STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Charleston County
Honorable R. Markley Dennis, Jr., Circuit Court Judge
Appellate Case No. 2018-000504

THE STATE,

Respondent,

vs.

DARELL ONEIL BOSTON,

Appellant.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

Did the trial court err by denying Appellant's motion to suppress evidence seized after law enforcement conducted a "knock-and-talk" without reasonable suspicion of illegal activity in violation of Appellant's right to privacy under Article I, Section 10 of the South Carolina Constitution and State v. Counts, 413 S.C. 153, 776 S.E.2d 59 (2015)?

COUNTER-STATEMENT OF ISSUE ON APPEAL

Assuming for argument's sake Appellant could properly challenge the constitutional propriety of the officers' act of approaching another individual's residence to knock on the front door and those officers lacked reasonable suspicion of criminal activity when they did so, did the trial judge nonetheless correctly decline to suppress any of the incriminating evidence discovered as a result of the "knock-and-talk" in light of the fact the officers' actions were fully consistent with the controlling state and federal precedent in effect at the time they approached and knocked on the residence's door?

STATEMENT OF THE CASE

In March of 2015, Appellant Darell Oneil Boston was arrested after law enforcement officers caught him and an accomplice, William Holmes, in the process of manufacturing crack cocaine inside another individual's residence. In November of 2015, the Charleston County Grand Jury indicted Appellant for one count of manufacturing crack cocaine, one count of possession of crack cocaine with intent to distribute, and one count of possession of a controlled substance with intent to distribute within proximity of a school. Prior to trial, Appellant filed a motion to suppress, and, on November 30, 2017, a pre-trial hearing was held on Appellant's motion in the Charleston County Court of General Sessions with the Honorable R. Markley Dennis, Jr., circuit court judge, presiding. On January 10, 2018, Judge Dennis issued a written order denying the suppression motion. Thereafter, on February 5, 2018, a jury trial was commenced solely on the charges of manufacturing crack cocaine and possession of crack cocaine with intent to distribute in the Charleston County Court of General Sessions with Judge Dennis again presiding.[1] At the conclusion of the three-day trial, the jury convicted Appellant of manufacturing crack cocaine.[2,3] Following the verdict, Judge Dennis sentenced Appellant to a seventeen-year term of imprisonment.[4] Subsequently, on February 14, 2018, Appellant filed a

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[1] Appellant was tried jointly with Holmes, but Holmes absconded prior to trial and was not present for it. (R. pp. 157-160).

[2] During the course of trial, the trial judge instructed the jurors they could only convict Appellant of one of the indicted charges in the event they found his guilt had been established. (R. pp. 477-478).

[3] In addition to convicting Appellant of manufacturing crack cocaine, the jury also convicted Holmes of manufacturing crack cocaine and possession of cocaine. (R. pp. 480-481).

[4] Since Holmes was not present for trial, his sentence was sealed at the conclusion of the sentencing proceedings. (R. p. 504). Thereafter, once Holmes was eventually apprehended, his sentence was unsealed, and the trial judge imposed an aggregate term of imprisonment of twenty

motion for a new trial. While that motion was still pending, Appellant then filed both a premature notice of appeal and a motion seeking reconsideration of his sentence on February 16, 2018. Ultimately, Appellant's premature appeal was dismissed, and Judge Dennis denied Appellant's post-trial motions following a hearing on the matter conducted on March 15, 2018.[5] Appellant then timely filed a valid notice of appeal.

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years for his convictions. Records for William Holmes, Charleston County Public Index, https://jcmsweb.charlestoncounty.org/PublicIndex.

[5] Currently, the records associated with Appellant's premature appeal are available on the South Carolina Appellate Court Public Index. Appellate Records for State v. Darell Oneil Boston, South Carolina Appellate Court Public Index, https://ctrack.sccourts.org/public/caseView.do?csIID=66782.

STATEMENT OF FACTS

Around approximately 5:00 p.m. on March 6, 2015, several officers from the North Charleston Police Department, including Officer Joseph Sherwood and Sergeant Fred Hoose, took up a position in an area located in North Charleston, South Carolina, that was known to be a "hot spot" for narcotics activity. (R. pp. 10-12; pp. 14-15; p. 47; pp. 51-52; p. 77; pp. 200-201; p. 242; p. 342; pp. 345-346). While they were there, the officers observed Appellant and Holmes, whom they recognized as being connected to drug activity, arrive to the area in a taxicab, exit it together, and quickly enter a nearby single-occupancy apartment rented by Denise Holman, whom they knew to be a drug user with some cognitive issues.[6] (R. pp. 14-16; p. 48; p. 52; pp. 200-204; p. 242; p. 293; pp. 352-353). Suspicious, the officers temporarily remained where they were and discussed what they had observed.[7] (R. p. 15; p. 201). However, after waiting approximately fifteen minutes, they decided to approach Holman's apartment to both make sure she was okay and find out if any criminal activity was afoot. (R. pp. 16-17; pp. 68-69; pp. 77-78; p. 242; p. 291).

Upon approaching the residence, Officer Sherwood knocked on the door and identified himself as a law enforcement officer. (R. p. 16; p. 18; p. 52; pp. 124-125; pp. 204-205; p. 328; p. 346). In response, Holman opened the door in an "inviting way," and Officer Sherwood asked

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[6] At that time, Appellant had an extensive criminal record, which included convictions for trafficking crack cocaine, trafficking cocaine, possession of cocaine with intent to distribute, possession of cocaine, and possession of marijuana. (R. p. 492). Likewise, Holmes also had an extensive criminal record, which included convictions for trafficking crack cocaine, possession of cocaine with intent to distribute, possession of crack cocaine, possession of cocaine, and possession of marijuana. (R. pp. 501-502).

[7] As to why what he observed raised his suspicious, Officer Sherwood subsequently explained he knew it was common for drug manufacturers to use the apartments in the area where Holman lived to manufacture drugs in exchange for some form of compensation. (R. p. 36). Furthermore, Officer Sherwood indicated he had received drug-related complaints in connection to Holman's apartment complex. (R. pp. 59-60; p. 240; pp. 291-292).

her if she minded if they came inside and spoke with her. (R. pp. 16-18; p. 52; pp. 93-94; p. 100; p. 113; p. 124; pp. 204-205; p. 328; p. 346). At that point, Holman, who appeared to be relieved, granted consent to the officers, and Officer Sherwood stepped inside the small apartment. (R. p. 16; p. 18; pp. 22-23; p. 53; p. 78; pp. 93-94; p. 98; p. 113; pp. 205-207; p. 231; p. 328; p. 346).

When he did so, Officer Sherwood saw Appellant and Holmes huddled together in the apartment's kitchen near a microwave with two plastic bags containing white residue nearby. (R. pp. 23-24; pp. 56-57; p. 207; pp. 210-211; p. 243; pp. 255-259). Almost immediately after that, Appellant and Holmes realized the officer had entered the apartment, and the two quickly opened the microwave, made rapid hand movements, slammed the microwave shut, and then fled into the adjacent bathroom. (R. pp. 25-26; pp. 210-211; p. 263; pp. 282-284). In response, Officer Sherwood directed Appellant and Holmes to come out of the bathroom, and they complied. (R. p. 28; p. 211; pp. 346-347). The men, who were visibly nervous, were then detained, and Sergeant Hoose proceeded to conduct a consent-based search of Holmes. (R. p. 29; p. 41; p. 65; p. 119; p. 124; p. 211; p. 248; p. 349; p. 367). During the search, Sergeant Hoose located a bag of cocaine and a digital scale in Holmes's pockets.[8] (R. p. 29; p. 212; pp. 221-223; p. 349). Meanwhile, Officer Sherwood conducted a brief protective sweep of the apartment. (R. p. 29; p. 57; p. 211; p. 367). During the sweep, he found a steaming Pyrex-brand cup in the bathroom with a substance that appeared to be crack cocaine inside. (R. p. 29; pp. 58-59; pp. 70-71; p. 211; p. 218; p. 286; p. 350). Additionally, Officer Sherwood found a digital scale in the kitchen and noticed the microwave still had nearly two minutes left on its timer.[9] [10]

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[8] Ultimately, an additional bag of cocaine was discovered in Holmes's possession when he was searched at the jail. (R. pp. 222-223; pp. 393-394).

[9] Later on, the microwave was tested for the presence of cocaine, and the testing suggested cocaine or cocaine residue was present inside it. (R. pp. 31-32; pp. 226-228).

(R. p. 26; p. 213). Officer Sherwood then obtained a search warrant to conduct a more complete search of the apartment, the drugs and other incriminating evidence were secured, and Appellant and Holmes were arrested. (R. p. 31; p. 33; pp. 212-213; pp. 223-224; pp. 279-280; p. 350; p. 358; p. 382).

As the investigation into the incident continued, the crack cocaine recovered from Holman's residence was submitted for testing along with the cocaine recovered from Holmes's pockets. (R. p. 406). Upon completing the analysis, an expert forensic analyst confirmed the substances were, in fact, 5.83 grams of crack cocaine and 0.57 grams of cocaine. (R. pp. 404-406; p. 412; p. 416; p. 420). At that point, Appellant was indicted for manufacturing crack cocaine, possession of crack cocaine with intent to distribute, and possession of a controlled substance with intent to distribute within proximity of a school. (R. pp. 509-514).

Before his case was brought to trial, Appellant sought the suppression of all the evidence discovered as a result of the "knock-and-talk," and the trial judge conducted a pre-trial hearing on the matter. (R. p. 6; pp. 523-524). During the course of the hearing, Officer Sherwood recounted the events of March 6, 2015, and identified Appellant as one of the men he caught manufacturing crack cocaine inside Holman's apartment on that date.[11] (R. pp. 10-83). In addition to that testimony, Holman, who admitted she had previously been a crack cocaine user, offered her account of the incident, indicated Appellant and his accomplice were using her residence at that time to manufacture crack cocaine, and affirmed she voluntarily provided consent to the officers to enter her apartment after they knocked on her door. (R. pp. 88-102).

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[10] Notably, no food items were discovered in Holman's kitchen other than some baking soda, which was an ingredient used in the manufacture of crack cocaine. (R. p. 78; p. 93; p. 213; p. 229; p. 304; pp. 333-334).

[11] By the time of the suppression hearing, Officer Sherwood had been promoted to the rank of sergeant. (R. p. 10).

Meanwhile, Appellant, who admitted he had been a cocaine and crack cocaine dealer, offered a sharply different account of what occurred, claimed he was simply at Holman's apartment on the date of the incident as an invited guest, and alleged he was there solely to use her electronics to upload music to his phone. (R. pp. 104-115). Similarly, Holmes denied going to Holman's apartment to manufacture crack cocaine while insisting he instead went there with Appellant to "get high" and upload some music. (R. pp. 117-126). However, Holmes did candidly admit he had cocaine and marijuana in his pockets at that time. (R. pp. 118-119; p. 122).

Following the presentation of that testimony, Appellant argued the "knock-and-talk" and ensuring search were unconstitutional pursuant to both the state and federal constitutions. (R. pp. 137-138). In support of that argument, Appellant cited to the South Carolina Supreme Court's decision in State v. Counts, 413 S.C. 153, 776 S.E.2d 59 (2015), for the proposition a "knock-and-talk" requires reasonable suspicion while maintaining the officers did not, in fact, possess reasonable suspicion when they approached the door of Holman's residence.[12] (R. pp. 131-132; pp. 150-151; pp. 534-535). Furthermore, Appellant alleged Holman's consent was not valid or sufficient, the drugs observed inside Holman's residence were not actually in plain view, and the protective sweep conducted by Officer Sherwood was invalid. (R. pp. 132-134; pp. 537-541). In rebuttal, the solicitor contended Appellant did not have a reasonable expectation of privacy in Holman's residence and the "knock-and-talk" was supported by reasonable suspicion under the totality of the circumstances. (R. pp. 141-142; pp. 145-147; pp. 589-593). Furthermore, the solicitor maintained the officers obtained valid consent from Holman, Officer Sherwood observed the bags of cocaine in plain view upon entering the apartment, a proper protective sweep was conducted based on the exigent circumstances that arose, and the ensuing

[12] While the "knock-and-talk" at Holman's residence occurred on March 6, 2015, the decision in Counts was not issued until July 8, 2015. State v. Counts, 413 S.C. 153, 776 S.E.2d 59 (2015).

full search of the residence was conducted with a valid search warrant supported by probable cause. (R. pp. 594-604).

At the conclusion of the pre-trial hearing, the trial judge took the matter under advisement. (R. p. 151). Thereafter, upon considering the arguments of counsel, the trial judge denied Appellant's suppression motion. (R. p. 610). In denying the motion, the trial judge specifically found Appellant had standing to raise the constitutional challenge pursuant to the South Carolina Constitution. (R. p. 610). However, based on the totality of the circumstances, the trial judge determined the officers possessed reasonable suspicion of criminal activity at the time of the "knock-and-talk." (R. p. 166; p. 610). Furthermore, the trial judge concluded the officers obtained valid consent to enter after knocking on Holman's door and acted in an entirely reasonable manner once they entered Holman's apartment. (R. p. 610).

Subsequently, Appellant proceeded forward to trial on the charges of manufacturing crack cocaine and possession of crack cocaine with intent to distribute. (R. p. 159). During the course of trial, the officers involved in "knock-and-talk" and ensuing investigation testified about the events that transpired, and Appellant was identified as one of the individuals discovered in the act of manufacturing crack cocaine inside Holman's apartment on the date of the incident. (R. pp. 197-294; pp. 302-307; pp. 342-369; pp. 376-390; pp. 392-395). Furthermore, Holman offered her account of the events occurring at the time of the "knock-and-talk," and the crack cocaine and other incriminating items discovered as a result of the "knock-and-talk" were admitted into evidence over Appellant's renewed objection. (R. pp. 322-330; pp. 333-341; pp. 411-412; pp. 415-416).

At the conclusion of trial, the jury convicted Appellant of manufacturing crack cocaine. (R. pp. 480-481). Following the verdict, the trial judge sentenced Appellant to a seventeen-year

term of imprisonment. (R. p. 500). Thereafter, Appellant moved for a new trial on multiple grounds, including on the basis the trial judge allegedly erred by denying his motion to suppress the crack cocaine and other evidence found as a result of the "knock-and-talk." (R. p. 611; pp. 613-618). However, once again, the trial judge denied Appellant's motion. (R. pp. 506-507).

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, an appellate court in South Carolina is limited to determining if there is any evidence to support the trial court's findings and can only reverse due to clear error. 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."). The reviewing court may conduct its own review of the record to determine whether the trial judge's ruling is supported by the evidence. State v. Khingratsaiphon, 352 S.C. 62, 70, 572 S.E.2d 456, 460 (2002). However, the appellate court must affirm the trial court if there is any evidence supporting the ruling. See State v. Moore, 415 S.C. 245, 251, 781 S.E.2d 897, 900 (2016) ("[A]ppellate courts must affirm if there is any evidence to support the trial court's ruling."); State v. Morris, 411 S.C. 571, 578, 769 S.E.2d 854, 858 (2015) (" 'When reviewing a Fourth Amendment search and seizure case, an appellate court must affirm if there is any evidence to support the ruling.' " (citation omitted)). Critically, the appellate court will not reverse merely because it would have reached a different conclusion than the trial judge. State v. Rivera, 384 S.C. 356, 361, 682 S.E.2d 307, 310 (Ct. App. 2009); see Khingratsaiphon, 352 S.C. at 70, 572 S.E.2d at 459 ("In State v. Brockman, . . . [w]e concluded the appellate court would not review the trial judge's ultimate determination de novo but, rather, would apply a deferential standard of review.").

ARGUMENT

Even assuming Appellant could properly challenge the constitutional propriety of the officers' act of approaching another individual's residence to knock on the front door and those officers lacked reasonable suspicion of criminal activity when they did so, the trial judge correctly declined to suppress any of the incriminating evidence discovered as a result of the "knock-and-talk" because the officers' actions were fully consistent with the controlling state and federal precedent in effect at the time they approached and knocked on the residence's door.

Appellant contends the trial judge erred by declining to suppress the evidence discovered as a result of a "knock-and-talk" conducted at a residence he was using to manufacture crack cocaine. In support of that contention, Appellant maintains the "knock-and-talk" conducted by the officers constituted an unreasonable invasion of privacy in violation of his rights under the South Carolina Constitution because the officers allegedly lacked reasonable suspicion of criminal activity when they approached the residence and knocked on its door. Critically, even assuming for argument's sake the officers' actions violated Appellant's own personal rights under the South Carolina Constitution due to the absence of reasonable suspicion, application of the exclusionary rule was not appropriate in Appellant's case because the officers fully complied with the controlling state and federal precedent in effect at the time they conducted the "knock-and-talk" at Holman's residence.[13] Under such circumstances, suppression of the evidence

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[13] Importantly, the residence where the "knock-and-talk" was performed was *not* Appellant's residence and, instead, was a residence he and his confederate were simply using on a brief and temporary basis to manufacture crack cocaine as part of a quid pro quo arrangement with the actual resident. (R. p. 15; pp. 30-31; p. 36; pp. 68-69; pp. 91-92; p. 135; p. 214; p. 245; pp. 279-280; p. 304; pp. 326-367; p. 333; pp. 339-340; pp. 608-610). Under those circumstances, Appellant had *no* expectation of privacy—legitimate or otherwise—in the residence and, therefore, could not possibly meet his burden of establishing he had a reasonable expectation of privacy that was unlawfully violated by the "knock-and-talk" he sought to challenge. See State v. McKnight, 291 S.C. 110, 114, 352 S.E.2d 471, 473 (1987) (instructing a defendant seeking to challenge the propriety of a search or seizure must establish his own personal constitutional rights were violated by that search or seizure in order to be entitled to the benefits of the exclusionary rule); see also Rakas v. Illinois, 439 U.S. 128, 132, n. 1 (1978) ("The proponent of a motion to suppress has the burden of establishing that his own Fourth Amendment rights were

would not have served the goals of the exclusionary rule in any way since the officers were simply acting in a manner that had been judicially condoned at the time of the "knock-and-talk." Accordingly, the trial judge committed no error by declining to suppress the evidence discovered as the result of the "knock-and-talk," which, notably, was conducted several months before the "newly enunciated" rule from State v. Counts, 413 S.C. 153, 776 S.E.2d 59 (2015), requiring reasonable suspicion was even in existence. Appellant's conviction should be affirmed.

Beyond the protections afforded by the United States Constitution, 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[.]"); see also U.S. Const. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be

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violated by the challenged search or seizure."); Alderman v. United States, 394 U.S. 165, 174 (1969) ("Fourth Amendment rights are personal rights which, like some other constitutional rights, may not be vicariously asserted."); cf. Minnesota v. Carter, 525 U.S. 83, 91 (1998) (holding Carter and his accomplice had no expectation of privacy in another person's apartment that they were only briefly and temporarily using for the business-like purpose of packaging cocaine); State v. Robinson, 410 S.C. 519, 530, 765 S.E2.d 564, 570 (2014) ("[W]e find that [Robinson] was 'merely present with the consent of the householder,' and as such, did not have a reasonable expectation of privacy on the porch of Apartment 122." (citations omitted)). Accordingly, the trial judge's ruling refusing to suppress evidence discovered as the result of an allegedly unreasonable invasion of someone *other than* Appellant's state constitutional right to privacy should be affirmed due to Appellant's lack of a reasonable expectation of privacy in Holman's residence. Cf. State v. Weaver, 374 S.C. 313, 326, 649 S.E.2d 479, 485 (2007) (Pleicones, J., concurring) ("Analysis of the facts of this case with our privacy provision in mind reveals no state constitutional violation. Although one's expectation of privacy in his automobile increases when that automobile is parked in the backyard of his private residence, [Weaver] in this case was not the owner of the Jeep that was seized. More importantly, the vehicle was not parked at [Weaver]'s residence. Our state constitution's provision protecting unreasonable invasions of privacy necessarily requires some analysis of the privacy interests involved when a warrantless seizure is made on private property. However, [Weaver] cannot show he had a reasonable expectation of privacy in the seized Jeep." (footnote omitted)).

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, __ U.S. __, 135 S. Ct. 530, 536 (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)).

Typically, when a constitutional violation occurs, any evidence seized as the result of that unconstitutional action must be excluded from trial pursuant to the exclusionary rule, which is a judicially-created remedy designed to serve as a deterrent sanction against unconstitutional conduct. Weaver, 374 S.C. at 319, 649 S.E.2d at 482; see generally State v. Brown, 401 S.C. 82, 88, 736 S.E.2d 263, 266 (2012) ("The Fourth Amendment itself provides no remedy for a violation of the warrant requirement. However, the United States Supreme Court has fashioned a judicially-created remedy, the exclusionary rule, which is a deterrent sanction by which the prosecution is barred from introducing evidence obtained in violation of the Fourth Amendment." (citation omitted)). Importantly though, the exclusion of evidence following an unconstitutional action "is 'not a personal constitutional right,' nor is it designed to redress the injury occasioned by an unconstitutional search." Davis v. United States, 564 U.S. 229, 236 (2011) (citations omitted); see Stone v. Powell, 428 U.S. 465, 486 (1976) ("[T]he [exclusionary] rule is not a personal constitutional right. It is not calculated to redress the injury to the privacy of the victim of the search or seizure[.]"); Elkins v. United States, 364 U.S. 206, 217 (1960) ("The [exclusionary] rule is calculated to prevent, not to repair."). Due to the heavy costs exacted by the exclusion of evidence on both the judicial system and society as a whole, application of the exclusionary rule is only appropriate where the deterrent benefits of the rule outweigh the heavy costs its application would exact. Brown, 401 S.C. at 88, 736 S.E.2d at 266. As a result, not every constitutional violation warrants the application of the exclusionary rule. State v. Adams, 409 S.C. 641, 647, 763 S.E.2d 341, 345 (2014).

With those principles in mind, the matter at issue in the case sub judice involves two distinct inquiries. The first inquiry hinges on the question of whether the officers' actions in conducting the "knock-and-talk" at Holman's residence violated Appellant's constitutional

rights. See Illinois v. Gates, 462 U.S. 213, 223 (1983) ("The question whether the exclusionary rule's remedy is appropriate in a particular context has long been regarded as an issue separate from the question whether the Fourth Amendment rights of the party seeking to invoke the rule were violated by police conduct."). Meanwhile, the second—and most critical—inquiry hinges on the question of whether suppression of the evidence was warranted in the event a constitutional violation did occur.[14] See Davis, 564 U.S. at 243 ("Remedy is a separate, analytically distinct issue."); see also Hudson v. Michigan, 547 U.S. 586, 592 (2006) ("[E]xclusion may not be premised on the mere fact that a constitutional violation was a 'but-for' cause of obtaining evidence. Our cases show that but-for causality is only a necessary, not a sufficient, condition for suppression."). To resolve those questions, it is critically important to look to the law in effect—and, thus, available as guidance to the officers—at the time the officers conducted the "knock-and-talk" in Appellant's case. See Davis, 564 U.S. at 250 ("[W]hen the police conduct a search in objectively reasonable reliance on binding appellate precedent, the exclusionary rule does not apply.").

Looking to the relevant law concerning "knock-and-talks," the citizens of the United States—including the citizens of South Carolina—have extended an implicit license through deeply-ingrained customs and practices to their fellow citizens to approach their homes, knock on their doors, wait to be received, attempt to speak with them, and then depart absent some invitation to stay longer. Florida v. Jardines, 569 U.S. 1, 8 (2013). Historically, that implicit

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[14] Significantly, resolution of the second inquiry is so critical its resolution can render resolution of the first inquiry wholly unnecessary. Cf. United States v. Leon, 468 U.S. 897, 925 (1984) (explaining a reviewing court may proceed directly to the good faith inquiry without first deciding whether a warrant was supported by probable cause); United States v. Bynum, 293 F.3d 192, 194-195 (4th Cir. 2002) ("Assuming without deciding that no probable cause supported the warrant, we will proceed 'immediately to a consideration of the officers' good faith.' " (citations omitted)).

license has been extended to all manner of visitors and has granted door-to-door salesmen, service providers, evangelicals, neighbors, *law enforcement officers*, and anyone else who might wish to do so an equal opportunity by which they can attempt to make contact with the residents of a home regardless of their particular motives for doing so. See id. at 9, n. 4 (recognizing "*all are invited*" to approach a home to speak with an occupant pursuant to the implicit license). Thus, even though every homeowner might not need—or even have the remotest desire—to buy a new vacuum cleaner or box of cookies, obtain assistance with yard maintenance, speak to a stranger who wants to discuss religion or some other topic, lend a cup of sugar, or chat with an officer of the law, a citizen of our state and country can permissibly approach a home and knock on the door in an effort to talk to someone inside solely by virtue of the implicit license derived from long-standing customs and practices. Id. at 8.

Accordingly, law enforcement officers—including those in South Carolina—have traditionally been fully entitled to avail themselves of that implicit license and, just like everyone else, have been permitted to approach a home to speak with someone residing inside regardless of their purpose for doing so, including if that purpose was to conduct a "knock-and-talk." See Kentucky v. King, 563 U.S. 452, 469-470 (2011) (recognizing law enforcement officers not armed with a warrant ordinarily do not violate an individual's constitutional rights by approaching a home and knocking on a door). Demonstrating that fact, our Supreme Court expressly recognized law enforcement officers were *obviously* entitled to go to a person's home and door to interview that person through its decision in State v. Wright, 391 S.C. 436, 444, 706 S.E.2d 324, 328 (2011), which was decided over four years before the officers approached the residence to conduct the "knock-and-talk" in Appellant's case. Specifically, in Wright, law enforcement officers received an anonymous tip dogfighting was taking place at a mobile home,

drove past the residence identified in the tip on a public road to investigate, and observed a large number of vehicles and shining spotlights at the residence. Id. at 440, 706 S.E.2d at 325. Based on their observations, the officers stealthily approached the home in multiple vehicles by driving down a private dirt road and activated their headlights just as they neared the home. Id. at 440, 706 S.E.2d at 326. When they did so, the officers saw people and dogs running away along with a portable dogfighting pit that was being dismantled. Id. In response, the officers detained the people who attempted to flee, arrested Wright and his co-defendants, captured as many dogs as they could, and seized numerous items of evidence related to dogfighting that were found in plain view. Id. at 440-441, 706 S.E.2d at 326. Following their arrests, Wright and the others moved prior to trial to suppress the evidence due to the fact the officers seized it after making a warrantless entry onto private property, and the circuit court judge granted their suppression motions. Id. at 441, 706 S.E.2d at 326. Subsequently, the State appealed the circuit court judge's ruling, and the Supreme Court reversed. Id. at 446, 706 S.E.2d at 329. In reversing, the Supreme Court specifically found the officers' entry onto the private road and approach of the mobile home were constitutionally proper because the officers had investigative authority to enter the property *even if* the officers had not developed a reasonable basis for proceeding forward at the time they did so. Id. at 444-445, 706 S.E.2d at 328.

However, subsequent to the decision in Wright and just over four months *after* the officers discovered Appellant in the process of manufacturing crack cocaine inside Holman's residence, our Supreme Court took another look at the issue of "knock-and-talks" in State v. Counts, 413 S.C. 153, 167, 776 S.E.2d 59, 67 (2015), and 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 constituted 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 without restriction. Id. at 172, 776 S.E.2d at 69. Therefore, 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. The majority then applied that "newly enunciated rule" to the facts of Counts's case before determining Counts's rights under the South Carolina Constitution were not violated.[15] Id. at 173, 776 S.E.2d at 70.

In light of the Counts decision, law enforcement officers in South Carolina now unquestionably must possess reasonable suspicion in order to approach a residence for the purposes of conducting an investigative "knock-and-talk," and the actions of the officers in Appellant's case would have violated the state constitution if the officers did not possess sufficient information under the totality of the circumstances to satisfy the relatively low bar of the reasonable suspicion standard when they approached Holman's door.[16] Id. at 172, 776

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[15] Because it determined no state constitutional violation occurred in Counts's case, the Supreme Court did not address the question of whether application of the exclusionary rule would have been appropriate if the officers had, in fact, violated Counts' constitutional rights. Counts, 413 S.C. at 173, 776 S.E.2d at 70. As a result, the Supreme Court's decision in Counts did *not* establish the exclusionary rule can or should be applied in cases involving suspicionless "knock-and-talks" performed prior to the creation of the new rule requiring reasonable suspicion. See 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 omitted)).

[16] Notably, even if the officers did not possess reasonable suspicion at the time they approached Holman's door, their decision to do so was motivated—at least to some extent—by their legitimate desire to check on Holman's welfare, which did *not* require any reasonable suspicion on their part. See Counts, 413 S.C. at 174, n. 7, 776 S.E.2d at 71 ("[O]ur decision should not be misconstrued . . . to prevent law enforcement from conducting 'welfare checks' at residences.").

S.E.2d at 70; see generally Kaley v. United States, 571 U.S. 320, 338 (2014) (recognizing even the probable cause standard "is not a high bar"). However, because the Supreme Court's decision in Counts had not yet been issued at the time of the officers' approach to Holman's door, it was not available to the officers to guide them in Appellant's case until *months* after they had already acted. Cf. Davis, 564 U.S. at 235 ("The search at issue in this case took place a full two years before this Court announced its new rule in Gant."). Under those circumstances, even if the officers' actions were not in compliance with the mandates of the new rule articulated by the Supreme Court in Counts, suppression of the evidence could not rationally be an appropriate remedy if the officers' actions were consistent with the controlling precedent in effect at the time they conducted the "knock-and-talk." Cf. Narcisco v. State, 397 S.C. 24, 32, 723 S.E.2d 369, 373 (2012) ("[E]xcluding the evidence against [Narcisco] would not deter police misconduct because the police in this instance conducted a search incident to arrest pursuant to binding appellate precedent. Moreover, exclusion of the evidence in this case would result in severe social costs, including the articulation of an inexplicable and undecipherable message to law enforcement regarding how to conduct a legal search. The protection of the Fourth Amendment can only be realized if police are acting under a set of rules which make it possible to reach a correct determination beforehand as to whether an invasion of privacy is justified in the interest of law enforcement." (citations omitted)). Critically, in Appellant's case, the officers' actions did, in fact, wholly comply with the relevant and applicable precedent on both "knock-and-talks" and the implicit license that has been extended to everyone, including the officers, by our state's citizenry through long-standing customs and practices.

Specifically, the officers' approach of Holman's residence to conduct a "knock-and-talk" was completely consistent with our Supreme Court's decision in Wright, which recognized a law

enforcement officer may *obviously* go to a residence's door to speak with someone inside. See Wright, 391 S.C. at 444, 706 S.E.2d at 328 ("A policeman may lawfully go to a person's home to interview him. . . . In doing so, he obviously can go up to the door. . . ." (citation and internal quotations omitted)). Furthermore, the officers' decision to approach the residence to conduct a "knock-and-talk" was also entirely consistent with federal precedent from the United States Supreme Court and the Fourth Circuit Court of Appeals regarding "knock-and-talks" and the implicit license that had been issued prior to their actions in the case at bar. See Jardines, 569 U.S. at 8 (instructing law enforcement officers are generally permitted to conduct warrantless "knock-and-talks" pursuant to the implicit license); King, 563 U.S. at 469-470 ("When law enforcement officers who are not armed with a warrant knock on a door, they do no more than any private citizen might do."); see also United States v. Cephas, 254 F.3d 488, 493 (4th Cir. 2001) ("[A]n officer generally does not need probable cause or reasonable suspicion to justify knocking on the door and then making verbal inquiry."); Rogers v. Pendleton, 249 F.3d 279, 289-290 (4th Cir. 2001) (recognizing "police officers do not need a warrant to do what any private citizen may legitimately do—approach a home to speak to the inhabitants"); United States v. Taylor, 90 F.3d 903, 909 (4th Cir. 1996) (explaining "there is no rule of private or public conduct which makes it illegal per se, or a condemned violation of the person's right of privacy" for anyone—including a police officer—to approach a home's front door to make contact with someone inside (citation and internal quotations omitted)).

Based on the then-controlling decisions issued by our Supreme Court, the United States Supreme Court, and the Fourth Circuit Court of Appeal, it was objectively reasonable for the officers in Appellant's case to believe they had the investigative authority to approach Holman's residence pursuant to the implicit license for the purpose of conducting a "knock-and-talk"

regardless of whether they possessed reasonable suspicion of criminal activity. Cf. Wright, 391 S.C. at 445, 706 S.E.2d at 328 ("[T]hese observations would give a reasonable police officer in the deputies' position cause to go forward. However, even absent these observations, the police had the investigative authority to approach the front door of the mobile home in order to investigate the anonymous tip."). As a result, suppression of the incriminating evidence—including the crack cocaine Appellant was in the process of manufacturing—would in no way serve the deterrent goals of the exclusionary rule since the officers were merely acting in a manner that had been expressly condoned and recognized as proper by both state and federal courts, including our Supreme Court. See Davis, 564 U.S. at 249 ("It is one thing for the criminal 'to go free because the constable has blundered.' It is quite another to set the criminal free because the constable has scrupulously adhered to the governing law. Excluding evidence in such cases deters no police misconduct and imposes substantial social costs." (citation omitted)); see also Herring v. United States, 555 U.S. 135, 144 (2009) ("To trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system."). Therefore, even assuming the officers' action violated Appellant's state constitutional rights in light of the Supreme Court's decision in Counts, their actions nonetheless did not justify or warrant the exclusion of the incriminating evidence during trial. See Davis, 564 U.S. at 241 ("[T]he harsh sanction of exclusion 'should not be applied to deter objectively reasonable law enforcement activity.' Evidence obtained during a search conducted in reasonable reliance on binding precedent is not subject to the exclusionary rule." (citation omitted)); see also Herring, 555 U.S. at 140 ("The fact that a Fourth Amendment violation occurred—i.e., that a search or arrest was unreasonable—does not necessarily mean that the exclusionary rule applies. Indeed,

exclusion 'has always been our last resort, not our first impulse,' . . . and our precedents establish important principles that constrain application of the exclusionary rule." (citations omitted)); cf. Brown, 401 S.C. at 96, 736 S.E.2d at 270 ("[W]e hold the Court of Appeals properly applied Gant and found the warrantless police search conducted incident to Brown's arrest for an open container violation was illegal. We further hold, however, pursuant to the Supreme Court's subsequent pronouncement in Davis, that the exclusionary rule is not applicable to this case because the officer relied upon existing appellate precedent at the time he conducted his search."). Accordingly, the trial judge correctly denied Appellant's suppression motion and declined to impose the harsh sanction of exclusion in a case in which it simply could not and cannot be justified. See State v. Butler, 353 S.C. 383, 393, 577 S.E.2d 498, 503 (Ct. App. 2003) ("[T]his court will affirm if there is any evidence to support the decision, regardless of the basis of the trial court's ruling."); see also Davis, 564 U.S. at 237 ("Exclusion exacts a heavy toll on both the judicial system and society at large. It almost always requires courts to ignore reliable, trustworthy evidence bearing on guilt or innocence. And its bottom-line effect, in many cases, is to suppress the truth and set the criminal loose in the community without punishment. Our cases hold that society must swallow this bitter pill when necessary, but only as a 'last resort.' " (citations omitted)). Appellant's conviction should be affirmed.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

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April 5, 2019

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Charleston County
Honorable R. Markley Dennis, Jr., Circuit Court Judge
Appellate Case No. 2018-000504

THE STATE,

Respondent,

vs.

DARELL ONEIL BOSTON,

Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies this Final Brief of Respondent 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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