

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Alison R. Lee, Circuit Court Judge

Appellate Case No. 2014-001070
Case No. 2010-CP-40-03299

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NOV 20 2014

S.C. Supreme Court

Tynyasha Horton Petitioner,

v.

The City of Columbia Police Department Respondent.

BRIEF OF RESPONDENT

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QUESTION PRESENTED

- I. Did the Court of Appeals correctly affirm the grant of summary judgment in favor of the City when the Petitioner failed to establish her entitlement to a Franks hearing and the arrest warrants established probable cause as a matter of law?

STATEMENT OF THE CASE

The Statement of the Case submitted by the Petitioner is adequate for purposes of this Brief of Respondent.

STATEMENT OF FACTS

The facts set forth in the Brief of Petitioner are largely sufficient to rely upon for purposes of the issue(s) before this Court, with the following additions and clarifications.

On the day of the summary judgment hearing, counsel for Ms. Horton produced the July 26, 2010, letter from Agent Albert Smith to both the Court and defense counsel for the first time. The unsworn statement was in letter form, without addressee, and not in compliance with Rule 56, SCRCR. (R. p. 7). This letter contained one sentence regarding Agent Smith's thoughts on the matter of Ms. Horton's capacity to commit the crimes alleged. "I informed Investigator Tyler that Mrs. Horton was the mother of a newborn baby and that she has recently had issues with transportation." (R. p. 210). Beyond that one sentence, there is no additional illustration of Agent Smith's "personal reservations" about Ms. Horton's guilt and certainly nothing in affidavit form. Any representation otherwise, as "fact" or evidence, is simply not supported by the record.

ARGUMENT

I. THE COURT OF APPEALS CORRECTLY AFFIRMED THE GRANT OF SUMMARY JUDGMENT IN FAVOR OF THE CITY ON THE ASSAULT AND BATTERY CLAIM BECAUSE PETITIONER WAS NOT ENTITLED TO A FRANKS HEARING AND THE ARREST WARRANTS ESTABLISH PROBABLE CAUSE AS A MATTER OF LAW.

A facially valid arrest warrant can only be attacked if the party makes “a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit.” Franks v. Delaware, 438 U.S. 154, 155-56 (1978); Miller v. Prince George’s County, 475 F.3d 621, 627 (4th Cir. 2007). The showing must be more than conclusory and must be accompanied by a detailed offer of proof. Franks, 438 U.S. at 171. With regard to alleged omissions in the affidavit, a party must establish that the officer failed to inform the magistrate of facts the officer knew would negate a finding of probable cause. Miller, 475 F.3d at 627. Allegations of negligence or honest mistake are insufficient. Id. at 627-28. If a Franks hearing is required and an affiant’s material perjury or recklessness is established by a preponderance of the evidence, and with the false material set aside the remaining content is insufficient to constitute probable cause, the warrant must be voided. Franks, 438 U.S. at 156.

The Court of Appeals correctly noted that a Franks hearing may be required for an alleged omission if the omitted information is done intentionally or in reckless disregard for whether it makes the affidavit misleading. State v. Missouri, 337 S.C. 548, 554, 524 S.E.2d 394, 397 (1999). However, Missouri also holds that there is no Franks violation if the affidavit still contains sufficient information to establish probable cause when the omitted information is included. Id.

There is no dispute that this case revolves around the omission of information in an affidavit used to obtain an arrest warrant, rather than any misstatement contained therein. The Fourth Circuit Court of Appeals discussed omissions from such an affidavit in United States v. Colkley, 899 F.2d 297 (4th Cir. 1990). “The Franks test also applies when affiants omit material facts ‘with the intent to make, or in reckless disregard of whether they thereby made, the affidavit misleading’ United States v. Reivich, 793 F.2d 957, 961 (8th Cir. 1986)” Colkley, 899 F.2d at 300.

The Colkley decision discussed the distinction between basic intent and a more specific intent to mislead the magistrate, holding:

[E]very decision not to include certain information in the affidavit is ‘intentional’ insofar as it is made knowingly. If, as the district court held, this type of ‘intentional’ omission is all that *Franks* requires, the *Franks* intent prerequisite would be satisfied in almost every case. *Franks* clearly requires defendants to allege more than ‘intentional’ omission in this weak sense. ‘The mere fact that the affiant did not list every conceivable conclusion does not taint the validity of the affidavit.’ United States v. Burnes, 816 F.2d 1354, 1358 (9th Cir. 1987). *Franks* protects against omissions that are *designed to mislead*, or that are made in *reckless disregard of whether they would mislead*, the magistrate. See Reivich, 793 F.2d at 961. To obtain a *Franks* hearing the defendant must show that the omission is the product of a ‘deliberate falsehood or of reckless disregard for the truth.’ *Franks*, 438 U.S. at 171.

In following the Fourth Circuit’s discussion in Colkley, the Court of Appeals recognizes that the Franks requirement of intent cannot be met merely by relying on the weakest sense of intent. The Court of Appeals correctly deduced that inferring bad motives from an officer’s omission “collapses into a single inquiry the two elements – ‘intentionality’ and ‘materiality’ – which Franks states are independently necessary.” Colkley, 899 F.2d 301. (Appendix p. 7). The two concepts must mean something distinct from each other.

Petitioner attempts to persuade this Court that a more appropriate standard for reviewing this omission is found in Lombardi v. City of El Cajon, 117 F.3d 1117 (9th Cir. 1997). Lombardi rejected the notion that intent to mislead the issuing body was an element on top of the subjective intent required by Franks. Lombardi, 117 F.3d at 1123. But Lombardi still recognizes a similar Franks standard of whether there has been a “substantial showing that the affiant intentionally or recklessly omitted facts required to prevent technically true statements in the affidavit from being misleading.” Id. *Citing United States v. Stanert*, 762 F.2d 775 (9th Cir.), amended by 769 F.2d 1410 (9th Cir. 1985). The Lombardi standard appears to include the element of whether the omitted information has the effect of misleading while not requiring intent to mislead as an element under Franks. But it is not necessary to look beyond the Fourth Circuit and Colkley to find this same analysis, Lombardi simply merges materiality into intent.

Whether the omission affects the outcome of the probable cause determination speaks to the materiality component of the Franks analysis. To be material under Franks, an omission must:

[D]o more than potentially affect the probable cause determination: it must be necessary to the finding of probable cause. For an omission to serve as the basis for a hearing under Franks, it must be such that its inclusion in the affidavit would defeat probable cause for arrest. Omitted information that is potentially relevant but not dispositive is not enough to warrant a Franks hearing.

Colkley, 899 F.2d at 301 (citations omitted).

The statement from Agent Smith says only that he informed Investigator Tyler that Ms. Horton was the mother of a newborn baby and that she recently had issues with transportation. (R. p. 210). It does not say that he contends that it was impossible or even improbable that she committed the robbery. At most, it would suggest only that she

would have had to borrow a car and get a babysitter to do so. Ms. Horton would need to make these same arrangements in order work at a job. There is no evidence in the record that Investigator Tyler believed that there was any question that Ms. Horton had committed the robbery. Based upon the facts as she knew them, an extremely well-trained and experienced crime scene investigator¹ had determined that Ms. Horton's fingerprint matched the latent print from the robbery location. The trial court correctly found that there was no evidence that Investigator Tyler knowingly or recklessly omitted material information to obtain the warrants and there was therefore no basis to invalidate the arrest warrants. (R. p. 8). Although indicating the statement was not to be considered, the trial court did so anyway and found that even if Agent Smith's statement were properly before the Court, it did not involve a material omission. (R. p. 7).

Without any indication that the statements were material and omitted intentionally or in reckless disregard to whether the affidavit was misleading without the omitted information, the Court of Appeals correctly followed the Colkley decision and held that Petitioner wasn't entitled to a Franks hearing and the review turned to the face of the warrant. The Court of Appeals then correctly held that probable cause was established on the face of the warrants and the arrest was lawful. The cause of action for

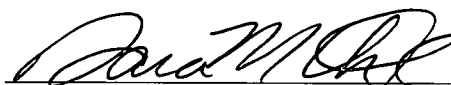
¹ Officer Currie worked in the Crime Scene Unit of the Columbia Police Department for approximately 14 years. (R. pp. 254-5). He received extensive training as a crime scene analyst. (R. p. 255). He successfully completed a one-week course of study entitled "Basic Fingerprints" at the South Carolina Criminal Justice Academy. (Id.). He also completed a two-week advanced fingerprint course taught by the FBI at the Criminal Justice Academy. (Id.). He took courses and received certification in the Automatic Fingerprint Identification System (AFIS) and was a member of the International Association for Identification. (Id.). He also received other training while on the job. (Id.). He has reviewed literally thousands of possible fingerprint matches and, as far as he knows, the Horton fingerprint is the only one that has ever been called into question. (R. p. 257).

assault and battery failed as a matter of law and summary judgment was properly granted in this case.

CONCLUSION

For the reasons stated, the Respondent respectfully submits that the decision of the Court of Appeals should be affirmed.

Respectfully submitted,



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November 20, 2014

THE STATE OF SOUTH CAROLINA
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APPEAL FROM RICHLAND COUNTY
Alison R. Lee, Circuit Court Judge

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Op. No. 5200 (S.C. Ct. App. filed Feb. 26, 2014)

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S.C. Supreme Court

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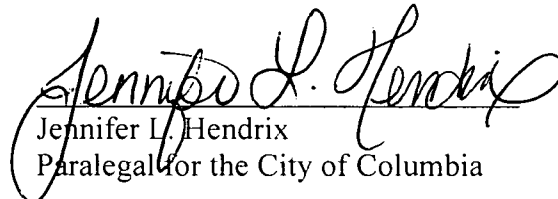
City of Columbia Respondent.

PROOF OF SERVICE

The undersigned hereby certifies that she served copies of *Brief of Respondent* upon the Petitioner by placing it in the United States mail, first class postage prepaid to her attorneys of record at the addresses indicated below on this 20th day of November, 2014:

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November 20, 2014
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November 20, 2014

The Honorable Daniel E. Shearhouse
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S.C. Supreme Court

RE: Tynyasha Horton v. The City of Columbia Police Department
Case No.: 2014-001070

Dear Mr. Shearhouse:

Attached for filing please find the original and seventeen copies of the *Brief of Respondent* along with the *Proof of Service* in the above referenced matter. After filing same, please return the extra clocked copies to the courier of this letter.

By copy of this letter I am serving copies of *Brief of Respondent* on counsel for Petitioner by regular mail.

Sincerely,

Dana M. Thye
Attorney for Respondent

DMT/jlh
Attachments as Stated

cc: John S. Nichols, Esquire
Blake A. Hewitt, Esquire
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