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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenville County

Honorable G.D. Morgan, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

V.

MICHAEL J. KENNEDY,

APPELLANT

APPELLATE CASE NO. 2022-001293

INITIAL BRIEF OF APPELLANT

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Did the trial judge err in refusing to suppress items discovered as the result of a search warrant lacking probable cause?

STATEMENT OF THE CASE

In June of 2021, the Greenville County Grand Jury indicted Appellant, Michael Justin Kennedy, for trafficking methamphetamine, trafficking heroin, possession with intent to distribute a controlled substance, and three counts of possession of a weapon during the commission of a violent crime, indictments #2121-GS-23-00619, 0020, 3572, 537A, 538A, 539A. (R. pp. **). On June 10, 2022, Appellant appeared before the Honorable Alex Kinlaw, Jr. and moved to relieve appointed counsel, Morgan C. Shankle, and proceed to trial *pro se*. Judge Kinlaw granted the motion. On July 15, 2022, Appellant appeared before the Honorable G.D. Morgan and moved to compel the State to produce discovery. Judge Morgan took the motion under advisement. (July 15, 2022, Tr. p. 20, lines 103). On August 29, 2022, Appellant proceeded to jury trial before Judge Morgan. Ms. Shankle appeared as stand-by counsel. Clark Grounsell prosecuted the case. The jury found Appellant not guilty for two of the three weapons charges and guilty of the drug charges. A timely notice of intent to appeal was served on September 8, 2022. This appeal follows.

STANDARD OF REVIEW

" [A]ppellate review of a motion to suppress based on the Fourth Amendment involves a two-step analysis. This dual inquiry means we review the trial court's factual findings for any evidentiary support, but the ultimate legal conclusion—in this case whether reasonable suspicion exists—is a question of law subject to de novo review." State v. Frasier, 437 S.C. 625, 633–34, 879 S.E.2d 762, 766 (2022).

ARGUMENT

The trial judge erred in refusing to suppress items discovered as the result of a search warrant lacking probable cause.

On October 2, 2020, officers with the Greenville County Multi-jurisdictional Drug Enforcement Unit, pursuant to a search warrant, searched Appellant's car and apartment. Officers found 55.5 grams of methamphetamine, 5.75 grams of heroin, a little bit of marijuana, and money in the car. (Aug 29th Tr. p. 219, lines 12-25; p. 333, lines 3-5; p. 334, lines 8-10). Inside the apartment officers found 21.71 grams of methamphetamine, 21.73 grams of heroin, 254.67 grams of carfentanil, a hydraulic press, a blender, scales, and three firearms. (Aug 29th Tr. pp. 248-251; p. 335, lines 16-17; p. 336, lines 21-22; p. 337 ,lines 20-21).

Prior to trial Appellant moved to suppress the items seized as a result of the search warrant lacking probable cause. (Aug. 29th Tr. pp. 17-70). Appellant specifically argued that the search warrant was issued without probable cause in violation of the Fourth Amendment. (Aug 29th Tr. p. 19, lines 2-7; p. 20, lines 21-25). Appellant argued that the affidavit in support of the search warrant failed to establish a connection between drugs and the apartment. (Aug 29th Tr. p. 56, lines 21-22; p. 57, lines 3-6; p. 60, line 25 – p. 61, lines 1-3). Appellant argued that the affidavit in support of the search warrant failed to establish the reliability of a tipster who claimed Appellant was selling drugs around his Greenville apartment. (Aug 29th Tr. p. 48, lines 10-25; p. 49, lines 14-25; p. 51, lines 4-14).

In response to the failure to establish reliability of the tipster the State appears to argue that the tipster and the confidential informant referenced in the affidavit who claims to have purchased heroin from Appellant during a controlled buy at a location away from the apartment was the same person. (Aug 29th Tr. p. 67, lines 10-19). As correctly noted by Appellant, it is not clear that the tipster and the confidential informant involved with the controlled buy were the

same person. (Aug 29th Tr. p. 68, line 19 – p. 69, lines 1-25). The confidential informant involved with the controlled buy provided no information about Appellant's apartment. The judge denied the motion to suppress stating, "I have reviewed the Defendant's motions. I have reviewed the case law, reviewed the arguments by the Defendant on the issues regarding his motion to suppress and motion in limine. And as to the motion to suppress, I deny those motions at this time as well as the motions in limine based on the totality of the circumstances and the lack of prejudice as well. On all issues those motions are denied. Your motions are noted, though, for the record and/or preserved." (Tr. p. 120, lines 11-20). The rial judge erred.

During trial Appellant objected to the admission of photos taken during the search of the apartment marked State's exhibits #6-#11. (Aug 29th Tr. p. 244, lines 11-24). Appellant objected to the admission of a pistol found during the search of the apartment, marked State's exhibit #12. (Aug 29th Tr. p. 280, lines 11-20). Appellant objected to the admission of another set of photos taken during the search of the apartment marked State's exhibits #16-#18. (Aug 29th Tr. p. 283, lines 8-18). Appellant objected to the admission of the hydraulic press, referred to by the witness as a kilo press marked State's exhibit #21. (Aug 29th Tr. p. 293, lines 5-25). Appellant objected to the admission of a Magic Bullet blender marked State's exhibit #25. (Aug 29th Tr. p. 307, lines 3-25). Appellant objected to the admission of digital scales marked State's exhibit #26. (Aug 29th Tr. p. 308, lines 6-24). Appellant objected to the admission of 55.5 grams of methamphetamine found in the car marked State's exhibit #4. (Aug 29th Tr. p. 333, lines 2-14). Appellant objected to the admission of 5.75 grams of heroin found in the car marked State's exhibit #5. (Aug 29th Tr. p. 334, lines 7-19). Appellant objected to the admission of 21.71 grams of methamphetamine found in the apartment marked State's exhibit #13. (Aug 29th Tr. p. 335, lines 2-25). Appellant objected to the admission of 254.67 grams of carfentanil found in the

apartment marked State's exhibit #14. (Aug 29th Tr. p. 336, line 3 – p. 337, lines 1-6). Appellant objected to the admission of 21.73 grams of heroin found in the apartment marked State's exhibit #15. (Aug 29th Tr. p. 337, line 8- p. 338, lines 1-4). Appellant additionally objected to the admission of the drug analysis report marked State's exhibit #28. (Aug 29th Tr. p. 338, line 11 – p. 339, lines 1-8). The judge admitted all of the above exhibits over the objection of Appellant. The judge erred. The affidavit in support of the search warrant lacked probable cause to believe that drugs would be found inside the apartment.

The first paragraph of the affidavit in support of the search warrant lists the affiant's, Investigator McWhite's, training and experience. (R. p. **). The second paragraph of the affidavit states:

> Within the past month, I received a tip from a confidential informant that the subject, Michael Justin Kennedy, was selling heroin from and around his Greenville apartment. According to this informant, he/she has witnessed Michael Kennedy sell illegal drugs on multiple occasions in recent months. I researched this subject and found him to have a criminal history which listed prior arrests for larceny, burglary, armed robbery, kidnapping, possessing a weapon during a violent crime, attempted murder and possession of illegal drugs.

(R. p. **). The next paragraph of the affidavit discusses a controlled buy with a confidential informant at a prescribed location. There is no mention of Appellant's apartment in this paragraph. The next paragraph of the affidavit states:

> During this incident, Kennedy was observed arriving in his 2007 Ford Mustang, which is registered to him at an old home address. Kennedy was followed from the incident location to the Woodside Eleven Apartments where he was observed parking and entering the apartment that contains Apartment ****. After observing Kennedy enter the breezeway that leads to Apartment ****, Woodside Eleven Apartments management confirmed that Michael Justin Kennedy was the current lease holder of Apartment **** as of September 7, 2020,

(R. p. **). The last paragraph of the affidavit states:

> Based on the recent information provided by a confidential informant, and Kennedy's criminal history, I had reason to believe that Michael Kennedy was engaged in illegal drug activity. Based on the aforementioned undercover operation, I confirmed this belief to be true. Based on my law enforcement training and my experience investigating criminal drug cases, I know illegal drug dealers to keep the items listed in the "DESCRIPTION OF PROPERTY SOUGHT" section of the warrant in their homes and vehicles, along with records of such activity on their cellular communication devices. Based on my training and experience, I know individuals related to the sale of illegal drugs to commonly possess illegal drugs, drug paraphernalia, and concealable weapons on and/or about their persons.

(R. p. **). The affidavit was not supplemented with oral testimony. (Aug 29th Tr. p. 22, lines 2-10).

The affidavit fails to provide a sufficient connection between drugs and the apartment where Appellant lived with his girlfriend. The only reference to Appellant's Greenville apartment, with no address provided, is from the anonymous tipster in the second paragraph of the affidavit. The State failed to establish the reliability of this tipster and failed to establish the basis of the anonymous tipster's knowledge. The State failed to independently corroborate the tip with regard to the apartment. The controlled buy, away from the apartment, does not provide the sufficient nexus to believe drugs would be found inside the apartment. The affidavit does not state that Appellant made a controlled buy immediately after leaving his apartment. Instead, the affidavit states that Appellant went home after the controlled buy. There is no mention of Appellant's apartment in the paragraph of the affidavit discussing the controlled buy. The controlled buy and Appellant returning home is not sufficient to establish probable cause. Appellant's prior record is not sufficient. The factors contained in the affidavit, viewed together, do not provide probable cause to believe drugs would be found inside the apartment. Based on the totality of the circumstances the magistrate lacked a substantial basis upon which to conclude probable cause existed to search the apartment.

Both the Fourth Amendment to the Unites States Constitution and Article I, § 10 of the South Carolina Constitution protect citizens from unreasonable searches and seizures. Both constitutions provide that search warrants may not be issued except upon "probable cause, supported by oath or affirmation," and particularly describing the place to be searched and the persons or things to be seized. State v. Dunbar, 361 S.C. 240, 246, 603 S.E.2d 615, 618 (Ct. App. 2004); see also State v. Weston, 329 S.C. 287, 290, 494 S.E.2d 801, 802 (1997) ("A search warrant may issue only upon a finding of probable cause."). Evidence seized in violation of the Fourth Amendment must be excluded from trial. See Mapp v. Ohio, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961).

In State v. Kinloch, 410 S.C. 612, 616–17, 767 S.E.2d 153, 155 (2014)(fn #4 omitted), this Court wrote:

> The Fourth Amendment protects against unreasonable searches and seizures. U.S. Const. amend. IV. A search or seizure does not violate the Fourth Amendment if it is authorized by a warrant that is supported by probable cause. Id.; see State v. Baccus, 367 S.C. 41, 50, 625 S.E.2d 216, 221 (2006), cert. denied, 555 U.S. 1074, 129 S.Ct. 733, 172 L.Ed.2d 735 (2008). A warrant is supported by probable cause if, given the totality of the circumstances set forth in the affidavit, there is a fair probability that contraband or evidence of a crime will be found in a particular place. Baccus, 367 S.C. at 50, 625 S.E.2d at 221 (citing Illinois v. Gates, 462 U.S. 213, 238, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983)).

"When reviewing a magistrate's decision to issue a search warrant, we must consider the totality of the circumstances. See State v. Missouri, 337 S.C. 548, 524 S.E.2d 394 (1999)(citing Illinois v. Gates, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983)). Although great deference must be given to a magistrate's conclusions, a magistrate may only issue a search warrant upon a finding of probable cause. See State v. Bellamy, 336 S.C. 140, 519 S.E.2d 347 (1999)." State v. Jones, 342 S.C. 121, 126, 536 S.E.2d 675, 678 (2000)(fn #1 omitted).

"In reviewing a magistrate's probable cause determination, circuit court judges must determine whether the issuing magistrate had a substantial basis upon which to conclude that probable cause existed. Baccus, 367 S.C. at 50, 625 S.E.2d at 221; see also State v. Bellamy, 336 S.C. 140, 143–45, 519 S.E.2d 347, 348–49 (1999) (applying the fair probability standard and stating the duty of a reviewing court is to ensure the magistrate had a substantial basis for its probable cause determination)." Kinloch, 410 S.C. at 617, 767 S.E.2d at 155.

"An affidavit must contain sufficient underlying facts and information upon which a magistrate may make a determination of probable cause. State v. Viard, 276 S.C. 147, 276 S.E.2d 531 (1981). Mere conclusory statements which give the magistrate no basis to make a judgment regarding probable cause are insufficient. '[H]is action cannot be a mere ratification of the bare conclusions of others.' Illinois v. Gates, 462 U.S. 213, 239, 103 S.Ct. 2317, 2333, 76 L.Ed.2d 527, 549 (1983)." State v. Smith, 301 S.C. 371, 373, 392 S.E.2d 182, 183 (1990). As noted by the Court of Appeals in State v. Gentile, 373 S.C. 506, 514, 646 S.E.2d 171, 174 (Ct. App. 2007), "Although we are cognizant that our decision should be based on the totality of the circumstances, for analytical purposes we find it necessary to separately address each piece of evidence presented to the magistrate."

In the present case the magistrate was presented with information in the affidavit in support of the search warrant that; 1.) an anonymous tipster claimed that Appellant was selling drugs from and around his Greenville apartment; 2.) that Appellant had prior a criminal history; and 3.) that Appellant was involved in a controlled buy at a location away from his apartment. The totality of circumstances presented to the magistrate was insufficient for the magistrate to determine there was a substantial basis to believe drugs would be found at Appellant's

apartment. The affidavit lacked probable cause and as a result the evidence found in the apartment should have been suppressed.

1. Anonymous Tip

The only reference to drug sales at an apartment in the affidavit in support of the search warrant comes from an anonymous tipster. In United States v. Wilhelm, 80 F.3d 116, 119–20 (4th Cir. 1996), the Fourth Circuit Court of Appeals wrote:

> The Fourth Circuit has explained that in evaluating whether an informant's tip establishes probable cause, the degree to which the report is corroborated is an important consideration. United States v. Lalor, 996 F.2d 1578, 1581 (4th Cir.), cert. denied, 510 U.S. 983, 114 S.Ct. 485, 126 L.Ed.2d 436 (1993). In the Lalor case, the court found an informant's tip reliable when the police corroborated the suspect's address, vehicle, and alias, and determined that he had been arrested for drug possession just a few days before the warrant was issued, confirming his involvement in drug activity. Id. at 1581; see also United States v. Miller, 925 F.2d 695 (4th Cir.) (upholding warrantless arrest based on informant's tip, which police substantially corroborated by observing the suspect), cert. denied, 502 U.S. 833, 112 S.Ct. 111, 116 L.Ed.2d 80 (1991); United States v. Blackwood, 913 F.2d 139, 142 (4th Cir.1990) (upholding search warrant based on anonymous tip corroborated by a previously reliable informant's purchase of crack cocaine from the suspect).

The anonymous tip that claimed that Appellant was selling drugs from and around his Greenville apartment did not establish probable cause to search the apartment. The affidavit in support of the search warrant provided no information about the tipster's reliability or basis of knowledge. Law enforcement did not conduct surveillance to corroborate the anonymous tip. The tipster did not provide additional details that might have been corroborated. While the controlled buy, discussed below, may have confirmed drug activity, that activity was not connected to the apartment. There was no address given for the apartment. The time frame claiming the tipster witnessed Appellant sell illegal drugs on multiple occasions in "recent months" is suspect when the affidavit states that Appellant became a lease holder on September 7, 2020. The affidavit is dated September 24, 2020. Appellant was not living at the apartment in

"recent months." The affidavit includes information that Appellant's vehicle, discussed with regard to the controlled buy, was registered to Appellant at an old home address, not the apartment that was searched. The anonymous, unreliable, uncorroborated tip fails to show probable cause to search the apartment where Appellant had just become a lease holder on September 7, 2020.

2. Prior Convictions

The affidavit in support of the search warrant includes Appellant's criminal history. Criminal history alone does not support a finding of probable cause to search the apartment. In United States v. Nelson, 535 F. Supp. 3d 529, 533 (S.D.W. Va. 2021), the Court wrote:

> Likewise, while some weight may normally be given to the fact of prior convictions of similar crimes, criminal history standing alone cannot sustain a finding of probable cause. United States v. Melvin, 419 F.2d 136, 141 (4th Cir. 1969). Previous arrests or convictions can support a finding of probable cause "especially where the previous arrest or conviction involves a crime of the same general nature as the one the warrant is seeking to uncover." United States v. Perkins, 850 F.3d 1109, 1119–20 (9th Cir. 2017). But the more time that has passed since an arrest or conviction, the less support it gives to a finding of probable cause. United States v. Falso, 544 F.3d 110, 123 (2d Cir. 2008) (finding that stale convictions are only marginally relevant to a probable cause determination).

While the investigator included possession of illegal drugs and possession of a weapon during a violent crime in the affidavit as part of Appellant's criminal history, the investigator provided no dates and no further information about the criminal history that would support a finding of probable cause.

3. Controlled Buy

The affidavit in support of the search warrant also includes information about a controlled buy that took place away from the apartment. In United States v. Lalor, 996 F.2d 1578, 1582 (4th Cir. 1993), the Fourth Circuit Court of Appeals wrote, "In determining whether

a search warrant is supported by probable cause, the crucial element is not whether the target of the search is suspected of a crime, but whether it is reasonable to believe that the items to be seized will be found in the place to be searched. Zurcher v. Stanford Daily, 436 U.S. 547, 556 & n. 6, 98 S.Ct. 1970, 1976–77 & n. 6, 56 L.Ed.2d 525 (1978)." Based on the information provided in the affidavit it was not reasonable to believe that drugs would be found inside Appellant's apartment. While Appellant went home after the controlled buy, Appellant was not seen leaving his apartment to go to the controlled buy. The controlled buy does not provide a nexus between drugs and the apartment.

In State v. Thompson, 419 S.C. 250, 257, 797 S.E.2d 716, 719–20 (2017), the South Carolina Supreme wrote:

> The appellate courts of this state have routinely held that information contained in an affidavit providing a timely and direct nexus between the contraband sought and the location to be searched—e.g., *inter alia*, specific details of surveillance of a suspect conducting a drug transaction immediately upon leaving a residence—is sufficient to support a search warrant. See Kinloch, 410 S.C. at 618, 767 S.E.2d at 156 (concluding probable cause existed to issue a search warrant based on "namely, the numerous tips indicating drug activity was probably present at 609 A and the subsequent surveillance of 609 A during which seemingly drug-related behavior was observed"); State v. Gore, 408 S.C. 237, 248, 758 S.E.2d 717, 722–23 (Ct. App. 2014) (cert. dismissed as improvidently granted) (finding surveillance of defendant leaving residence to sell drugs at another location provided a sufficient nexus to the residence to justify a search warrant); *cf.* State v. Scott, 303 S.C. 360, 362–63, 400 S.E.2d 784, 785–86 (Ct. App. 1991) (cert. denied) (upholding subsequent search warrant of defendant's home when affidavit stated officers had visual contact with defendant from time he left his residence until the time of the traffic stop and drugs were uncovered on defendant at stop).

In Thompson the Court found the trial judge erred in failing to suppress evidence obtained from an address as a result of a search warrant lacking probable cause. The Court found that the affidavit in support of the search warrant, that included a hearsay statement from the year before that cocaine was delivered to the address on several different occasions and the

assertion that in the six months preceding the affidavit investigators witnessed the defendant visit the address just before making cocaine deliveries throughout Spartanburg, failed to contain specific facts showing any connection between drug related activity and the address searched. The affidavit in Thompson contained specific detailed information from "confidential reliable informants" as well as named individuals about defendant's involvement in drug activity. The affidavit in Thompson also included information about a controlled exchange of $9000.00 in recorded funds in exchange for a "package" to be delivered the next morning.

The affidavit in the present case contains less information than the affidavit in Thompson. Unlike Thompson, the affidavit in the present case does not allege that Appellant visited his apartment before selling drugs. The affidavit in the present case fails to contain specific facts showing any connection between drug related activity and Appellant's current apartment. The trial judge erred in refusing to suppress evidence found inside the apartment.

In United States v. Lalor, 996 F.2d 1578, 1583 (4th Cir. 1993), the Fourth Circuit Court of Appeals wrote:

> In this and other circuits, residential searches have been upheld only where some information links the criminal activity to the defendant's residence. United States v. Williams, 974 F.2d 480, 481–82 (4th Cir.1992) (totality of facts establishes fair probability that drug paraphernalia will be found in drug dealer's motel room; three weeks before motel search, police found drug paraphernalia in defendant's residence); United States v. Corral, 970 F.2d 719, 728 (10th Cir.1992) (defendant's return to residence after negotiating purchase price but before actual exchange provides reasonable probability that cocaine was stored in residence); United States v. Hawkins, 788 F.2d 200, 204 (4th Cir.) (surveillance connected drug activity to defendant's residence), cert. denied, 479 U.S. 850, 107 S.Ct. 176, 93 L.Ed.2d 112 (1986); United States v. Wylie, 705 F.2d 1388, 1391–92 (4th Cir.1983) (finding indirect link between drug activity and residence; distinguishing cases where no link found). Where no evidence connects the drug activity to the residence, the courts have found the warrant defective. United States v. Ramos, 923 F.2d 1346, 1352 (9th Cir.1991) (finding no probable cause where surveillance did not lead to facts making it likely that items officers sought

were located in apartment); United States v. Stout, 641 F.Supp. 1074, 1078–79 (N.D.Cal.1986) (arrest with cocaine does not provide probable cause to search residence).

In Lalor the Court found that the affidavit in support of the search warrant failed to contain information from which the magistrate could infer that evidence of drug activity would be found at the place to be searched. Like in Lalor, the affidavit in the present case failed to contain information from which the issuing magistrate could infer that evidence of drug activity would be found at Appellant's apartment. Unlike in Lalor, the good faith exception does not apply in the present case. Unlike the present case, much of the information provided by the informants in Lalor was at least corroborated.

In State v. Robinson, 408 S.C. 268, 275–76, 758 S.E.2d 725, 729 (Ct. App. 2014), aff'd as modified, 415 S.C. 600, 785 S.E.2d 355 (2016), this Court wrote:

> In Leon[1], the Supreme Court established a good faith exception to the exclusionary rule, holding "that when an officer acting in objective good faith has obtained a search warrant from a judge or magistrate and acted within its scope, a reviewing court should not order a suppression of the evidence based on a lack of probable cause." State v. Weston, 329 S.C. 287, 292, 494 S.E.2d 801, 803–04 (1997) (summarizing Leon). The Leon Court listed three situations in which the good faith exception cannot apply, one of which is reviewing courts will not defer to a warrant based on an affidavit " that does not provide the magistrate with a substantial basis for determining the existence of probable cause." 468 U.S. at 914–15, 104 S.Ct. at 3416, 82 L.Ed.2d at 693.

As discussed above, the only reference to drug sales at an apartment in the affidavit in support of the search warrant in the present case came from an unreliable, anonymous tipster who provided no apartment address, and a suspect time frame. The tip was not corroborated by

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[1] United States v. Leon, 468 U.S. 897, 919–20, 104 S.Ct. 3405, 3419, 82 L.Ed.2d 677, 696–97 (1984).

law enforcement. The controlled buy took place away from the apartment. The fact that Appellant went home after the controlled buy does not link the apartment to drug activity. The affidavit did not provide the magistrate with a substantial basis for determining the existence of probable cause to search the apartment. The good faith exception does not apply. See United States v. Brown, 828 F.3d 375, 385-86 (6th Cir. 2016). The trial judge erred in refusing to suppress the items found inside the apartment.

CONCLUSION

Based on the above argument, this Court should reverse the trafficking in heroin charge, the possession with intent to distribute a controlled substance charge and the weapon charge based on items seized in the apartment pursuant to a search warrant that lacked probable cause.

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Appellate Defender

ATTORNEY FOR APPELLANT

This 26th day of July, 2023.