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SC Court of Appeals

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
The Honorable G.D. Morgan, Jr., Circuit Court Judge

Appellate Case No. 2022-001293

THE STATE, Respondent,

V.

MICHAEL JUSTIN KENNEDY, Appellant.

FINAL BRIEF OF RESPONDENT

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ATTORNEYS FOR RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

The trial judge correctly denied Appellant'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 established a clear nexus between drugs and Appellant's apartment.

STATEMENT OF THE CASE

In June of 2021, a Greenville County Grand Jury indicted Appellant for trafficking methamphetamine (2021-GS-23-000319), trafficking heroin (000539A), possession with intent to distribute a controlled substance (003572), and three counts of possession of a weapon during the commission of a violent crime (000619, 000537A, 000538A). 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. On August 29, 2022, Appellant proceeded to jury trial before Judge Morgan. Ms. Shankle appeared as standby counsel. The jury found Appellant guilty of one of the gun charges (000619) and all the drug charges. Appellant was sentenced to five years on the gun charge, twenty-five years on both trafficking charges, and fifteen years on the distribution charge, to be run concurrently. A timely notice of appeal was filed. This appeal follows.

STATEMENT OF FACTS

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. (R. 253, 367, 368). 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. (R. 282-285, 369-371).

Prior to trial, Appellant moved to suppress the items seized as a result of the search warrant lacking probable cause. (R. 51-104). Appellant argues that the search warrant was issued without probable cause in violation of the Fourth Amendment. (R. 53). Appellant further argues that the affidavit for the search warrant did not meet the nexus requirement that established a connection between drugs and his apartment. (R. 90-95). Lastly, 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. (R. 82-85). The State argued in reply that the search warrant was sought within 72 hours of a controlled buy where Appellant was surveilled during and after the buy and was seen returning immediately from the buy to his apartment. (R. 99). The State further stated that Agent McWhite stated in his affidavit through his experience investigating criminal cases that drug dealers keep the drugs in their homes and vehicles and that it would be more than reasonable for drugs to be found in Appellants car and house, that he returned to immediately after the controlled buy, and was under constant surveillance. (R. 99-100). The State argued that the affidavit itself proves that the confidential informant was reliable. (R. 101).

In the affidavit, the first paragraph explains Investigator Jonathan McWhite's experience and training. (R. 550-553). The second paragraph explains that a tip was received from a confidential informant (Cl) that Appellant was selling heroin from and around his Greenville apartment. The third paragraph explains that within 72 hours of this affidavit, McWhite personally conducted an undercover operation where he witnessed Appellant distribute a quantity of heroin to a CL. The CI met with Appellant at a predetermined location where the CI purchased a quantity of heroin with money provided by the drug enforcement unit. There is audio and visual recordings of the buy. The informant was able to positively identify Appellant in a six-person lineup. The fourth paragraph describes the car that Appellant arrived to the buy in and then was followed immediately after the buy to some apartment buildings where he parked and entered an apartment. Management confirmed that Appellant was the current lease holder of that specific apartment. The final paragraph summarized the encounter and based off the Cl's tip he explained he had reason to believe that Appellant was engaged in illegal drug activity and that then based off of the undercover operation he confirmed that belief. (R. 550-553).

Judge Morgan denied Appellant's 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." (R. 102-103).

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 trial judge correctly denied Appellant'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 established a clear nexus between the drugs and Appellant's apartment.

Appellant 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, Appellant argues the search warrant failed to provide a sufficient connection between drugs and the apartment where Appellant lived and therefore did not provide probable cause to believe drugs would be found inside the apartment. Appellant's argument lacks merit because the warrant contained sufficient information to establish a probable cause basis for the search of Appellant'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).

In this case, the search warrant affidavit contained sufficient facts to establish a probable cause basis to search Appellant's apartment. The search warrant included a confidential tip that Appellant was selling drugs from and around his apartment. It also had information about a controlled purchase of heroin from Appellant in the last 72 hours and was the actual purpose of the search warrant.

Appellant argues that evidence seized in Appellant's apartment should be suppressed because the search warrant failed to provide a sufficient connection between the drugs and Appellant's apartment. Although the anonymous tip mentioned 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 onymous tip 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. 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 solely by the fact officers observed Appellant sell heroin to the confidential informant, get into his vehicle, drive straight to his apartment, and then go inside. Similar to this case, 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).

The search warrant affidavit contained sufficient facts to establish a probable cause to search Appellant's apartment. A confidential informant, met with Appellant and purchased heroin. This drug deal was captured on audio and visual surveillance. Appellant was then surveilled directly from the drug deal into his vehicle and to his apartment where he remained until the search warrant was executed. Sufficient information was provided in the search warrant

that established a timely and direct nexus between the illegal drug evidence sought and Appellant's apartment. Therefore, the trial judge properly denied Appellant's motion to suppress, and this court should affirm.

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF COUNSEL

The undersigned certifies this Final Brief of Respondent complies with Rule 211(b), SCACR, and the April 15, 2014, order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

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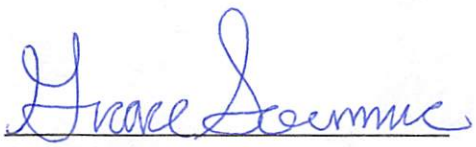
PROOF OF SERVICE

I, Grace Sommer, certify that I have served the Final Brief of Respondent on Kathrine H. Hudgins counsel of record for the Appellant, by sending one copy by electronic mail to the address listed for counsel in AIS.

I further certify that all parties required by Rule to be served have been served. This 16th day of February, 2024.



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