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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO THE COURT OF APPEALS
Appeal From Lexington County
The Honorable Walton J. Mcleod, IV Circuit Court Judge

Appellate Case No. 2023-001945

THE STATE,RESPONDENT,

v.

JEROME SMITH, PETITIONER.

Opinion No. 2023-UP-343 (S.C. Ct. App. filed October 25, 2023)

RETURN TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF ISSUE ON APPEAL

The Court of Appeals properly affirmed the trial judge's decision to deny Petitioner's motion to suppress evidence seized by SLED because the search warrant provided a sufficient probable cause basis for issuance of the warrant since it was not based on stale information and established a clear nexus between heroin and Petitioner's apartment.

STATEMENT OF THE CASE

A Lexington County Grand Jury indicted Petitioner for trafficking heroin and distributing heroin on March 9, 2020. Petitioner proceeded to a jury trial July 12-14, 2021, before the Honorable Walton J. McLeod, IV. Benjamin A. Stitely represented Petitioner. Following a bench trial, Judge McLeod found Petitioner guilty of trafficking heroin and distribution of heroin. Petitioner was sentenced to concurrent terms of imprisonment of twenty-five years for trafficking and ten years for distribution. Petitioner timely filed his appeal. On October 25, 2023, the South Carolina Court of Appeals affirmed the convictions in an unpublished opinion, State v. Smith, No. 2023-UP-343. (S.C. Ct. App. filed October 25, 2023). A timely filed petition for rehearing was denied on November 30, 2023. A timely Petition for Writ of Certiorari was filed on December 19, 2023. This Return follows.

STATEMENT OF FACTS

On October 16, 2019, Jamie Shaw, a SLED narcotics investigator received two arrest warrants for Petitioner Jerome Smith. (R. 156). She queried Petitioner through the DMV and realized he had changed his driver's license address. (R. 156). Shaw attempted twice to see if the Honda Odyssey van, registered to Petitioner, was in the parking lot of the new address. (R. 158). The car was not seen on either occasion. (R. 158).

On October 23, 2019, Shaw organized a group to surveil Petitioner's listed address at 6:30 a.m. to serve the two warrants. SLED Special Agent Zachary Perry accompanied Shaw to the residence. Shaw parked in view of the van registered to Petitioner. (R. 158). At approximately 6:35 a.m, Shaw observed a black male, dressed in a gray hoodie, walk from Petitioner's residence. (R. 159). The male walked to the van to retrieve something, then back to the residence. (R. 159). At this point, Shaw was unable to identify the person as Petitioner and continued to surveil. (R. 159).

At approximately 8:25 a.m., the same male walked to the van and entered the driver's compartment. (R. 159). SLED Special Agent Kyle Fowler arrived in the parking lot while the vehicle was in reverse. (R. 68). Shaw instructed the others to follow the vehicle. (R. 160). Shaw, Fowler, and Perry followed the van to the Walmart parking lot in West Columbia, Lexington County. (R. 160).

The van then pulled into the parking lot and parked near the right entrance. (R. 161). Shaw parked directly in front of the van in order to maintain eyes on the vehicle. (R. 161). At this point, Shaw identified the driver of the van as Petitioner. (R. 161). Shaw contacted SLED Special Agent Lewis Stoertz, who had entered the parking lot as well to keep eyes on the van in case it moved.

A white male, later identified as Roland Carver, was observed walking around the parking lot and then directly walking to Petitioner's van and entering the passenger side of the vehicle. (R.

163). Almost immediately after Carver entered the vehicle, it began moving in reverse, then pulled forward to the front of the Walmart, where Carver exited the vehicle. (R. 164). Shaw instructed Stoertz to conduct a traffic stop of Petitioner's vehicle and instructed Fowler and Perry to find Carver inside the Walmart. (R. 164). Petitioner was stopped and removed from the vehicle where Shaw confirmed his name and date of birth on the arrest warrants and placed him under arrest. (R. 165).

Fowler followed Carver into Walmart toward the restrooms. (R. 75-76). Fowler identified himself and explained to Carver he was placing him in investigative detention. (R. 76). Fowler conducted a search of Carver's person and found a syringe, a yellow zip lock bag with a substance later identified as .44 grams of heroin, a plastic cap that had a cotton type filter, and a black glove. (R. 77). Carver was placed in Fowler's vehicle. (R. 166). Carver was Mirandized and indicated that he wanted to make a statement. (R. 166). Carver said that he got into Petitioner's van and exchanged \$80.00 for a yellow baggie of heroin. (R. 99).

After Petitioner was placed under arrest, Perry transported him from Walmart to the SLED annex. (R. 129). Petitioner was placed in the SLED interview room, where Perry remained with him while Shaw obtained the search warrant. (R. 133-34). A search warrant was prepared and presented to the Cayce Magistrate's Office where it was signed. (R. 174).

The search warrant affidavit was detailed and contained a lot of information. It began by describing Agent Shaw's training, experience and familiarity with how drug distribution networks are established and maintained as well as the methods the illegal drugs are distributed. (Search Warrant dated October 23, 2019). The search warrant further contained background information as to why Petitioner was being surveilled. It identified two controlled buys between a SLED authorized confidential informant (CI) and Petitioner.

The first buy occurred on August 19, 2017, where a SLED CI went to Petitioner's residence at that time and Petitioner sold him heroin that Petitioner retrieved from the bedroom area of his apartment. The substance purchased from Petitioner yielded a positive result for heroin. The second buy included in the search warrant occurred on August 25, 2017 in which a SLED CI got into Petitioner's vehicle at Petitioners residence at that time and purchased drugs from Petitioner. The substance purchased yielded a positive result for heroin.

The remainder of the search warrant described the surveillance on Petitioner. It detailed how Agent Shaw along with Perry followed Petitioner from his residence to the Walmart parking lot, where they observed Carver enter Petitioner's vehicle. It described how Carver then exited the vehicle and was followed into the Walmart restrooms where he was placed in investigative detention. The Search Warrant Affidavit stated that a needle and heroin were found on Carver's person and includes statements made by Carver that he had purchased said heroin from Petitioner in the white Honda van in the parking lot and that he had purchased heroin from Petitioner hundreds of times.

After the warrant was signed, but prior to its execution, Perry informed Shaw that he had found a small yellow zip lock bag with a substance later identified as .45 grams of heroin at Petitioner's feet in the interview room. (R. 134). The search warrant was then executed on Petitioner's apartment. (R. 177). Multiple bags containing smaller zip lock baggies of varied colors, \$1800.00 in cash, and a clear plastic bag with a substance later identified as 16.53 grams of heroin were found in Petitioner's apartment. (R. 177).

Petitioner made a pretrial motion to suppress all evidence seized in the execution of the search warrant. (R. 7). The trial judge denied Petitioner's motion to suppress stating "I believe it's reasonable to believe in light of the surveillance that was underway that day it was reasonable to

believe that the items seized subsequently those drugs would have been found in that home..." (R. 53).

STANDARD OF REVIEW

In criminal cases, appellate courts sit to review errors of law only. State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). “Historically, we have repeatedly noted that appellate courts review and appeal from a motion to suppress based on a violation of the Fourth Amendment under the deferential “any evidence” standard.” State v. Frasier, 437 S.C. 625, 632, 879 S.E.2d 762, 765 (2022). “Pursuant to this standard, our appellate courts ‘will not reverse a trial court’s finding of fact simply because it would have decided the case differently.’” Id. “Appellate 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 evidentiary support, but the ultimate legal conclusion... is a question of law subject to de novo review.” Id. at 633-634, 879 S.E.2d at 766.

ARGUMENT

The Court of Appeals properly affirmed the trial judge's decision to deny Petitioner's motion to suppress evidence seized by SLED because the search warrant provided a sufficient probable cause basis for issuance of the warrant since it was not based on stale information and established a clear nexus between heroin and Petitioner's apartment.

Petitioner argues that the trial judge erred by denying the motion to suppress evidence seized by SLED pursuant to a search warrant unsupported by probable cause. Specifically, Petitioner argues the search warrant contained stale information from August 2017, which did not establish probable cause to believe heroin would be found in Petitioner's current residence. Further Petitioner argues that the search warrant did not establish a timely and direct nexus between the heroin sought and Petitioner's apartment. Petitioner's argument lacks merit because the warrant contained sufficient information to establish a probable cause basis for the search of Petitioner's apartment.

The United States Constitution protects people from unreasonable searches and seizures. "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures and unreasonable invasions of privacy shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, the person or thing to be seized, and the information to be obtained." U.S. Const. amend. IV. The State of South Carolina also provides people with protections against unreasonable searches and seizures. "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures and unreasonable invasions of privacy shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be

searched, the person or thing to be seized, and the information to be obtained.” S.C. Const. art. I, § 10.

“A magistrate may issue a search warrant only upon finding of probable cause.” State v. Dupree, 354 S.C. 676, 684, 583 S.E.2d 437, 441 (Ct. App. 2003). “The South Carolina General Assembly has enacted a requirement that search warrants may be issued ‘only upon affidavit sworn to before the magistrate...establishing the grounds for the warrant.’” State v. Bellamy, 336 S.C. 140, 143, 519 S.E.2d 347, 348 (1999) (quoting S.C. Code Ann. §17-13-140 (1985)). “The affidavit must contain sufficient underlying facts and information upon which the magistrate may make a determination of probable cause.” Dupree, at 684, 583 S.E.2d at 441. The facts contained in the affidavit must be so closely related to the time of the issuance of the warrant to justify a finding of probable cause at that time. State v. Winborne, 273 S.C. 62, 64, 254 S.E.2d 297, 298 (1979). The term “probable cause” does not mean absolute certainty, but magistrates should be concerned with probabilities not certainties. Dupree, at 683, 583 S.E.2d at 441. “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.” State v. Kinloch, 410 S.C. 612, 617, 767 S.E.2d 153, 155 (2014).

The Court of Appeals properly found in this case that: “The totality of the circumstances of the facts set forth in the affidavit establish a fair probability that contraband or evidence of the sale of heroin would have been found in Smith’s apartment.” State v. Smith, Opinion No. 2023-UP-343 (S.C. Ct. App. filed October 25, 2023). In this case, the search warrant affidavit contained sufficient facts to establish a probable cause basis to search Petitioner’s apartment. The search warrant included information about two controlled purchases of heroin from Petitioner that occurred in 2017 as well as information of the drug deal between Carver and Petitioner in the last

72 hours and was the actual purpose of the search warrant. Petitioner argues that evidence seized in Petitioner's apartment should be suppressed because the search warrant was based on stale information. Although this supporting information in the affidavit did not occur within the 72 hours of the issuance of the warrant, this information established a pattern of drug activity. See State v. Thompson, 363 S.C. 192, 207, 609 S.E.2d 556, 564 (Ct. App. 1992). The additional information gave background about the reason for the search warrant, but probable cause would still exist without the added "stale" information based on the drug deal that occurred the day the warrant was issued.

"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." State v. Thompson, 419 S.C. 250, 257, 797 S.E.2d 716, 719-720 (2017). Petitioner cites to State v. Steeves¹ in arguing that "a one off sale of heroin at Smith's Allen Benedict Court apartment in August of 2017 does not establish probable cause to believe heroin would be found in his Riverbend apartment in October 2019", however the purpose of this information from 2017 was to establish the reason for surveilling Petitioner. In Kinloch, our Supreme Court held that each fact in the search warrant affidavit supported a mere suspicion of drug activity, but the totality of the circumstances, namely, the numerous tips indicating drug activity was probably present at the address and the subsequent surveillance of the residence during which seemingly drug-related behavior was observed established probable cause. State v. Kinloch, 410 S.C. 612, 767 S.E.2d 153 (2014). Similarly, in Gore, the court held "we find the earlier drug transaction at the residence

¹ State v. Steeves, 525 F.2d 33 (8th Cir. 1975).

coupled with this drug transaction demonstrate a pattern of ongoing illegal activity.” State v. Gore, 408 S.C. 237, 248, 758 S.E.2d 717, 723 (Ct. App. 2014). See also State v. Dupree, 354 S.C. 676, 691, 583 S.E.2d 437, 445 (2003) (stating evidence of a drug transaction supports and “inference that more will be found at the place of operation.”)

In this case probable cause to search the residence was established not based solely on the 2017 controlled buys but that, coupled with the observation of Petitioner engaging in a drug transaction that day. However, even if the “stale information” of the controlled buys was not in the search warrant affidavit, sufficient probable cause to search Petitioner’s residence was still established. The Fourth Circuit Court of Appeals has held that there was sufficient probable cause to search a motel room where the facts established that the defendant, arrested in a traffic stop away from the motel, was a drug dealer and was a resident of the motel room. United States v. Williams, 974 F.2d 480, 481-482 (4th Cir. 1992). Similarly, State v. Scott held that a search warrant affidavit, which alleged that defendant, whom investigators were holding an arrest warrant for distribution of cocaine, was found in possession of cocaine after leaving his residence and that investigators had visual contact with defendant from the time he left his residence until time of stop, articulated sufficient probable cause for search of defendant’s residence for cocaine and related paraphernalia. State v. Scott, 303 S.C. 360, 400 S.E.2d 784 (Ct. App. 1991).

Officers observed Petitioner leave the apartment, travel straight to Walmart where officers observed Carver get into Petitioner’s car and engage in what appeared to be a drug deal. The officers placed Carver in investigative detention. A needle and heroin were found on Carver’s person. Carver told officers that he had purchased the heroin from Petitioner, who Carver knew as “Mr. C,” inside Petitioner’s white van in the Walmart parking lot and that he had purchased heroin from Petitioner hundreds of times over the past three years. The search warrant affidavit contained

sufficient facts to establish a probable cause to search Petitioner's apartment even without the additional information of the controlled buys from 2017 and was therefore not based on stale information, but information that occurred on the day the search warrant was issued.

Petitioner argues that there is no nexus between the heroin sought in Agent Shaw's affidavit and Petitioner's Riverbend apartment. Petitioner argues that courts in South Carolina have typically held that the nexus exists when the following factors are established by the search warrant affidavit, (a) law enforcement had a home under surveillance, (b) law enforcement followed a person from that home to another location, (c) that person was found to be in possession of drugs or law enforcement witnessed a drug transaction at the other location. (Initial Brief of Appellant pg. 13). Petitioner further argues that none of these factors are present in this case. Petitioner's argument is without merit as all of these factors are present here.

First, although the search warrant affidavit does not specifically say "while we were surveilling Petitioner's home", it does say "law enforcement observed SMITH aka 'Chrome' walk from apartment building H which is located on the right hand side of the apartment complex...Shaw with the South Carolina Law Enforcement Division (SLED) knew SMITH to reside at apartment H25 because SMITH'S driver's license listed that address as his residence....Shaw observed SMITH walk from the building that contains apartment H25 to a white 2013 Honda Odysseyregistered to SMITH at his residence. Smith started the vehicle and exited the parking lot." (Search Warrant dated October 23, 2019). This information showed they knew where Petitioner resided, they were already on scene, witnessed Petitioner leave the apartment, and get into his vehicle. The apartment being surveilled was confirmed in the search warrant by stating "Surveillance is maintained by S/A Shaw and S/A Zachary Perry of SLED. SMITH [Petitioner] drove straight with no stops in between to the Walmart Supercenter." (Search Warrant dated

October 23, 2019). Lastly, although Petitioner is not found to be in possession of drugs, the third element is still met because the search warrant details the interaction between Petitioner and Carver, including that a needle and heroin were found on Carver's person. Also included are Carver's subsequent statements that he just purchased that heroin from Petitioner in the white Honda van officers observed him getting into. (Search Warrant dated October 23, 2019). All of the elements that Petitioner argues need to be present for there to be a nexus are blatantly presented in the search warrant affidavit and therefore show a nexus between the heroin sought and Petitioner's residence. Accordingly, the Court of Appeals properly affirmed the trial judge's decision to deny Petitioner's motion to suppress and this court should affirm.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgment and convictions of the lower court be affirmed.

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