THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. 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 BRIEF OF PETITIONER ALTON WESLEY GORE, JR.

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ARGUMENT

I. The Court of Appeals erred in holding that the admission of the prejudicial photographs depicting Gore holding up a large amount of United States currency 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. (App. 80, line 1-82, line 25; App. 243-43). 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).

In its Brief of Respondent, the State argues that the photographs were relevant because it was evidence that Gore lived at the residence. (Br. of Resp't at 4). However, there were other non-prejudicial photographs of Gore located at the residence that the State could have utilized at trial. (App. 68, lines 12-19; App. 109, line 23-110, line 4). Introducing the prejudicial photographs was unnecessary and cumulative. 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. *See State v. Barnes*, 790 So.2d 651, 655 (La. Ct. App. 2001) (finding that photograph depicting the defendant holding money spread into a fan shape in his hand was admitted into evidence was irrelevant and that its probative value was substantially outweighed by its prejudicial effect as it "show[ed] the defendant in a negative light, indicating an association with . . . money . . . which might be considered [an] attribute[] of a drug user."). "[P]hotographs calculated to arouse the sympathy or prejudice of the jury should be excluded if they are irrelevant or not necessary to substantiate material facts or conditions." *State v. Jackson*,

364 S.C. 329, 334, 613 S.E.2d 374, 376 (2005).

The State further argues that the photographs were relevant and admissible because they "corroborated Detective Cooper's **un-objected-to** testimony regarding the particular content of the photographs." (Br. of Resp't 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. (App. 79, line 13-81, line 18). The State also states that trial counsel should have moved to strike Detective Cooper's statement. (Br. of Resp't at 6). The trial court ruled that the photographs that Detective Cooper testified to were admissible. Moving to have Detective Cooper's statement stricken from the record would have been futile. *See State v. Bryant*, 316 S.C. 216, 220, 447 S.E.2d 852, 855 (1994) ("[W]e find that it would have been futile to move to strike testimony which the trial court had already ruled was proper."). The State's argument is without merit.

Alternatively, the State argues that even if the photographs were improperly permitted, the error was harmless because the trial court provided a limiting instruction. (Br. of Resp't at 5). The State did not address the limiting instruction argument in its brief to the Court of Appeals or in its Return to Petition for Writ of Certiorari to this Court. (App. 280-303). Therefore, this argument should be deemed waived. Additionally, as Gore set forth in his brief, *State v. Barnes* is remarkably similar to the instant case. 790 So.2d 651 (La. Ct. App. 2001). In that case, the trial court provided a similar limiting instruction and instructed the jury to consider the photographs as evidence of identity only. *Id.* at 654 n.3. However, the appellate court found that the limiting instruction was not enough to cure the possibility that the photographs raised the connotation in

the minds of the jurors that defendant was a drug user. *Id.* at 656. Since, as in *Barnes*, the photographs in this case had the same high likelihood of raising the negative connotation that Gore was a drug user, their admission cannot be considered harmless error, even despite the limiting instruction.

The State also argues that any error in the admission of the photographs was harmless given the overwhelming evidence of Gore's guilt. (Br, of Resp't at 7). To the contrary, there was a substantial amount of evidence that Gore's girlfriend, Angel Deangelo, resided at the residence. 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 it was undisputed at trial that Gore's mother was the owner of the house and that she permitted Gore to live there. (Br. of Resp't at 7). The only testimony attesting to this fact was that of Ms. Deangelo. The State did not offer anything, besides the testimony of Ms. Deangelo, that Gore's mother was the owner of the house. It was not verified by law enforcement or title records. Ms. Deangelo had reason to fabricate this point and such is not enough to diminish the possibility that Ms. Deangelo lived at the residence.

Second, the State alleges that it is undisputed that Ms. Deangelo had a separate residence in North Carolina and that her lease agreement for that residence was presented at trial. (Br. of Resp't at 7). While true, based on Ms. Deangelo's own testimony, it is also **undisputed** that she resided at the subject residence three or four nights per week. (App. 155, lines 10-14; App. 163, lines 10-14). Detective Kent testified that Deangelo came to the residence while he was executing the search warrant. When Detective Kent told her to leave, Ms. Deangelo adamantly stated that she lived at the residence and refused to leave. (App. 57, lines 12-19). Notably, Deangelo admitted that she made such a statement. (App. 164, lines 23-25). The State's own exhibits tended to

corroborate the fact that Deangelo resided at the subject residence. In particular, State's exhibit fourteen showed Ms. Deangelo's personal effects at the residence. (App. 139, lines 9-11). Furthermore, Ms. Deangelo acknowledged that she had continued staying at the subject residence even **after** her arrest. (App. 146, lines 1-11). In other words, the fact that she was maintaining two premises does not diminish her involvement in drug activity and her connection to the subject residence. Notably, following her arrest, she had asked Gore's trial counsel to represent her child's father on drug charges, indicating her continued involvement in drug activity. (App. 156, lines 6-20).

Third, the State argues that officers obtained a key to the residence from Gore when he was arrested and that Gore's vehicles were located at the residence. (Br. of Resp't at 7). When officers conducted a traffic stop on Gore, they took the keys associated with the vehicle Gore was driving. (App. 58, lines 8-9; App. 91, lines 1-15). 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. (App. 62, line 16-63, line 6; App. 113, line 25-114, line 4). Notably, Detective Donald admitted that it could have been Ms. Deangelo's vehicle. As to the vehicle present at the residence during the search, the State is relying on the testimony of Detective Ard. (App. 110, line 18-111, line 1). At first, Detective Ard testifies that the vehicle is Gore's vehicle, but is not clear as to how he identified the vehicle as belonging to Gore:

> Q: Were there vehicles in the attached garage at the home?
>
> A: Yes, ma'am. I believe there was another vehicle in the attached garage.
>
> Q: Did you run the license and registration of that vehicle?
>
> A: I don't remember if I ran—we did run the license and registration on the vehicle.

Q: Who did it come back to?

A: If I'm not mistaken, it was Mr. Gore or they were known to us to be Mr. Gore's vehicles.

(*Id.*) Reviewing the record, it is not clear whether he knew it was Gore's vehicle at all. Moreover, the State did not introduce any registration information on the vehicle indicating that it belonged to Gore.

Fourth, the State argues that officers concluded, based on their observations, that Gore resided at the residence. (Br. of Resp't at 7). Detective Donald admitted that he had no documentation such as a lease agreement, title or invoice which connected Gore to the residence. (App. 63, lines 7-20). Detective Ard also could not definitively state that Gore resided at the residence. (App. 113, lines 11-13). Even the testimony relied on by the State does not show how the officers concluded that Gore resided at the residence. (App. 55-56; App. 87-89).

Fifth, the State claims that the address listed on Gore's bond documents shows he resided at the residence. (Br. of Resp't at 7). There was no evidence that Gore actually listed this address on the bond form. (App. 169, lines 5-16; App. 195, 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. (App. 62, lines 4-10). Rather, it indicated that he lived at a different address in Little River, South Carolina. (App. 61, lines 22-24).

Sixth, the State claims that the cocaine found in the residence was hidden in the master bedroom in a stack of men's clothes. (Br. of Resp't at 8). However, the clothes were not taken into evidence and were not measured to determine whether or not they could belong to Gore. (App. 76, line 19-77, line 11).

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.

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.

(App. 27). The affiant, Detective Ard, failed to include specific dates for both of the alleged drug transactions. The affidavit was executed on February 28, 2010. (App. 27). The first buy occurred on July 23, 2009, over seven months prior to the execution of the affidavit. (App. 20, 24). 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. (App. 36, lines 4-17). 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.

(Br. of Resp't at 13 (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 further argues that Detective Ard omitted the date of the first drug transaction to protect the identity of the confidential informant. (App. 43, lines 15-20). 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. (Br. of Resp't at 14-15). 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 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). 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 explicitly admitted that he **intentionally** omitted the date of the first buy. (App. 47, 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, the Court of Appeals simply failed to apply the correct standard under *Franks v. Delaware*, 438 U.S. 154 (1978). Specifically, it stated that Gore had to prove that "Detective Ard included a deliberate falsehood or recklessly disregarded the truth *in an effort* to make the affidavit misleading to the magistrate." *Gore*, 408 S.C. 237, 758 S.E.2d at 722 (emphasis added). To the contrary, this Court stated in *Missouri* that

> [t]o be entitled to a *Franks* hearing for an alleged omission, the challenger must make a preliminary showing that the information in

> question was omitted with the intent to make, or *in reckless disregard of whether it made, the affidavit misleading to the issuing judge.*

337 S.C. at 554, 524 S.E.2d at 397 (emphasis added). The Court of Appeals improperly held Gore to a heightened standard of proof. The affidavit's indication that the first and second buy both occurred within seventy-two hours of the affidavit was false, misleading and at the very least, a reckless disregard for the truth. The State did not dispute this argument in its brief to this Court.

Furthermore, Gore did not have the opportunity to question the magistrate regarding the affidavit and Detective Ard's alleged oral supplementation. (App. 39, lines 12-16). The trial court limited the oral supplementation to that of Detective Ard. (*Id.*) The State claims that Gore failed to call the magistrate as a witness. (Br. of Resp't 21-22). However, under *Franks*, Gore made a preliminary showing that the affidavit was false or in reckless disregard of the truth. 438 U.S. at 155-56. This entitled Gore to an evidentiary hearing where he would have had the opportunity to call the magistrate as a witness. *Id.* at 156. Gore had no such opportunity at the motion hearing because the judge dismissed his request. (App. 52, line 10-53, line 14). 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).

Based on the foregoing, 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). Therefore, 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. (App. 24). 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). In fact, the State admits that the first drug transaction referenced in the affidavit would not have provided probable cause to search the residence. (Br. of Resp't at 19). 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." (Br. of Resp't at 17). The drug transaction did not occur immediately upon Gore leaving the residence. (App. 24). Rather, Gore entered his vehicle and travelled a considerable distance to a lot away from the residence. (*Id.*) 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). While the State makes several assertions that the residence was "Petitioner's residence," officers put forth **no effort** to establish that the location was actually Gore's residence and merely relied on their generalized conclusions.

Additionally, there was no established connection between the residence and drug activity. 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. The affidavit contained nothing more than generalized conclusions and was not enough to establish probable cause. *See United States v. Ventresca*, 380 U.S. 102, 108-09 (1965).

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.

CONCLUSION

For all the foregoing reasons, Petitioner, Alton Wesley Gore, respectfully requests that the decision of the Court of Appeals be reversed and his conviction overturned.

STATEMENT REGARDING ORAL ARGUMENT

The Petitioner respectfully submits that oral argument is necessary to the just resolution of this appeal and will significantly enhance the decision making process.

Respectfully Submitted,

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v.

Alton Wesley Gore, Jr., Petitioner.

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that on March 27, 2015, a true copy of the Reply Brief of Petitioner Alton Wesley Gore, Jr. in the above referenced case has been served upon:

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VIA FEDEX

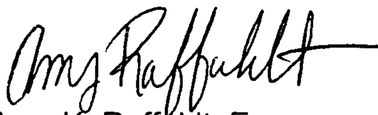
RE: The State, Respondent v. Alton Wesley Gore, Jr., Petitioner
Appellate Case No.: 2014-001496

Dear Clerk:

Please find enclosed the original (unbound) and fourteen (14) copies (bound) of the *Reply Brief of Petitioner Alton Wesley Gore, Jr.*

If you should need any additional information, please do not hesitate to contact our office at (843) 839-2900. Thank you.

Sincerely,



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Enclosure

cc: Christina Catoe, Esq.