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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Charleston County
Honorable R. Markley Dennis, Jr., Circuit Court Judge
Appellate Case No. 2018-001642

THE STATE,

Respondent,

vs.

WILLIAM HOLMES,

Appellant.

RETURN TO APPELLANT'S PETITION FOR REHEARING

On June 30, 2021, this Court issued an unpublished opinion in which it unanimously affirmed Appellant William Holmes's convictions for several narcotics offenses. State v. Holmes, Op. No. 2021-UP-249 (S.C. Ct. App. filed June 30, 2021). As support for that decision, this Court looked to and relied upon its earlier opinion in the virtually-identical appeal of Holmes's co-defendant, Darell Oneil Boston. In that earlier opinion, this Court noted the following facts and circumstances existed prior to the initiation of the "knock-and-talk" at issue in Boston's—and Holmes's—case:

> Sergeant Sherwood testified to objective knowledge of the apartment community and the three people inside the apartment. Sergeant Sherwood had years of experience investigating criminal drug activity, with extensive training and certification, including eleven years with the department, and was very familiar with the apartment community he surveilled. He knew Boston and Holmes did not live there and recognized them from a previous incident at another location. Sergeant Sherwood's department had specifically directed him to patrol the area of the apartments based

> upon information the area had been 'a hot spot of narcotics activity.' He also testified he had knowledge of the practice of those engaged in illegal activity using the apartments of others to manufacture drugs. During his patrol, he observed Boston and Holmes enter the home of a person he knew lived alone, had some undefined limitations, and had used narcotics in the past.

State v. Boston, 433 S.C. 177, 185, 857 S.E.2d 27, 31 (Ct. App. 2021). Based on the totality of those circumstances, this Court concluded the trial judge did not err by finding reasonable suspicion of illegal activity existed such that the law enforcement officers, who were *not* engaged in random "knock-and-talks" at that time, could properly approach the apartment's door for the purpose of conducting a "knock-and-talk." Id. at 185-186, 857 S.E.2d at 31-32. Accordingly, this Court affirmed the trial judge's ruling denying the suppression motion pursuant to the applicable standard of review. Id. at 186, 857 S.E.2d at 32.

Now, Holmes has submitted a petition for rehearing. Through that petition, Holmes asserts this Court may have misapprehended or overlooked several points when resolving Boston's case, which was relied upon to resolve his case. More specifically, Holmes maintains the facts and circumstances involved did not rise to the level of reasonable suspicion because the officers had not received any anonymous tips as had occurred in other unrelated cases in which reasonable suspicion has in the past been found, the officers had no specific knowledge of any illegal activity occurring at the apartment where the "knock-and-talk" was conducted, no additional investigation was conducted to corroborate the officers' suspicions, and neither he nor Boston were observed in possession of any contraband or firearms prior to entering the apartment. Thus, at its core, Holmes's argument in his petition can be summarized as a claim the facts and circumstances found by the trial judge to support reasonable suspicion did not, in fact, actually do so.

Importantly though, the reasonable suspicion standard does *not* require officers to always first receive anonymous tips, possess specific knowledge of illegal activity, obtain corroboration, or directly observe contraband or firearms before they can engage in some limited investigatory action. Cf. Kansas v. Glover, __ U.S. __, 140 S. Ct. 1183, 1190 (2020) (concluding an officer possessed "more than reasonable suspicion" to initiate an actual seizure based on his knowledge of just three facts: (1) someone was driving a truck with a specific license plate; (2) the truck's registered owner had a revoked driver's license; and (3) the vehicle linked to the registered owner based on the observed license plate's information matched the observed vehicle); Terry v. Ohio, 392 U.S. 1, 28 (1968) (holding an officer's actions, which were based on the officer observing Terry and his confederate simply walk by and look in a store window several times, 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). Instead, that standard is a flexible one grounded in common sense and simply requires a showing of "a *minimal* level of objective justification" in order to be satisfied. 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"); United States v. Lender, 985 F.2d 151, 154 (4th Cir. 1993) ("Reasonable suspicion is a commonsensical proposition."); see also Glover, 140 S. Ct. at 1190 (rejecting an interpretation of what is required to satisfy the reasonable suspicion standard because the rejected interpretation "would considerably narrow the daylight between the showing required for probable cause and the 'less stringent' showing required for reasonable suspicion"). Accordingly, the presence of factors seemingly consistent with innocent behavior can—and frequently does—suffice to establish the existence of reasonable suspicion to believe

criminal activity *may* be afoot. United States v. Sokolow, 490 U.S. 1, 9 (1989); Wardlow, 528 U.S. at 125-126 (recognizing factors that are "susceptible of an innocent explanation" can establish reasonable suspicion and probable cause); see also 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); United States v. Pack, 612 F.3d 341, 356 (5th Cir. 2010) ("Requiring police to have particularized facts that support a finding that 'criminal activity may be afoot' is different from requiring the police to articulate particularized facts that support a finding that a particular specific crime is afoot.").

With that flexible standard in mind, the primary officer involved in Holmes's case—prior to approaching and knocking on the apartment door—was aware Holmes and Boston, whom were observed entering the single-occupancy residence, had previously been connected to drug activity. See, e.g., 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. 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). Likewise, the experienced officer was aware the apartment's occupant was herself a known drug user with some cognitive issues. See, e.g., 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."). Beyond that, the officer was aware the area was a known "hot spot" for narcotics activity and the apartments themselves

were commonly used by drug manufacturers who employed quid pro quo arrangements to obtain access to locations where they could produce their narcotics. See, e.g., 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); 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."); 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[.]").

In isolation, those factors may not have individually been sufficient to establish the minimal level of objective justification needed to validate the limited and reasonably-tempered investigatory action undertaken by the officers, which simply involved an approach and knock at the apartment's door. 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, 588 (2018) (recognizing "the whole is often greater than the sum of its parts—especially when the parts are viewed in isolation" and explaining even the higher probable cause standard "does not require officers to rule out a suspect's innocent explanation for suspicious facts"). However, when viewed collectively as required, those factors—just as the trial judge and this Court recognized—were sufficient to satisfy the low bar of the reasonable suspicion standard and provide objective justification for the "knock-and-talk" conducted at the apartment, which was not carried out in a harassing, random, or arbitrary manner. See Robinson v. State, 407 S.C. 169, 184, 754 S.E.2d 862, 870 (2014) ("[T]he facts and inferences relied on by the officer must be articul*able*, not necessarily articulat*ed*."); see also

Devenpeck v. Alford, 543 U.S. 146, 153 (2004) ("As we have repeatedly explained, the fact that the officer does not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officer's action does not invalidate the action taken as long as the circumstances, viewed objectively, justify that action." (citations and internal quotations omitted)); United States v. McKie, 951 F.2d 399, 402 (D.C. Cir. 1991) ("The Terry standard being one of objective reasonableness, we are not limited to what the stopping officer says or to evidence of his subjective rationale; rather, we look to the record as a whole to determine what facts were known to the officer and then consider whether a reasonable officer in those circumstances would have been suspicious."). Accordingly, the trial judge properly denied the suppression motion, and this Court correctly affirmed that ruling on appeal in both Boston's case and Holmes's as it was supported by the evidence and testimony presented during trial. See State v. Wright, 391 S.C. 436, 442, 706 S.E.2d 324, 326 (2011) (instructing "an appellate court must affirm if there is any evidence to support the ruling" in a case involving a search and seizure issue).

Beyond that, suppression—the relief Holmes sought and continues to seek—would not have been proper under the circumstances of Holmes's case even assuming all the judges who have considered the reasonable suspicion issue involved up to this point have somehow collectively been wrong. See Sec. & Exch. Comm'n v. Chenery Corp., 318 U.S. 80, 88 (1943) ("[I]n reviewing the decision of a lower court, it must be affirmed if the result is correct although the lower court relied upon a wrong ground or gave a wrong reason. The reason for this rule is obvious. It would be wasteful to send a case back to a lower court to reinstate a decision which it had already made but which the appellate court concluded should properly be based on another ground within the power of the appellate court to formulate." (citation and internal quotations

omitted)); State v. Goodstein, 278 S.C. 125, 128, 292 S.E.2d 791, 793 (1982) ("An appellate court . . . is not, as a general rule, bound by the reasoning adopted below if the record discloses a correct result. . . . No principle in the disposition of appeals is more firmly established than that a right decision upon a wrong ground will be affirmed." (citations and internal quotations omitted)). Significantly, that is true because the Supreme Court's decision in State v. Counts, 413 S.C. 153, 776 S.E.2d 59 (2015), was not available to the officers to guide them in Holmes's case at the time they approached the apartments's door since it was not issued until *months* after they had already acted. Cf. Davis v. United States, 564 U.S. 229, 235 (2011) ("The search at issue in this case took place a full two years before this Court announced its new rule in Gant."). Under such circumstances, even if the officers' actions were not in compliance with the mandates of the new rule articulated by our 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)). And, in Holmes'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 the apartment's door to conduct a "knock-and-talk" was completely consistent with our Supreme Court's decision in State v. Wright, 391 S.C. 436, 706 S.E.2d 324 (2011), which recognized a law enforcement officer may *obviously* go to a residence's door to speak with someone inside. See id. 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 Florida v. Jardines, 569 U.S. 1, 8 (2013) (instructing law enforcement officers are generally permitted to conduct warrantless "knock-and-talks" pursuant to the implicit license); Kentucky v. King, 563 U.S. 452, 469-470 (2011) ("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."); 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 Holmes's case to believe they had the investigative authority to approach the apartment 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 Holmes and Boston were in the process of manufacturing in *someone else's residence*—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.[1] See Davis, 564 U.S. at 249 ("It is one thing for the

[1] Because the apartment was not Holmes'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, Holmes 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); 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, Holmes's lack of a reasonable expectation of privacy in 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' actions somehow violated Holmes's state constitutional rights in light of our 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)); cf. State v. Brown, 401 S.C. 82, 96, 736 S.E.2d 263, 270 (2012) ("[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 declined to impose the harsh

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apartment provides an additional compelling reason for his petition for rehearing to be rejected. 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)).

sanction of exclusion in a case in which it simply could not and cannot be justified, and this Court correctly affirmed that decision on appeal in both Boston's and Holmes's cases. 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)).

In light of all the foregoing reasons coupled with the arguments raised in the State's appellate brief, this Court correctly affirmed Holmes's convictions and sentence. Therefore, no legitimate grounds exist warranting a grant of rehearing in Holmes's case. Holmes's petition for rehearing should be denied.

Respectfully submitted,

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August 3, 2021

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PROOF OF SERVICE

I, Leigh Ann Stone, certify I have served the within Return to Appellant's Petition for Rehearing on Appellant by sending an electronic copy via email to the addresses listed in AIS for the following individuals:

Jason T. Yonge, Esquire
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200 East Main Street
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S.C. Commission on Indigent Defense
Division of Appellate Defense
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I further certify all parties required by Rule to be served have been served.
This 3rd day of August, 2021.

LEIGH ANN STONE
Legal Assistant
Office of the Attorney General

From:	Leigh Ann Stone
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Cc:	Mark Farthing; William Blitch; Kellner, Haley
Subject:	The State v. William Holmes (2018-001642)
Date:	Tuesday, August 3, 2021 1:36:05 PM
Attachments:	image001.png Holmes.Return to Pet for Rehearing (02662171xD2C78).PDF

Good Afternoon Mr. Dudek and Mr. Yonge,

Attached please find a copy of the Return to Appellant's Petition for Rehearing in The State v. William Holmes (2018-001642). This return will be submitted to the South Carolina Court of Appeals today via the AIS One Drive System.

If you will, please reply to confirm receipt of this email.

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