STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Charleston County
R. Markley Dennis, Jr. Circuit Court Judge

Appellate Case No.: 2018-000504

THE STATE,

RESPONDENT,

V.

DARELL ONEIL BOSTON,

APPELLANT.

FINAL REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

South Carolina Cases

United States Supreme Court Cases

Other Federal Cases

Constitutional Provisions

Other Authorities

ARGUMENT IN REPLY

The State's counter statement of the issue on appeal raises three issues: 1) whether Appellant Boston had standing (i.e., a reasonable expectation of privacy) such that he could challenge the knock and talk at his friend's apartment; 2) whether the officers conducting the knock and talk had reasonable suspicion of criminal activity at the apartment searched; and 3) whether, even if the above are established, the exclusionary rule should apply to the evidence obtained, when, at the time of the knock and talk, the South Carolina Supreme Court had not yet announced its decision in *State v. Counts*, 413 S.C. 153, 776 S.E.2d 59 (2015). In reply, Boston contends: 1) the trial court correctly determined that he had standing to challenge the knock and talk; 2) the State has conceded that the officers lacked reasonable suspicion; and 3) the exclusionary rule should apply to the evidence collected in this case.

I. There is evidence in the record to support the trial court's unappealed ruling that Appellant Boston had standing (i.e., a reasonable expectation of privacy) such that he could challenge the unconstitutional knock and talk.

In an extensive footnote, the State argues that Boston had no expectation of privacy in his friend's residence and therefore, had no right to challenge the evidence found within, because he was merely using the apartment on a temporary basis to allegedly manufacture crack cocaine. The trial court heard testimony and arguments directly related to Boston's expectation of privacy as a guest in Holman's apartment. In his testimony, Boston denied that he was at Holman's apartment to manufacture crack cocaine. (R. p. 106, ln. 11-13). His reason for going to Holman's apartment on the day of the incident was to use Holman's laptop to load music onto his phone. (R. p. 106, ln. 3-7). He also testified that he had known Holman for about 15 years and that he had visited her on prior occasions and at prior addresses. (R. p. 104, ln. 14 – p. 105, ln. 5). These statements provide evidence that Boston was at the the house for social, not commercial reasons and that his ties to Holman were longstanding. *See State v. Robinson*, 410 S.C. 519, 529–30, 765 S.E.2d 564,

569–70 (2014) (stating that, in determining whether the defendant had an actual and reasonable expectation of privacy in the place illegally searched, courts may consider such factors as how long the defendant had known the owner of the home, whether the defendant attempted to keep his activities in the home private, and whether the defendant engaged in typical domestic activities at the home, or whether he treated it as a commercial establishment). The trial court ruled specifically and correctly that Boston had standing under the South Carolina Constitution to challenge the admissibility of the evidence collected by law enforcement. (R. pp. 608 - 610). Because there is evidence in the record to support the trial court's ruling that Boston had an expectation of privacy in his friend's apartment, this court must affirm this aspect of the trial court's ruling. *See State v. Moore*, 415 S.C. 245, 251, 781 S.E.2d 897, 900 (2016) (stating "appellate courts must affirm if there is any evidence to support the trial court's ruling").

II. The State has conceded that law enforcement did not have reasonable suspicion of illegal activity when they conducted the knock and talk.

Tellingly, the State does not specifically respond to or offer counter arguments against Boston's primary argument on appeal – that the officers lacked reasonable suspicion to justify the knock and talk at Holman's apartment. In failing to argue this issue, the State has conceded this crucial point.

Pursuant to *Counts*, law enforcement must have reasonable suspicion of illegal activity at a targeted residence prior to approaching the residence and knocking on the door. 413 S.C. at 172, 776 S.E.2d at 70. As more fully argued in Appellant's Brief, Officer Sherwood, the officer who conducted the knock and talk, had no particularized basis for suspecting criminal activity was occurring in Holman's apartment when he approached her residence and knocked on her door. He was not responding to a complaint regarding Holman's apartment nor was he acting on an anonymous tip. In the 15 minutes between the time he saw Appellant Boston and his co-defendant

Holmes enter Holman's apartment, Officer Sherwood did not see anything suggesting criminal activity. Officer Sherwood's statement that he found it "odd" that Boston and Holmes would go into Holman's house (R. p. 15, ln. 1 - 6). describes only an "inchoate and unparticularized suspicion" or "hunch," which is not sufficient to support a finding of reasonable suspicion. *United States v. Slocumb*, 804 F.3d 677, 682 (4th Cir. 2015).

Additionally, Officer Sherwood's decision to knock on Ms. Holman's door to look for any evidence of "any crime" was based solely on his knowledge that the neighborhood was a high crime area and that Boston and Holman had prior issues with drugs. This very scenario was of grave concern to the *Counts* court and influenced their decision to impose a reasonable suspicion requirement on knock and talks. *See* 413 S.C. at 172, 776 S.E.2d at 69–70 ("[W]e believe there must be some threshold evidentiary basis for law enforcement to approach a private residence. Otherwise, we foresee the potential for abuse if law enforcement targets a neighborhood and indiscriminately knocks on doors with the hope of discovering contraband without a search warrant"). Thus, based on Officer Sherwood's stated reason for approaching Holman's door and knocking, this court should find that, as a matter of law, reasonable suspicion of illegal activity did not exist.

III. The evidence discovered as a result of the unconstitutional knock and talk should have been excluded.

The bulk of the State's brief is used to convince this court that, even if Boston's rights under the South Carolina Constitution have been violated, the evidence collected as a result of that violation should not be excluded because at the time law enforcement conducted the knock and talk, *Counts* had not been decided.[1] Relying heavily on the United States Supreme Court's

[1] The knock and talk in this case occurred on March 6, 2015. The Court's decision in *Counts* was issued on July 8, 2015. The Supreme Court heard oral arguments in *Counts* on September 25, 2014.

decision in *Davis v. United States*, 564 U.S. 229 (2011), the State asserts that because law enforcement was acting in accordance with binding Fourth Amendment precedent, the evidence collected as a result of the knock and talk should not be excluded.[2]

a. Violations of Article I, § 10 of the South Carolina Constitution are to be remedied by application of the exclusionary rule.

First, it is clear that our courts view the exclusionary rule as the remedy for violations of Article I, § 10 of the South Carolina Constitution. *See State v. Forrester*, 343 S.C. 637, 644, 541 S.E.2d 837, 840–41 (2001) (finding that seizures that do not offend the federal Constitution may still offend the South Carolina Constitution, and determining that evidence collected in violation of the state Constitution should have been excluded at trial). The exclusionary rule was not discussed in *Counts* because the court found the knock and talk proper. Nevertheless, it seems clear that exclusion of the evidence was the remedy sought by Counts and that the court would have excluded that evidence, based on *Forrester*, had it found a constitutional violation in that case.

b. *Davis* is not applicable to Boston's evidentiary challenge because at the time of the search, there was no binding precedent regarding the constitutionality of knock and talks under Article I, § 10 of the South Carolina Constitution.

The State's argument that the exclusionary rule should not apply in this case is heavily influenced by the Supreme Court's decision in *Davis*.[3] A brief synopsis of the procedural facts of

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[2] The State did not argue to the trial court that the exclusionary rule should not apply based on the "good faith" exception announced in *Davis*.

[3] Since the *Davis* decision was issued in 2011, it does not appear that it has been applied widely in South Carolina cases. *Davis* has been decisive only in those South Carolina decisions that had the same procedural facts as *Davis* – a search that was valid under *Belton*, but which was later invalidated under *Gant*. *See State v. Brown*, 401 S.C.82, 736, S.E.2d 263 (2012); *Narciso v. State*, 397 S.C. 24, 32, 723 S.E.2d 369, 373 (2012).

Davis is necessary in order to distinguish it from the present case and explain why this court should not apply *Davis*'s good faith exception to the exclusionary rule in this case.

Defendant Davis was a passenger in a car that was the subject of a traffic stop, and he was arrested for giving the police a false name. 564 U.S. at 235. While Davis was handcuffed and in the back of a police vehicle, the officer searched his jacket (which was still inside the car) and found a revolver in the pocket. *Id.* At the time of the search, it was widely understood that the Supreme Court's decision in *New York v. Belton*, 453 U.S. 454, 458–459 (1981) authorized "automobile searches incident to arrests of recent occupants, regardless of whether the arrestee in any particular case was within reaching distance of the vehicle at the time of the search." *Id.* at 233. However, while Davis's case was on appeal before the Eleventh Circuit Court of Appeals, the United States Supreme Court issued its opinion in *Arizona v. Gant,* 556 U.S. 332 (2009). *Id.* at 236. The decision in *Gant* limited *Belton's* holding to situations where "the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search." *Gant*, 556 U.S. at 343.

Based on the decision in *Gant*, the Eleventh Circuit Court of Appeals agreed with Davis that the search violated the Constitution, but it concluded that the exclusionary rule did not apply because the officers were operating in good faith based on the prevailing understanding of *Belton.* 564 U.S. at 236. The Supreme Court affirmed the Eleventh Circuit's ruling, stating that "when binding appellate precedent specifically *authorizes* a particular police practice," such that the officer has acted in an objectively reasonable manner, the exclusionary rule should not apply. *Id.* at 241.

In this case, there was no binding precedent under the South Carolina Constitution specifically authorizing knock and talks without reasonable suspicion at the time officers

approached Holman's residence and knocked on her door. Indeed, that specific issue was being considered by the Supreme Court in *Counts* at the time of the search.

The State cites dicta from *State v. Wright,* 391 S.C. 436, 706 S.E.2d 324 (2011) in asserting that the knock and talk procedure was presumed valid in South Carolina. However, *Wright* did not involve a knock and talk procedure, and the case was not analyzed under Article I, § 10 of the South Carolina Constitution. At issue in *Wright* was whether law enforcement's warrantless intrusion onto private property was lawful when law enforcement received an anonymous tip about an illegal dogfight on the property and the officers observed other conduct (large numbers of vehicles, spotlights) consistent with the tip. *Id* at 440-42, 706 S.E.2d 324-26. In its summary of Fourth Amendment jurisprudence, the court made passing reference to a First Circuit Court of Appeals opinion,[4] stating that "a policeman may lawfully go to a person's home to interview him." However, that passage goes on to cite South Carolina law stating "[a] police officer without a warrant is privileged to enter private property *to investigate a complaint or a report of an ongoing crime*." *Id.* at 444, 706 S.E.2d at 328 (emphasis added) (quoting 24 C.J.S. *Criminal Law* § 2404 (2006)). Thus, *Wright* does not establish prior binding precedent specifically authorizing knock and talks without reasonable suspicion.

c. The Court should not apply a good faith exception to the exclusionary rule in this case.

"The South Carolina Constitution provides citizens an express right to privacy." S.C. Const. art. I, § 10. *Counts*, 413 S.C. at 167, 776 S.E.2d at 67. "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.* However, it is clear that our state courts

[4] *United States v. Daoust*, 916 F.2d 757, 758 (1st Cir. 1990). Daoust was not determinative of any issue in *Wright*.

"can develop state law to provide their citizens with a second layer of constitutional rights." *Forrester*, 343 S.C. at 643–44, 541 S.E.2d at 840. Stated differently, the "federal Constitution sets the floor for individual rights while the state constitution establishes the ceiling." *Id.* Accordingly, our courts can, and have rejected the rationale of federal courts in determining that no good faith exception exists under our Constitution. *See State v. Austin*, 306 S.C. 9, 16, 409 S.E.2d 811, 815 (Ct. App. 1991) (stating "as a general proposition of law, we have the right to reject the rationale of [*United States v. Leon,* 468 U.S. 897 (1984)] and determine that no good faith exception exists under our Constitution" and collecting similar cases from other states).

To apply the "new 'good faith' exception" announced in *Davis* would leave Boston with a right, but not a remedy. *See Davis*, 564 U.S. at 253 (BREYER, J. *dissenting*). Cases alleging a violation of Article I, § 10 are likely to be brought when the much more developed Fourth Amendment jurisprudence forecloses a defendant's evidentiary challenge. Consequently, if the court were to apply *Davis*'s good faith exception in situations where the Fourth Amendment allows the search, but the issue has not been decided under the state constitution, a Defendant who is successful in challenging the practice under state constitutional principles would always be left without a remedy. The notion that our state constitution provides a second layer of constitutional rights would be undermined and rendered ineffectual, at least as to the defendant bringing the initial challenge.

Rather than trying to determine the officer's reasonableness by guessing at what the officer knew of the law at the time he conducted the knock and talk, the court's focus should be on effectuating the constitutional rights recognized by the Supreme Court in *Counts*. The only way to effectuate that right is to exclude the evidence discovered as a result of the unconstitutional

knock and talk. To do otherwise would be to endorse the unconstitutional conduct of the officers in this case.

CONCLUSION

For the reasons stated above, and in the Appellant's opening brief, this court should reverse the trial court's order denying Appellant's motion to suppress and remand the case to the trial court with instructions that the evidence collected following the unconstitutional knock and talk at Holman's apartment be excluded from consideration in any subsequent trial on this matter.

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This ___day of April, 2019

CERTIFICATE OF COUNSEL FOR APPELLANT

Counsel for Appellant certifies that this Final Reply Brief of Appellant contains all material proposed to be included by any of the parties and not any other material and that this Record on Appeal complies to the best of my ability with 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."

Respectfully Submitted,

By: DNL

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This 12th day of April, 2019.