An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-888-2

No. COA17-1051-2

Filed: 5 November 2019

Hoke County, Nos. 14 CRS 51735-37, 15 CRS 557

Johnston County, Nos. 14 CRS 55560, 55877

STATE OF NORTH CAROLINA

v.

ROBERT DWAYNE LEWIS

On remand by opinion of the North Carolina Supreme Court on 16 August 2019 in *State v. Lewis*, __ N.C. __, 831 S.E.2d 37 (2019), reversing in part and remanding this Court's decisions filed 1 May 2018. Cases originally appealed by defendant from judgments entered 7 February 2017 by Judge Richard T. Brown in Hoke County Superior Court and judgments entered 6 April 2017 by Judge Kendra D. Hill in Johnston County Superior Court.

Attorney General Joshua H. Stein, by Assistant Attorney General Milind Dongre, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Kathryn L. VandenBerg, for defendant.

DIETZ, Judge.

These consolidated cases returned to us on remand from our Supreme Court "for determination by the Court of Appeals whether the evidence seized from the Kia Optima was admissible under the plain view doctrine." *State v. Lewis*, __ N.C. __, __, 831 S.E.2d 37, 47 (2019). Because the plain view exception to the warrant requirement does not apply, we vacate the trial courts' judgments and remand these cases to the trial court with instructions to grant Lewis's motions to suppress with respect to evidence seized from the Kia Optima.

Facts and Procedural History

The facts and procedural history of this case are described in the Supreme Court's opinion. *State v. Lewis*, __ N.C. __, 831 S.E.2d 37 (2019). In its mandate, the Supreme Court held that "we affirm the portions of the Court of Appeals' decisions holding that defendant's motion to suppress should have been allowed as to evidence seized from defendant's residence and reverse the portions of the Court of Appeals' decisions holding that probable cause existed to support the issuance of the search warrant for the Kia Optima. The Court of Appeals' ruling that probable cause existed to support the search of the Nissan truck is not before us and is left undisturbed. We remand this case for determination by the Court of Appeals whether the evidence seized from the Kia Optima was admissible under the plain view doctrine." *Id.* at __, 831 S.E.2d at 47. Because the parties fully briefed and argued the plain view issue in

the initial appeal to this Court, we can decide this question without further supplemental briefing or argument.

Analysis

The State contends that the search of the Kia Optima was permissible under the plain view doctrine. The parties agree that the evidence seized from that vehicle was visible from outside the passenger window, and also agree that, in general, "police may seize evidence in plain view without a search warrant." *State v. Prevette*, 43 N.C. App. 450, 454–55, 259 S.E.2d 595, 599 (1979). But a necessary element of the plain view doctrine is that the officer "must have a right to be where he is when the evidence comes into view." *Id.* Thus, the dispositive issue on remand is whether Deputy Kavanaugh, the officer who looked into the car window and saw the incriminating evidence, was in a place he was lawfully permitted to be when he saw the incriminating evidence.

Importantly, the Kia Optima was not parked on a public street. It was parked in the front yard of a home, inside the home's curtilage. But the State contends that Deputy Kavanaugh had a right to walk over to the car and look in the window because he was on the property conducting a routine knock and talk with the home's occupant.

There is a fatal flaw in this argument. The knock-and-talk doctrine permits law enforcement to "do what occupants of a home implicitly permit anyone to do, which is approach the home by the front path, knock promptly, wait briefly to be

received, and then (absent invitation to linger longer) leave." *State v. Huddy*, __ N.C. App. __, __, 799 S.E.2d 650, 654 (2017). "Importantly, law enforcement may not use a knock and talk as a pretext to search the home's curtilage." *Id.* The knock-and-talk doctrine only permits officers to do what a "reasonably respectful citizen" is permitted to do—to approach the main entry of a home and knock at the door in order to speak to the occupants. *Id.* As the U.S. Supreme Court explained in the foundational case defining the scope of the knock-and-talk doctrine, "[w]hile law enforcement officers need not shield their eyes when passing by the home on public thoroughfares, an officer's leave to gather information is sharply circumscribed when he steps off those thoroughfares and enters the Fourth Amendment's protected areas." *Florida v. Jardines*, 569 U.S. 1, 7 (2013).

Here, Deputy Kavanaugh testified that, after arresting Lewis on the public street outside the home, he walked up to the front porch of the home, knocked, and spoke with Lewis's stepfather. Deputy Kavanaugh asked who owned the Kia Optima parked in the yard and Lewis's stepfather told him that it belonged to Lewis. Kavanaugh testified that he then left the front porch of the home, "went over to the Kia that was in the yard, looked inside of the passenger area," and saw various incriminating evidence. Deputy Kavanaugh testified that the car was "backed into the yard, in front of the residence," "not in the driveway but in the grass," about 20 feet away from the front porch where Kavanaugh spoke to Lewis's stepfather.

The trial court, based on this testimony, found that "the Kia was parked backed into the yard approximately 20 feet from the porch." The trial court also found that "[t]here was no furtive or surreptitious movement by Deputy Kavanaugh to investigate the vehicle, and no indication the person inside the home did not know the officer was near the vehicle." The trial court made no other findings concerning Deputy Kavanaugh's approach to the car.

Based on these findings, Deputy Kavanaugh's search of the Kia Optima was not permitted under the knock-and-talk doctrine. As noted above, the knock-and-talk doctrine permits officers to "approach the home by the front path, knock promptly, wait briefly to be received, and then (absent invitation to linger longer) leave." *Huddy*, __ N.C. App. at __, 799 S.E.2d at 654. Deputy Kavanaugh did more than that. After speaking with the home's occupant, he lingered. He continued his investigation by walking over to a car on the property that he had just confirmed belonged to the suspect.

Importantly, there are no findings, and no evidence in the record, indicating that the officer looked into the Kia as he passed by it while departing the property along the path that other invitees would use to leave the front porch. To the contrary, the officer's own testimony is that he stepped off the porch and walked twenty feet into the yard because he learned from the home's occupant that the Kia parked in the yard belonged to Lewis.

It was the State's burden to present evidence that the officer looked into that car window as part of the knock-and-talk process. "When a defendant in a criminal prosecution makes a motion to suppress evidence obtained by means of a warrantless search, the State has the burden of showing, at the suppression hearing, how the warrantless search was exempted from the general constitutional demand for a warrant." *State v. Smathers*, 232 N.C. App. 120, 123, 753 S.E.2d 380, 383 (2014) (brackets omitted). The trial court's findings, and the corresponding evidence in the record, do not show that the officer conducted this warrantless search while within the bounds of a permissible knock and talk. Accordingly, we vacate the trial court's judgments and remand these cases with instructions for the trial courts to allow Lewis's motions to suppress the evidence seized from the Kia Optima.

Conclusion

For the reasons discussed above, we vacate the trial courts' judgments and remand for further proceedings consistent with this opinion.

VACATED AND REMANDED.

Judges ARROWOOD and BROOK concur.

Report per Rule 30(e).