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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Charleston County

R. Markley Dennis, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

WILLIAM HOLMES,

APPELLANT.

Op. No. 2021-UP-249

APPELLATE CASE NO. 2018-001642

PETITION FOR REHEARING

Pursuant to Rules 221 and 240, SCACR, Appellant William Holmes files this petition for rehearing regarding this Court's decision in the above-referenced case.

The Court based its decision in this case on its opinion in State v. Boston, 433 S.C. 177, 857 S.E.2d 27 (Ct. App. 2021). See State v. Holmes, Op. No. 2021-UP-249 (S.C. Ct. App. 2021 filed June 30, 2021) ("Because Boston's and Holmes's appeals concern the same factual circumstances and legal arguments, this court's affirmance of the trial court's findings of reasonable suspicion in *Boston* applies to Holmes's appeal."). Therefore, the argument in this Petition will primarily address the points the Court may have overlooked or misapprehended in its reasoning in Boston.

By affirming the trial court's finding that law enforcement had reasonable suspicion to perform a knock-and-talk, this Court may have overlooked or misapprehended the following points:

I. The evidence that the trial court relied on to support its ruling lacks the specificity of the evidence presented in Kotowski and Counts and more closely matches the evidence presented in Foster, Sprinkle, and Hewins, where courts held the evidence did not rise to the level of reasonable suspicion.

A. This case can be distinguished from Kotowski and Counts.

In Boston, the Court discussed two cases in support of its holding that the circuit court did not err in denying the motion to suppress: State v. Counts, 413 S.C. 153, 776 S.E.2d 59 (2015); and State v. Kotowski, 427 S.C. 119, 828 S.E.2d 605 (Ct. App. 2019). See Boston, 433 S.C. at 182-86, 857 S.E.2d at 29-31. However, the type and amount of evidence presented in those cases provided a "particularized and objective basis that would lead one to suspect another of criminal activity," which is what is required to support a finding of reasonable suspicion. Kotowski, 427 S.C. at 128, 828 S.E.2d at 610 (internal quotations omitted). The evidence presented in this case does not rise to that level.

Both Counts and Kotowski involved anonymous tips, which occurred months before the knock-and-talks were performed. See Counts, 413 S.C. at 157-58, 776 S.E.2d at 61-62; Kotowski, 427 S.C. at 125-26, 828 S.E.2d at 608. There was no anonymous tip involved in this case.

The anonymous tips in Counts and Kotowski described specific types of illegal activity taking place at specific addresses. See Counts, 413 S.C. at 157, 776 S.E.2d at 61-62 (Law enforcement "received an anonymous tip alleging Counts was selling Marijuana and crack cocaine out of his mother's house and an apartment in Allen Benedict Court in Columbia."); Kotowski, 427 S.C. at 125, 828 S.E.2d at 608 (Law enforcement "received an anonymous tip

about the possibility of a drug house at 111 Marsh Point Road."). Such specificity is lacking in this case. Although Officer Sherwood claimed to have knowledge about narcotics activity at the apartment complex generally, he had no specific knowledge of illegal activity at the apartment where the knock-and-talk took place. See Boston, 433 S.C. at 179-80, 857 S.E.2d at 28. Officer Sherwood was not even certain what criminal activity he thought he might find prior to performing the knock-and-talk. He testified that he "knock[ed] on the door to make sure that one, [the apartment resident] is okay[,] and two, see if there is any [possibility of] ***any crime*** or if she had any information for us." Id., 433 S.C. at 180, 857 S.E.2d at 28-29 (emphasis added).

Furthermore, in Counts and Kotowski, law enforcement corroborated the information in the anonymous tips through additional investigation and surveillance before performing the knock-and-talks. Counts, 413 S.C. at 158, 776 S.E.2d at 62 (Law enforcement corroborated the information provided in the tips by reviewing the defendant's rap sheet, confirming the defendant had two identification cards on record, and conducting surveillance of Counts' residence.); Kotowski, 427 S.C. at 125, 828 S.E.2d at 608 (Law enforcement corroborated the information provided in the tip by confirming several pseudoephedrine purchases were made by the homeowner and another person and by conducting "spotty surveillance" of the residence that was the subject of the tip.) In this case, Officer Sherwood did not corroborate his hunch with any additional investigation before performing the knock-and-talk.

Because this case is factually distinguishable from Counts and Kotowski, those cases do not support this Court's holding that Officer Sherwood had reasonable suspicion. Instead, this Court should look to other cases for guidance.

B. This case more closely matches Foster, Sprinkle, and Hewins.

Unlike the courts in Counts and Kotowski, courts in the following cases held that law enforcement did not have reasonable suspicion: United States v. Foster, 634 F.3d 243 (4th Cir. 2011); United States v. Sprinkle, 106 F.3d 613 (4th Cir. 1997); and State v. Hewins, 409 S.C. 93, 760 S.E.2d 814 (2014). Although these cases involved investigative stops rather than knock-and-talks, the information known to law enforcement prior to initiating (or choosing to extend) these stops is similar to the information known to Officer Sherwood in this case.

In Foster, Sprinkle, and Hewins, law enforcement only observed the defendants for a short time before initiating (or extending) the stops. See Foster, 634 F.3d at 245 (The officer initiated the stop "approximately fifteen minutes after first encountering Foster."); Sprinkle, 106 F.3d at 615-16 (Officers decided to initiate the stop as they walked from the stoop of a home to their cars, which were "parked about a block away."); Hewins, 409 S.C. at 99-100, 760 S.E.2d at 817 (The officer observed Hewins during a traffic stop resulting in a warning citation before deciding to extend the stop). In this case, Officer Sherwood only observed Holmes and Boston for a few moments as they walked from the taxi to the apartment. (R. p. 18, line 21–p.19, line 6).

Additionally, law enforcement did not observe any illegal activity before initiating (or extending) the stops in Foster, Sprinkle, and Hewins. See Foster, 634 F.3d at 247 ("[T]he encounter occurred in the middle of the day, and Detective Ragland did not see Foster in the possession of any drugs, money, weapons, or paraphernalia."); Sprinkle, 106 F.3d at 616 (The officer "did not see anything in either man's hands. Neither officer saw any drugs, money, guns, or drug paraphernalia in the car."); Hewins, 409 S.C. at 100, 760 S.E.2d at 817(It can be inferred that the officer did not observe any illegal activity after the initial stop, because the officer "question[ed] [Hewins] as to whether he had any guns, drugs, or explosives," which Hewins

denied.). In this case, Officer Sherwood did not see Holmes or Boston carrying any firearms or contraband before they entered the apartment. (R. p. 73, lines 8-10). Likewise, during the fifteen minutes between Holmes and Boston entering the apartment and the knock-and-talk, Officer Sherwood did not see or hear anything suggesting someone was committing a crime. (R. p. 73, lines 2-16).

Finally, in Foster and Sprinkle, although the officers were aware the defendants had criminal histories, the officers were not able to couple that knowledge with more concrete factors to support a finding of reasonable suspicion of current criminal activity. See Foster, 634 F.3d at 245-247 (The officer had arrested Foster in the past for driving with a revoked license, and he was aware that Foster was previously arrested for a marijuana-related crime. However, "he lacked explicit familiarity with Foster's prior marijuana arrest or that arrest's ultimate disposition."); Sprinkle, 106 F.3d at 617 ("Poindexter first got Officer Riccio's attention because the officer knew Poindexter had a criminal record and that he had recently finished a sentence for a drug conviction. Riccio, however, had no information that Poindexter had returned to crime since his release."). In this case, Officer Sherwood did not testify that he knew whether Holmes or Boston had ever been arrested, charged, or convicted of a crime. He merely testified that he "recogniz[ed] them from another residence where drug activity took place," and he "had previously had 'several run-ins with them.'" Boston, 433 S.C. at 180, 857 S.E.2d at 28.

Based on the factual similarities described above, this Court should follow the courts in Foster, Sprinkle, and Hewins, and hold that Officer Sherwood did not have reasonable suspicion in this case.

II. This ruling will open the door to the type of behavior by law enforcement that the Supreme Court was trying to avoid in Counts.

Officer Sherwood's actions in this case illustrate the type of behavior that the Supreme Court of South Carolina intended to prevent with its holding in Counts. Without "some threshold evidentiary basis for law enforcement to approach a private residence," the Court noted, "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." Counts, 413 S.C. at 172, 776 S.E.2d at 69. In order to prevent such abuse, the Court held that "law enforcement must have reasonable suspicion of illegal activity at a targeted residence prior to approaching the residence and knocking on the door." Id. 413 S.C. at 172, 776 S.E2d at 70

The only thing Officer Sherwood saw before initiating this knock-and-talk was two men walk from a taxi to an apartment in an area he considered to be "a hot spot of narcotics activity." Although his experience as a law enforcement officer and vague knowledge of the three people inside the apartment certainly entitled him to be curious about what might be occurring inside, he did not pair these factors with more concrete evidence of criminal activity. Curiosity alone is not enough to establish reasonable suspicion. See Sprinkle, 106 F.3d at 618 ("Officer Riccio's curiosity was understandably aroused when he spotted Poindexter, who had recently served time for a narcotics offense, in a neighborhood with a high incidence of drug traffic. But for these factors to support reasonable suspicion, there must be (other) particularized evidence that indicates criminal activity is afoot.).

The innocuous behavior Officer Sherwood witnessed before performing this knock-and-talk–two men walking to an apartment–only takes on the appearance of suspicious behavior in the context of the drugs that were later found. The purpose of requiring law enforcement to have reasonable suspicion of criminal activity before taking some action, however, is generally to

prevent "the government [from relying] upon post hoc rationalization to validate those seizures that happen to turn up contraband." Foster, 634 F.3d at 249 (citing United States v. Martinez-Fuerte, 428 U.S. 543, 565 (1976)). The Fourth Circuit Court of Appeals has summarized the importance of enforcing the exclusionary rule in cases like the present case:

> "[W]e are deeply troubled by the way in which the Government attempts to spin these largely mundane acts into a web of deception. Although these matters generally only come before this Court where a police seizure uncovers some wrongdoing, we would be remiss if we did not acknowledge that the exclusionary rule is our sole means of ensuring that police refrain from engaging in the unwarranted harassment or unlawful seizure of anyone–whether he or she is one of the most affluent or most vulnerable members of our community.

Id., 634 F.3d at 248-49.

CONCLUSION

For the reasons stated above, Appellant requests that this Court grant this Petition, rehear this matter, reverse Appellant's convictions, and remand this matter for a new trial with instructions that the Trial Court suppress all evidence seized following this knock-and-talk.

Respectfully Submitted,

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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 on Mark R. Farthing, Assistant Attorney General, at the Rembert Dennis Building, PO Box 11549, Columbia, SC 2921-15491, and a copy of the Petition for Rehearing has been served on William Holmes, #275110, at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 13th day of July, 2021.

Jason T. Yonge
Attorney for Appellant

SUBSCRIBED AND SWORN TO before me
this 13 day of July, 2021.

Notary Public for South Carolina
My Commission Expires: 06/15/2026