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SC SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Berkeley County

Stephanie P. McDonald, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

WALTER M. BASH

PETITIONER

APPELLATE CASE NO. 2013-001430

REPLY BRIEF OF PETITIONER

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I. The police violated the Fourth Amendment by entering a residential backyard without a warrant and with intent to search based upon an uncorroborated anonymous tip lacking reasonable suspicion.

Before turning to the legal arguments presented, it is necessary to clarify some important factual matters.

According to Respondent, the anonymous tip reported "several men were actively engaged in drug activity behind a residence located on Nelson Ferry Road." BOR at 3. First, and foremost, Holbrook never testified that the anonymous tip identified the gender of the individual(s) alleged to be involved in a drug activity. Second, the tip *evolved* during the testimony of Holbrook to indicate the location of the alleged drug activity was behind the residence. Additionally, the tip did not even describe what the drug activity was. When Holbrook was first asked about his involvement in the case, he explained that "one of the agents - - I don't know exactly who it was at the time - - received a - - a phone call stating that there was drug activity at a particular residence." R. 20, ll. 12-17. Next, Holbrook said, "The - - the tip was actually, if I'm not mistaken, that there was drug activity occurring at that exact time, and it was at XXX Nelson Ferry Road. And it - - just specifically, that there was drug activity occurring at that incident." R. 21, ll. 19-23. When asked if the tip indicated where the drug activity was taking place, Holbrook responded, "It was on the property of XXX or on it." R. 23, ll. 1-4.

Respondent claimed Holbrook testified to observing "three men standing in an open grassy area outside of the fenced-in backyard of the residence near a small utility shed, a broken-down car, and a parked black truck." BOR at 3. Rather, Holbrook claimed he saw "several black males standing right here by this little shed, and there was a pickup truck pulled in on to the grass area."

R. 26, ll. 21-24; see also R. 24, ll. 5-8 ("At that particular time, somewhere in this vicinity, you could actually look back behind this house at XXX Nelson Ferry and see occupants inside this grassy area here behind the house."). Holbrook did not indicate that he saw "three people standing outside the vehicle" until he was already on the private property and outside of his car. R. 31, ll. 19-23.

According to Respondent, when "one of the men standing in the grassy area threw down a bag containing a white powdery substance the officer immediately recognized to be cocaine." BOR at 3. However, Holbrook testified that the "plastic bag" contained "a white powder substance that appeared to be cocaine." R. 30, ll. 12-13. He said it looked like "a plastic bag containing a white pow[d]er substance." R. 31, ll. 2-3; see also, R. 36, ll. 13-15 ("I've already had what appeared to be cocaine thrown at the ground.").

Respondent claimed "the grassy area could be seen unobstructed from at least two public roadways and several residences other than the one identified in the anonymous tip." BOR at 3 n. 1. To support this statement, Respondent referred to page 108 of the Record on Appeal. This page is an aerial photograph of the location. This photograph does not support Respondent's contention. In fact, the photograph shows large trees growing on the property blocking the view of the backyard from both Nelson Ferry Road and Shine Bash Lane. Of course, the views are not obstructed completely, but the large trees and bushes demonstrate the backyard was not on full display for everyone to see from those two roadways. The thick growth of trees in the area is made clear in the photographs submitted as exhibits by the defense and included in the record. See R. 89; R. 94-102.

Additionally, Respondent claimed the police used "the same route Bash had used to drive his truck onto the property in the same manner any private citizen was impliedly permitted to approach the men." BOR at 10; BOR at 16. There was no evidence in the record of how

Petitioner's truck arrived in that position or why the truck was in the backyard. The suggestion that Bash's truck's presence in the backyard somehow created an implied license for any citizen, including the police, to approach the backyard reads too much into the record.

Respondent suggested that if the police were not allowed to trespass on the property, then the police would have had to abandon the investigation because the anonymous tip was insufficient for a warrant. BOR at 13 n. 5. In fact, the police had many investigatory tools left in their toolbox. The police could have surveiled the property from an area open to the public. This is especially true in light of Respondent's contention that a view of the backyard was unobstructed from two public roadways. The police could have executed traffic stops on any cars leaving the residence that committed traffic infractions. The police, from an area open to the public, could have sought permission to enter the private property.

Critical to Respondent's argument that the backyard was not part of the curtilage was Respondent's contention that "the evidence and testimony presented during the suppression hearing established **no** steps had been taken by the homeowner to shield that area from outside observation in any way." BOR at 24 (emphasis in original). This statement ignores the evidence in the record. The backyard was blocked from the main road by the house, and portions of the backyard were blocked from view by the side road by the shed. See R. 95; R. 97; R. 108. The backyard was protected from view by the trees planted as well. The photographs show a clear line of trees and shrubs planted in the backyard area very close to the dirt road on the back side of the house, blocking the view of passersby on the dirt road. See R. 94; R. 96; R. 97; R. 98; R. 108. Without question, the trees and shrubs evidence the intent to block observation of people passing by on the side road.

Turning to Respondent's legal argument, Respondent contends the Jardines Court rejected any consideration of the subjective intention of the officers to determine whether officers act in conformity with an implied license. BOR at 17 n.8. Respondent appears to ignore very language used by the Supreme Court in arriving at its conclusion and ultimate holding. The Court explained it was distinguishing the line of cases stating that "the subjective intent of the officer is irrelevant." Florida v. Jardines, 133 S.Ct. 1409, 1416-17 (2013). Jardines explained the question of "whether the officers had an implied license to enter the porch," "depends upon the purpose for which they entered." Id. at 1417. Jardines concluded that "no one is impliedly invited to enter the protected premises of the home in order to do nothing but conduct a search." Id. at 1416 n.4. The Court explained:

> The officers were gathering information in an area belonging to Jardines and immediately surrounding his house – in the curtilage of the house, which we have held enjoys protection as part of the home itself. And they gathered that information by physically entering and occupying the area to engage in conduct not explicitly or implicitly permitted by the homeowner.

Id. at 1414.

The objective evidence presented during the hearing amply supported the trial judge's decision. Not only was the trial judge able to judge the witnesses' credibility, the judge heard undisputed evidence showing the officers "suited up," drove directly into the backyard of a residence without any attempt to knock on the front door. Further, the officer took no steps to attempt to corroborate the anonymous tip about alleged drug activity, which would have included surveillance on the property, asking to enter the private property, questioning neighbors about the goings-on at the residence, stopping cars leaving the property for traffic infractions, finding the name of the property owner and searching the police records for past criminal activity or

unserved warrants, or any other plethora of investigative tools available to the long arm of the law.

II. The police violated the South Carolina Constitution by entering a residential backyard without a warrant and with intent to search based upon an uncorroborated anonymous tip lacking reasonable suspicion.

In its brief, Respondent appeared to concede that the police violated Petitioner's state constitutional right to be free from unreasonable invasions of privacy where the only response to the argument was to request this Court *create* a good-faith exception to the exclusionary rule used to effectuate the privacy provision of the South Carolina Constitution. BOR at 28. This Court should decline Respondent's request.

In asking this Court to adopt a good-faith exception to the exclusionary rule, Respondent relied upon federal precedent explaining the *purpose* of the federal exclusionary rule. BOR at 29-31; 33-34. According to the United States Supreme Court, the exclusionary rule was not "calculated to redress the injury to the privacy of the victim of the search or seizure." Stone v. Powell, 428 U.S. 465, 486 (1976). According to the Court, "[t]he primary justification for the exclusionary rule ... is the deterrence of police conduct that violates the Fourth Amendment." Id. However, South Carolina's exclusionary rule to effectuate the privacy provision of the state constitution is not grounded in a justification to deter police misconduct. Rather, the exclusionary rule follows from the specific constitutional provision protecting individuals from unreasonable governmental invasions of privacy. Thus, it is a personal right and the exclusionary rule that serves as its enforcer is also a product of a personal right. See State v. Forrester, 343 S.C. 637, 644-645, 541 S.E.2d 837, 841 (2001)(explaining South Carolina has a "distinct privacy right" and the South Carolina Constitution affords "a higher level of privacy protection than the Fourth Amendment"); State v. Counts, 413 S.C. 153, 167, 776 S.E.2d 59, 67

(2015)(explaining the "South Carolina Constitution provides citizens an express right to privacy").

In interpreting its state constitution's provision providing for a right against unreasonable invasions of privacy, the Hawaii Supreme Court explained the purposes of its exclusionary rule were (1) judicial integrity, (2) protection of individual privacy, and (3) deterrence of illegal police misconduct. State v. McKnight, 319 P.3d 298, 317 (Haw. 2013). "'The "judicial integrity" purpose of the exclusionary rule is essentially that the courts should not place their imprimatur on evidence that was illegally obtained by allowing it to be admitted into evidence in a criminal prosecution.'" Id. (quoting State v. Torres, 262 P.3d 1006, 1018 (Haw. 2011)). Further, the court explained the "primary purpose" of its constitutional provision was "'to safeguard the privacy and security of individuals against arbitrary invasions by government officials.'" Id. at 318 (quoting State v. Lopez, 896 P.2d 889, 897 (Haw. 1995)). To this point, the Hawaii Supreme Court explained its exclusionary rule "guarantee[d] individual privacy rights." Torres, 262 P.3d at 1020. See also Commonwealth v. Edmunds, 586 A.2d 887, 899 (Pa. 1991)(rejecting a good-faith exception to the exclusionary rule because the rule "served to bolster the twin aims" of the state constitution of "safeguarding of privacy and the fundamental requirement that warrants shall only be issued upon probable cause").

The Idaho Supreme Court explained the exclusionary rule developed by its courts concerning the Idaho Constitution's provisions protecting individuals against unreasonable searches and seizures was rooted in purposes in addition to deterring police misconduct. State v. Koivu, 272 P.3d 483, 491 (Idaho 2012). According to the Idaho Court, "'[l]aw and court made rules of expediency must not be placed above the Constitution.'" Id. at 488 (quoting State v. Arregui, 254 P. 788, 792 (Idaho 1927)). The court warned that disregarding the rights

guaranteed under the state constitution to protect individuals against governmental intrusion "'heads [societies] directly to revolution'" based on the teachings of history. Id. The court explained the violation of rights "'was one of the chief moving reasons for the Revolution.'" Id. "'The shock to the sensibilities of the average citizen when his government violates a constitutional right of another is far more evil in its effect than the escape of any criminal through the court's observance of those rights.'" Id.

When presented with a similar issue, the Georgia Court of Appeals held that recognizing a good-faith exception to the exclusionary rule "would be inconsistent with fairness and the even-handed administration of justice." Brown v. State, 767 S.E.2d 299, 303 (Ga. Ct. App. 2014). The Georgia Court explained that permitting a good-faith exception to apply to the exclusionary rule based on a change in precedent would "treat similarly situated defendants differently" because the defendant for whom the precedent was changed would get the benefit, but defendants thereafter would not if their cases involved searches occurring when the prior precedent controlled. Id.

Similarly, the Montana Supreme Court refused to recognize a good-faith exception to the exclusionary rule based on the privacy rights afforded under its state constitution, reasoning that application of such an exception would negate the retroactivity rule requiring that defendants whose cases are pending on direct review or not final when a new rule for the conduct of criminal prosecutions is announced must benefit from the rule. State v. Stewart, 291 P.3d 1187, 1197 (Mont. 2012). In that case, prior law permitted officers to surreptitiously record individuals using pretext phone calls and officers had recorded Stewart. Id. at 513. Those calls were admitted at Stewart's trial. Id. at 1195. However, prior to Stewart's sentencing, the Montana Supreme Court determined pretext calls violated the Montana Constitution. Id. After

determining Stewart benefitted from the ruling, the court addressed the state's argument that a good-faith exception should apply because the officer was relying on prior law permitting such conduct. Id. at 1196. The Montana Supreme Court explained its decision was "not intended to impugn" the officer's efforts "or to suggest that he needs to be 'penalized.'" Id. at 1197. However, adoption of a good-faith exception "would undermine the very retroactivity principles that the state concede[d] appl[ied]." Id.

This Court should decline Respondent's request to *create* a good-faith exception to the exclusionary rule under the state constitution. The police approached a residence with no reasonable suspicion of illegal activity at the residence. When announcing the rule in Counts, 413 S.C. at 172, 776 S.E.2d at 70, this Court explained the purpose was to "safeguard[] the express constitutional right against unreasonable invasions of privacy." The rule is a direct product of the state constitution's protection from unreasonable invasions of privacy; thus, the exclusionary rule used to effectuate the protection is also a direct product of the personal protection provided in the state constitution. As such, the purpose of the exclusionary rule cannot be simply to deter police misconduct. Rather, the purpose of the exclusionary rule must be to effectuate the privacy rights of South Carolinians and protect them from unreasonable invasions of privacy by the government. Creating a good-faith exception to the exclusionary rule in this context would not serve the purpose of the exclusionary rule; instead, such an exception would gut the exclusionary rule and render the South Carolina Constitution's privacy provision impotent.

CONCLUSION

Petitioner respectfully requests this affirm the ruling by the Circuit Court to suppress the evidence seized during the illegal search.

Respectfully submitted,

Susan B. Hackett
Appellate Defender

ATTORNEY FOR PETITIONER

This 6th day of June, 2016.

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Reply Brief of Petitioner in the above referenced case has been served upon Mark R. Farthing, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Mr. Walter Bash, this 6th day of June, 2016.

Susan B. Hackett
Appellate Defender

ATTORNEY FOR PETITIONER.

SUBSCRIBED AND SWORN TO before me
this 6th day of June, 2016.

(L.S.)
Notary Public for South Carolina
My Commission Expires: October 30, 2022.