

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

THE STATE,

RESPONDENT,

V.

ANTONIO MILLER,

APPELLANT

APPELLATE CASE NO. 2012-208640

Appeal from Aiken County

Doyet A. Early, III, Circuit Court Judge

Opinion No. 2014-UP-409

PETITION FOR REHEARING

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Pursuant to Rule 221 (a), SCACR, appellant requests rehearing because this Court may have overlooked the fact that the position of the Attorney General's Office at oral argument, that drugs being found in an automobile in the yard of a residence, is sufficient to provide probable cause for a search warrant of that residence is incorrect. What happened at the trial level here, and what was argued on appeal, demonstrates a recklessness with appellant's Fourth Amendment rights in his house, his Castle.

During the argument on suppression of the evidence, Defense Counsel Johnson noted there was no linkage between the crack cocaine located in the automobile, and the residence. The judge

observed “the crack cocaine simply is a basis for getting a search warrant.” R. 110, l. 24 – 111, l. 5. Counsel countered that the law required “a finding of probable cause that some evidence of a crime is located within that location.”

At no point on the search warrant affidavit or anywhere does it say anybody lives at 5520 North Main. It doesn't identify that as anybody's residence . . .

[N]ow, if there's no linkage to 5520, it's impossible to see how a Magistrate, without additional sworn testimony, could discover that there's probable cause to go into 5520 [where they would] locate drugs or some illegal substance or evidence of a crime.

R. 111, l. 22 – 112, l. 10. R. 599.

Counsel further argued “the search warrant affidavit says nothing about anybody going into 5520, coming out of 5520, or living there. And it's impossible - - in my argument, I would say *it's impossible to have that linkage that's required for just basic probable cause.*” R. 113, ll. 3-8. (emphasis added). Counsel also noted **there was no confidential informant saying that anybody was inside the residence or had contraband** which would support a search warrant, and that “it's just a bad search warrant, and basically all the items should be excluded as a result.” R. 113, ll. 9-16.

Defense counsel also noted that the report reflected *Aiken County investigators participated in the search* where three guns and the shoes were discovered and there was no probable cause to believe that fruit of that murder would be found inside and because “they didn't get a special search warrant” for the items involving the murder scene, and they had to be suppressed. R. 113, l. 3 – 114, l. 8.

The solicitor argued that appellant was present in the yard with the rental car. The police wanted to give the rental car back to “the rightful owner, they found these drugs, and things

proceeded from there.” R. 116, ll. 14-23. The “proceeded from there” meant the police had another officer type an affidavit stating that the drugs had been located. R. 599.

Defense counsel repeated there was no confidential informant providing information to the police and the state’s argument was simply if someone was “*arrested and they’re near a car that has drugs in it, well, you can go search that house. And that’s basically what they’re arguing, because there’s nothing left. There’s nothing else in addition to the affidavit.*” R. 117, ll. 1-24. (emphasis added). Again, the Attorney General’s Office bluntly confirmed at oral argument before this Court that drugs being found in an automobile near the house where appellant was arrested was insufficient cause to justify the Magistrate in issuing the search warrant.

The trial judge stated he believed the Magistrate had a substantial basis for concluding probable cause existed to search the residence, and he denied the motion to suppress. R. 117, l. 25 – 118, l. 6. On appeal, in a summary opinion, this Court held that the trial court did not err in denying the motion to suppress because “given all the circumstances set forth in the search warrant affidavit, there was a fair probability evidence of a crime would be found in the residence identified. Thus, the trial court correctly found the magistrate had a substantial basis for concluding probable cause existed to issue the warrant.” State v. Antonio Miller, 2014-UP-409 (November 19, 2014), at p. 2.

The police guessed correctly here that evidence of the Aiken County homicide and drugs would be found inside the North Main Street Columbia residence. However, that *guess* based on the drugs being found in the automobile near the house was insufficient to establish probable cause to search the house.

As one Judge on this Court noted at oral argument: “A person’s house is his Castle,” and it is entitled to great protection absent viable probable cause to search it. “The poorest man may in his cottage bid defiance to all the forces of the Crown. It may be frail; its roof may shake; the wind may

blow through it; the storm may enter; the rain may enter; but the King of England cannot enter—all his force dares not cross the threshold of the ruined tenement!” Miller v. United States, 357 U.S. 301, 307 (1958).

Further, the lack of candor on behalf of law enforcement in this case about the role of Aiken County law enforcement in its homicide investigation in the search of this house on North Main Street in Columbia remains very troublesome. It also appears law enforcement from Aiken County was participating in this case based on a hunch given the GPS indicated the rental car had been in Aiken County earlier where a drug dealer was murdered. The argument nonetheless goes full circle that the drugs found in the rental car did not provide the probable cause for the search of the house.

The defense would repeatedly object to evidence of the shoes that were found inside the residence with blood on them, that the state’s expert, SLED DNA analyst Stephanie Stanley, testified was a match to the decedent’s blood. R. 456, l. 1 – 464, l. 25.

The defense would also repeatedly object to the fruits of the search, or any item bearing any resemblance to it. R. 224, l. 11 – 225, l. 14 (reference to the crack cocaine); R. 260, l. 3 – 261, l. 18 (photographs of 5520 North Main Street); R. 278, ll. 2-14 (purported paraphernalia found in the house); R. 291, l. 14 – 293, l. 9 (the shoes with the blood stain); R. 393, l. 3 – 394, l. 17 (photographs and other evidence about the shoes); R. 477, l. 23 – 479, l. 8 (gun evidence); R. 484, ll. 1-18 (gun evidence); R.490, l. 6 – 491, l. 22 (gun evidence); R. 493, l. 21 – 494, l. 23 (gun evidence); R. 500, l. 18 – 501, l. 8 (gun evidence); R. 501, l. 16 – 502, l. 11 (gun evidence); R. 505, ll. 16-25 (gun evidence).

There was not any of the normal indicia of reliability present in the search warrant affidavit in this case. Completely lacking was any indication that drugs were seen in this house on a recent date, or that drugs were recently sold from this house, or even that appellant was

linked to the house by anything other than the fact that drugs were found in the automobiles in the yard near the house, and appellant had been arrested for drugs in the past.

Instead, the affidavit stated that 22 grams of cocaine were found in the search of the rental car, appellant was arrested, and appellant had been arrested “at on least 12 occasions for illegal narcotics.” The affidavit then alleged that weapons are often found and used in drug cases, and “cellular phones, pagers and hand-held ‘PDA’s’ are commonly used to store phone numbers of other individuals involved in illegal drug activity.” R. 599. Again, there is no allegation in this case that the affidavit was supplemented by oral testimony to the Magistrate, and there was no tie or nexus of appellant to the house other than the fact the vehicle wherein the cocaine was found was parked close to the house.

Appellant respectfully submits that this Court should reconsider its holding that the search warrant in this case was issued upon a finding of probable cause. See State v. Bellamy, 336 S.C. 140, 143, 519 S.E.2d 347, 348 (1999). The duty of the reviewing court to ensure that the issuing Magistrate had a **substantial basis** upon which to conclude that probable cause existed. State v. Adams, 291 S.C. 132, 352 S.E.2d 483 (1987). This determination by the Magistrate, as the Court notes in its summary opinion is governed by the “totality of the circumstances test.” State v. King, 349 S.C. 142, 148, 561 S.E.2d 640, 643 (Ct. App. 2002, *citing* State v. Jones, 342 S.C. 121, 536 S.E.2d 675 (2000).

The affidavit in this case did not set forth particular facts of circumstances underlying the existence of probable cause to allow the Magistrate to make an independent evaluation of the matter. See Franks v. Delaware, 438 U.S. 154 (1978). In this case, as the defense argued there was not a sufficient nexus found between the drugs or weapon found in the car in the yard of the residence, to show there was probable cause to believe that drugs and weapons, or fruits of the

Aiken murder would be found inside the residence. Moreover, the affidavit and search warrant contained conclusory statements that were not supported by a showing of reliability. Mere conclusory statements which give the Magistrate no basis to make the judgment of probable cause are insufficient. State v. Smith, 301 S.C. 371, 373, 392 S.E.2d 182, 183 (1990). There must be a sufficient nexus, described in the affidavit, between the items to be seized and the criminal behavior. State v. McGuinn, 268 S.C. 112, 232 S.E.2d 229 (1977).

The state failed to demonstrate the reliability of any information leading the Magistrate to make an independent determination that fruits of a crime or drugs or weapons would be found inside the residence on North Main Street. See State v. Johnson, 302 S.C. 243, 247-248, 395 S.E.2d 167, 169, 170 (1990); State v. Gentile, 373 S.C. 506, 514-516, 646 S.E.2d 171, 174-176 (Ct. App. 2007).

Finally, counsel also correctly argued under Article I, § 10 of the State Constitution that appellant had the right to privacy under the State Constitution that went above the protections provided by the Fourth Amendment to the United States Constitution. See State v. Forrester, 343 S.C. 637, 541 S.E.2d 837 (2001). This Court did not address that argument in its opinion which is further reason that rehearing should be granted on this important suppression issue in this most unusual case.

The evidence in this case shows that the Aiken County investigators were at the scene of the search. In the final analysis, it is apparent this search was merely a fishing expedition for fruits of the Aiken County murder. A magistrate is not a rubber stamp to be used by law enforcement on the hopes that its hunches and guesses about the contraband, and the fruits of a crime may be turn out correct. The search and seizure in this case was unreasonable under the Fourth Amendment to the

United States Constitution, and it independently violated appellant's right to privacy under the State Constitution. See Article I, § 10, South Carolina Constitution.

Rehearing should be granted.

Respectfully submitted,



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ATTORNEYS FOR APPELLANT

December 1, 2014

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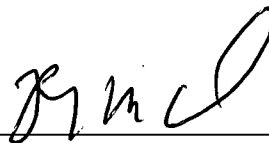
ANTONIO MILLER,

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CERTIFICATE OF SERVICE

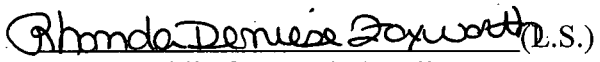
The undersigned attorney hereby certifies that a true copy of the Petition for Rehearing in the above-entitled case has been served upon J. Anthony Mabry, Esquire of the Office of the South Carolina Attorney General, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 1st day of December, 2014.



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

SWORN TO BEFORE ME this 1st day
of December, 2014.

 (L.S.)
Notary Public for South Carolina
My Commission Expires: October 17, 2021