suppress any evidence stemming from this knock and talk. In his memorandum in support of his motion to suppress evidence, Holmes argued that Patrolman Sherwood's use of the knock-and-talk technique violated his state and

federal constitutional rights because "the officers involved lacked reasonable suspicion to approach the residence and lacked probable cause to search the residence and seize any items" (R. p. 574).

Suppression Hearing

Patrolman Sherwood, Denise Holman, William Holmes, and Darell Boston testified at the pre-trial suppression hearing. (R. p. 7).

Patrolman Sherwood Testimony

During the pre-trial suppression hearing, Patrolman Sherwood testified that, before he performed this knock and talk, there were no prior complaints regarding drugs, weapons, wanted persons, or armed and dangerous persons at Holman's apartment. (R. p. 55, lines 2-14). In fact, he was not aware of any complaints involving the apartment. (R. p. 54, line 24–p. 55, line 1). Furthermore, when asked whether he had any information that Holmes or Boston were committing a burglary or armed robbery, Patrolman Sherwood said "not at all." (R. p. 55, lines 17-19).

Although Patrolman Sherwood was not aware of any complaints concerning the apartment, he testified that the area where the apartment was located has "always been a hot spot for narcotics activity" and the Police Department had several complaints about drug activity in the area. (R. p. 17, lines 5-9). He made similar contentions in his search warrant affidavit and incident report in this case. In his search warrant affidavit, he stated that he "went to [Apartment 2] in reference to a complaint about drug deals using the apartments for drug sales." (R. p. 618). In his incident report for this case, he stated that he went to Apartment 2 "in reference to drug complaints under case number 2015008889." (R. pp. 602-603). However, Patrolman Sherwood later admitted that case number 2015008889 actually involved a trespassing complaint near

another apartment, not a drug complaint.[2] He did not cite any other case numbers in his incident report to support his statement that he approached Apartment 2 because of drug complaints. (R. p. 63, lines 20-22). Moreover, at the suppression hearing, he testified that he was in the area for a "completely unrelated" traffic stop or call for service, and he decided to perform a knock and talk only after he remembered who Holmes and Boston were. (R. p. 56, lines 5-15).

Denise Holman Testimony

Denise Holman, the sole resident of Apartment 2, testified that she suffered a brain aneurysm and stroke between the incident and her suppression hearing testimony, which resulted in slight memory issues. (R. p. 100, lines 5-22). Despite her memory issues, she was able to testify to the following: (1) she knew Holmes and Boston (R. p. 100, line 23–p. 101, line 19); (2) Holmes and Boston visited her apartment with her permission (R. p. 101, line 21–p. 102, line 6); and (3) She let the officers in after they knocked on her apartment door, but they did not tell her that she could say no (R. 102, lines 7-20).

William Holmes Testimony

Appellant William Holmes testified that he (1) had known Holman since he was a little boy (R. p. 121, line 24–p. 122, line 1); (2) considered her his friend (R. p. 122, lines 2-4); (3) went to her apartment on the day of the incident to get high and get some music with Boston (R. p. 122, lines 12-14); and (4) felt safe and comfortable in Ms. Holman's apartment (R. p. 123, line 13–p. 120, line 4).

[2] During trial, when he was questioned about why he would say a trespassing case was about drugs, Sergeant Sherwood stated that "trespassing and drugs, we always look at go hand in hand," because "drug dealers usually trespass." (R. p. 142, line 11–p. 143, line 6).

Darell Boston Testimony

Darell Boston testified that he (1) had known Holman for about fifteen years (R. p. 108, lines 14-15); (2) had been to her home about ten times (R. p. 109, lines 3-5); (3) typically visited Holman to use her electronics and smoke weed in peace (R. p. 109, lines 6-22); (4) had sold Holman crack in the past (R. p. 113, line 22–p. 114, line 3); (5) called Holman and told her he was coming over on the day of the incident (R. p. 109, lines 23-25); and (6) visited the apartment that day to smoke a blunt and upload music (R. p. 110, lines 3-7; R. p. 116, lines 6-8).

Suppression Argument

At the conclusion of the suppression hearing testimony, the Trial Court heard arguments from the State and counsel. Holmes's counsel cited State v. Counts, 776 S.E.2d 59, 776 S.C. 153 (2015), and argued that Officer Sherwood did not have the reasonable suspicion necessary to perform a knock and talk when he decided to approach Holman's apartment after fifteen minutes without hearing or seeing anything that would lead him to believe a crime was being committed. (R. pp. 143-144). The State argued that Holmes and Boston did not have standing and Officer Sherwood had reasonable suspicion because of his experience as a law enforcement officer, knowledge of Holmes and Boston's prior offenses, and knowledge of drug complaints in the general area. (R. pp. 150-152). However, the State conceded that a police officer's knowledge of a person's criminal history does not give that officer carte blanche to approach that person's door every time the officer sees the person. (R. p. 150, lines 12-18).

Suppression Ruling

After taking the matter under advisement, the Trial Court made the following findings in a written Suppression Hearing Order: (1) "Pursuant to the S.C. Constitution, Defendants do have standing to contest the admissibility of any evidence collected by Sergeant Sherwood and the

North Charleston Police Department;" and (2) "Taking into consideration the totality of the circumstances, Sergeant Sherwood . . . had reasonable suspicion to conduct a knock and talk at the home of Denise Holman. Furthermore, Denise Holman, freely and voluntarily gave officers consent to enter her apartment and the officers' actions inside the apartment were lawful and not violative of the Defendants' rights." Based on these findings, the Trial Court denied the motions to suppress evidence. (R. pp. 1-3).

The case subsequently proceeded to trial, where Holmes was convicted of manufacturing crack cocaine and possession of cocaine, third offense. (R. p. 520, line 19–p. 521, line 13).

ARGUMENT

The Trial Court erred by refusing to grant Appellant's motion to suppress evidence where a law enforcement officer initiated a knock and talk without reasonable suspicion of criminal activity at the targeted home in violation of Appellant's state constitutional right to be free from unreasonable invasions of privacy.

William Holmes was an invited guest in his friend Denise Holman's apartment when Patrolman Sherwood performed this knock and talk. As a guest, the right-to-privacy provision of the South Carolina Constitution guarantees him the right to be free from unreasonable invasions of privacy while visiting her home. See S.C. Const. art. I, § 10. Patrolman Sherwood violated Holmes's right to privacy when he executed this knock and talk without a reasonable suspicion of illegal activity at Holman's specific apartment. See State v. Counts, 413 S.C. 153, 172, 776 S.E.2d 59, 70 (2015). Because the right to feel free from unreasonable governmental intrusions in our homes outweighs the cost to society of suppressing evidence when police perform unconstitutional knock-and-talk investigations, this Court should hold that the Trial Court erred in refusing to grant Holmes's motion to suppress here.

A. Holmes had a reasonable expectation of privacy in Denise Holman's apartment.

While the Trial Court correctly found that Holmes had standing to contest the admissibility of evidence seized by Patrolman Sherwood, the more appropriate question, as it would be in a Fourth Amendment search and seizure case, is whether he had a legitimate expectation of privacy that was violated here. See State v. Missouri, 361 S.C. 107, 603 S.E.2d 594 n.2 (2004) ("The use of the term standing has created confusion in this context, and therefore standing is no longer appropriate to connote the legitimate expectation of privacy in the evidence seized or the premises searched.") (internal quotation marks and citations omitted); Rakas v. Illinois, 439 U.S. 128, 139, 99 S. Ct. 421, 428 (1978) ("[W]e think the better analysis forthrightly focuses on the extent of a particular defendant's rights under the Fourth Amendment, rather than on any theoretically separate, but invariably intertwined concept of standing.") (internal quotation marks and citations omitted); Counts, 413 S.C. 153, 172, 776 S.E.2d 59, 69 ("[O]ur state constitutions provision protecting unreasonable invasions of privacy necessarily requires some analysis of the privacy interests involved.") (internal quotation marks and citations omitted).

During the pretrial suppression hearing, the State analogized this case to Minnesota v. Carter, 525 U.S. 83, 119 S. Ct. 469 (1998), and argued that Holmes had no reasonable expectation of privacy in Holman's apartment because he went there for the "commercial transaction" of getting high and listening to music. (Mot. Suppress Hr'g Tr. pp. 141-142). However, as discussed below, the present case more closely resembles State v. Missouri, 361 S.C. 107, 115, 603 S.E.2d 594, 597-98 (2004), in which the Supreme Court of South Carolina held that a guest had a legitimate expectation of privacy. Furthermore, even if we set aside the factual differences between this case and Carter, Carter is not dispositive here. In Carter, the

Supreme Court of the United States only addressed whether a guest had a reasonable expectation of privacy in his host's home under the Fourth Amendment. It did not address whether that same guest would have a reasonable expectation of privacy under the right-to-privacy provision of the South Carolina Constitution, which provides individuals with greater protection than the federal constitution. See Counts, 413 S.C. at 172, 776 S.E.2d at 70; State v. Weaver, 374 S.C. 313, 322, 649 S.E.2d 479, 483 (2007); State v. Forrester, 343 S.C. 637, 647-48, 541 S.E2d 837, 842-43 (2001).

Because "the federal constitution sets the floor for individual rights," we must first determine whether Holmes had a reasonable expectation of privacy in Ms. Holman's apartment under the framework established by current Fourth Amendment jurisprudence. See Forrester, 343 S.C. at 643, 541 S.E.2d at 840. In the seminal case on this issue, Jones v. United States, 362 U.S. 257, 80 S. Ct. 725, 734 (1960), the Supreme Court of the United States held that "anyone *legitimately on premises* where a search occurs may challenge its legality by way of a motion to suppress." Id., 362 U.S. at 267, 80 S. Ct. at 734 (emphasis added), overruled in part on other grounds by United States v. Salvucci, 448 U.S. 83, 100 S. Ct. 2547 (1980). In so holding, the Court rejected "the prevailing view in the lower courts" at the time, which denied Fourth Amendment protection to guests, invitees, and employees. Id., 362 U.S. at 265, 80 S. Ct. at 733. In a subsequent case, Rakas v. Illinois, 439 U.S. 128, 99 S. Ct. 421 (1978), the Court reaffirmed the factual holding in Jones, but refused to extend the "legitimately on premises" test beyond the facts of that case. See id., 439 U.S. at 143, 99 S. Ct. at 430. Instead, the Court established the test that is still used today: the "capacity to claim the protection of the Fourth Amendment depends . . . upon whether the person who claims [its protection] has a *legitimate expectation of privacy* in

the invaded place." Minnesota v. Olson, 495 U.S. 91, 97, 110 S. Ct. 1684, 1688 (1990) (emphasis added) (quoting Rakas, 439 U.S. at 143, 99 S. Ct. at 430).

Since Rakas, the Supreme Court of the United States has applied the "legitimate expectation of privacy" test in two cases originating from Minnesota. First, in Minnesota v. Olson, the Court addressed whether an overnight guest had a legitimate expectation of privacy in his host's home. See id. 495 U.S. at 93, 110 S. Ct. at 1686. The government in that case argued that the respondent lacked a legitimate expectation of privacy because he was never left alone in the home or given a key. See id. 495 U.S. at 98, 110 S. Ct. at 1689. The Court, however, rejected this argument and held "that Olson's status as an overnight guest is alone enough to show that he had an expectation of privacy in the home that society is prepared to recognize as reasonable." Id. 495 U.S at 96, 110 S. Ct. at 1688.

In the second Minnesota case, Minnesota v. Carter, the Court addressed the privacy interests of a houseguest who was "somewhere in between" an overnight guest and merely legitimately on the premises. See id., 525 U.S. at 91, 119 S. Ct. at 474 (1998). The respondent in that case lived in another state and was visiting an apartment for the first time solely to bag cocaine. See id. 525 U.S. at 86, 119 S. Ct. at 471. He was there for approximately two and a half hours, and he gave the lessee cocaine in exchange for use of the property. See id. 525 U.S. at 86, 119 S. Ct. at 471-72. Ultimately, the Court held that the respondent did not have a legitimate expectation of privacy in the apartment. See Id. 525 U.S. at 91, 119 S. Ct. at 474. The Court reasoned that "respondents' situation is closer to that of one simply permitted on the premises," because of the "purely commercial nature of the transaction . . . the relatively short period of time on the premises, and the lack of any previous connection between respondents and the householder." Id. 525 U.S. at 91, 119 S. Ct. at 474.

The Supreme Court of South Carolina also addressed a case involving a respondent who was not an overnight guest, but it upheld the trial court's finding that the respondent did have a reasonable expectation of privacy. State v. Missouri, 361 S.C. 107, 115, 603 S.E.2d 594, 597 (2004). In Missouri, law enforcement discovered the respondent in the kitchen of his friend's apartment "standing over several dishes of cooling crack cocaine." Id. 361 S.C. at 110, 603 S.E.2d at 595. The Court found that, unlike the respondent in Carter, the respondent in Missouri had grown up with the homeowner, visited the apartment on several occasions, went to the apartment to "get away" and "find comfort," and paid nothing to use the apartment. See id. 361 S.C. at 115, 603 S.E.2d at 597.

In the present case, like the respondents in Missouri and Carter, Holmes's status in Holman's apartment was somewhere in between an overnight guest and someone merely legitimately on the premises. However, because Holmes was from the same neighborhood as Holman, had known her since childhood, visited her on multiple occasions, felt safe and comfortable in her apartment, and considered her his friend, the facts of this case more closely resemble those found in Missouri than Carter. Therefore, this Court should uphold the Trial Court's ruling that Holmes had standing to contest the admissibility of evidence here (i.e. Holmes had a reasonable expectation of privacy in Ms. Holman's apartment).

Even if this Court holds that Holmes did not have a reasonable expectation of privacy in Ms. Holman's apartment under the Fourth Amendment, however, the analysis is not complete. See Forrester, 343 S.C. at 643, 541 S.E.2d at 840 (The federal constitution merely "sets the floor for individual rights while the state constitution establishes the ceiling."). Unlike the Fourth Amendment to the federal constitution, "the South Carolina Constitution provides citizens an express right to privacy." Counts, 413 S.C. at 167, 776 S.E.2d at 67 (2015); see also S.C. Const.

art. I, § 10 ("The right of the people to be secure in their persons, houses, papers, and effects against . . . unreasonable invasions of privacy shall not be violated."). "But, other than the use of the word 'unreasonable' to modify this right, there are no parameters concerning the right or a definition of what constitutes 'unreasonable invasions of privacy." Id.; See also S.C. Const. art. I, § 10. Thus, "'the drafters were depending upon the state judiciary to construct a precise meaning of this phrase.'" Counts, 413 S.C. at 167, 776 S.E.2d at 67 (quoting Jaclyn L. McAndrew, *Who has More Privacy?: State v. Brown and its Effect on South Carolina Criminal Defendants*, 62 S.C. L. Rev. 671, 694 (2011)).

While "our state jurisprudence is scant on the right to privacy," id., the Supreme Court of South Carolina has addressed this provision of our constitution on a few occasions. See Counts, 413 S.C. at 67-70, 776 S.E.2d at 167-73 (involving a knock-and-talk at a homeowner's residence); State v. Weaver, 374 S.C. 313, 321-22, 649 S.E.2d 479, 482-83 (2007) (involving the search of a Jeep in the backyard of a private residence); State v. Houey, 375 S.C. 106, 113, 651 S.E.2d 314, 317 (2007) (involving a challenge to the constitutionality of a statute requiring that certain criminal offenders be tested for sexually transmitted diseases); Forrester, 343 S.C. 637, 541 S.E.2d 837 (involving the search of a purse at a Burger King); Singleton v. State, 313 S.C. 75, 88-89, 437 S.E.2d 53, 60 (1993) (involving the State's attempt to forcibly medicate a death-row inmate solely to facilitate execution). However, our appellate courts have not specifically addressed whether the right-to-privacy provision of our constitution provides guests with greater privacy protections in their hosts' homes than the Fourth Amendment.

The Protection of Persons and Property Act illustrates the level of privacy that guests may reasonably expect to have in their hosts' homes in South Carolina. See Counts, 413 S.C. at 173, 776 S.E.2d at 70. In the Act, our General Assembly expressly found "that persons residing

in or visiting this State have a right to expect to remain unmolested and safe in their homes." S.C. Code Ann. § 16-11-420(D). This right extends to both residents and those "visiting as invited guests." S.C. Code Ann. § 16-11-430(3). In fact, both the Act and the common law "Castle Doctrine" it codified acknowledge that guests have the same right to protect the residence from intruders as their hosts. See id.; State v. Osborne, 202 S.C. 473, 25 S.E.2d 561, 566 (1943) (upholding trial judge's jury instruction that stated the occupant of a house, which included "not only the owner . . . but a guest," need not attempt to retreat before using deadly force to protect the home) (internal quotation marks omitted). Furthermore, there is no temporal language that modifies guests' rights under the Act. Thus, while the amount of time a guest spent in a home is a factor considered by courts in determining whether defendants have a reasonable expectation of privacy in their hosts' homes under the Fourth Amendment, there is no such consideration when determining whether the Act applies to a person. Once someone is an "invited guest" in a residence, that person is entitled to "expect to remain unmolested and safe" within the residence.

When the Protection of Persons and Property Act is read in conjunction with our state constitution's right-to-privacy provision, which "favors an interpretation offering a higher level of privacy protection than the Fourth Amendment," it is clear that South Carolinians are entitled to feel free from unreasonable governmental intrusions as soon as they enter their friends', families', and neighbors' homes as an invited guest. See Counts, 413 S.C. at 167, 776 S.E.2d at 68 (quoting Forrester, 343 S.C. at 645, 541 S.E.2d at 841). Therefore, as soon as Holmes was invited inside his friend Denise Holman's apartment, he had a reasonable expectation of privacy there.

B. Patrolman Sherwood did not have a reasonable suspicion of illegal activity at Holman's apartment prior to approaching it.

The Trial Court erred by refusing to grant Holmes's suppression motion because its finding that Patrolman Sherwood had the requisite reasonable suspicion to initiate a knock and talk at Holman's apartment was not supported by the evidence presented at the pretrial suppression hearing. See State v. Tindall, 388 S.C. 518, 521, 698 S.E.2d 203, 205 (2010) ("On 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. Khingratsaiphon, 352 S.C. 62, 70, 572 S.E.2d 456, 459-60 (2002) ("[T]he appellate court may . . . conduct its own review of the record to determine whether the trial judge's decision is supported by the evidence.").

During the pretrial suppression hearing, Patrolman Sherwood did not articulate any factors that would reasonably lead him to believe criminal activity was underway in Holman's apartment prior to initiating this knock and talk. He was only able to observe Holmes and Boston for a few moments while they walked from the taxi to Holman's apartment. (R. p. 18, line 21–p. 19, line 6). During that time, he did not see either man carrying any firearms or contraband. (R. p. 73, lines 8-10). After Holmes and Boston entered the apartment, Patrolman Sherwood waited fifteen minutes before initiating the knock and talk, and he did not see or hear anything that would suggest someone was committing a crime. (R. p. 73, lines 2-16).

Despite the dearth of evidence that could reasonably lead Patrolman Sherwood to believe that a crime was occurring in Holman's apartment, he decided to initiate this knock and talk anyway for the following reasons: (1) the apartment was located in a "hot spot for narcotics activity" (R. p. 17, lines 5-9); (2) he had prior run-ins with Holmes and

Boston at another house known for drug activity (R. p. 253, lines 2-13); and (3) he had prior "little run-ins" with Holman regarding drugs, but "nothing too serious" (R. p. 19, lines 7-11). While these factors would constitute sufficient grounds for Patrolman Sherwood to perform a knock and talk under a Fourth Amendment analysis, the right-to-privacy provision of the South Carolina Constitution requires that he must have "reasonable suspicion of illegal activity at a targeted residence prior to approaching the residence and knocking on the door." Counts, 413 S.C. at 172, 776 S.E.2d at 70; Cf. Florida v. Jardines, 569 U.S. 1, 8, 133 S. Ct. 1409, 1416 (2013) ("Thus, a police officer not armed with a warrant may approach a home and knock, precisely because that is no more than any private citizen might do.") (internal quotation marks and citations omitted).

Standing alone, none of the factors that prompted Patrolman Sherwood to initiate this knock and talk are enough to establish a reasonable suspicion of criminal activity at the apartment. See Illinois v. Wardlow, 528 U.S. 119, 124, 120 S. Ct. 673, 676 (2000) ("An individual's presence in an area of expected criminal activity, standing alone, is not enough to support a reasonable, particularized suspicion that the person is committing a crime."); United States v. Sprinkle, 106 F.3d 613, 617 (4th Cir. 1997) ("A prior criminal record 'is not, standing alone, sufficient to create reasonable suspicion.'") (quoting United States v. Davis, 94 F.3d 1465, 1469 (10th Cir. 1996)). However, even when these factors are considered together–as they must be–they gain little, if any, strength. See Sprinkle at 617 ("The government is right that in the end we must evaluate the combined strength of these factors.").

In Sprinkle, the Fourth Circuit Court of Appeals rejected the government's argument that a police officer had reasonable suspicion to initiate a traffic stop because he was aware of a defendant's criminal history, the vehicle was in a high-crime area, and the officer considered the defendants' innocuous movements suspicious. See id. The officer in that case was in a high-crime neighborhood for an unrelated incident[3] when he saw a man sitting in a parked car. He knew the man had just been released from prison after serving time for narcotics violations. See id. He observed another man get into the vehicle and the two men huddled close together over the center console. See id. When the officer walked by the vehicle one of the men covered his face as if to avoid recognition, and the vehicle drove away as soon as the officer had walked past. See id. However, as the officer walked by the vehicle, he could see the defendants' hands, and the defendants were not passing anything between them or concealing any object. See id. at 618. While the Court acknowledged that the officer's "curiosity was understandably aroused when he spotted [the defendant], who had recently served time for a narcotics offense, in a neighborhood with a high incidence of drug traffic," it stated that "there must be (other) particularized evidence that indicates criminal activity is afoot" before the officer's curiosity is elevated to a reasonable suspicion. See id. Because the officer "could actually see that nothing of a criminal nature was happening in the car" when he saw the men's hands as he walked by and there were innocent explanations for the men's other behaviors, the Court held that the factors cited by the government "did not give the officers the necessary reasonable, articulable suspicion of criminal activity." Id. at 619-20.

[3] The officers were escorting "a misbehaving (rock-throwing) juvenile to his house." See id. at 615.

In United States v. Foster, 634 F.3d 243 (4th Cir. 2011), the Fourth Circuit again held that a detective did not have reasonable suspicion to perform a traffic stop where the detective walked past a parked vehicle in a low-crime neighborhood. Id. 634 F.3d at 245, 248. The detective had observed a man sitting in the driver's seat with his hands on the wheel. See id. at 245. As the detective passed the vehicle, he saw a passenger, whom he knew to have a prior arrest for a drug-related crime, sit up in the passenger seat from a crouching position. See id. The detective said the passenger's arms began "shifting" and "going haywire," and when he asked the men what they were doing they said "just chilling." Id. The detective subsequently got in his own vehicle and continued to watch the defendant's vehicle for approximately fifteen minutes. See id. During that time he learned that the defendant was "under investigation," so he called for backup and returned to the still parked vehicle with his gun drawn to perform a stop. See id. The government argued "that three factors, taken together, reasonably led [the detective] to initiate the stop:" (1) prior knowledge of the defendant's criminal history; (2) the defendant's sudden appearance from a crouched position in the vehicle; and (3) the defendant's frenzied arm movements. See id. at 246. The Court, however, disagreed, stating that the detective "was required to pair his prior knowledge of [the defendant's] criminal record with some more 'concrete factors' to demonstrate that there was reasonable suspicion of criminal activity." The Court held that the government failed to meet this burden and that it found "it particularly disingenuous of the Government to attempt to portray [the defendant's] arm movements as ominous." Id. at 248.

The Supreme Court of South Carolina has also rejected arguments by the State that resemble those presented by the government in Sprinkle and Foster. For example, in

State v. Hewins, 409 S.C. 93, 760 S.E.2d 814 (2014), the Court rejected the State's argument that three factors provided an officer with the requisite reasonable suspicion to extend a lawful stop after issuing a warning citation: (1) the defendant was seen driving in a "known drug area" earlier that evening; (2) the defendant remained nervous after the warning citation was issued; and (3) "when questioned, [the defendant] quickly responded that he did not have any drugs." Id. 409 S.C. at 116, 760 S.E.2d at 826. The Court "conclude[d] that these facts did not provide [the officer] with a reasonable suspicion that criminal activity was afoot." Id.

In the present case, like the detective in Foster, Patrolman Sherwood failed to pair his knowledge of Holmes and Boston's criminal history with any concrete factors that demonstrated a crime was occurring in Holman's apartment. Furthermore, like the officer in Sprinkle, Patrolman Sherwood actually saw Holmes and Boston's empty hands as they walked into the apartment. Finally, there was no testimony that Patrolman Sherwood ever observed either man behaving nervously or suspiciously prior to entering Holman's apartment.

Therefore, considering the above-referenced authorities, the Trial Court erred in finding that Patrolman Sherwood had the necessary reasonable suspicion that a crime was occurring at Holman's apartment prior to initiating this knock and talk.

C. The Trial Court should have suppressed the evidence seized as a result of this knock and talk to prevent similar misconduct by law enforcement in future cases.

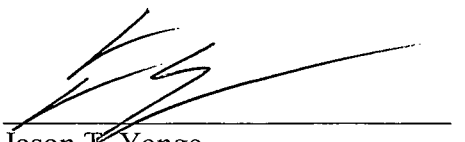
Because Patrolman Sherwood was only able to discover the drug evidence seized in this case by performing a knock and talk at Holman's apartment without a reasonable suspicion of criminal activity there, in violation of Holmes's right to privacy under the

South Carolina Constitution, the Trial Court should have suppressed the evidence. See State v. Copeland, 321 S.C. 318, 323, 468 S.E.2d 620, 624 (1996) ("The 'fruit of the poisonous tree' doctrine provides that evidence must be excluded if it would not have come to light but for the illegal actions of the police, and the evidence has been obtained by the exploitation of that illegality."); See also Foster, 634 F.3d 243 at 249 ("Accordingly, we apply the exclusionary rule here to continue to deter police from engaging in these types of unconstitutional seizures. . . . [T]o do otherwise, would 'invite intrusions upon constitutionally guaranteed rights based on nothing more substantial than inarticulate hunches.") (quoting Terry v. Ohio, 392 U.S. 1, 22, 88 S. Ct. 1868, 1880 (1968)).

Furthermore, the Trial Court's finding that Holman consented to Patrolman Sherwood entering her apartment does not change this result. See State v. Tindall, 388 S.C. 518, 523-24, 698 S.E.2d 203, 206 (2003) ("[W]hen an officer asks for consent to search after an unconstitutional detention, the consent procured is per se invalid unless it is both voluntary and not an exploitation of the unlawful detention.") (internal quotation marks and citations omitted); See also State v. Counts, 413 S.C. 153, 776 S.E.2d 59 (2015) ("In contrast to a routine sales call, the 'knock and talk' technique is inherently coercive as it is conducted by law enforcement and not a private citizen.").

CONCLUSION

For the reasons stated above, this Court should reverse Holmes's convictions and remand this matter for a new trial with instructions that the Trial Court suppress all evidence seized following this knock and talk.



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CERTIFICATE OF COUNSEL

The undersigned counsel certifies this Final Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 2014, order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

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