STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Laurens County
Honorable Frank R. Addy, Jr., Circuit Court Judge
Appellate Case No. 2018-002133

THE STATE,

Appellant,

vs.

SYLVESTER FERGUSON, III,

Respondent.

FINAL BRIEF OF APPELLANT

ALAN WILSON
Attorney General

MARK R. FARTHING
Senior Assistant Attorney General

Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

DAVID M. STUMBO
Solicitor, Eighth Judicial Circuit

Post Office Box 516
Greenwood, SC 29648
(864) 842-8800

ATTORNEYS FOR APPELLANT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

South Carolina Cases:

United States Supreme Court Cases:

Other State and Federal Cases:

Other Authorities:

STATEMENT OF ISSUE ON APPEAL

Did the trial judge reversibly err by granting Ferguson's motion to suppress illegal drugs and other incriminating evidence recovered from an individual unit in a multi-unit apartment building based on an alleged violation of Ferguson's constitutional rights when the law enforcement officers reasonably approached the apartment building and engaged in a consensual encounter with one of the apartment's occupants prior to entering the apartment's curtilage after obtaining reasonable suspicion of criminal activity from a face-to-face tip provided by a non-anonymous concerned citizen that was fully consistent with the officers' knowledge of both Ferguson's prior criminal history and the high-crime nature of the area where Ferguson was reported to be actively engaged in the dangerous act of manufacturing methamphetamine?

STATEMENT OF THE CASE

In January of 2017, Respondent Sylvester Ferguson, III was arrested after illegal drugs and other incriminating evidence were found both in a search of an apartment located in Joanna, South Carolina, and in a search of Ferguson's clothing. In May of 2017, the Laurens County Grand Jury indicted Ferguson for possession of methamphetamine, possession of crack cocaine, and manufacturing methamphetamine. On November 26, 2018, Ferguson's case was called for trial in the Laurens County Court of General Sessions with the Honorable Frank R. Addy, Jr., circuit court judge, presiding. Ferguson was not present at that time, and the trial proceeded forward in his absence. At the outset of the trial proceedings, Ferguson's counsel moved for the illegal drugs and other incriminating evidence that had been discovered to be suppressed, and the trial judge conducted an in limine hearing on the matter. At the conclusion of the hearing, the trial judge granted the suppression motion, and the trial was aborted prior to the jury being sworn. The State then timely filed a notice of appeal.[1]

[1] Because the trial judge's suppression of the drugs substantially impairs the State's ability to prosecute Ferguson for the indicted drug-related offenses, the State can properly appeal the trial judge's suppression ruling. See State v. McKnight, 287 S.C. 167, 168, 337 S.E.2d 208, 209 (1985) ("A pre-trial order granting the suppression of evidence which significantly impairs the prosecution of a criminal case is directly appealable[.]").

STATEMENT OF FACTS

Shortly before 11:00 a.m. on the morning of January 17, 2017, Deputy Andrew Hall of the Laurens County Sheriff's Office pulled his patrol vehicle into the parking lot of a convenience store located off Whitmire Highway while conducting routine patrol in Joanna, South Carolina. (R. pp. 7-8; p. 11). When he did so, a man with whom Deputy Hall was not previously familiar approached the store on foot and began waving at the officer to get his attention. (R. pp. 8-10). In response, Deputy Hall drove over to the man, exited his vehicle, and engaged in a face-to-face encounter with him for several minutes to find out what he wanted. (R. p. 9; p. 18). During that conversation, the man reported "Trey" Ferguson, whom the deputy was familiar with from past encounters and recognized as Respondent Sylvester Ferguson, III, was cooking "dope" inside a two-story apartment building located on Whitmire Highway. (R. p. 9; p. 11; p. 17; p. 19; p. 24; p. 86). Furthermore, the man indicated the specific apartment Ferguson was cooking methamphetamine inside of was situated on the upper left-hand side of the identified apartment building. (R. p. 11; p. 24; p. 80; p. 86; pp. 182-183).

Upon receiving that information, Deputy Hall immediately contacted Investigator Charles Nations, who was a member of the Laurens County Sheriff's Office's narcotics unit, and alerted him of what had been relayed by the concerned citizen. (R. pp. 10-11; p. 26; p. 105). At that time, Investigator Nations was already familiar with Ferguson, knew Ferguson had previously been involved with methamphetamine, had encountered Ferguson during an investigation into methamphetamine manufacturing that resulted in Ferguson's arrest, and had previously received tips about Ferguson being involved in methamphetamine production in the past, including one tip indicating he was still actively purchasing the precursor ingredients involved in making methamphetamine. (R. pp. 150-152; p. 157; p. 159; pp. 176-178; pp. 180-181; p. 188; p. 195).

Concerned about the high degree of danger created by the methamphetamine manufacturing process, Investigator Nations met up with Deputy Hall, and the two headed over to the apartment building—which was located in an area known to have a high level of activity involving methamphetamine and drug trafficking—to follow up on the tip and attempt to initiate a "knock-and-talk" along with Investigator Steven Sweat, who was another experienced member of the sheriff's office's narcotics unit and who was also familiar with Ferguson based on Ferguson's past involvement with drugs. (R. pp. 10-11; pp. 19-20; pp. 25-28; pp. 79-81; pp. 85-88; p. 102; p. 105; p. 152; p. 172; pp. 179-181; p. 190).

A few minutes later and just twenty to thirty minutes after the citizen provided the tip about Ferguson to Deputy Hall, the three officers, who were wearing badges and other law enforcement attire, arrived at the apartment building and, with Investigator Nations in the lead, began to ascend the exterior stairway to reach the building's second story, which contained a shared balcony connected to all the second-story units. (R. p. 11; p. 27; pp. 68-69; pp. 87-88; pp. 155-156; p. 263). As they neared the top, Henry Davis, who was Ferguson's cousin and the apartment's lone lessee, opened the door to the apartment, began to leave for work, and saw the officers on the stairway.[2] (R. p. 28; p. 49; p. 62; pp. 155-156; pp. 183-184; p. 191; p. 196; p. 198; pp. 202-206; p. 209). At that point, Investigator Nations identified himself, greeted Davis, and asked him if Ferguson was inside the apartment. (R. p. 29; p. 66; p. 88; p. 156; pp. 183-184). In response to the question, Davis confirmed Ferguson was inside, started to head back into the apartment to retrieve Ferguson, and gestured for Investigator Nations to follow him

[2] Initially, Investigator Nations mistakenly indicated he knocked on the apartment's door before making contact with Davis, but he then immediately clarified no knocking actually took place. (R. p. 28; pp. 183-184). Consistent with Investigator Nations's clarification, Davis confirmed he opened his apartment's door while leaving for work and observed the officers on the stairwell. (R. pp. 203-204).

while leaving the door open.[3] (R. pp. 29-30; p. 66; p. 70; p. 88). Investigator Nations then stepped just inside the apartment's doorway to maintain visual contact, and, shortly after that, Ferguson emerged from a back bedroom and came to the front with Davis. (R. pp. 29-31; pp. 88-89; pp. 183-184).

Upon making contact with Ferguson, Investigator Nations explained why they were there and disclosed the substance of the citizen's complaint, and both Ferguson and Davis denied being involved in methamphetamine manufacturing or any other illegal activity. (R. pp. 31-32; p. 88; p. 233). Investigator Nations then asked the men for permission to do a brief walkthrough of the apartment to make sure nothing illegal was occurring, and Davis immediately provided consent. (R. pp. 32-33; pp. 72-73; pp. 88-89; pp. 184-185). Following that, Ferguson—after some initial hesitation—also provided consent to the investigators for a walkthrough search. (R. pp. 32-33; pp. 88-89; pp. 184-185).

Once consent had been obtained, Investigator Nations and Investigator Sweat split up and conducted a quick sweep of the apartment.[4] (R. pp. 33-34; p. 89). While doing so, Investigator Nations observed a lighter fluid bottle, which he knew was commonly associated with methamphetamine production, along with what appeared to be a package of crack cocaine in plain view. (R. p. 33). Meanwhile, Investigator Sweat located a pipe with marijuana residue on it in plain view on a table in the apartment's living room. (R. p. 34; p. 89). Based on their observations, the officers contacted Sergeant Matt Veal, who was the supervisor of the Laurens

[3] Later on during the trial proceedings, Davis confirmed he provided consent to the officers to enter his apartment after making contact with them. (R. p. 204).

[4] After he entered the apartment, Investigator Nations indicated he detected a musky and ammonia-like smell that was consistent with the odors created by the methamphetamine production process. (R. pp. 171-172). However, he had been unable to detect that odor through an open window prior to making entry into the apartment. (R. p. 170).

County Sheriff's Office's narcotics unit, and asked him to obtain a search warrant for the apartment. (R. p. 34; p. 90; p. 105).

While the officers waited for the search warrant to arrive, Ferguson began behaving in a "fidgety" manner and repeatedly put his hands into his pockets despite being asked not to do so. (R. p. 35; p. 90). Based on Ferguson's concerning behavior, Investigator Sweat conducted a frisk search of Ferguson and, during the search, felt a small vial he knew was commonly used to store drugs. (R. pp. 35-36; pp. 91-94). At that point, Investigator Sweat removed the vial and discovered both methamphetamine and crack cocaine inside. (R. p. 91; p. 100).

Thereafter, just over thirty minutes after Investigator Nations and the other officers had arrived at the apartment, Sergeant Veal obtained a search warrant and swiftly brought it over to the apartment building. (R. p. 26; p. 34; pp. 87-88; p. 90; p. 92; pp. 105-107). During the ensuing warrant-based search, the officers founds numerous items associated with methamphetamine production, including three hydrogen chloride gas generators, a "one pot" bottle, a jar of solvent, a bottle of sulfuric acid, several containers of drain opener, multiple plastic tubes, a metal strainer, a "pill wash," more lighter fluid, some coffee filters, various containers of salt, and an open ammonium-nitrate pack. (R. pp. 37-39; pp. 92-93). Furthermore, officers located some paperwork associated with Ferguson in one of the apartment's bedrooms and found some coffee filters containing an unknown substance in a pair of Ferguson's pants. (R. p. 93; pp. 96-97). Based on the officers' discoveries, field testing was conducted on some of the unknown substances found in the apartment, and those substances tested positive for methamphetamine. (R. p. 96). Both Ferguson and Davis were then placed under arrest.[5] (R. p. 25; p. 41; p. 209).

[5] Davis's charges were later unconditionally dismissed. (R. pp. 209-210).

Subsequently, Ferguson was indicted for a litany of drug-related charges, and his case proceeded forward to trial. (R. p. 1; p. 4; pp. 271-276). At the outset of trial, defense counsel moved to suppress the drugs and other incriminating evidence found during the search of the apartment pursuant to both the state and federal constitutions, and the trial judge conducted an in limine hearing on the matter. (R. p. 6). During the course of the hearing, Deputy Hall recounted his face-to-face encounter with the concerned citizen along with the information provided by that individual, and the other officers discussed the actions they took in response to the citizen's tip, which ultimately led to the discovery of the incriminating evidence and Ferguson's arrest. (R. pp. 7-81; pp. 85-103; pp. 105-108; pp. 150-195). In doing so, the officers explained they believed the tip they received was reliable based on the fact it was provided by a concerned citizen who had nothing to gain from it, noted they believed they had an imperative need to act based on the potential danger an active methamphetamine manufacturing operation could pose in an apartment building, and confirmed the tip of methamphetamine manufacturing was consistent with both their knowledge of Ferguson's past drug-related activities and the nature of the area in which the apartment building was located. (R. pp. 10-11; pp. 19-20; pp. 26-27; p. 87; p. 102; pp. 150-152; pp. 159-160; pp. 179-181; p. 188; p. 190). Furthermore, in addition to the officers' testimony, Davis testified about what occurred on the date of the incident, confirmed he encountered several officers on his apartment building's stairwell after opening his own door to leave for work, and indicated he spoke with those officers and provided them with consent to enter his apartment.[6] (R. pp. 196-210).

[6] During his testimony, Davis also stated he lived alone in the apartment and asserted Ferguson was merely visiting on the morning of the incident. (R. pp. 199-202; p. 205; p. 209). However, according to Investigator Nations, the officer had received information indicating Ferguson—who was known to move from residence to residence—was renting a room from Davis. (R. p. 32; pp. 151-152). Based on Investigator Nations's testimony in that regard, the trial judge

In light of the testimony elicited during the hearing, defense counsel argued all the incriminating evidence should be suppressed based on a purported violation of Ferguson's constitutional rights. (R. p. 110). As support for that particular contention, defense counsel asserted the officers needed reasonable suspicion in order to conduct a "knock-and-talk" pursuant to South Carolina law while maintaining the tip the officers received was not sufficient to establish reasonable suspicion due to the alleged absence of required corroboration, predictive information, or information demonstrating the tipster was reliable or trustworthy.[7] (R. pp. 110-112; p. 134; pp. 137-139; pp. 221-222). Furthermore, defense counsel maintained the officers were required to have reasonable suspicion in order to even approach the apartment in any manner and, therefore, violated Ferguson's constitutional rights despite the fact they did not actually knock on the apartment's door. (R. p. 218; pp. 221-222; p. 228).

In rebuttal, the solicitor contended no "knock-and-talk" occurred in Ferguson's case because Davis came outside and verified Ferguson was inside the apartment before the officers had left the apartment building's common area and made it to the unit's door. (R. p. 121; pp. 235-236). Beyond that, the solicitor asserted the "fresh" tip provided by the concerned citizen was sufficient to establish reasonable suspicion when considered in conjunction with the other circumstances, such as the officers' awareness of Ferguson's past connection to criminal activity and the apartment being located in a high-crime area, due to the fact it was not anonymous but, instead, was provided in a face-to-face encounter that enabled Deputy Hill to personally evaluate

---

determined Ferguson had a possessory interest in the apartment and could properly raise a constitutional challenge to the propriety of the officers' actions. (R. p. 215).

[7] Directly before making his arguments to the trial judge, defense counsel presented the trial judge and solicitor with a written motion to suppress that had not previously been submitted. (R. p. 109; pp. 267-270).

the credibility of an individual who was directly providing information to him.[8] (R. p. 123; pp. 125-126; pp. 143-144; p. 233; pp. 247-249).

Upon considering the matter, the trial judge granted defense counsel's motion to suppress. (R. p. 245; pp. 254-256). In doing so, the trial judge correctly found the officers' actions in Ferguson's case were not "indiscriminate" in the manner the South Carolina Supreme Court noted would be constitutionally problematic in its decision in State v. Counts, 413 S.C. 153, 776 S.E.2d 59 (2015), and, instead, were based on specific information the officers had received about a specific individual. (R. p. 130). Nonetheless, the trial judge interpreted the Counts decision to hold reasonable suspicion was necessary whenever law enforcement officers engaged the occupants of a residence in any manner and determined the officers did not possess reasonable suspicion when they approached the apartment's door in Ferguson's case. (R. p. 232; p. 243; p. 245). In reaching that determination, the trial judge concluded the tip the officers relied upon was "anonymous" and lacked corroboration.[9] (R. pp. 126-127; pp. 145-146; pp. 244-245; pp. 252-253). Furthermore, the trial judge found the tip was unreliable because the officers did not know the tipster's identity and did not question the tipster to determine where he obtained his information. (R. pp. 230-231; pp. 233-234; p. 244; p. 252). However, the trial judge conceded the issue was "a very close call" and invited the solicitor to appeal the ruling. (R. p. 242; p. 245; p. 253). The solicitor then did just that. (R. pp. 245-246; p. 277).

[8] Furthermore, the solicitor argued exigent circumstances supported the officers' actions, but the trial judge found no exigency existed based on the testimony indicating the officers did not detect any odors associated with the methamphetamine manufacturing process from the apartment's open window. (R. p. 249; p. 251).

[9] As to how the tip might have been corroborated, the trial judge suggested the officers could have asked the "druggies" at the jail if Ferguson had been supplying methamphetamine. (R. p. 245).

STANDARD OF REVIEW

In criminal cases, appellate courts sit to review errors of law only. State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). In search and seizure cases, the appellate court reviews the trial judge's determinations under a clear error standard and will affirm those determinations if they are supported by the evidence. State v. Flowers, 360 S.C. 1, 5, 598 S.E.2d 725, 727 (Ct. App. 2004); see State v. Brockman, 339 S.C. 57, 66, 528 S.E.2d 661, 666 (2000) ("[W]e will review the trial court's ruling like any other factual finding and reverse if there is clear error. We will affirm if there is any evidence to support the ruling."). However, the appellate court is *not* barred from conducting its own review of the record to determine whether the trial judge's decision in a search and seizure case is supported by the evidence and will reverse when the trial judge's ruling is clearly legally erroneous. State v. Cheeks, 400 S.C. 329, 334, 733 S.E.2d 611, 614 (Ct. App. 2012); see State v. Adams, 409 S.C. 641, 654, 763 S.E.2d 341, 348 (2014) (reversing the trial judge's denial of a suppression motion where the trial judge's ruling was clearly legally erroneous); Narcisco v. State, 397 S.C. 24, 28, 723 S.E.2d 369, 371 (2012) ("[T]his Court is not barred from conducting its own review of the record to determine whether the trial judge's decision is supported by the evidence.").

ARGUMENT

Did the trial judge reversibly err by granting Ferguson's motion to suppress illegal drugs and other incriminating evidence recovered from an individual unit in a multi-unit apartment building based on an alleged violation of Ferguson's constitutional rights when the law enforcement officers reasonably approached the apartment building and engaged in a consensual encounter with one of the apartment's occupants prior to entering the apartment's curtilage after obtaining reasonable suspicion of criminal activity from a face-to-face tip provided by a non-anonymous concerned citizen that was fully consistent with the officers' knowledge of both Ferguson's prior criminal history and the high-crime nature of the area where Ferguson was reported to be actively engaged in the dangerous act of manufacturing methamphetamine?

Following an in limine suppression hearing, the trial judge ruled the illegal drugs and other incriminating evidence recovered in Ferguson's case should be excluded from trial after finding Ferguson's constitutional rights were violated by the law enforcement officers' actions in approaching an apartment building purportedly without reasonable suspicion of criminal activity, which he found was required under the circumstances. Contrary to the trial judge's ruling, the evidence and testimony presented during the suppression hearing established the officers did not trigger a need for reasonable suspicion in Ferguson's case because they did not actually conduct a "knock-and-talk" and, instead, engaged in a consensual encounter with one of the apartment's occupants prior to entering the apartment's curtilage. Moreover, even if the officers needed to have reasonable suspicion before approaching the apartment, the evidence and testimony presented during the suppression hearing established the officers possessed reasonable suspicion of criminal activity based on the information they received from a non-anonymous concerned citizen during a face-to-face encounter coupled with their knowledge of Ferguson's past criminal history and the high-crime nature of the area where Ferguson was reported to have actively been engaged in the act of manufacturing methamphetamine. Under such circumstances, the officers' actions were entirely reasonable and did not constitute an unreasonable invasion of Ferguson's right to privacy, and the trial judge's conclusions to the contrary were clearly erroneous as a

matter of law. The trial judge's suppression ruling should be reversed, and Ferguson's case should be remanded for trial.

The Fourth Amendment of the United States Constitution protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. In addition to those protections, the South Carolina Constitution provides its own protections to the state's citizens against unreasonable searches and seizures. State v. Forrester, 343 S.C. 637, 643, 541 S.E.2d 837, 840 (2001); see S.C. Const. art. I, § 10 ("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[.]"). Furthermore, primarily in order to guard against invasive technological advancements, the South Carolina Constitution also expressly protects our citizens from "unreasonable invasions of privacy." S.C. Const. art. I, § 10; see Forrester, 343 S.C. at 647, 541 S.E.2d at 842 ("[T]he drafters of our state constitution's right to privacy provision were principally concerned with the emergence of new electronic technologies that increased the government's ability to conduct searches.").

Through the additional provision regarding 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). Thus, "the South Carolina Constitution favors an interpretation offering a higher level of privacy protection than the Fourth Amendment." Id. However, the South Carolina Constitution by its express language only forbids searches, seizures, and invasions of privacy that are *unreasonable*. S.C. Const. art. I, § 10; see State v. Foster, 269 S.C. 373, 378, 237 S.E.2d 589, 591 (1977) ("It is only unreasonable searches and seizures that are prohibited.");

see also Maryland v. Buie, 494 U.S. 325, 331 (1990) ("It goes without saying that the Fourth Amendment bars only unreasonable searches and seizures[.]"). Accordingly, just like the search and seizure protections offered by the federal constitution, the touchstone of our state constitution's search and seizure protections is reasonableness. See Florida v. Jimeno, 500 U.S. 248, 250 (1991) ("The touchstone of the Fourth Amendment is reasonableness."); see also Heien v. North Carolina, 574 U.S. 54, 60-61 (2014) ("To be reasonable is not to be perfect, and so the Fourth Amendment allows for some mistakes on the part of government officials, giving them 'fair leeway for enforcing the law in the community's protection.' " (citation omitted)).

Generally speaking, it is not typically reasonable from a constitutional standpoint for a person to enter the private property of another without leave. Florida v. Jardines, 569 U.S. 1, 7-8 (2013). However, through longstanding and deeply-ingrained customs and practices, the citizens of the United States—and the citizens of South Carolina—have extended an implicit license to their fellow citizens, including their fellow citizens serving as law enforcement officers, that permits visitors to approach their homes in an effort to make contact with them. Id. at 8; see Kentucky v. King, 563 U.S. 452, 469 (2011) ("[W]hen law enforcement officers who are not armed with a warrant knock on a door, they do no more than any private citizen might do."). Based on that implicit license, a law enforcement officer is constitutionally permitted *under the Fourth Amendment* to enter a home's curtilage and approach a home in an attempt to speak with or question an occupant so long as the officer's entry and approach is conducted in an objectively reasonable manner consistent with the implicit license, and such entries and approaches do not constitute searches and seizures for Fourth Amendment purposes. See State v. Wright, 391 S.C. 436, 444, 706 S.E.2d 324, 328 (2011) (instructing a law enforcement officer may lawfully go to a person's home and door to interview that person); see also Jardines, 569 U.S. at 9, n. 4 ("[I]t is

not a Fourth Amendment search to approach the home in order to speak with the occupant, *because all are invited to do that*."). Thus, as far as the federal constitution is concerned, an officer can typically "approach [a] home by the front path, knock promptly, wait briefly to be received, and then (absent invitation to linger longer) leave" without encroaching upon the Fourth Amendment. Jardines, 569 U.S. at 8.

Importantly though, our Supreme Court in State v. Counts, 413 S.C. 153, 167, 776 S.E.2d 59, 67 (2015), recently addressed the question of whether a law enforcement officer's approach of a home to knock on its door and speak with an occupant for investigative purposes constitutes a violation of the South Carolina Constitution. After analyzing the issue, a majority of the Supreme Court determined "there must be some threshold evidentiary basis for law enforcement to approach a private residence" based on "the potential for abuse" that could occur if officers were permitted to approach citizens' homes "*indiscriminately*" without any limitations. Id. at 172, 776 S.E.2d at 69 (emphasis added). As a result, the majority articulated a new rule of criminal procedure in South Carolina holding "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 (emphasis added). Accordingly, despite the fact a "knock-and-talk" would be constitutionally proper under the Fourth Amendment due to the implicit license extended by our citizenry, officers in South Carolina must possess reasonable suspicion before conducting a "knock-and-talk" when investigating a potential crime. Id.

In a general sense, reasonable suspicion has been described as consisting 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)). Significantly, the reasonable suspicion standard "is not a

high bar." United States v. Coker, 648 F. App'x 541, 544 (6th Cir. 2016) (citing Navarette v. California, 572 U.S. 393 (2014)). To the contrary, it "is a less demanding standard than probable cause" and simply requires a showing of "a *minimal* level of objective justification" in order to be established. Illinois v. Wardlow, 528 U.S. 119, 123 (2000) (emphasis added); see Kaley v. United States, 571 U.S. 320, 338 (2014) (recognizing even the probable cause standard "is not a high bar"). The concept of reasonable suspicion "is not readily, or even usefully, reduced to a neat set of legal rules, but, rather, entails common sense, nontechnical conceptions that deal with factual and practical considerations of everyday life on which reasonable and prudent persons, not legal technicians, act." State v. Provet, 391 S.C. 494, 500, 706 S.E.2d 513, 516 (Ct. App. 2011) (citation and internal quotations omitted), aff'd, 405 S.C. 101, 747 S.E.2d 453 (2013). Stated simply, it is more than "a general hunch" but less than what is necessary to establish probable cause. State v. Willard, 374 S.C. 129, 134, 647 S.E.2d 252, 255 (Ct. App. 2007); see State v. Rogers, 368 S.C. 529, 534, 629 S.E.2d 679, 682 (Ct. App. 2006) ("Reasonable suspicion is something more than an inchoate and unparticularized suspicion or hunch.").

When determining the existence of reasonable suspicion, the totality of the circumstances must be considered. State v. Pichardo, 367 S.C. 84, 104, 623 S.E.2d 840, 851 (Ct. App. 2005). In reviewing the totality of the circumstances, the individual factors present must not be considered piecemeal or in isolation. See United States v. Arvizu, 534 U.S. 266, 273 (2002) (instructing courts are precluded from conducting a "divide-and-conquer analysis" when considering the totality of the circumstances). Instead, all of the circumstances, including the officer's own experience and specialized training, must be considered as a whole to determine whether the officer's actions were reasonable in light of all the information available to him at the time. See id. ("[W]e have said repeatedly that [reviewing courts] must look at the 'totality of

the circumstances' of each case to see whether the detaining officer has a 'particularized and objective basis' for suspecting legal wrongdoing. The process allows officers to draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them that 'might well elude an untrained person.' " (citations omitted)). Thus, the presence of several factors that are seemingly innocent can establish reasonable suspicion when viewed together in totality. United States v. Sokolow, 490 U.S. 1, 9 (1989); see Wardlow, 528 U.S. at 125-126 (recognizing factors that are "susceptible of an innocent explanation" can establish reasonable suspicion and probable cause).

In the case sub judice, the officers received a face-to-face tip from a concerned citizen relaying specific information about Ferguson's precise location and indicating Ferguson was presently engaged in an inherently dangerous criminal activity inside a multi-unit apartment building. See State v. Hudgins, 672 S.E.2d 717, 719 (N.C. Ct. App. 2009) (recognizing information relayed to an officer through a face-to-face encounter can provide reasonable suspicion because it enables the officer to judge the credibility of the tipster firsthand); see also Hatcher v. State, 762 N.E.2d 170, 173 (Ind. Ct. App. 2002) (characterizing the manufacturing process used to produce methamphetamine as "inherently dangerous"). Significantly, the information provided by the concerned citizen was fully consistent with the officers' knowledge of both the nature of the area where Ferguson was reported to be manufacturing the methamphetamine and Ferguson's past criminal history. See United States v. Calvetti, 836 F.3d 654, 667 (6th Cir. 2016) (recognizing a prior criminal history can constitute a "strong" indicator of criminal activity for purposes of a reasonable suspicion analysis); United States v. Lender, 985 F.2d 151, 154 (4th Cir. 1993) ("While the defendant's mere presence in a high crime area is not by itself enough to raise reasonable suspicion, an area's propensity toward criminal activity is

something that an officer may consider."). Although that information might not have alone been sufficient to rise to the level of probable cause, it certainly was sufficient to give the officers an objectively reasonable basis to go to the apartment building where the dangerous activity was reported to be occurring for investigative purposes. See Wardlow, 528 U.S. at 123 (instructing the reasonable suspicion standard only requires "a minimal level of objective justification"); see also District of Columbia v. Wesby, __ U.S. __, 138 S. Ct. 577, 586 (2018) (recognizing even the probable cause standard is not a high bar to meet). In fact, from the prospective of responsible law enforcement designed to protect the citizens the officers had a duty to serve, the information provided to the officers necessarily *required* them to take some action to investigate the citizen's tip and confirm or dispel whether dangerous criminal activity was actively ongoing in an apartment building potentially inhabited by people other than the ones reported to be engaged in the hazardous process of methamphetamine production. See Adams v. Williams, 407 U.S. 143, 145 (1972) ("The Fourth Amendment does not require a policeman who lacks the precise level of information necessary for probable cause to arrest to simply shrug his shoulders and allow a crime to occur or a criminal to escape. On the contrary, . . . it may be the essence of good police work to adopt an intermediate response.").

In finding the officers' actions to be constitutionally improper, the trial judge found the officers triggered a constitutional need for reasonable suspicion by approaching the apartment even though they did not actually make it to the apartment's door and knock prior to encountering one of its occupants. Furthermore, primarily due to the fact he did not believe the face-to-face tip received by the concerned citizen was sufficient to establish reasonable suspicion absent corroboration, the trial judge found the officers' actions in approaching the apartment under the circumstances were not constitutionally reasonable and, as a result, suppressed the

incriminating evidence they discovered after entering the apartment.[10] Significantly though, when the totality of the circumstances and information available to the officers are considered in the proper light, the officers' actions in approaching the apartment to follow up on a face-to-face tip provided by a non-anonymous concerned citizen were entirely reasonable from a constitutional standpoint, and the trial judge's conclusions to the contrary were clearly erroneous.

Demonstrating the erroneous nature of the trial judge's suppression ruling, the trial judge's conclusion a need for reasonable suspicion was triggered in Ferguson's case was clearly erroneous because the officers neither actually conducted a "knock-and-talk" nor entered a constitutionally-protected area prior to making contact with Davis and corroborating Ferguson was inside the apartment just as described in the citizen's tip. Critically, at the time the officers encountered Davis, they were on the shared exterior stairwell of a multi-unit apartment building and, therefore, were *not* in the curtilage of Davis's apartment such that they could properly be found to have treaded upon any legitimate privacy expectations that could have been held by the apartment's occupants. See United States v. Brooks, 645 F.3d 971, 975-976 (8th Cir. 2011) (holding a staircase connected to a multi-family dwelling was not part of the curtilage of Brooks's individual apartment since it was a common area shared by all the dwelling's tenants and noting it is "well-settled" there exists no generalized expectation of privacy in the common areas of apartment buildings); see also United States v. Dunn, 480 U.S. 294, 300 (1987) (explaining the question of whether an area constitutes the curtilage of a home such that it is entitled to the special constitutional protections afforded to a person's residence hinges on "whether the area harbors the intimate activity associated with the sanctity of a man's home and

[10] In explaining his ruling, the trial judge emphasized it hinged on "the fact that no one knew who the initial tipster was who made this report" and "none of that information from that initial anonymous tipster was corroborated." (R. p. 252).

the privacies of life" (citation and internal quotations omitted)). Moreover, the officers did not actually make it to the apartment's door *or actually knock on it* before encountering Davis and obtaining important corroborative information from him during an unquestionably consensual encounter. See Counts, 413 S.C. at 172, 776 S.E.2d at 70 ("[W]e 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*." (emphasis added)). Under such circumstances, the officers had not yet undertaken any actions requiring a constitutional need for reasonable suspicion before they were able to corroborate through Davis critical information contained in the tip they had received in the face-to-face encounter with the concerned citizen. See Oliver v. United States, 466 U.S. 170, 180 (1984) (explaining "only the curtilage" of a home is entitled to the special constitutional protections afforded to a person's residence while further noting such a rule is consistent with respect for an individual's reasonable expectations of privacy); see also Counts, 413 S.C. at 174, 776 S.E.2d at 71 ("[W]e hold that law enforcement must have reasonable suspicion of illegal activity before approaching the targeted residence *and conducting the 'knock and talk' investigative technique*." (emphasis added)); Hutto v. S. Farm Bureau Life Ins. Co., 259 S.C. 170, 173, 191 S.E.2d 7, 8-9 (1972) ("It is, of course, settled law that a case cannot be considered as a binding precedent on a legal point that was not argued in the case and not mentioned in the opinion." (citation and internal quotations omitted)). As a result, the trial judge's erroneous suppression ruling based on his belief a "knock-and-talk" had occurred in Ferguson's case was predicated on a clear legal error.

However, even if the officers had somehow needed reasonable suspicion before interacting with Davis from the apartment building's common stairwell, the trial judge's suppression ruling was nonetheless still clearly erroneous because the officers actually possessed

reasonable suspicion when the information known to them is properly evaluated in light of the low bar set out by the reasonable suspicion standard. Looking to the information known to the officer before they headed to the apartment building where Ferguson and his illegal drugs were found, the officers had received a *face-to-face* tip from a concerned citizen who had done nothing to hide his identity or remain anonymous to law enforcement. See United States v. Heard, 367 F.3d 1275, 1280 (11th Cir. 2004) (holding a tip offered by an informant through a face-to-face encounter may provide a law enforcement officer with reasonable suspicion). By personally engaging in a face-to-face encounter with Deputy Hall, the concerned citizen in Ferguson's case enabled the officer to directly evaluate the credibility of the tip firsthand and determine for himself whether the information provided was sufficiently reliable. See United States v. Perkins, 363 F.3d 317, 323 (4th Cir. 2004) ("Where the informant is known or where the informant relays information to an officer face-to-face, an officer can judge the credibility of the tipster firsthand and thus confirm whether the tip is sufficiently reliable to support reasonable suspicion."); cf. Giles v. Commonwealth, 529 S.E.2d 327, 329-330 (Va. Ct. App. 2000) ("Although Officer Devoti did not obtain the women's names or addresses, their reports were not an anonymous tip. He stood face to face with them and listened to their accounts. He was able to assess their credibility and the reliability of their information."). Furthermore, since the concerned citizen was *not* anonymous and, instead, was fully visible to the officer, the concerned citizen exposed himself to potential liability in the event the tip had been untruthful. See State v. Driggers, 322 S.C. 506, 511, 473 S.E.2d 57, 60 (Ct. App. 1996) ("[A] non-confidential informant should be given higher level of credibility because he exposes himself to public view and to possible criminal and civil liability should the information he supplied prove to be false."); cf. Navarette, 572 U.S. at 400 (finding an anonymous 911 call reporting erratic driving was

sufficient to establish reasonable suspicion for a stop based, in part, on the fact the call provided "some safeguards against making false reports with immunity" since the caller *potentially* could have been traced and identified under the circumstances). Under such circumstances, the tip provided to the officers was very, very different than an anonymous tip and was sufficiently reliable *by itself* to warrant a limited investigative response from the officers. See Milbin v. State, 792 So. 2d 1272, 1274 (Fla. Dist. Ct. App. 2001) ("A witness who provides information to a police officer through 'face to face' communication is deemed to be sufficiently reliable."); State v. Fudge, 42 S.W.3d 226, 232 (Tex. App. 2001) (finding a law enforcement officer possessed sufficient reasonable suspicion to justify an investigatory detention based on the fact he received unsolicited information about criminal activity in a face-to-face manner from an individual who was neither connected to police nor a paid informant, which made the information provided "inherently reliable"); cf. State v. Hutz, 144 So. 3d 618, 621 (Fla. Dist. Ct. App. 2014) ("The officer received information from the security guard through face to face communication. The security guard thus was a citizen informant *whose tip was sufficiently reliable by itself to provide the officer with reasonable suspicion* to conduct an investigatory stop of the defendant without further investigation or corroboration." (emphasis added)). Accordingly, the trial judge's conclusion the face-to-face tip—which he incorrectly characterized as anonymous—was not sufficiently reliable to establish reasonable suspicion was clearly erroneous and predicated on a mistaken belief regarding what was necessary and required in order for officers to reasonably rely upon information received directly from concerned citizens. See Illinois v. Gates, 462 U.S. 213, 230 (1983) (rejecting the idea an informant's veracity, reliability, and basis of knowledge are elements that "should be understood as entirely separate and independent requirements to be rigidly exacted in every case" when a probable cause

analysis is being conducted); see also United States v. Valentine, 232 F.3d 350, 354 (3rd Cir. 2000) (recognizing older, more rigid standards regarding informants have been replaced with "a flexible standard that assesses the relative value and reliability of an informant's tip in light of the totality of the circumstances").

Beyond that, corroborating the information supplied by the concerned citizen and further supporting the existence of reasonable suspicion, the officers were aware the general area where Ferguson was reported to be engaged in the manufacture of methamphetamine was a known area having a high level of both methamphetamine-related activity and drug trafficking. See Wardlow, 528 U.S. at 124 (recognizing the nature of particular area and its connection to criminal activity is a pertinent factor in a reasonable suspicion analysis); Milledge v. State, 422 S.C. 366, 377, 811 S.E.2d 796, 802 (2018) ("A person's presence in a known high-crime area is one relevant consideration in analyzing reasonable suspicion[.]"). More importantly though, the officers were also aware Ferguson had personally been involved in *the exact type of activity* described in the tip in the past based on their knowledge of his prior criminal background. See United States v. Lewis, 920 F.3d 483, 493 (7th Cir. 2019) ("Criminal histories can support reasonable suspicion."); United States v. Green, 897 F.3d 173, 187 (3rd Cir. 2018) (recognizing an individual's criminal history—although not alone sufficient to establish reasonable suspicion—"is a valid factor" in a reasonable suspicion analysis with a value that "is enhanced when the prior offenses relate to the crime being investigated"); United States v. Simpson, 609 F.3d 1140, 1147 (10th Cir. 2010) ("In conjunction with other factors, criminal history *contributes powerfully to the reasonable suspicion calculus.* Although a person with a criminal record could not be pulled over or detained based on the record itself, such a record is one factor that may justify further detention and that may cast a suspicious light on other seemingly

innocent behavior." (citations, internal quotations, and brackets omitted)); United States v. Sprinkle, 106 F.3d 613, 617 (4th Cir. 1997) ("[A]n officer can couple knowledge of prior criminal involvement with more concrete factors in reaching a reasonable suspicion of current criminal activity."). In light of their knowledge of independent information corroborative of the information reported by the non-anonymous concerned citizen during the face-to-face encounter, the officers—much like the officers in Counts—possessed sufficient information to satisfy the minimal requirements of the reasonable suspicion standard such that it was entirely reasonable for them to follow up and investigate the tip, and the trial judge's ruling to the contrary erroneously elevated the level of information needed to establish the existence of reasonable suspicion beyond what is actually required. See Terry v. Ohio, 392 U.S. 1, 28 (1968) (holding an officer's actions in effectuating a detention and frisk search were constitutionally reasonable because they were not "the product of a volatile or inventive imagination" or "undertaken simply as an act of harassment" and, instead, were reasonably tempered based on the officer observing Terry and his confederate repeatedly walk by and look in a store window in a manner that appeared suggestive of criminal activity to the officer); cf. Counts, 413 S.C. at 173, 776 S.E.2d at 70 (considering the officers' knowledge of Count's prior drug convictions in finding the officers possessed reasonable suspicion for a "knock-and-talk").

Because the officers did *not* actually conduct a "knock-and-talk" and because they possessed reasonable suspicion of criminal activity even before they approached the apartment building to follow up on the tip, the trial judge clearly erred as a matter of law by finding the officers' actions were unreasonable and violative of Ferguson's constitutional rights. See S.C. Const. art. I, § 10 (prohibiting only *unreasonable* searches, seizures, and invasions of privacy); cf. Counts, 413 S.C. at 173, 776 S.E.2d at 70 ("[L]aw enforcement 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. Through their investigation, the officers confirmed that Counts had two false identification cards on record and had prior drug convictions. In light of this evidence, 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.' " (emphasis added)). Contrary to the trial judge's findings, the officers in Ferguson's case engaged in nothing other than good police work by reasonably acting on information supplied to them by a non-anonymous concerned citizen during a face-to-face encounter that was inherently reliable based upon the manner in which it was supplied coupled with the fact it was fully consistent with the officers' knowledge of Ferguson and the area in which he was reported to be manufacturing methamphetamine. See United States v. Christmas, 222 F.3d 141, 145 (4th Cir. 2000) ("A community might quickly succumb to a sense of helplessness if police were constitutionally prevented from responding to the face-to-face pleas of neighborhood residents for assistance. Officers in turn are entitled to investigate such reports without jeopardizing their personal safety. Any other constitutional rule would destroy the basis for effective community police work."); cf. Terry, 392 U.S. at 23 (instructing "[i]t would have been poor police work indeed" for an officer not to do anything further to investigate after developing a reasonable basis to believe criminal activity was afoot). Under such circumstances, the trial judge's suppression ruling should be reversed and Ferguson's case should be remanded for trial.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted the ruling of the circuit court judge should be reversed and the case should be remanded for trial.

Respectfully submitted,

ALAN WILSON
Attorney General

MARK R. FARTHING
Senior Assistant Attorney General

DAVID M. STUMBO
Solicitor, Eighth Judicial Circuit

BY:_____
Mark R. Farthing

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR APPELLANT

May 20, 2020

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Laurens County
Honorable Frank R. Addy, Jr., Circuit Court Judge
Appellate Case No. 2018-002133

THE STATE,

Appellant,

vs.

SYLVESTER FERGUSON, III,

Respondent.

CERTIFICATE OF COUNSEL

The undersigned 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."

ALAN WILSON
Attorney General

MARK R. FARTHING
Senior Assistant Attorney General

DAVID M. STUMBO
Solicitor, Eighth Judicial Circuit

BY:_____
Mark R. Farthing
Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR APPELLANT

May 20, 2020