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Mar 23 2021

SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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

THE STATE,

RESPONDENT,

v.

DARELL ONEIL BOSTON,

APPELLANT.

APPELLATE CASE NO. 2018-000504

Opinion No. 5808

PETITION FOR REHEARING

On March 10, 2021, this Court affirmed, in a published opinion, the lower court's decision in Appellant Darell Boston's trial not to suppress evidence that was discovered as a result of law enforcement conducting a knock and talk. Pursuant to Rule 221(a), SCACR, Appellant respectfully petitions this Court for a rehearing based upon the significant points overlooked or misapprehended by this Court in arriving at its determinative conclusion that law enforcement had the requisite reasonable suspicion to conduct this knock and talk.

This Court's opinion rightly relied upon *State v. Counts* for the proposition that "law enforcement must have reasonable suspicion of illegal activity at a targeted residence" prior to

conducting a knock and talk. 413 S.C. 153, 172, 776 S.E.2d 59, 70 (2015). The *Counts* court reached this decision citing the express right to privacy contained in Article 1 § 10 of the South Carolina Constitution, which “favors an interpretation offering a higher level of privacy protection than the Fourth Amendment.” *Id.* at 168, 776 S.E.2d at 68 (quoting *State v. Forrester*, 343 S.C. 640, 645, 541 S.E.2d 837, 841 (2001)). The *Counts* court’s analysis distinguished the knock and talk technique from searches of people in public and automobile searches, articulating several interrelated reasons why a knock and talk at a person’s home is a more significant intrusion. Specifically, the *Counts* court stated:

Because the privacy interests in one's home are the most sacrosanct, we 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. Although the State maintains these encounters are entirely consensual, we cannot ignore the nature of the “knock and talk” procedure. 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.

Id. at 172, 776 S.E.2d at 69–70. The concerns expressed by the *Counts* court are present in this case. Law enforcement was keeping a presence in a targeted neighborhood; they knocked on the door of a woman they knew to have drug and mental issues and who, therefore, might be more easily convinced to open the door; and they conducted the knock and talk without observing any criminal behavior with the stated intent of looking for evidence of “any possib[ilit]y [of] any crime.”

Here, respectfully, this Court overlooked or misapprehended the fact that law enforcement did not have “reasonable suspicion that a crime was occurring at the targeted residence” before conducting the knock and talk. The testimony of Officer Sherwood, one of the officers who

conducted the knock and talk, was the basis for the lower court's decision to deny Boston's motion to suppress and the basis for this Court affirming the lower court's ruling.

This Court cited the following passage as Officer Sherwood's stated reason for conducting the knock and talk: "When [w]e have the complaints that we were having and the elements that we had at this residence[,] we will knock on the door to make sure that one, she is okay[,] and two, see if there is any possib[ilit]y [of] any crime or if she had any information for us." Opinion, p. 4. The "elements" about which Officer Sherwood testified do not amount to reasonable suspicion. Officer Sherwood testified the neighborhood had long been a "hot spot for narcotics activity." (R. p.13, ln. 4-9). He testified there had recently been "several complaints about the drug activity [and] illegal trespassing *in the area*." (R. p.13, ln. 4-9 (emphasis added)). He later clarified and admitted that the complaints were not about Holman or her apartment. (R. p. 50, ln. 24 - 51, ln. 14).

Officer Sherwood knew Holman lived in the apartment, that she had some mental limitations, and that he had a "couple of little run-ins with her" on narcotics related issues, but "nothing too serious." (R. p. 15, ln. 9-11; p. 50, ln. 21). Sherwood did not specify what those "run-ins" entailed or the nature of the narcotics related issues.

Officer Sherwood testified he recognized Boston and his co-Defendant from previous "run-ins with them." (R. p.15, ln. 12-17). He did not state the nature of these "run-ins" except for one instance he recalled when he had seen them at a house where the North Charleston City Police Department had conducted several drug searches. (R. p.16, ln. 1-8). Officer Sherwood admitted he did not know whether Boston or Holmes lived at that house, only that he had seen them there. (R. p.16, ln. 3-4). He did not say whether Boston was at the house when the searches were conducted or whether Boston was part of the searches at this house. He also did not say whether

these searches found any drugs. He did not say whether these searches led to any arrests or even any further investigations.

In short, Officer Sherwood knew the reputation of the neighborhood; he was somewhat familiar with Holman and her history; and he vaguely remembered that Boston had, at some unidentified point in the past, been in the proximity to suspected drug activity. Generally, the reputation of the neighborhood and the criminal history of a suspect are disfavored in the reasonable suspicion analysis. *See United States v. Perrin*, 45 F.3d 869, 873 (4th Cir. 1995) (“Were we to treat the dangerousness of the neighborhood as an independent corroborating factor, we would be, in effect, holding a suspect accountable for factors wholly outside of his control.”); *see also United States v. Foster*, 634 F.3d 243, 246 (4th Cir. 2011) (prior knowledge of a person’s criminal record must be paired with more concrete factors to demonstrate that there was a reasonable suspicion of current criminal activity). Here, there was no testimony about Boston’s criminal record; only Officer Sherwood’s vague recollection that Boston had been in proximity to suspected drug activities at some point in the past. Presumably, such vague information should be accorded even less weight than knowledge of a person’s actual criminal record.

Importantly, Sherwood observed no behavior by Boston, Holmes, or Holman that was consistent with or indicative of criminal activity. Officer Sherwood was questioned at the suppression hearing by defense counsel on this point:

- Q. I want to talk to you about your initial approach to the residence. What you testified to was that you sat by your car for about 15 minutes thinking about it, right?
- A. Well, we were talking so.
- Q. So the gentlemen, these two guys that you have identified had already gone into the house and had been inside for 15 minutes or so.
- A. Approximately.
- Q. Did you hear any screams?
- A. No, sir.

Q. Did you see them carrying any firearms or any contraband as they approached the residence?

A. Not that I observed, no.

Q. Okay. So at the time you approached to conduct the knock and talk you saw nothing that suggested someone was committing a crime.

A. No, sir.

Q. Nothing?

A. No, sir.

(R. pp. 68, ln. 22 - 69, ln. 16). Surely, reasonable suspicion requires observation of, at least, some behavior indicating criminal activity. *See, e.g., State v. Burgess*, 394 S.C. 407, 416, 714 S.E.2d 917, 921 (Ct. App. 2011) (finding reasonable suspicion present when officers observed behavior consistent with a drug deal including that defendant's car entered a fast food parking lot that was known for drug activity, a person from a waiting Jeep entered defendant's car and extended his hand, and then exited the defendant's car 15 second later and returned to the Jeep). The only behavior Officer Sherwood observed was Boston and Holmes getting out of a taxi and going into Holman's residence.

Respectfully, Officer Sherwood's general knowledge that sometimes people manufacture illegal drugs in other people's apartments is of little relevance because this was not coupled with testimony that Officer Sherwood knew that Boston or Holmes was suspected of manufacturing illegal drugs or that Holman had previously allowed her apartment to be used for such purposes.

This case is readily distinguishable from *Counts* and the more recent case of *State v. Kotowski*,¹ both of which are relied upon in this Court's opinion. In both cases, law enforcement conducted investigations based on anonymous tips of criminal behavior and observed some

¹ 427 S.C. 119, 828 S.E.2d 605 (Ct. App. 2019), *reh'g denied* (June 21, 2019), *cert. granted* (Sept. 25, 2019), *aff'd in part, vacated in part*, 430 S.C. 318, 844 S.E.2d 650 (2020).

behavior indicative of criminal activity prior to conducting the knock and talk. In *Counts*, the Supreme Court pointed to the following findings of fact which the Court found sufficient to establish that law enforcement had reasonable suspicion of illegal activity occurring at the targeted residence:

[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.

Id. at 173, 776 S.E.2d at 70. At one point, law enforcement’s investigation included an attempted drug buy at Counts’ residence. *Id.* at 157, 776 S.E.2d at 62.

In *Kotowski*, the Court of Appeals cited facts which, as in *Counts*, included an anonymous tip followed by further investigation which revealed behavior indicating criminal activity in finding that law enforcement had reasonable suspicion to conduct a knock and talk. 427 S.C. at 129, 828 S.E.2d at 610. The law enforcement officer in *Kotowski* received an anonymous tip on June 13, 2014, that a house on Marsh Point Road was a meth house. *Id.* at 125, 828 S.E.2d at 608. The officer searched the NPLEX system, which showed pseudoephedrine purchases by Michelle Vining, the owner of the Marsh Point Road house. *Id.* The officer set up an alert on NPLEX and began to conduct “spotty surveillance” consisting of drive-by viewings of the house. *Id.* During one such viewing, the officer recognized a vehicle belonging to the son of a convicted methamphetamine cook parked at the house. *Id.* On October 29, 2014, the officer received NPLEX notifications indicating Vining had attempted to purchase pseudoephedrine three separate times. *Id.* The officer referred to the NPLEX records as showing “a substantial amount of purchases” and attempted purchases at different pharmacies. *Id.* The officer, who had extensive training in methamphetamine labs and had been “clandestine meth lab certified” since 2004, testified that

these purchases and attempted purchases were consistent with the actions of illicit drug manufacturing. *Id.* at 129, 828 S.E.2d at 610.

In this case, there was no anonymous tip regarding Boston, Holmes, or Holman or Holman's apartment. There was no testimony indicating any sort of investigation took place. Importantly, Officer Sherwood did not observe any behavior indicating criminal activity. The only behavior law enforcement observed was Boston and Holmes exiting a taxi and walking, invited, into Holman's residence.

Respectfully, the Court overlooked the significance of Officer Sherwood's candid statement that his reason for approaching Holman's door was to, "see if there is any, possibly any crime or if she had any information for us." (R. p.17, ln. 7-12). "[A]ny, possibly any crime" indicates, respectfully, that Sherwood rather clearly had no reasonable suspicion that illegal activity was occurring at Holman's residence. This testimony, at best, describes the kind of "inchoate and unparticularized suspicion" or "hunch," which courts have determined is not sufficient to support a finding of reasonable suspicion. *See United States v. Slocumb*, 804 F.3d 677, 682 (2015).

This Court's opinion correctly notes that officers were not acting randomly. However, the bar for finding reasonable suspicion is not that low. While officers were not "indiscriminately" knocking on every door in the community, which was the explicit concern of the *Counts* court, Officer Sherwood's testimony that he knocked on the door for the express purpose of looking for "any possib[ilit]y [of] any crime" resonates with the concern expressed by the *Counts* court that knock and talks without reasonable suspicion could be used by law enforcement "hoping to

discover contraband without a search warrant” in targeted neighborhoods. *Id.* at 172, 776 S.E.2d at 69.²

In sum, respectfully, this Court’s opinion lowers the bar for what is legally necessary to establish reasonable suspicion in the context of knock and talks. Appellant respectfully requests this Court rehear his case pursuant to Rule 221(a), SCACR, due to the significant legal and factual points overlooked and/or misapprehended by this Court.

Respectfully submitted:



David N. Lyon (S.C. Bar # 100676)
DUFF | FREEMAN | LYON, LLC
P. O. Box 1486
Columbia, South Carolina 29202
(803) 790-0603

Robert M. Dudek
Chief Appellate Defender
South Carolina Commission on Indigent Defense
Appellate Division
PO Box 11589
Columbia, SC 29201-1589
(803) 734-1330

ATTORNEYS FOR APPELLANT

This 23rd day of March 2021

² In footnote 4 of the Opinion, this Court notes correctly that neither the lower court nor the parties asserted that Officer Sherwood knocked on Holman’s door to perform a “welfare check.” As is clear from Officer Sherwood’s testimony cited above, there was no behavior observed that indicated a welfare check was necessary, just as there was no behavior observed indicating criminal activity was afoot. Moreover, Officer Sherwood’s asserted concern for Holman’s welfare is, per his own testimony, inextricably linked to his interest in finding “any possib[ilit]y [of] any crime.”

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Petition for Rehearing in the above referenced case has been served upon Mark Reynolds Farthing, Esquire, at P.O. Box 11549 Columbia SC 29211-1549; and Darell Boston, c/o Lieber Correctional Institution CA-50, #339646, 136 Wilborn Ave., Ridgeville, SC 29472, this 23rd day of March 2021.



David N. Lyon
DUFF | FREEMAN | LYON, LLC

Robert M. Dudek
Chief Appellate Defender

ATTORNEYS FOR APPELLANT