STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Aiken County

Doyet A. Early, III, Circuit Court Judge

Opinion No. 2014-UP-409 (S.C. Ct. App. filed 11/19/2014)
10-GS-02-1526, 1527, 1529, 1578

THE STATE,

RESPONDENT,

V.

ANTONIO MILLER,

PETITIONER

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

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CERTIFICATE OF COUNSEL

Counsel for petitioner certifies that the petition for rehearing was made and finally ruled on by the Court of Appeals on January 26, 2015.

QUESTION PRESENTED

Whether the Court of Appeals erred by affirming the refusal to suppress evidence located within the North Main Street home where the seized cocaine and guns were located in automobiles in the yard of that address, the search warrant affidavit did not provide the Magistrate with a reliable sufficient nexus to provide probable cause that this was petitioner's home, and if it was his house, that he was secreting drugs, weapons, or the fruits of the Aiken murder within that home?

STATEMENT OF FACTS

Procedural history

Petitioner was indicted by the Aiken County Grand Jury for the offenses of murder, kidnapping, burglary in the first degree, and possession of a firearm during the commission of a violent crime. R.602. His case was called to trial on February 14, 2012 before the Honorable Doyet A. Early, III. Ola A. Johnson represented petitioner. Elizabeth B. Young and Kevin Molony were the assistant solicitors. R. 1.

On February 17, 2012, the jury found petitioner guilty on all counts. R. 582, l. 13 – 583, l. 13. Judge Early sentenced petitioner to life imprisonment for murder, life imprisonment for burglary in the first degree, thirty years for kidnapping, and five years imprisonment on the firearm offense. R. 592, l. 23 - 593, l. 20.

The Court of Appeals affirmed in part and vacated in part in The State v. Antonio Miller, 2014-UP-409 (filed November 19, 2014). The Court ruled, pertinent to this petition that the trial court did not err in refusing to suppress the evidence seized from inside the home, but it vacated petitioner's kidnapping conviction. App. 1-3. A petition for rehearing was filed December 1, 2014. App. 4-11. A return to petition for rehearing was filed December 15, 2014. App. 12-50. Rehearing was denied on January 26, 2015. App. 51.

This petition for writ of certiorari follows.

ARGUMENT

The Court of Appeals erred by affirming the refusal to suppress evidence located within a Columbia home where the seized cocaine and guns were located in automobiles in the yard of that address, the search warrant affidavit did not provide the Magistrate with a reliable sufficient nexus to provide probable cause that this was petitioner's home, and if it was his house, was he secreting drugs, weapons, or the fruits of the Aiken murder within that home.

Relevant Facts

Defense counsel filed three separate motions to suppress. The relevant one in this case involved drugs, guns, and counterfeit tennis shoes found within a North Main Street residence in Columbia, South Carolina where a green Taurus rental car, that had not been timely returned, was located. Petitioner asserted the search violated his Fourth Amendment right against unreasonable searches and seizures, and his right to privacy under Article I § 10 of the South Carolina Constitution. See Defendant's exhibits 1-3; Defense exhibit 3 at 1-3. Supp. R. 5. The murder in this case occurred on the morning of September 15, 2008 in Aiken, South Carolina. Co-defendant Cummings was from Aiken. There was evidence the decedent was a rather wealthy drug dealer.

A GPS with a "kill switch" was attached to the rental car, which had been rented by petitioner's girlfriend, Deidre King, in Columbia. On September 15, 2008, Officer Franklin Ham of the Richland County Sheriff's Department was dispatched to U-Save Auto Rentals on Two Notch Road. There, he met manager Jeff Day who informed him that a green Taurus he had rented had not been returned. Day told Ham that the GPS showed the vehicle was in Aiken, South Carolina. He did not want to hit the "kill switch" and disable the vehicle while it was in Aiken. R. 7-9.

The GPS revealed that later in the day the car had returned to Trenholm Road in Columbia. This was shortly after noon. The car was then traced to 5520 North Main Street. R. 12.

In the motion to suppress, defendant's exhibit #3, the defense argued "the search warrant contained insufficient information for the Magistrate to find probable cause to issue the warrant." Motion at p. 2; Supp. R. 6. The motion noted that the police had a report that the stolen car - - a rental car rented by Deidra Miller - - was located at 5520 North Main Street. The affidavit to the search warrant stated that petitioner was arrested for trafficking in crack cocaine when crack cocaine was discovered in the vehicle. The affidavit also said that petitioner had **twelve prior arrests** for illegal narcotics. R. 598.

A search of the North Main residence resulted "in the seizure of weapons that the state alleges to be linked to the scene of the murder [in Aiken] through a ballistics match as well as DNA evidence. The state also recovered shoes that the state alleges to be linked to the crime. The state also alleged that money and crack cocaine seized are from the home of the victim." Supp. R. 5. (Page one of Motion to Suppress, defendant's exhibit #3).

The motion noted that the affidavit failed to "list **any information** about the relevance of the home **at 5520 North Main Street *or* who resided there**." (emphasis added). It alleged the Magistrate could not make a practical, common sense decision of whether, given the totality of the circumstances put forth in the affidavit, including the veracity and basis of knowledge of the person supplying information, that there is a fair probability that contraband or evidence of a crime will be found in a particular place. Supp. R. 6.

Petitioner further argued the affidavit failed to mention *any connection between petitioner and the car where the crack cocaine was located, and the residence at 5520 North Main Street.* It

was undisputed that no additional information outside of the affidavit was presented to the Magistrate. Supp. R. 6.

The motion demonstrated that the police only made conclusory statements in the affidavit for the search warrant. Thus, pursuant to the Fourth Amendment to the United States Constitution, and Article I, § 10 of the South Carolina Constitution, the search was unreasonable and a violation of petitioner's right to privacy. Supp. R. 6.

State's Theory of the Case – an introduction

The state's theory of the case was that petitioner and three other men, including the state's star witness, co-defendant Melvin Cummings, who was from Aiken, targeted the decedent because he was a drug dealer. The state tracked the green Taurus, through the rental car agency, to Aiken at about the time the decedent's house was burglarized, and he was killed. The state essentially asserted it was "luck" that the GPS tracked the green Taurus to Aiken, and back to North Main Street.

Once Cummings and petitioner arrived back in Columbia in the green rental Taurus, they went by Books a Million in Trenholm Plaza where Cumming's girlfriend worked. From there, Cummings got in his girlfriend's red Taurus and eventually made his way to the North Main Street address. Cummings was stopped as he pulled into the North Main Street driveway where the police knew the green Taurus was already located. Cummings was arrested for DUS, and removed from the vehicle. Shortly thereafter, the police found a gun in the red Taurus. Cummings asserted petitioner planted this weapon after he was arrested and while the police were distracted. Crack cocaine was then discovered during search of the green Taurus. During this time, the police only had vague information from a "confidential informant" in Aiken, they knew Cummings was from Aiken, that the decedent had been killed in Aiken around the time the green Taurus was tracked to

Aiken. The police certainly did not have probable cause to believe that petitioner or Cummings were involved in the Aiken murder at the time the cocaine was found inside the rental vehicle, which gave rise to the search warrant for 5520 North Main Street.

The evidence

Deputy Ham testified that Cummings was arrested for driving under suspension when he turned the red Taurus into the yard at 5520 North Main Street where the green rented Taurus was already located. R. 11-15. Ham said petitioner gave him the name "Eric Huey" when asked for his identification. Ham later found out that was false when petitioner's girlfriend arrived in the yard, and told him petitioner's real name. Ham also said petitioner went inside the red Taurus where the police suspected him of planting a gun. Crack cocaine was also found inside the green Taurus after it was searched as well. R. 17.

Richland County Investigator Stephen Dauway testified that on September 15, 2008 he was called to the North Main Street yard after the gun was found inside the red Taurus. R. 22-26. Dauway was asked, on cross-examination during the suppression hearing, if petitioner was free to leave when he arrived at the North Main Street where two vehicles cars were located in the yard. Dauway answered: "When I initially got there, he was free to leave. And as the investigation went on, I found a gun in one car and crack in the other car. At that time, he wasn't free to leave at that time." R. 34, ll. 14-19.

After the crack cocaine was found Dauway acknowledged: "I called some [other] officers. . . and that led to a search warrant." Dauway estimated the green Taurus was about two feet from the residence they wanted to search. R. 36, l. 14 – 37, l. 24.

Narcotics Investigator Marcus Brown was then called to the North Main Street location. He testified: "Dauway called me and stated they were out with a guy who had a large quantity of crack

cocaine and a couple of guns, and they wanted me to see if I could get a search warrant for the residence." R. 36, l. 18 – 37, l. 11.

When Brown heard that Cummings was from Aiken, (as was he), "I texted an informer that I had been using on several occasions that knew Mr. Cummings. And they said that they didn't know him, but did I know that Fred Tucker had been killed this morning [in Aiken]." Brown then asked Cummings about Tucker "and he said Fred was after his cousin." R. 39, ll. 2-13. Brown recalled that Cummings told him he was in Augusta that morning, and petitioner told him that he was in Charleston. R. 39, ll. 16-24.

When the pistol was found inside the red Taurus, Brown thought petitioner actually planted it there "because we observed him in the back seat." R. 41, ll. 1-10. Cummings denied the weapon was his and told Brown "he had no idea how it got into the back seat, the other weapon, and he stated it had to be Antonio Miller's weapon." R. 41, ll. 16-21.

Brown testified he told petitioner at the time that "it's kind of messed up that you're putting this other gun in here on your friend when it's pretty obvious that the gun belonged to you." R. 42, ll. 5-22. Petitioner told Brown he was worried about picking up his child at school while all of this was transpiring. Brown responded that they could call his wife or "*we'll call DSS to take control of the child* until we get the situation taken care of." R. 42, l. 23 – 43, l. 7. (emphasis added). It was at that time, Brown acknowledged, petitioner agreed to talk to him. R. 43, ll. 8-11.

Brown maintained he read petitioner his Miranda[1] warnings and petitioner admitted he placed the gun in the back seat "of the vehicle while the officer's attention was diverted." When Brown asked petitioner about the crack cocaine in the green rented Taurus, he said petitioner

[1] Miranda v. Arizona, 384 U.S. 436 (1966)

responded: "Yes, it's mine, too. And that's when I told him at that time that he was being placed under arrest. And someone placed handcuffs on him." R. 46, ll. 17-25.

Petitioner was charged for possession of the drugs and the weapon. Brown said he had learned that Melvin Cummings was a person of interest in the Aiken County murder earlier that day. R. 46, l. 17 – 47, l. 20.

Brown remembered that Deidre King or Deidre Miller returned to the scene in the North Main Street yard where the Tauruses were located. Brown said Ms. Miller had outstanding arrest warrants. He told Manager Day of the rental car lot that as soon as they finished processing the scene, they would return the green Taurus.

Brown recalled: "At that time, a call was made to Richland County Investigator Robert Crane, and I asked him was he still at the office. And I asked him if he would type a search warrant for me." R. 49, ll. 8-18. Brown identified the search warrant and affidavit that Crane signed for him. R. 50, ll. 13-15. Forty-five minutes to an hour later, Crane returned with the search warrant signed by the Magistrate, "and then we made entry into the residence." R. 51, ll. 2-17.

Brown testified that crack cocaine was found in the master bedroom dresser drawer "and some weapons were found in the closet." R. 51, ll. 20-24. Two other weapons were found inside the residence and Brown remembered there appeared to be blood on one of the weapons and blood on some tennis shoes inside the residence. R. 52, ll. 2-14.

Brown told petitioner: "If you don't tell us about the drugs," that he was going to "*charge you and your wife with trafficking in crack cocaine and weapons charges* because it was in the master bedroom." Petitioner stated: "Okay, I'll claim it." Brown maintained another investigator told petitioner he could not just "claim it," and then petitioner stated "that the drugs found in the top

dresser drawer and the guns found in the closet" belonged to him. R. 53, ll. 2-16. Three guns were found in the residence as a result of the search. R. 61, ll. 15-20.

Investigator Crane acknowledged that he drafted the search warrant for 5520 North Main Street on September 15, 2008 as requested. Crane said he "ran" petitioner's criminal history and discovered petitioner had "at least twelve occasions for illegal narcotics," and therefore he swore out the search warrant affidavit before Judge Cuff. Crane took the search warrant to 5520 North Main Street and gave it to Investigator Marcus Brown. R. 64, l. 14 – 65, l. 12.

On cross-examination Crane admitted the search warrant ***did not state*** who lived at 5520 North Main Street, nor did it contain ***any information about petitioner ever entering that house.*** R. 65, l. 22 – 66, l. 5. The following occurred on cross-examination of Crane:

> Mr. Johnson: Is there any information about confidential informants saying that drugs are being sold out of 5520 North Main Street or the presence of illegal drugs within that location?
>
> Mr. Crane: No. sir.
>
> Mr. Johnson: Was the Magistrate informed of any connection all through that search warrant between Antonio Miller or Ms. Miller and that location?
>
> Mr. Crane: Just like the affidavit said, that Mr. Miller, the vehicle he had rented, was at the residence, you know, in the yard of the location.
>
> Mr. Johnson: Is that what it says?
>
> Mr. Crane: It says that the GPS tracking unit put the green Taurus or the said vehicle at 5520 North Main Street.
>
> Mr. Johnson: Does it say that, or does it say to be in the 5520 Main Street area?
>
> Mr. Crane: Deputies responded and observed the said vehicle parked in front of the location, the incident location.

Mr. Johnson: Where are you at?

Mr. Crane: I'm on the third line from the bottom, or second line from the bottom. Deputies respond to location and observed the said vehicle parked in front of the incident location. And upon approaching the said vehicle, deputies made contact with Mr. Miller.

Mr. Johnson: Okay. **And it says nothing about Mr. Miller being inside of the vehicle or being inside of the location, correct?**

Mr. Crane: That's correct.

Mr. Johnson: Or Ms. Miller, or Deidre King, as she was known?

Mr. Crane: That's correct.

R. 66, l. 6 – 67, l. 14. (emphasis added).

Investigator Taima Jordan testified that petitioner said he would claim the drugs and weapons found inside the house. Jordan said he told petitioner that "was not sufficient," and that that "he and his wife both would be charged with those items." In the face of this threat, petitioner admitted "they're mine." Petitioner was then taken to headquarters where he refused to provide a written statement confirming his verbal admission. R. 77, ll. 9-24.

Investigator Antony Branham remembered helping with the search warrant and finding a pair of counterfeit Nikes with blood on the inside. R. 84, l. 12 – 85, l. 14. *Aiken County Investigator Jack Sanders assisted in the search of the residence.* He testified "the tread pattern on these shoes looks similar to the ones we found on the [Aiken County Murder] scene." R. 95, l. 6 – 97, l. 13.

Argument on Suppression

During the argument on suppression of the evidence, defense counsel noted there was "no linkage between that crack cocaine and Fred Tucker's [the Aiken murder victim's] house." The judge observed "the crack cocaine simply is a basis for getting a search warrant." R. 110, l. 24 –

111, l. 5. Defense Counsel Johnson responded 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.
>
> It also doesn't say anything about Mr. Miller or Ms. Miller entering the green Taurus, which is the breach of trust vehicle, I believe, where they found the suspected crack cocaine.
>
> Now, 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 [they would] locate drugs or some illegal substance or evidence of a crime.

R. 111, l. 22 – 112, l. 10.

Defense counsel 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). Defense counsel 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 told the judge 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. (emphasis added).

The solicitor argued that petitioner 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.

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).

The judge stated that he believed the Magistrate had a substantial basis for concluding probable cause existed to search the residence, and denied the motion to suppress. R. 117, l. 25 – 118, l. 6.

Repeated trial objections to the fruit of the search

The defense repeatedly objected to evidence of the shoes found inside the residence with blood on them, which SLED DNA analyst Stephanie Stanley, testified was a match to the Aiken 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).

Melvin Cummings was allowed to plead guilty to involuntary manslaughter,[2] armed robbery, and possession of a weapon during a violent crime for his role as the driver in the death of the decedent. He received a twenty-year prison term even though he was originally charged with murder. R. 297, l. 22 – 298, l. 3.

Cummings strikes a deal – claims Petitioner was involved

Cummings maintained he was involved in the decedent's murder in Aiken with petitioner, Marquise Redfield, and Ronald Grooms. R. 298, l. 25 – 299, l. 4. Cummings was living on Fairfield Road in Columbia on September 15, 2008 while petitioner was living on North Main Street at the time of the Aiken crime. R. 299, ll. 17-22. Cummings said the men began talking about the robbery of the decedent drug dealer "a couple of months before it happened." R. 299, l. 23 – 300, l. 1.

Over an objection, and a motion for a mistrial, Cummings claimed petitioner said he knew the decedent because they had done time in the federal prison system together. R. 301, 19 – 303, l. 21.

Cummings told the jury that on the day of the robbery he parked in an Aiken cemetery and fell asleep. The other men, including petitioner, were all dressed in black, and returned to the green Taurus after walking somewhere. They drove to the decedent's house, and Cummings maintained that petitioner knocked on the decedent's door but no one answered. He claimed petitioner stated: "We're not going back empty-handed." Cummings claimed that the other men got out of the car, and he drove to a nearby neighbor's, "Mrs. Jennifer's house." Cummings said as he was knocking on her door "I heard a shot." R. 308, l. 16 – 311, l. 13.

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[2] Such is sometimes characterized as a "country ham" or a "Baby Ruth."

Cummings maintained he saw co-defendant Grooms shoot out the back window of the house, and then: "I went and got back in the car. And as I was pulling off, Mrs. Glover came out the back door and flagged me down. I backed up, got out of the car, and we started talking about the cars that was in her front yard. While me and her was talking about the cars that was in her yard we heard gunshots, me and Mrs. Glover heard a gunshot. I heard someone yell. I didn't know who was yelling or anything, but I heard someone yell. I got in the car and I pulled off. I rode around for a little while trying to figure out what was going on." R. 308, l. 16 – 311, l. 25.

Cummings said he saw petitioner, Redfield, and Grooms running through the bushes and they jumped into the green Taurus. Cummings claimed petitioner said: "Drive, drive, mother fucker, drive, drive. So I pulled off, you know." R. 312, ll. 1-14.

Cummings testified that he drove the men back to Columbia, and they went by the Books A Million on Trenholm Road where his fiancé worked. R. 314, l. 11 – 315, l. 7. Once they left the book store, Cummings got into his girlfriend's **red Taurus** and they went to lunch at Wendy's. Petitioner and the other men followed him in the **green Ford Taurus**. Petitioner told Cummings to come by his North Main house so he could go with him to return the green Taurus rental car. R. 315, l. 1 – 317, l. 4.

As Cummings entered the driveway at 5520 North Main Street, "Richland County pulled in behind me. Miller, Redfield, and some other guy was sitting on the back porch." Cummings said the deputy asked him "Where was Antonio Miller?" and asked for his ID. Cummings was arrested for DUS. R. 316, l. 1 – 317, l. 22.

Cummings maintained that while he was talking with police, petitioner got into the red Taurus and a police officer later told him they had found a gun in the red Taurus. Cummings protested that the gun did not belong to him. He said petitioner admitted putting the gun in his red

Taurus and he said petitioner told the police "that the guns and the drugs and everything was his." R. 318, l. 19 – 320, l. 19.

Cummings claimed the men had targeted the decedent's house for a robbery and drove by it Friday, Saturday and Sunday before the Monday burglary and armed robbery which ended in the decedent being murdered. R. 321, ll. 18-23.

Narcotics agent Stephen Dauway and Brown essentially recounted their suppression hearing testimony about finding the cocaine and gun in the green Taurus, red Taurus, and obtaining the search warrant for the residence, resulting in the discovery of the evidence. R. 196 – 220; R. 224.

Court of Appeals

The Court of Appeals held, in a summary opinion, that there was probable cause to issue the search warrant for the house, because "there was a fair probability evidence of a crime would be found in the residence identified." App. 2.

Rehearing

Petitioner continued to argue on rehearing that the fact drugs and a gun were found in a vehicle in the yard of a residence did not of itself establish probable cause for a warrant to search the residence. The state's position at oral argument that contraband being found in a vehicle in the yard **automatically** established probable cause to search the house demonstrated a "recklessness with [petitioner's] Fourth Amendment rights in his house, his Castle." App. 4; app. 5-10.

Petitioner showed the Court that

> 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).

Petition for rehearing at 5-6.

Discussion

The state, at oral argument, contended contraband being found in a car (owner of car unknown), in a citizen's yard automatically justifies the issuance of a search warrant for the citizen's house. This is reckless and dangerous. There was nothing before the issuing Magistrate that established a proper nexus between the vehicle in which the contraband was located, and the house. In fact, there was no nexus established between petitioner and the house:

DESCRIPTION OF PREMISES (PERSON, PLACE OR THING)
TO BE SEARCHED

The location to be searched at (redacted) St. The location is described as a single story single family dwelling that is white in color with white in color front porch, and black in color shutters. The location has a brick foundation that is painted gray. The location has cement steps leading to the front door. The numbers 5520 appear over the front door. The search is to include all persons at the premise, vehicles owned or operated by persons at the premise and outbuilding on the curtilage.

REASON FOR AFFIANT'S BELIEF THAT THE
PROPERTY SOUGHT IS ON THE SUBJECT PREMISES

On September 15, 2008 U-Save Auto rentals notified the Richland County Sheriff's Department that they had a 2006 Ford Taurus SC tag 2903CF that was rented by Deidra Miller and it had not been returned. An incident report was taken RCSD case number 08091449-15. During the course of the investigation U-Save advised that they had a GPS tracking unit on the said vehicle. U-Save advised Richland County Sheriff's Department that the vehicle appeared to be in the 5520 Main St. area. Deputies responded to the location and observed the said vehicle parked in front of the incident location. Upon approaching the said vehicle Deputies made contact with Antonio Miller, who was placed into investigative detention.

Moments later Deidra Miller arrived on the location and was placed under arrest for Use of motor vehicle without owners consent. A search of the vehicle prior to giving the vehicle back to U-Save

> rentals **revealed approximately 22 grams of an off white rocklike substance that field tested positive for cocaine. At that time Antonio Miller was placed under arrest for trafficking crack cocaine.** Also a search of Antonio Miller's criminal history revealed that **he had been arrested on at least 12 occasions for illegal narcotics. Based on the totality of the circumstances the affiant believes that additional narcotics will be recovered from inside of the location to be searched.** Through the affiant's and other Richland County Sheriff's Department Narcotic officers experience in drug enforcement, it is known that subjects present at the scene of illegal drug distribution and/or possession commonly have drugs in their possession and control or stored in their vehicles. Through the Affiant's and other RCSD Narcotic officer's experience in drug investigation and enforcement, it is known that there is a common connection between drug activity and weapons. Those engaged in illegal drug activity often carry or have weapons ranging from razors to firearms for protection of themselves and their drugs. Additionally, through the Affiant's and other RCSD Narcotics experience in drug investigation and drug enforcement, it is known that persons located in and around a drug sales location commonly carry drugs and/or weapons concealed on their person. Even those not directly selling illegal drugs are used to conceal or hold illegal drugs for those engaged in selling them. It is also known through the Affiant's experience in drug investigation and enforcement that vehicles owned or operated by those present at drug sales locations are commonly used to transport and store illegal drugs and that **illegal drugs are commonly stored in and around outbuildings within the curtilage of illegal drug sales locations.**
> Through the Affiant's and other RCSD Narcotic Officers experience in drug investigation and enforcement, it is known that cellular phones, pagers and hand-held "PDA's" are commonly used to store phone numbers of other individuals involved in illegal drug activities.

R. p. 598-599. (emphasis added).

Again in this case, it is undisputed the affidavit **was not supplemented by any oral testimony** from investigator Crane or otherwise. See, e.g. State v. Sachs, 264 S.C. 541, 216 S.E.2d 501 (1975). This was it. There was nothing in this affidavit tying petitioner to residence. Drugs and a gun were found in the rental car. The state's strongest assertion, although very weak, was that, allegedly, "illegal drugs are commonly stored in and around **outbuildings** within the curtilage

of illegal drug sales locations." R. 598-599. (emphasis added). The house, whoever's house it was, was not an **outbuilding.**[3]

Further, there is no allegation in the affidavit to support the assertion that this was an "illegal drug sales location." The rental car was traced to this location, and drugs were found inside it. Illegal drugs are often found inside rental cars, it does not establish probable cause to search whatever house or building is close to the rental car.

A search warrant may only issue upon a finding of probable cause. 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). The determination by the Magistrate 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).

In South Carolina, search warrants may only be issued "upon affidavits sworn to before the Magistrate . . . establishing the grounds for the warrant." S.C. Code § 17-13-140 (2003); See also, State v. McKnight, 291 S.C. 110, 352 S.E.2d 471 (1987). The affidavit **must set forth particular facts of circumstances underlying the existence of probable cause** to allow the Magistrate to make an independent evaluation of the matter. Franks v. Delaware, 438 U.S. 154 (1978).

The defense argued that 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. Further, the defense argued there was no showing tying the residence to petitioner even if there was such a

[3] An outbuilding is "a building separate from but associated with a main building." American Heritage Dictionary (2d Ed) at p. 881.

nexus between the weapons and drugs found in the car and 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). In Smith, the Court held the affidavit defective because it contained no facts as to **why the police believed Smith robbed the Master Host Inn**. Rather the search warrant affidavit contained a conclusory statement that Smith had robbed the Inn. See, also, State v. Baccus, 367 S.C. 41, 52, 625 S.E.2d 216, 222 (2006).

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). As defense counsel argued in this case, 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).

In sum, the affidavit did not reveal probable cause to believe that weapons, drugs, or fruits of the Aiken murder would be found inside the residence **even if it was tied to petitioner**. Further, *there was no proof of the reliability of the scant information* that was provided. Moreover, the affidavit and search warrant were defective because they were grounded in conclusory language.

The evidence seized from the North Main Street residence should have been suppressed. See Wong Sun v. United States, 371 U.S. 471 (1963). Finally, defense counsel also correctly argued under Article I, § 10 of the State Constitution that petitioner 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). Although Forrester is the only case petitioner is aware of where relief was granted under this state Constitutional provision, it is elementary that the state constitutional provided petitioner additional protection.

The state's position that drugs being found in a vehicle in the yard of some person's home is sufficient to provide probable cause to search whoever's home the yard is adjacent to is incorrect. While there are case law changes from time to time on Fourth Amendment searches, as one Judge on the Court of Appeals 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 dare not cross the threshold of the ruined tenement!" Miller v. United States, 357 U.S. 301, 307 (1958).

The evidence in this case shows that the Aiken County investigators were at the scene of the search. This was merely a fishing expedition for them. The drugs found inside the rental car did not provide probable cause to search the residence adjacent to it without some allegation in the affidavit showing it was petitioner's residence, and **why police** believed drugs and weapons would be found inside the house. State v. Smith, 301 S.C. 371, 373, 392 S.E.2d 182, 183 (1990). Petitioner was the target in this case, and a nexus between Petitioner and the house to be searched being averred to in the affidavit was therefore indispensable. Yet it was totally lacking here.

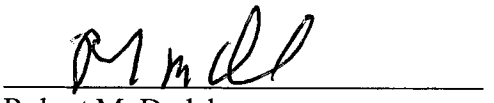
The search and seizure in this case was unreasonable under the Fourth Amendment to the United States Constitution for all of the reasons argued above. The search violated petitioner's

rights under the Fourth Amendment to the United States Constitution. It also independently violated petitioner's right to privacy under the State Constitution. See Article I, § 10, South Carolina Constitution.

CONCLUSION

By reason of the foregoing arguments, a writ of certiorari should be issued to allow full briefing on these issues.

Respectfully submitted,



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR PETITIONER.

This 25th day of February, 2015

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

RECEIVED
FEB 25 2015
SC Court of Appeals

Certiorari to Aiken County
Doyet A. Early, III, Circuit Court Judge

Opinion No. 2014-UP-409 (S.C. Ct. App. filed 11/19/2014)
10-GS-02-1526, 1527, 1529, 1578

THE STATE,

RESPONDENT,

V.

ANTONIO MILLER,

PETITIONER

CERTIFICATE OF SERVICE

I certify that a true copy of the petition for writ of certiorari and a copy of the appendix, in this case has been served on J. Anthony Mabry, Esquire, Office of the Attorney General, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and upon the S.C. Court of Appeals this 25th day of February, 2015.

Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 25th day
of February, 2015.

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

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Robert M. Dudek, Chief Appellate Defender
Wanda H. Carter, Deputy Chief Appellate Defender

February 25, 2015

J. Anthony Mabry, Esquire
Assistant Attorney General
Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211

Re: The State v. Antonio Miller

Dear Anthony:

Enclosed are two copies of the petition for writ of certiorari and the appendix in the above case that I filed with the S.C. Supreme Court today.

If you have any questions concerning this matter, please contact me.

Sincerely,

Robert M. Dudek
Chief Appellate Defender

RMD/rdf

Enclosures

cc: Court of Appeals