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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Lexington County

Honorable Debra R. McCaslin, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JUSTIN TYLER ELLAREE HOPKINS,

APPELLANT

APPELLATE CASE NO. 2022-001567

INITIAL REPLY BRIEF OF APPELLANT

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TABLE OF AUTHORITIES

South Carolina Cases

United States Supreme Court Cases

Statutes

ARGUMENT IN REPLY

1. Respondent's argument that exigent circumstances concerning the execution of a search warrant justified the warrantless stop and search of a vehicle in which appellant was a passenger outside the vicinity of the place to be searched ignores the limited authority to detain incident to the execution of a search warrant to those in the immediate vicinity of the premises to be searched and creates an exception that swallows the clear spatial limitation on the authority granted by a search warrant outlined in *Bailey v. United States*, 568 U.S. 186 (2013).

In short, the state argues that at "the time law enforcement saw the Appellant leaving his apartment with *possible* evidence they had every right to stop him, *because exigent circumstances existed.* There *was a possibility* that Appellant was going to destroy evidence." Initial Brief of Respondent p. 11 (emphasis added). It is certainly accurate that an exception to a search warrant requirement exists when "the circumstances, viewed objectively, justify" a warrantless seizure and search to prevent the destruction of evidence. Kentucky v. King, 563 U.S. 452, 464 (2011).

However, this authority is an exception to the general rule that searches and seizures conducted without a warrant violate the Fourth Amendment. The Supreme Court has already examined the extent that "exigent circumstances" allows authorities to detain individuals and vehicles away from the place to be searched under the authority granted by the search warrant. "If officers *elect to defer the detention until the suspect or departing occupant leaves the immediate vicinity*, the lawfulness of detention is controlled by other standards, including, of course, a brief stop for questioning based on reasonable suspicion under Terry or an arrest based on probable cause." Bailey v. United States, 568 U.S. 186, 202 (2013) (emphasis added).

Here, the state acknowledges officers allowed an individual to leave the place to be searched, get into the rear compartment of a vehicle driven by a third-party, and allowed the vehicle

to leave the immediate vicinity to be searched. Initial Brief of Respondent p. 8 - 9. The authority to stop and detain the vehicle could no longer rest upon the search warrant. The state attempts to artificially expand the geographic limits imposed by Bailey by allowing a "possibility" the person may be leaving with evidence the state wants to seize under the power of the search warrant as an "emergency" justifying further erosion of the Fourth Amendment's protections. However, any "warrantless entry based on exigent circumstances must, of course, be supported by a genuine exigency." King, 563 U.S. at 470. The exigent circumstances exception allows a "warrantless search when *an emergency* leaves police insufficient time to seek a warrant." Birchfield v. North Dakota, 579 U.S. 438, 456 (2016). If observing bags being taken from a location to be searched was such an "exigent circumstance" justifying an "emergency" warrantless detention a mile away from the place to be search, the Supreme Court in Bailey would have acknowledged that fact. Instead, the Supreme Court in Bailey required some other source of authority for the delayed stop that was outside the geographical bounds of the search warrant.

Under the state's theory of Fourth Amendment interpretation, once the police are in the process of obtaining a search warrant, they have the ability to stop and search any individuals they see leaving the premises, as far away as a mile from the place to be searched, because it is *possible* they may be removing or destroying the evidence the state wants to seize. Bailey has examined this argument, and found it lacks merit.

The state's continued use of the term "possible" is important in this case, as there is no evidence in the record Appellant was aware of the police presence before the traffic stop was initiated. In fact, the record shows the great lengths the police went through in order to shield their activities from view leading up to the arrival of the search warrant, such as using unmarked vehicles to observe the location from distance and assembling the search team well away from the

location to be searched. Tr. 105, l. 14 – 106, l. 5. These careful steps included the delay in stopping the one vehicle of interest in their investigation when it left the vicinity in part to prevent any "tip-off" of the police presence. Tr. 81, ll. 15 – 24.

Appellant is troubled by the state's reliance upon the assertion that Lieutenant Brock knew for certain that appellant was the man seen leaving the location to be searched and the car stopped in violation of Bailey. Initial Brief of Respondent p. 11. Brock became certain the person in the back seat of the car eventually stopped was Appellant only after it was improperly pulled over:

> I followed it all the way to where the traffic stop was conducted. I got in the back seat with Mr. Hopkins with my flashlight in his face, I saw him, he was detained. There was no loss of sight of him between me putting my flashlight in his face and him going into handcuffs with Sergeant Burt. *So absolutely I know 100 percent that the guy that came out of that apartment was Mr. Hopkins.*

Tr. 93, l. 20 – 94. l. 2 (emphasis added). The state conveniently ignores the certainty was only obtained following the illegal stop of the vehicle outside the scope allowed by Bailey. In reality, Brock was only able to a vague shape of a person that resembled the general description of Appellant:

> I observed an individual get out of that vehicle and go into Apartment 27A a pretty relatively short time later. Now I communicated that to the detectives that were sitting down the street that somebody had just entered the apartment, but I couldn't see who that individual was just because of the nighttime hours that it was and also I had these headlights that are pointing straight in my eyes, but shortly thereafter that -- an individual exited 27A and this time instead of getting onto his side of the vehicle, he went past the front headlights and so I was able to see more of a descriptive of that person's height and weight and that he was carrying two bags, one in each hand, and then he went around to the -- I'm sorry, I've got to think in my head. It's backwards. So he went around to the far side as he crossed it, which would be the driver's side, and then got into the passenger -- the back passenger right -- the back passenger seat

Tr. 77, l. 21 – 78, l. 12.

This vague description of a based upon approximate height and weight was combined with an observation of the person carrying two bags:

> I could just see that – again, because of the light from the headlights, all I can see is kind of like bags. I can't tell what they are, what color they are, anything about them because of the way the light's in my eyes, but I could definitely tell he had something in his hands.

Tr. 79, ll. 5 – 9.

Since there is absolutely no evidence that appellant was aware of the police presence, any assertion of an "exigent circumstance" about "destruction of evidence" is mere speculation and is properly expressed as a "possibility" in the state's argument.

Therefore, even if an "exigent circumstance" of "imminent destruction of evidence" could justify police action when someone drives away from a place to be searched, no such exigent circumstances existed in this case as there was no ongoing criminal activity or public emergency that would fall within the typical exigent circumstance fact pattern. *See* State v. Carter, 438 S.C. 463, 472, 884 S.E.2d 195, 199 (Ct. App. 2022*) cert. granted* (Jan. 9, 2024) ("Thus, this was not a standard criminal investigation seeking cell phone data; rather, this request sought to address an ongoing emergency because Carter was potentially armed and dangerous, had been involved in a violent crime only hours prior to the request, and left his co-conspirator for dead when he fled Hahn Village."). The limitation of this lack of emergency is mirrored in Bailey:

> The need to prevent flight, however, if unbounded, might be used to argue for detention of any regular occupant regardless of his or her location at the time of the search, e.g., detaining a suspect 10 miles away, ready to board a plane. Even if the detention of a former occupant away from the premises could facilitate a later arrest if incriminating evidence is discovered, "*the mere fact that law enforcement may be made more efficient can never by itself justify disregard of the Fourth Amendment.*" Mincey v. Arizona, 437 U.S. 385, 393, 98 S.Ct. 2408, 57 L.Ed.2d 290.

Bailey, 568 U.S. at 199.

The behavior of the police in connection with this vehicle stop should be contrasted with how they handled the stop of the white pickup truck that was a vehicle of interest in their investigation. Rather than rely upon the search warrant as an excuse to stop, the police elected to "find a reason" to stop the vehicle. Tr. 105, ll. 1 - 5. The police found such a pretext in the lights required for the rear license tag. Tr. 460, ll. 22 – 23. In contrast, for appellant the police ordered the vehicle be stopped, based upon a vague description of someone who fit the general characteristics of appellant getting into the back seat, as soon as the car left the parking lot of the apartment without even the justification of a minor traffic infraction. Tr. 84, ll. 20-25.

Respondent's argument improperly extends the exception to a warrantless detention and search allowing the detention of those in the vicinity of a place to be searched. As the stop here was in violation of the geographical limits outline in Bailey, a different justification, outside the mere presence of a search warrant, was required. As the vehicle was not of interest in the investigation and had committed no traffic violation justifying a stop, the resulting stop and search are a violation of Appellant's Fourth Amendment rights and the evidence seized from the two bags, including the ammunition, casings, and white t-shirt, should have been suppressed and appellant is entitled to a new trial.

II. The state's good faith argument does not excuse the complete failure of the search warrant to explain appellant's connection to Apartment 27A and would not support denying suppression as the proper remedy for the illegal search.

The state generally argues that the affidavit portion of the search warrant does not need to explain appellant's connection to the location to be searched. Here, the state encourages this Court to ignore the lack of connection contained in the supporting affidavit since the place to be search lists "27A" and they found useful evidence in that location that helped in the prosecution. Initial Brief of Respondent, p. 20 – 21. While most of the state's argument focuses on good faith as an exception regardless of defect, the argument that the suspect need not reside at the location to be searched misses the point entirely. Appellant's argument, as set forth in his initial brief, rests on the lack of connection in the supporting affidavit between appellant and the place to be searched. In effect, the police could have replaced 27A with any apartment in the entire Landmark Apartment complex and have the exact same defect – a complete absence of any information connecting appellant to the location to be searched.

In determining the validity of a search warrant, "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, 256–57, 797 S.E.2d 716, 719 (2017) (quoting Zurcher v. Stanford Daily, 436 U.S. 547, 556 (1978) (emphasis supplied). Thus, under the "totality of the circumstances set forth in the affidavit" is there "a fair probability that evidence of a crime will be found in the particular place to be searched." Thompson, , 419 S.C. at 256–57, 797 S.E.2d at 719. In the present case, the state completely omitted information connection apartment 27A to Appellant.

For this reason, good faith would also not apply. Good faith was not raised before the trial court as the court simply found the search warrant valid on its face. Tr. 130, ll. 3 – 10. Appellant's counsel had moved to suppress based upon "Fourth Amendment U.S., Article 1, Section 10 South Carolina, and the search warrant statute, 17-13-140." Tr. 139, ll. 13 – 16.

Our courts have been reluctant to use "good faith" to excuse improper compliance with the warrant requirement. For example, "the good faith exception is not available, where, as here, the warrant issued is based on a search-warrant affidavit of the officer which contained representations known to be false." State v. Robinson, 415 S.C. 600, 609, 785 S.E.2d 355, 359–60 (2016).

There is no viable excuse in the record for law enforcement's failure to disclose information regarding who resided in Apartment 27A to the magistrate for consideration. Since that was not the Appellant, the omission is telling. At the time the search warrant affidavit was signed, law enforcement knew, or should have known, the lease holder on Apartment 27A was not appellant but one Maxie Jacobs. Despite this knowledge, authorities made no effort to close the loop for the magistrate and explain appellant's connection to Jacobs or Apartment 27A.[1]

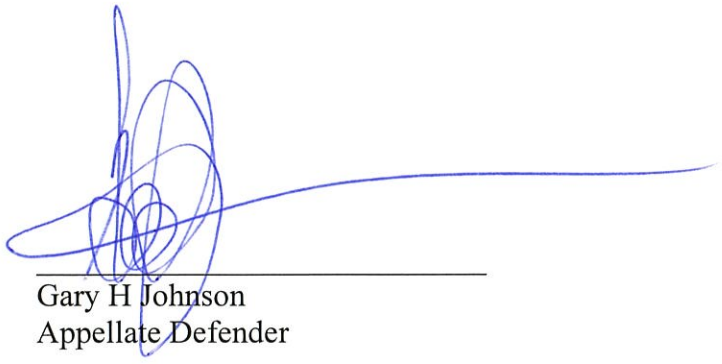
Contrasting Robinson with State v. Herring, 387 S.C. 201, 692 S.E.2d 490 (2009) is instructive. In Herring, our Supreme Court found a good faith exception due to the time and problems associated with an active shooting investigation and that "officers made a good faith attempt to comply with the affidavit procedures. . ." Id. at 215, 692 S.E.2d at 497. Here, investigators were under no pressure associated with an active shooting investigation as the shootings here occurred almost a week before. There were no exigent circumstances demanding action that excuse the requirement that the search warrant inform the magistrate of the connection

[1] That appellant could have been connected to Apartment 27A before the search warrant was issued was established at trial though the testimony of Kim Herlong. Tr. 585, l. 12 – 587, l. 23.

to the place to be search and the investigation. The present affidavit does not make that connection and good faith should not excuse such a failure absent the exigent circumstances seen in other cases that have relied upon good faith to avoid the impact of a defective (or absent) search warrant. Thus, good faith does not serve to save a defective on its face warrant. *See* State v. Covert, 382 S.C. 205, 209–10, 675 S.E.2d 740, 743 (2009) ("Here, we do not reach the question whether there exists a good faith exception to the statute where a defective warrant is issued, since under South Carolina law an unsigned warrant is not a warrant and is not capable of being issued within the meaning of § 17–13–140.").

CONCLUSION

For the reasons outlined both herein and in his Initial Brief, Appellant is entitled to a reversal of his conviction and remand for a new trial free from the taint of the improperly obtained evidence.



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This 20th day of February, 2024.