THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM HORRY COUNTY
Court of General Sessions

The Honorable Edward B. Cottingham, Sr., Circuit Court Judge

Appellate Case No.: 2014-001496
Opinion No.: 5214 (S.C. Ct. App. filed April 2, 2014)

The State, Respondent,

v.

Alton Wesley Gore Jr., Petitioner.

REPLY TO RESPONDENT'S RETURN TO PETITION FOR WRIT OF CERTIORARI

Nicole Nicolette Mace
Amy K. Raffaldt
The Mace Firm
1341 44th Avenue North, Suite 205
Myrtle Beach, SC 29577
843.839.2900 Telephone
843.839.2913 Fax
nen@themacefirm.com
akr@themacefirm.com

Attorneys for Petitioner

TABLE OF CONTENTS

ARGUMENT

I. The Court of Appeals erred in holding that the admission of the prejudicial photographs was harmless error.

Over defense counsel's objection that the photographs were irrelevant and unduly prejudicial, the trial court allowed the State to introduce two photographs of Gore appearing to hold up a large amount of currency. (R. 77, lines 1-25, 78, lines 1-25, R. 79, lines 1-25, R. 240-41). The Court of Appeals found the trial court's admission of the photographs was improper as they were unnecessary and invited the jury to infer criminal disposition. *State v. Gore*, 408 S.C. 237, 249-50, 758 S.E.2d 717, 723 (Ct. App. 2014). The State argues that the photographs were relevant because it was evidence that Gore lived at the residence. (Return to Pet. for Writ of Cert. at 4.) However, as the State fails to mention, there were other non-prejudicial photographs of Gore located at the residence that the State could have utilized at trial. (R. 65, lines 12-19; R. 106, line 23-107, line 4.) The State introduced these photographs solely to lure the jury to decide on an improper basis. The photographs the State introduced suggested that because Gore possessed and displayed what appeared to be a large amount of United States currency at some point he must be involved in drug activity. As this Court has repeatedly held, photographs used to arouse the sympathy or prejudice of the jury should not be admitted if they are irrelevant and unnecessary to substantiate material facts or conditions. *See State v. Jackson*, 364 S.C. 329, 334, 613 S.E.2d 374, 376 (2005); *State v. Brazell*, 325 S.C. 65, 78, 480 S.E.2d 64, 72 (1997); *State v. Kelley*, 319 S.C. 173, 178, 460 S.E.2d 368, 370-71 (1995). A defendant has a constitutional right to a fair and impartial jury. U.S. Const. amend. VI; S.C. Const. art. I, § 14. Therefore, the Court of Appeals properly ruled that the trial court erred in allowing the photographs into evidence.

The State further argues that the photographs were relevant and admissible because they "served to corroborate Detective Cooper's **un-objected-to** testimony that there were two photos

found in the bedroom depicting Petitioner squatting down and holding money in his hands." (Return to Pet. for Writ of Cert. at 4.) The Court of Appeals clearly dismissed this argument, concluding that Gore timely objected when Detective Cooper described the photographs. *Gore*, 408 S.C. at 249 n.4, 758 S.E.2d at 723 n.4. As soon as Detective Cooper mentioned the photographs, defense counsel requested to speak with the Court outside the presence of the jury and immediately raised his objections regarding the photographs. (R. 76, line 13-78, line 18.) Alternatively, the State argues that even if the photographs were improperly permitted, the error was harmless because there was overwhelming evidence that Gore resided at the residence. As argued in Gore's Petition for Writ of Certiorari, there was a substantial amount of evidence that Gore's girlfriend, Angel Deangelo, resided at the residence. (Pet. for Writ of Cert. at 5-6.) While the State points to several facts that it contends establish that Gore resided at the residence, it does not refute the testimony establishing that Ms. Deangelo actually resided there.

First, the State alleges that officers obtained a key to the residence from Gore when he was arrested and Gore's vehicles were located at the residence. When officers conducted a traffic stop on Gore, they took the keys associated with the vehicle Gore was driving. (R. 56, line 17-60, line 6.) Officers did not verify whether the vehicle was owned by or registered to Gore so it is unclear to whom the keys or the vehicle actually belonged. (R. 59, line 16-60, line 6; R. 110, line 25-111, line 4.) Second, the State asserts that officers testified that Gore resided at the residence. Detective Donald admitted that he had no documentation such as a lease agreement, title or invoice which connected Gore to the residence. (R. 60, lines 7-20.) Detective Ard also could not definitively state that Gore resided at the residence. (R. 110, lines 11-13.) Third, the State claims that the cocaine found in the residence was hidden in the master bedroom in a stack of men's clothes. However, the clothes were not taken into evidence and were not

measured to determine whether or not they could belong to Gore. (R. 73, line 19-74, line 11.) Fourth, the State argues that the address Gore listed on his bond documents showed he resided at the residence. There was no evidence that Gore actually listed this addressed on the bond form. (R. 166, lines 5-16; R. 192, lines 7-10.) Furthermore, the State fails to mention that Gore's ten-year driving record never listed the residence as an address associated with Gore. (R. 59, lines 4-10.) Rather, it indicated that he lived at a different address in Little River, South Carolina. (R. p. 58, line 22-24.)

Based on the foregoing, this issue should be heard by this Court as it involves novel questions of law and raises substantial constitutional concerns. Given the evidence and testimony indicating that Gore's girlfriend was residing at the residence rather than Gore, the trial court's admission of the photographs was not harmless error. Gore was entitled to a fair and impartial jury and the admission of the prejudicial photographs greatly affected his substantial rights. Therefore, the Court of Appeals erred in failing to set aside Gore's conviction.

II. The Court of Appeals erred in finding that the trial court properly denied Gore's motion for a *Franks* hearing because the affidavit contained information that was false and/or in reckless disregard for the truth and was not enough to establish probable cause to search the residence.

As shown below, this issue is a matter of great importance and should be heard by this Court. The decision of the Court of Appeals conflicts with prior decisions of this Court. Furthermore, this issue involves novel questions of law and substantial constitutional issues.

A. The affidavit was false and/or in reckless disregard of the truth, entitling Gore to an evidentiary hearing and suppression of the evidence obtained from the residence.

In this case, the allegations contained in the affidavit were as follows:

> A confidential and reliable informant made a buy for cocaine out of the residence while being recorded and monitored by agents in the area. Also within the last seventy-two hours agents followed

> the Defendant from the residence to another location, and were able to monitor and record another buy for cocaine.

(R. 24). The affiant, Detective Ard, failed to include specific dates for both of the alleged drug transactions. The affidavit was executed on February 28, 2010. (R. 24). The first buy occurred on July 23, 2009, over seven months prior to the execution of the affidavit. (R. 17, 21). The second buy occurred on February 25, 2010. On that occasion, Gore drove his vehicle to a location other than the residence. It was not within seventy-two hours of the first buy as suggested in the affidavit. (R. p. 33, line 4-p. 34, line 4). The State argues that this paragraph is not false or a reckless disregard for the truth and denies that it is ambiguous. It states that

> The first sentence in the affidavit indicates that a controlled buy of cocaine occurred at the residence the police wished to search. The second sentence indicates that, within the past seventy-two hours of the date of the affidavit, *but at some point after the controlled buy at the residence*, police followed Petitioner from the residence to another location where another controlled buy occurred.

(Return to Pet. for Writ of Cert. at 8-9 (emphasis added).) To the contrary, the dates on which the drug transactions occurred are omitted from the affidavit. The second sentence in no way indicates that it took place some point after the controlled buy at the residence. The paragraph is ambiguous and it is unclear exactly when the drug transactions occurred. Rather, the paragraph indicates, falsely, that both drug transactions occurred within seventy-two hours of the execution of the affidavit. In fact, the Court of Appeals agreed with Gore that the date and time of the first buy was improperly omitted and the paragraph itself was misleading. *Gore*, 408 S.C. 237, 758 S.E.2d at 721.

The State argues that Detective Ard omitted the date of the first drug transaction to protect the identity of the confidential informant. (R. 40, lines 16-20). Even though both buys involved a confidential informant, Detective Ard omitted a date that occurred seven months prior

to the execution of the affidavit, but included a time frame for the second buy which occurred three days prior to its execution. Surely, if Detective Ard's intention was to protect the confidential informant in omitting the date of the first buy, he would have similarly omitted any reference to the date of the second buy which occurred three days prior to the execution of the affidavit. This directly refutes Detective Ard's reasoning for the omission, and rather, shows an intent to omit and place language in the affidavit so that the first and second buy appear to have occurred within close proximity to each other in order establish probable cause to search the residence. *See State v. Missouri*, 337 S.C. 548, 557, 524 S.E.2d 394, 398 (1998) ("[W]hen an omission is combined with an affirmative falsehood, it reveals that the affiant not only believed the omitted information was critical, but that a statement in the affidavit to the contrary was necessary for establishing probable cause."). The affidavit submitted was false and in reckless disregard of the truth, entitling Gore to an omission of both allegations. Without these allegations, the affidavit would have been insufficient to establish probable cause.

Alternatively, the State argues that the insufficiency of the affidavit was remedied by Detective Ard's oral supplementation to the magistrate. (Return to Pet. for Writ of Cert. 10-11.) This Court has held that an "affidavit which fails altogether to state the time of the occurrence of the facts alleged is **insufficient**." *State v. Winborne*, 273 S.C. 62, 64, 254 S.E.2d 297, 298 (1979) (emphasis added). The affidavit did not include a specific date for either of the controlled buys. Moreover, the Court of Appeals' and the State's reliance on Detective Ard's alleged oral supplementation is completely contrary to this Court's holding in *State v. Jones*. 342 S.C. 121, 125, 536 S.E.2d 675, 677 (2000). Here, similar to *Jones*, Detective Ard omitted key information regarding the dates and times of the allegations, but included language so as to imply that the first buy occurred in close proximity to the second buy, or within seventy-two hours of the

execution of the affidavit. As this Court held in *Jones*, "oral information may *only* be used by an affiant to supplement or to amend incorrect information in an affidavit which was *not* knowingly, intentionally, or recklessly supplied by the affiant." 342 S.C. at 129, 536 S.E.2d at 679 (emphasis added). Detective Ard admitted that he intentionally omitted the date of the first buy. (R. 44, lines 17-21). Additionally, the structure of the second sentence together with the intentional omission of the date was at least a reckless disregard for the truth because it indicated that both buys occurred within seventy-two hours of the execution of the affidavit. Under the holding of *Jones*, Detective Ard should **not** have been able to orally supplement the affidavit because the omission of the date of the controlled buys was intentional and the inclusion of the "also within the last seventy-two hours" language in the second sentence was at the very least, recklessly supplied.

Furthermore, Gore did not have the opportunity to question the magistrate regarding the affidavit and Detective Ard's alleged oral supplementation. Gore specifically requested that he be allowed to question the magistrate at an evidentiary hearing. However, Gore was not given the opportunity to ask the magistrate as to his understanding of the affidavit. (R. 36, lines 12-16). The trial court limited the oral supplementation to that of Detective Ard. (*Id.*) Considering that there were several occasions in which Detective Ard could not recollect what the magistrate was told prior to the execution of the warrant, it is at least questionable whether the information regarding the lapse in time was communicated to the magistrate. (R. 42, lines 9-12, 43, lines 3-25, 44, lines 1-16,45, lines 1-24). The State claims that Gore failed to call the magistrate as a witness. (Return to Pet. for Writ of Cert. at 11.) However, under *Franks*, Gore established by a preponderance of the evidence that the affidavit was false or in reckless disregard of the truth. This entitled Gore to an evidentiary hearing where he would have had the opportunity to call,

without interference from the trial court, the magistrate as a witness. Gore had no such opportunity at the motion hearing because the judge dismissed his request. Therefore, the trial court erred in denying Gore an evidentiary hearing so that he would have the opportunity to question the magistrate. *See Hofer v. St. Clair*, 298 S.C. 503, 513, 381 S.E.2d 736, 742 (1989).

Therefore, the Court of Appeals erred in finding that the trial court's denial of Gore's *Franks* motion was proper. While the State argues that application of the good-faith exception is warranted, this exception does not apply when the affiant supplies information that is false or in reckless disregard of the truth. *State v. Weston*, 329 S.C. 287, 292-93, 494 S.E.2d 801, 803-04 (1997). Based on the foregoing, the good-faith exception is inapplicable and Gore is entitled to a suppression of the evidence obtained as a result of the unlawful search.

B. Even if the allegations of the affidavit had been credible, the Court of Appeals erred in finding that the warrant was supported by probable cause.

The affidavit in this case fails altogether to state the date and time of the occurrences and as a result, is insufficient to establish probable cause. *See Winborne*, 273 S.C. at 63, 254 S.E.2d at 298. The first allegation was the only part of the affidavit that pertained to alleged drug-related activity at the residence. Considering the first controlled buy occurred seven months prior to law enforcement obtaining a search warrant, it was very unlikely that the alleged evidence would still be in the residence. (R. 21). Further, the type of incriminating items that law enforcement was attempting to recover would be considered highly incriminating and consumable, making it less likely to remain in the residence during that lengthy period of time. *See State v. Corns*, 310 S.C. 546, 550-51, 426 S.E.2d 324, 326 (Ct. App. 1992). Notably, Detective Ard was unable to detect another buy from inside the residence despite his extensive investigation into Gore's alleged drug activity. (R. 40, lines 21-24). In fact, the State admits that the first drug transaction referenced in the affidavit would not have provided probable cause to

search the residence. (Return to Pet. for Writ of Cert. at 15.) As such, this allegation should not have even been included in the affidavit as it had become **stale** and was far removed from the date the affidavit was executed.

On the other hand, the State argues that the second drug transaction referenced in the affidavit would have been enough to establish probable cause because "it indicated that Petitioner left the residence and **immediately thereafter** conducted a monitored drug transaction." (Return to Pet. for Writ of Cert. at 13.) The drug transaction did not occur immediately upon Gore leaving the residence. (R. 21.) Rather, Gore entered his vehicle and travelled a considerable distance to a lot away from the residence. (*Id.*) There was no established connection between the residence and drug activity. Furthermore, the officers never alleged or proved at the time that affidavit was executed that Gore resided at the residence. *See United States v. Rowland*, 145 F.3d 1194, 1204 (10th Cir. 1998) ("[P]robable cause to search a person's residence does not arise based solely upon probable cause that the person is guilty of a crime. Instead, there must be additional evidence linking the person's home to the suspected criminal activity."); *Sowers v. Commonwealth*, 643 S.E.2d 506, 510 (Va. Ct. App. 2007) ("A *factual* nexus must connect the illegal activity to the place to be searched; otherwise police would have unfettered discretion to avow that criminals often keep contraband at home and then search the home of every suspect."); *State v. Graham*, 103 P.3d 1073, 1080 (Mont. 2004) ("[T]here were no facts included in the application for search warrant that implicated [the defendant's] home. Common sense, practical considerations and probabilities are not, therefore, enough."); *State v. Thein*, 977 P.2d 582, 590 (Wash. 1999) (holding that a "generalized conclusion that drug dealers are likely to keep evidence of illegal drug dealing in their homes" is insufficient to establish probable cause to search a person's residence). Simply connecting a

person to a home does not necessarily connect the home to the drugs. There were two separate drug transactions referenced in the search warrant affidavit. The only transaction that occurred at the residence to be searched was the first transaction. That transaction had taken place seven months prior to the execution of the affidavit. The second drug transaction, which took place three days before execution of the affidavit, occurred in a lot away from the residence. Considering the buy at the residence occurred nearly seven months prior to the execution of the warrant, the remaining allegation did not establish *any* connection between the residence and any alleged drug activity.

Therefore, the Court of Appeals erred in holding that the warrant was supported by probable cause and Gore was entitled suppression of the evidence seized as a result of the invalid search warrant.

III. The Court of Appeals erred in holding that the trial court properly refused to charge the lesser-included offense of simple possession.

The testimony revealed that cocaine residue was found in the guest bedroom of the residence under the mattress. (R. 95, lines 6-15). The larger amount of cocaine was found in the master bedroom. (R. 67, lines 2-7). Since Gore's primary argument was that the residence belonged to his girlfriend, Angel Deangelo, a jury could have determined that Gore only came to the residence as a *guest* and had constructive possession over items in the guest bedroom. In that circumstance, the jury would have found that Gore possessed less than the minimum amount required for the trafficking charge. *See State v. Tucker*, 324 S.C. 155, 170, 478 S.E.2d 260, 268 (1996) ("The trial court should refuse to charge on a lesser-included offense where there is no evidence that the defendant committed the lesser rather than the greater offense."). Instead, the trial court simply dismissed Gore's request for the simple possession charge, inferring that the jury could find Gore not guilty of the charged offense if they believed he was guilty of some

lesser amount. (R. 197, line 24-198, line 17.) However, the jury could have felt that it had to convict Gore based on the trace amount of cocaine located in the guest bedroom because it indicates he was involved in drug activity. *See Spaziano v. Florida*, 468 U.S. 447, 455 (1984) ("The absence of a lesser included offense instruction increases the risk that the jury will convict . . . simply to avoid setting the defendant free."). Under that circumstance, it is unlikely that the jury would have believed that the best option was a not guilty verdict.

As set forth in Gore's petition, the evidence presented at trial indicated that Deangelo resided at the residence. (Pet. for Writ of Cert. at 5-6, 22-23.) However, the State argues that the evidence "overwhelmingly" established that Gore resided at the residence. (Return to Pet. for Writ of Cert. at 19-20.) First, the State alleges that officers obtained a key to the residence from Gore when he was arrested and Gore's vehicles were located at the residence. When officers conducted a traffic stop on Gore, they took the keys associated with the vehicle Gore was driving. (R. 56, line 17-60, line 6.) Officers did not verify whether the vehicle was owned by or registered to Gore so it is unclear to whom the keys or the vehicle actually belonged. (R. 59, line 16-60, line 6; R. 110, line 25-111, line 4.) Second, the State asserts that officers testified Gore resided at the residence. Detective Donald admitted that he had no documentation such as a lease agreement, title or invoice which connected Gore to the residence. (R. 60, lines 7-20.) Detective Ard also could not definitively state that Gore resided at the residence. (R. 110, lines 11-13.) Third, the State claims that the cocaine found in the residence was hidden in the master bedroom in a stack of men's clothes. However, the clothes were not taken into evidence and were not measured to determine whether or not they could belong to Gore. (R. 73, line 19-74, line 11.) Fourth, the State argues that the address Gore listed on his bond documents showed he resided at the residence. There was no evidence that Gore actually listed this addressed on the

bond form. (R. 166, lines 5-16; R. 192, lines 7-10.) Furthermore, the State fails to mention that Gore's ten-year driving record never listed the residence as an address associated with Gore. (R. 59, lines 4-10.) Rather, it indicated that he lived at a different address in Little River, South Carolina. (R. p. 58, line 22-24.) Finally, the State states there was no evidence that Gore stayed in the guest bedroom, largely relying on the fact that it was described as a child's bedroom by Detective Cooper. Notably, Detective Cooper could not identify anything in the photographs taken of the guest bedroom that would support his characterization of it as a child's bedroom. (R. 94 line 17-95, line 4.)

Additionally, the State argues that because Gore "presented no 'evidence' that he was not a resident of the house," but only "presented cross-examination attempting to insinuate that he did not live there," he was not entitled to a lesser-included offense instruction for simple possession. In making such an argument, the State is attempting to shift the burden to Gore to establish that he is not guilty of the trafficking offense. It is not Gore's burden to prove that he was not a resident of the residence. That burden rested solely with the State. *See State v. Schrock*, 283 S.C. 129, 133, 322 S.E.2d 450, 452 (1984) (stating the State has the burden of proving "the accused was at the scene of the crime when it happened and that he committed the criminal act"). For the State to attempt to shift the burden to Gore is completely contrary to the well-established law of this State. Furthermore, testimony is evidence and Gore was able, through cross-examination, to illicit testimony that established his girlfriend, Angel Deangelo, resided at the residence. Gore also questioned Detective Donald regarding his driving record to establish that he did not reside at the residence. (R. 58, line 13-59, line 10.) As Gore argued in his petition, the evidence indicated that Deangelo, rather than Gore, resided at the residence. (Pet. for Writ of Cert. at 5-6, 22-23.)

Therefore, since there was evidence establishing the lesser-included offense of simple possession, Gore was entitled to a jury charge. *See State v. Cottrell*, 376 S.C. 260, 262, 657 S.E.2d 451, 452 (2008). Furthermore, this issue should be heard by this Court as it raises substantial constitutional concerns and the decision of the Court of Appeals conflicts not only with well-established case law of this Court but that of the United States Supreme Court.

CONCLUSION

For all the foregoing reasons, Petitioner, Alton Wesley Gore, respectfully requests that his petition for writ of certiorari be granted and this case be heard on the merits.

Respectfully Submitted,

By: Nicole Mace
Attorney for Petitioner

Nicole N. Mace, Esq.
Amy K. Raffaldt, Esq.
The Mace Firm
1341 44th Ave. N., Ste. 205
Myrtle Beach, SC 29577
(843) 839-2900

September 29, 2014

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM HORRY COUNTY
Court of General Sessions

The Honorable Edward B. Cottingham, Sr., Circuit Court Judge

Appellate Case No.: 2014-001496
Opinion No.: 5214 (S.C. Ct. App. filed April 2, 2014)

The State, Respondent,

v.

Alton Wesley Gore Jr., Petitioner.

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that on September 29, 2014, a true copy of the Reply to Respondent's Return to Petition for Writ of Certiorari in the above referenced case has been served upon:

Christina Catoe
Assistant Attorney General
P.O. Box 11549
Columbia, SC 29211

Nicole Mace

Nicole N. Mace, Esq.
Amy K. Raffaldt, Esq.
The Mace Firm
1341 44th Avenue North, Suite 205
Myrtle Beach, SC 29577
843.839.2900 Telephone
843.839.2913 Fax