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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Lexington County

Walton J. McLeod, IV, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

Jerome Smith,

PETITIONER.

Op. No. 2023-UP-343

APPELLATE CASE NO. 2021-000788

**PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS**

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CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies that a Petition for Rehearing was made and finally ruled on by the South Carolina Court of Appeals.

QUESTION PRESENTED

Did the Court of Appeals err in affirming the trial court's decision to deny Petitioner's motion to suppress evidence seized from his home pursuant to a search warrant that was not supported by probable cause?

STATEMENT OF THE CASE

This is an appeal from Petitioner Jerome Smith's conviction for trafficking in heroin. (R. p. 226, lines 13-20; R. p. 256-261). Smith was arrested on October 23, 2019. (R. p. 41, lines 17-21). On July 12, 2021, the State called this case for trial. (R. p. 5, lines 10-16). At trial, Smith made a motion to suppress evidence seized from his home pursuant to a search warrant, which the trial court denied. (R. pp. 7-53).

Following a bench trial, (R. pp. 54-57), the Honorable Walton J. McLeod, IV, found Smith guilty of trafficking heroin, distribution of heroin, and possession with intent to distribute heroin (R. p. 226, lines 12-22), and sentenced him to twenty-five years and ten years respectively, to be served concurrently, (R. p. 230, lines 5-12). Thereafter, Smith timely served and filed a notice of appeal.

On October 25, 2023, the Court of Appeals issued an unpublished opinion affirming Smith's conviction for trafficking in heroin. State v. Smith, Op. No. 2023-UP-343 (S.C. Ct. App. filed October 25, 2023). Smith filed a petition for rehearing on November 6, 2023. The Court of Appeals issued an Order denying the petition for rehearing on November 30, 2023.

This Petition for Writ of Certiorari to the Court of Appeals follows.

STATEMENT OF FACTS

On October 23, 2019, SLED Special Agent Jamie Shaw arrested Jerome Smith in a Walmart parking lot. (R. p. 41). That morning, Agent Shaw and a team of SLED agents followed Smith as he drove from his apartment—located at 100 Riverbend Drive—to a Walmart parking lot to execute two arrest warrants on Smith. (R. pp. 232-251). The arrest warrants were for distribution of heroin two years earlier, in August 2017. (R. pp. 252-255).

After Smith’s arrest, Agent Shaw applied for a search warrant for Smith’s Riverbend Drive apartment. (R. p. 49; R. p. 175). In support of her search warrant application, Agent Shaw submitted an affidavit to the Magistrate. (R. pp. 236-248).

Search Warrant Affidavit

Agent Shaw’s search warrant affidavit is nine pages long. The first five pages describe her training, experience, and familiarity with “drug distribution networks” generally. Neither Jerome Smith nor the facts of this case are mentioned until the sixth page. (R. p. 241). The information regarding this case can be divided into two categories: (a) information regarding events that occurred in August 2017 and (b) information regarding events that occurred within 72 hours of October 23, 2019. (R. pp. 241-248).

(a) Information regarding events that occurred in August 2017

In the search warrant affidavit, Agent Shaw alleged that SLED conducted two video-recorded controlled purchases of heroin from Smith in August 2017. Both controlled purchases were performed by confidential informants. (R. p. 241).

The first controlled purchase took place on August 19, 2017, at Smith’s apartment, which was located at 1810 Allen Benedict Court at the time. Smith allegedly sold the confidential informant 0.97 grams of heroin. (R. p. 241).

The second controlled purchase took place almost a week later, on August 25, 2017, in a vehicle that was registered to Smith. Smith allegedly sold the confidential informant 3.01 grams of heroin. (R. p. 241).

(b) Information regarding events that occurred within 72 hours of October 23, 2019

The search warrant affidavit also contains information from two years later, when Smith lived in a different apartment. (R. pp. 242-244). According to the affidavit, within 72 hours of October 23, 2019, Agent Shaw observed Smith walk from his new apartment—located at 100 Riverbend Drive—to his van. (R. p. 242). Agent Shaw and other SLED agents followed Smith from the Riverbend Drive apartment to Walmart. (R. p. 242). Smith did not stop along the way. Upon arrival at Walmart, SLED agents observed Smith park and wait approximately twenty minutes before a man named Roland Carver walked to the van and entered the passenger side. (R. p. 242). Smith drove himself and Carver from one side of Walmart to the other. (R. p. 242). Carver then exited the vehicle and entered Walmart. Agent Shaw and another SLED agent remained in the parking lot while two other SLED agents followed Carver inside Walmart. (R. p. 242).

In the parking lot, SLED agent Lewis Stoertz pulled Smith over. Agent Shaw then informed Smith that he had two warrants for his arrest for distribution of heroin. No drugs were found on him at that time. Smith was arrested and transported to the SLED Annex.

Inside Walmart, other SLED agents placed Carver in investigative detention. (R. p. 243). Prior to a pat down, Carver admitted to possessing a needle and heroin. (R. p. 243). Carver was taken outside and placed in a law enforcement vehicle. (R. p. 243). Carver then admitted that he purchased heroin from “Mr C” in a white van in the Walmart parking lot. (R. p. 243). Carver also

admitted to purchasing heroin from Mr. C “hundreds of times over the past three years, either a gram or a half gram of heroin each time.” (R. p. 243).

Execution of Search Warrant

Based on the search warrant affidavit, the Magistrate signed the search warrant for Smith’s Riverbend Drive apartment on October 23, 2019. (R. p. 244). The search warrant was executed the same day. (R. p. 235). After the search warrant had been signed, but before it was executed, Agent Shaw learned that a baggie of heroin was found underneath Smith in a SLED interview room. (R. p. 175).

Suppression Hearing

Smith made a pretrial motion to suppress all evidence seized from the execution of the search warrant for his apartment. (R. p. 7). Smith’s counsel argued that the search warrant was improperly issued based on the search warrant affidavit, which contained stale information and lacked specific information that heroin or contraband would be found in Smith’s apartment. (R. pp. 36-38).

Agent Shaw was the only witness that testified at the suppression hearing, (R. pp. 40-51), and the State conceded that she did “not provide any additional oral testimony” when she presented the search warrant affidavit to the magistrate. (R. p. 26). During her testimony, Agent Shaw stated that she did not witness Smith conduct any illegal, suspicious, or drug-related activity at the Riverbend Drive apartment on the day of his arrest. (R. p. 43, lines 13-19).

After reading the search warrant, (R. p. 28), listening to Agent Shaw’s testimony, (R. pp. 40-51), and hearing arguments from Smith’s Counsel and the State, (R. pp. 7-40; R. pp. 50-53), the trial court denied Smith’s motion to suppress, (R. p. 51, lines 10-14).

Trial

At trial, Agent Shaw testified that SLED agents seized baggies containing heroin, among other items, from three different locations in this case: (1) 0.44 grams of heroin from Carver at Walmart (R. pp. 167-168; R. pp. 184-185); (2) 0.45 grams of heroin from underneath Smith's feet in the SLED interview room (R. pp. 180-181; R. p. 185); and (3) 16.53 grams of heroin from Smith's home pursuant to the search warrant (R. pp. 177-180; R. pp. 185-186). The seized items were admitted into evidence at trial. (R. pp. 168-186).

ARGUMENT

The Court of Appeals erred in affirming the trial court’s decision to deny Petitioner’s motion to suppress evidence seized from his home pursuant to a search warrant that was not supported by probable cause.

Jerome Smith’s conviction for trafficking in heroin was based on evidence seized pursuant to the search warrant for his Riverbend Drive apartment. Without this evidence, the combined quantity of the heroin admitted at trial would have been less than one gram, which is insufficient to convict Smith of Trafficking. S.C. Code Ann. § 44-53-370(e)(3) (requiring four grams or more of heroin to find a person guilty of “trafficking in illegal drugs”). Therefore, if this Court determines that the trial court erred in denying Smith’s motion to suppress evidence, his trafficking conviction should be reversed.

The Court of Appeals found that the “totality of the circumstances of the facts set forth in the [search warrant] affidavit establish a fair probability that contraband or evidence of the sale of heroin would have been found in Smith’s apartment.” The search warrant affidavit contained two categories of information: information from August 2017 and information from October 2019, which is when Smith was arrested.

In its opinion, the Court of Appeals made no reference to the information from August 2017. Instead, it properly focused on the October 2019 information contained in the search warrant affidavit, which was not stale:

SLED agents watched Smith leave his apartment, followed him to a local store, and watched a man get in and then subsequently out of Smith’s van. Agent’s discovered heroin in that man’s possession, and he informed agents that smith sold him heroin that day and on numerous previous occasions. After providing this information in an affidavit to a magistrate, the agents obtained a search warrant to search Smith’s apartment for drugs.

State v. Smith, Op. No. 2023-UP-343 (S.C. Ct. App. filed October 25, 2023).

The Court of Appeals correctly disregarded the information from August 2017, because that information was stale and did not establish probable cause to believe heroin would be found in Smith's Riverbend Drive apartment in October 2019. See State v. Winborne, 273 S.C. 62, 64, 254 S.E.2d 297, 298 (1979) ("In order for an affidavit in support of a search warrant to show probable cause, it must state 'facts so closely related to the time of the issuance of the warrant as to justify a finding of probable cause at that time.'"); State v. Corns, 310 S.C. 546, 550, 426 S.E.2d 324, 326 (Ct. App. 1992) ("It is true that a probable cause affidavit must state facts so closely related to the time of the issuance of the warrant as to justify a finding of probable cause at that time."); United States v. McCall, 740 F.2d 1331, 1335 (4th Cir. 1984) ("[E]vidence seized pursuant to a warrant supported by 'stale' probable cause is not admissible in a criminal trial to establish the defendant's guilt.").

However, the October 2019 information described by the Court of Appeals did not establish a timely and direct nexus between the heroin sought in the affidavit and Smith's Riverbend Drive Apartment.

"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.*" State v. Thompson, 419 S.C. 250, 256, 797 S.E.2d 716, 719 (2017) (quoting Zurcher v. Stanford Daily, 436 U.S. 547, 556 (1978)). The "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 . . . is sufficient to support a search warrant." Thompson, 419 S.C. 250 at 257, 797 S.E.2d at 719-20.

There is not a timely and direct nexus between the heroin sought in the affidavit and Smith's Riverbend Drive apartment. In South Carolina, courts have typically held that this nexus exists where the following factors are established by the search warrant affidavit or supplemental oral testimony to the issuing magistrate: (a) law enforcement had a home under surveillance; (b) law enforcement followed a person from that home to another location; and (c) that person was found to be in possession of drugs or law enforcement witnessed a drug transaction at the other location. See State v. Kinloch, 410 S.C. 612, 767 S.E.2d 153 (2014); State v. Gore, 408 S.C. 237, 758 S.E.2d 717 (Ct. App. 2014); State v. Keith, 356 S.C. 219, 588 S.E.2d 145 (Ct. App. 2003); State v. Scott, 303 S.C. 360, 400 S.E.2d 784 (Ct. App. 1991).

Those three factors are not present in this case. Although the affidavit states that SLED maintained surveillance of Smith as he drove from the Riverbend Drive apartment to Walmart, there is no indication in the affidavit that the Riverbend Drive apartment was under surveillance, that Smith was found in possession of drugs in the Walmart parking lot, or that SLED witnessed a drug transaction in the Walmart parking lot.

First, the affidavit did not state that the Riverbend Drive apartment was under surveillance prior to Smith's arrest. Compare with Kinloch, 410 S.C. at 618, 767 S.E.2d at 156 (The search warrant affidavit stated that numerous tips indicated that "drug activity was probably present" at the home and that "drug-related behavior was observed" by law enforcement during subsequent surveillance of the home.); State v. Gore, 408 S.C. at 241-42, 758 S.E.2d at 719-20 (The search warrant affidavit stated that a confidential informant made a recorded and monitored cocaine buy out of the residence, and law enforcement provided supplemental oral testimony to the magistrate that the controlled buy occurred seven months before the affidavit was written as part of "a lengthy investigation."); Keith, 356 S.C. at 225, 588 S.E.2d at 148 (The search warrant affidavit "outlined

the investigative surveillance of [the defendant's] home.”); Scott, 303 S.C. at 362, 400 S.E.2d at 785 (The search warrant affidavit stated that law enforcement was “in a position of surveillance on the [home].”).

Second, the affidavit does not state that drugs were found on Smith's person or in Smith's vehicle after SLED followed him from his apartment to the Walmart parking lot. Compare with Keith, 356 S.C. at 221-22, 588 S.E.2d at 146 (Officers found a marijuana bud and pipe containing marijuana residue in defendant's vehicle when they performed a traffic stop after defendant left his residence.); Scott, 303 S.C. at 362, 400 S.E.2d at 785-86 (Defendant was found to be in possession of cocaine when he was stopped by law enforcement after leaving his apartment.).

Finally, the affidavit does not state that SLED agents witnessed a drug transaction take place in the Walmart parking lot. Compare with Kinloch, 410 S.C. at 614-15, 767 S.E.2d at 154 (Law enforcement observed a person walk from the home to a gas station, where the person “handed an unknown black male . . . a clear plastic wrapping [containing heroin] in exchange for money.” Law enforcement then observed the person return to the home.); Gore, 408 S.C. at 247, 758 S.E.2d at 722 (Defendant was followed from the home to another location where law enforcement monitored and recorded a cocaine sale.). According to the affidavit, SLED agents witnessed Carver enter Smith's vehicle, the vehicle drive from one side of Walmart to the other, and Carver exit the vehicle. They subsequently discovered heroin on Carver inside a Walmart bathroom.¹ SLED agents did not see what occurred inside Smith's vehicle.

¹ Carver was not searched before he entered Smith's vehicle, and there is no information in the affidavit about where he came from or what he was doing before this incident. See State v. Gentile, 373 S.C. 506, 516, 646 S.E.2d 171, 176 (Ct. App. 2007) (The court held that the search warrant for defendant's home was invalid where it was issued, based in part, on information that “officers discovered marijuana in the possession of [a] driver after he left [defendant's home].” The court noted that “[t]he officers . . . had no knowledge of whether the driver had purchased the marijuana from [defendant]”; “[n]either the driver nor his vehicle was searched prior to going

Because the search warrant affidavit does not state facts that establish a nexus between the heroin sought and the Riverbend Drive apartment, there was not a fair probability that contraband or evidence of the sale of heroin would be found there. Therefore, the trial court erred in finding that the search warrant was supported by probable cause.

CONCLUSION

For the reasons stated above, this Court should grant certiorari, reverse the decision of the Court of Appeals, and remand this matter for a new trial on the trafficking in heroin charge with instructions that the trial court suppress all evidence seized from the execution of the search warrant for Smith's apartment.

Respectfully submitted,

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to [defendant's home]"; and "without surveillance within [defendant's home], there was no verification that the driver in fact purchased marijuana from [defendant].").