

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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SC Court of Appeals

Appeal from Lexington County

Walton J. McLeod, IV, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

Jerome Smith,

APPELLANT.

Op. No. 2023-UP-343

APPELLATE CASE NO. 2021-000788

PETITION FOR REHEARING

On October 25, 2023, this Court issued an unpublished opinion in which it affirmed Appellant Jerome Smith’s conviction for trafficking in heroin. Pursuant to Rules 221 and 240, SCACR, Smith respectfully submits that this Court may have overlooked or misapprehended several critical points and petitions this Court for a rehearing.

This Court 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, this Court 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.

This Court 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 this Court 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.

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, in conjunction with the arguments raised in the Final Brief of Appellant, Appellant Jerome Smith respectfully requests that this Court rehear this matter, vacate its previous opinion, and remand this matter for a new trial with instructions that the trial court suppress all evidence seized from the execution of the search warrant for Smith's apartment.

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