STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Laurens County

Honorable R. Frank Addy, Jr., Circuit Court Judge

THE STATE,

APPELLANT,

V.

SYLVESTER FERGUSON, III,

RESPONDENT

APPELLATE CASE NO. 2018-002133

INITIAL BRIEF OF RESPONDENT

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RESPONDENT'S COUNTERSTATEMENT OF THE ISSUE ON APPEAL

Whether any evidence in the record supports the trial judge's suppression of evidence because the police lacked reasonable suspicion to approach the residence under the South Carolina Constitution?

STATEMENT OF THE CASE

A Laurens County grand jury indicted appellant for possession of methamphetamine, possession of crack cocaine, and manufacturing methamphetamine and on November 26, 2018, the case was called before the Honorable Frank R. Addy, Jr. Tr. 1. C. Dale Scott and Margaret G. Boykin represented the State. Tr. 1. Joel T. Broome and Tristan M. Shaffer represented respondent. Tr. 1. Judge Addy granted respondent's suppression motion and the State filed this appeal.

STANDARD OF REVIEW

"On appeal from a motion to suppress on Fourth Amendment grounds, this Court applies a deferential standard of review and will reverse only if there is clear error." Robinson v. State, 407 S.C. 169, 180–81, 754 S.E.2d 862, 868 (2014). The same deferential standard of review applies to cases decided under the South Carolina Constitution. State v. Counts, 413 S.C. 153, 161, 776 S.E.2d 59, 63 (2015).

ARGUMENT

Ample evidence in the record supports the trial judge's suppression of evidence because the police lacked reasonable suspicion to approach the residence under the South Carolina Constitution.

All the police had before they approached the residence in this case was an uncorroborated anonymous tip. Tr. 127, l. 25 – 128, l. 12. Officer Andrew Hall was at a convenience station in Joanna, South Carolina when a black male waved him down. Tr.57, l. 22 – 58, l. 5. The man told Officer Hall that appellant was at an apartment "cooking dope." Tr. 66, l. 6 – 25. Tr. 58, l. 2 – 5.

The officer did not know the black male who approached him at the convenience store. Tr. 58, l. 16 – 59, l. 2. The officer did not get the man's name, address, or any further information from the tipster. Tr. 70, l. 16 – 73, l. 8. Instead of getting any other scrap or tidbit of information from the man, Officer Hall instead called Officer Charles Nations and "asked him if he was busy; if he'd like to come and try to a knock-and-talk with me at the apartment." Tr. 59, l. 3 – 11.

The officers traveled to the apartment and conducted no further research or surveillance, but "decided, based upon this civilian complaint, to do a knock-and-talk at the residence." Tr. 75, l. 6 – 17. Officer Nations at first said he knocked on the door. Tr. 77, l. 7 – 9. Upon prompting from the solicitor, he said he saw the window open, heard the lock turn, and then said "the knock side of it did not occur." Tr. 77, l. 15 – 23.

A man named Henry Davis opened the door. Tr. 78, l. 1 – 7. The police asked if appellant was in the residence and Davis said he was. Tr. 78, l. 3 – 12. Davis made a motion indicating the police could enter the apartment, which they did. Tr. 78, l. 13 – 79, l. 14. Once inside the apartment, the police testified they found drugs "in plain view." Tr. 79, l. 15 – 83, l. 18.

Following a lengthy hearing, Judge Addy suppressed the drugs based on the South Carolina Constitution's right to privacy. Tr. 290, l. 21 – 294, l. 18. Relying on State v. Counts, 413 S.C. 153, 776 S.E.2d 59 (2015), the court found the police lacked reasonable suspicion to conduct the knock-and-talk. Tr. 290, l. 21 – 294, l. 18. The court found the police did no independent confirmation of the anonymous tip, stating, "They could've done something." Tr. 294, l. 4 – 8. But without any further work at all, Judge Addy found that the anonymous tip—under the circumstances of this case—did not satisfy Counts' reasonable suspicion requirement. Tr. 290, l. 21 – 294, l. 18.

The trial court's ruling was correct and based on the evidence presented during the hearing, therefore, this Court must affirm under the standard of review. A judge's ruling at a suppression hearing is reviewed under a deferential standard of review and only reverses when the decision is clearly erroneous. State v. Kotowski, 427 S.C. 119, 127, 828 S.E.2d 605, 609 (Ct. App. 2019), reh'g denied (June 21, 2019), cert. granted (Sept. 25, 2019). Judge Addy's ruling was based on the largely undisputed facts that the police did nothing but receive an anonymous tip and decided to conduct a knock-and-talk with no further investigation or any attempt whatsoever to corroborate the anonymous tip.

South Carolina's Constitution provides: "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." S.C. Const. Art. I, Section 10. "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." State v. Forrester, 343 S.C. 637, 645, 541 S.E.2d 837, 841 (2001). "[T]he federal Constitution sets the floor for individual rights while the state

constitution establishes the ceiling." Id. at 647, 541 S.E.2d at 842. According to the Supreme Court, "[t]he focus in the state constitution is on whether the invasion of privacy is reasonable, regardless of the person's expectation of privacy" in the place searched. State v. Weaver, 374 S.C. 313, 322, 649 S.E.2d 479, 483 (2007). "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." Id. (citing Forrester, 343 S.C. at 644-45, 541 S.E.2d at 841).

In Counts, the Court held expanded our citizens' right to privacy by holding "that law enforcement must have reasonable suspicion of illegal activity at a targeted residence **prior to approaching the residence** and knocking on the door." Counts at 172, 776 S.E.2d at 70 (emphasis added). The Court reasoned, "we find this rule safeguards the express constitutional right against unreasonable invasions of privacy and does not hamper law enforcement in their investigative efforts." Id. The State contends in its brief that a knock-and-talk never happened because Davis opened the door before the police knocked, but this attempt to circumvent Counts fails because of the above-emphasized language. The police must have reasonable suspicion before they approach a residence and here they did not. Accepting the State's loophole would invite police mischief and fails to respect the basis of Counts, which is the inherently coercive nature of the police targeting and approaching a residence.

The knock-and-talk in Counts was only upheld after the police corroborated two anonymous tips. Id. at 173-74, 776 S.E.2d at 70-71. The tips identified Counts' vehicles. Id. The tips gave Counts' phone number. Id. The tips gave Counts' multiple identities. Id. The officers investigated and determined that Counts had two false identification cards. Id. The police also learned Counts had two prior drug convictions. Id. The police here did none of the things that

gave them reasonable suspicion in Counts.

The recent interpretation of Counts in Kotowski further shows the lack of any effort to satisfy the reasonable suspicion standard in this case. Kotowski at 129, 828 S.E.2d at 610. In Kotowski, the police did not just rely on an anonymous tip before conducting a knock-and-talk. Id. The police conducted surveillance. Id. The surveillance revealed a car belonging to the son of a convicted meth cook. Id. The police also examined the sudafed database which revealed a substantial amount of purchases. Id. Here, the police did not even take these minimally sufficient steps that were performed in Kotowski.

Finally, the State claims that because the anonymous tip here was face-to-face, it satisfies reasonable suspicion. Face-to-face tips do not, however, as a matter of law, satisfy reasonable suspicion. The State's argument on this point forgets the standard of review and that Judge Addy found that this brief encounter at a gas station—with no follow-up whatsoever by the police—did not satisfy reasonable suspicion. The State's position would eliminate discretion for trial judges in these cases. Because ample evidence exists to support the lower court's ruling, this Court should affirm.

CONCLUSION

The ruling of the lower court should be affirmed.

This 27th day of April, 2020.

s/David Alexander
Appellate Defender

ATTORNEY FOR RESPONDENT

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CERTIFICATE OF SERVICE

Pursuant to the Supreme Court's Order "RE: Operation of the Appellate Courts During the Coronavirus Emergency," dated March 20, 2020, the undersigned hereby certifies a true copy of the Initial Brief of Respondent in the above-referenced case has been served upon Mark R. Farthing, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS) this 27th day of April, 2020.

s/David Alexander
Appellate Defender

ATTORNEY FOR RESPONDENT