

State of South Carolina

In the Court of Appeals

RECEIVED

SEP 16 2015

Certiorari to Greenville County

Deadra L. Jefferson, Circuit Court Judge **S.C. SUPREME COURT**

JAMES R. EUBANKS,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

PRO SE PETITION FOR WRIT OF CERTIORARI

James R. Eubanks

Pro Se Petitioner

South Carolina Department of Corrections

Perry Correctional Institution

430 Oaklawn Road

Pelzer, South Carolina 29669

Index.....	2
Issue Presented.....	3
Statement.....	4
Statement of Facts.....	5-12
Conclusion.....	13

ISSUE PRESENTED

- I. Whether Petitioner's Fourth and Sixth Amendment rights were violated because trial counsel was ineffective for not adequately investigating the law pertaining to the warrant procedure to the affidavit.

STATEMENT

James R. Eubanks was convicted of Trafficking in Cocaine after a jury trial was held before the Honorable Roger L. Couch on February 23, 2010. Dorothy A. Manigault represented petitioner and James E. Hunter represented the state. Petitioner received a life sentence without parole. Petitioner appealed his conviction and the appeal was affirmed on November 7, 2012 (State v. Eubanks, Op. No. 2012-UP-602). Petitioner filed a post conviction relief hearing on November 26, 2012. Christopher D. Brough represented the petitioner and Suzanne A. White represented the state. An evidentiary hearing was held on January 13, 2015 before the Honorable Deadra L. Jefferson. On March 26, 2015 Judge Jefferson issued an order denying and dismissing petitioner's application for post conviction relief.

STATEMENT OF FACTS

The defense counsel wanted to suppress evidence to the search because the affidavit was insufficient in describing factually what the department was seeking and a lack of probable cause - see - Tr. I. p. 39, line 21 - Tr. I. p. 38, line 1 & 20-21 . This was an erroneous error to argue at the suppression hearing. The defense counsel should have asked for an evidentiary hearing under Frank vs. Delaware 98 S. Ct. 2674 (1978).

In Frank's, the U.S. Supreme Court held that in certain narrowly defined circumstances a defendant can attack a facially sufficient affidavit - see - State vs. Sachs 216 S.E. 2d 501 (1975), the defense counsel should have attacked the truthfulness of the affidavit. The Franks court recognized a strong "presumption of validity with respect to the affidavit supporting the search warrant", - see - 98 S. Ct. at 2684, and thus created a rule of "limited scope", - see - 98 S. Ct. at 2682. The rule requires that a dual showing be made which incorporates both a subjective and an objective threshold component.

In order to obtain an evidentiary hearing on the affidavit's integrity, a defense must first make "a substantial preliminary showing that a false statement for the truth, was included by the affiant in the warrant affidavit" - see - 98 S. Ct. at 2676-77. The Franks test also applies to acts of omission in which exculpatory material is left out of the affidavit, with the intent to make the affidavit misleading - see - U.S. vs. Colkley 899 F. 2d 297 (4th Cir. 1990) & U.S. vs. Reivich 793 F. 2d 957 (18th Cir. 1986).

The affidavit to the search warrant stated that: Within the past seventy-two hours of today's date 06/13/08 a confidential reliable informant (CRI) working for the Spartanburg County Sheriff's Office observed cocaine being sold at the residence described above. (CRI) observed Petitioner exchanging cocaine for U.S. currency. In the past (CRI) has observed quantities of cocaine being stored inside the residence, on his person, and on the curtilage area to avoid police detection. (CRI) knows cocaine by sight, smell, texture, and

packaging. (CRI) has provided information to the Spartanburg County Sheriff's Office in the past that has led to the arrest of subjects and the confiscation of illegal contraband. The defense counsel should have moved to suppress the evidence obtained in the search under Franks. She should have argued that the affidavit supporting the search warrant contained false information and further omitted critical, exculpatory information - see - State vs. Missouri 524 S.E. 2d 394 (1999). An affidavit differs from an oath in that an "affidavit" consists of statements of facts which is sworn to as the truth, while an oath is a pledge - see - State vs. Dumber 603 S.E. 2d 615 (Ct. App. 2004).

It is a voluntary declaration of facts written down and sworn to by a declarant before an Officer authorized to administer oaths - see - Collins vs. Doe 539 S.E. 2d 62 (Ct. App. 2000).

Officer Hutchins made a sworn oath that the information he gave in the affidavit to obtain the search warrant was the truth, but according to his testimony, misstated facts and deception was used to acquire the search warrant. According to the record, Officer Hutchins was asked by the prosecutor why did he seek a search warrant for Petitioner's property and why did he think that he would find drugs there. He stated because of an investigation and information given to him by a (CI) who knew cocaine sales to take place at the residence and cocaine to be hidden in various locations on the property - see - Tr. I. p. 42, lines 11-24.

When asked by the prosecutor how the (CI) knew this, Officer Hutchins replied; through past experience and dealings with Petitioner - see - Tr. I. p. 42, line 25 - Tr. I. p.43, line 43. See also, Tr. I. p. 52, line 24 - Tr. I. p. 53, line 3 cross examination by defense counsel, reason for getting the search warrant.

Officer Hutchins stated that within the past seventy-two hours as the affidavit shows, that the (CI) observed the drugs being sold and money exchanged - see - Tr. I. p. 43, line 25 - Tr. I. p. 44, line 4 but according to further questioning the (CI) participated in the drug buy - see - Tr. I. p. 35, lines 19-27 & Tr. I. p. 44, lines 19-20 & Tr. I. p. 45, lines 2-19 - see also - Tr. I. p. 49, lines 1-3. When

you examine the transcript, you will see that the Officer himself (Hutchins) stated in the affidavit that the (CI) observed drugs being sold and money being exchanged, when in reality the (CI) never stated with her own mouth to Officer Hutchins of seeing drugs being sold or money being exchanged. When the prosecutor redirected his examination to Officer Hutchins pertaining to the word observed in the affidavit of the information within the seventy-two hours, he stated that it was standard how they (Sheriff's Office) describe a drug buy in a search warrant - see - Tr. I. p. 55, line 17 - Tr. I. p. 56, line 5. the information in the affidavit makes it look like the (CI) saw Mr. Eubanks selling drugs for money on the 06/13/08 and reported what she saw to Officer Hutchins, who then took the information to the magistrate the next day 06/13/08 to acquire a search warrant. See Tr. I. p. 35, line 22 - Tr. I. p. 36, line 7, even the trial judge thinks the (CI) is just speaking of what she saw only. So, if the trial judge assumes this, then the magistrate judge would also assume the same thing on determining probable cause existed to issue a search warrant. The record will show that Officer Hutchins says that the word observed is a common language used by the Sheriff's Office to describe drug buys in search warrants - see again - Tr. I. p. 55, line 17 - Tr. I. p. 56, line 5.

Officer Hutchins is using his own word observed to describe what occurred within the seventy-two hours concerning the drug buy, not what the (CI) told him. There was no testimony placed on the record by Officer Hutchins that the informant told him she saw Petitioner selling and exchanging money for drugs within the seventy-two hours period. It is the prosecutor, not the testifying Officer who claims the informant is a tipster for probable cause - see - Tr. I. p. 30, line 24 - Tr. I. p. 31, line 6 & 9-20, the only tip that the (CI) gave that was placed on the record by Officer Hutchins was what she observed in the past - see - Tr. I. p. 42, line 19 - Tr. I. p. 43, line 3 & Tr. I. p. 46, lines 6-11 & Tr. I. p. 49, line 4 - Tr. I. p. 50, line 23 & Tr. I. p. 51, line 20 - Tr. I. p. 52, line 23, not the present. During the suppression hearing, Officer Hutchins testimony was about the drug buy within the seventy-two hours and what the

informant observed in the past on the property through the course of an investigation that warranted probable cause.

The records show that when Officer Hutchins went to the magistrate seeking a search warrant, no verbal testimony was given with the affidavit - see - Tr. I. p. 47, lines 3-4, that the magistrate just read the affidavit and granted the search warrant - see - Tr. I. p. 46, lines 17-22. If no verbal testimony was given to the magistrate and the magistrate never knew of an investigation on Mr. Eubanks or even of the drug buy that took place within the seventy-two hours, ask yourself, without any questioning after reading the affidavit, how the magistrate did assume that the (CI) really did observe drugs being sold and money being exchanged. The Sheriff's Office set up the drug buy which was video and audio taped - see - Tr. I. p. 44, line 21 - Tr. I. p. 45, line 19. The (CI) did not have to delay any messages of what transpired during the drug buy because Officer Hutchins reviewed the video after the buy for himself - see - Tr. I. p. 73, lines 17-24. Officer Hutchins took it upon himself to describe what the (CI) observed, not what the (CI) told him within the seventy-two hours.

His action to speak for his informant using the word observed is based off of his own belief of a common language that is used by the Sheriff's Office to describe drug buys for their informants. In Nathanson vs. U.S. 54S Ct. 11 (1933), it says that an affidavit does not establish cause which merely states the affiant's belief that there is a cause to search, without stating facts upon which that belief is based.

If the search warrant was granted without any testimony to back up the affidavit based off Officer Hutchins belief of the observations within the seventy-two hours. What fact is this belief based upon if he took it upon himself to use the word observed for the (CI), without being told by the (CI) of what she saw. Officer Hutchins, placed misstated facts in the affidavit by using his own judgment to speak for the (CI) of what he thought she saw, and according to Franks, that false information must be essential to the probable cause determination.

When material that is the subject of the alleged falsity or reckless disregard is set to one side, and there remains sufficient content in the warrant affidavit to support a finding of probable cause, no hearing is required. The word observed in the first two paragraphs of the affidavit is misleading because they are not the (CI's) own words to the Officer's own word describing what she saw. Rather, it is the Officer's own words describing the drug buy, even though the buy and no other information were mentioned to the magistrate.

The word observed should be taken out of the first two paragraphs and a hearing granted, since probable cause cannot be determined from what is left in the affidavit - see - State v. Jones 536 S.E. 2d 675 (2000) concerning the word "Agent". Please view these cases pertaining to observations by (CI's) in a search warrant affidavit - see - State v. Cumber 232 S.E. 2d 291 (1977) & State v. Singleton 235 S.E. 2d 77 (1977) & State v. Williams 377 S.E. 2d 308 (1989) & State v. Clifton 396 S.E. 2d 831 (Ct. App. 1990), in each of these cases, the (CI's) told the Officers from their own mouth what they had observed within the seventy-two hour period. In U.S. vs. Colkley 899 F. 2d 297 (1990), it says a Frank hearing is appropriate and an affiant's material perjury or recklessness is established by a preponderance of the evidence, the warrant "must be voided" and evidence and testimony gathered pursuant to it must be excluded.

A warrant that violates Franks is not subject to the good-faith exception to the exclusionary rule announced in U.S. vs. Leon 104 S. Ct. 3405 (1984). The Court of Appeals in State v. Jones 536 S.E. 2d 675 (2000) characterized the false affidavit at all, and held that 17-30-140 had been violated since State v. McKnight 352 S.E. 2d 471 (1987) required a written affidavit. This conclusion is logical, because if an affidavit is not truthful, then the magistrate must depend totally on information provided orally by the affiant in order to determine if probable cause exists. Which, in my case no oral testimony was given with the affidavit.

I would also like to call your attention to omitted information that should have been included in the affidavit or mentioned to the

magistrate in his finding probable cause. To 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. There will be no Franks violation if the affidavit, including the omitted information, still contains sufficient information to establish probable cause.

The third and fourth paragraphs in the affidavit states that in the past, (CI) has observed quantities of cocaine being stored inside the residence. (CI) has known Petitioner to hide illegal contraband throughout the residence, on his person and on the curtilage area to avoid police detection, according to the record provided by the transcript. Officer Hutchins stated that through the course of an investigation and along with the (CI's) information, the (CI) knew of cocaine sales to take place and cocaine to be hidden in various locations on the property through past dealings with Petitioner, about four to six times - see - Tr. I. p. 42, line 17 - Tr. I. p. 43, line 3 & Tr. I. p. 46, lines 6-11. When asked by the defense counsel of the past dates of the observation of the drugs being hidden on the property, Officer Hutchins stated that they were in his notes, which he forgot to bring with him - see - Tr. I. p. 49, lines 4-16. However, on redirect examination by the prosecutor, Officer Hutchins stated that the past buys occurred on October and November of 2007 - see - Tr. I. p. 54, lines 16-18. Remember, it was the (CI's) past dealings with Petitioner in October and November of 2207 that she claimed to observed cocaine being hid in various locations of the property. In U.S. vs. Anderson 851 F. 2d 7727 (4th Cir. 1988), it says that a time frame should have been disclosed, the court has already cautioned the police about the need to specify time periods in warrant applications. Officer Hutchins testimony on the record shows that Petitioner was under investigation and that notes were taken explaining dates and times of transactions and observations of drugs.

So, there was no excuse to why dates and times could not have accompanied the third and fourth paragraphs in the affidavit or be mentioned to the magistrate orally with the affidavit, unless, they

were intentionally left out to mislead the magistrate in the finding of probable cause. If the magistrate knew the dates to the past observations of drugs being stored in different places on the property, he may have asked for more information because of an eight month gap between October and November of 2007 and June 13, 2008 - see - U.S. vs. Dennis 625 F. 2d 782 (1980), which says if past circumstances would justify search, there must be reason to believe that those circumstances still exist at the time of search.

No verbal information was given with the affidavit to the magistrate, on what was to say that the drugs were still there. U.S. vs. Colkley 899 F. 2d 297 (1990) says to determine whether the affidavit with the omitted information would be supported by probable cause, they must apply the "totality of circumstances" test of Illinois vs. Gates 103 S. Ct. 2317 (1983). The test requires "a practical, common sense decision whether, given all the circumstances set forth in the affidavit, there is probable cause to believe the suspect committed an offense - see - Beck vs. Ohio 85 S. Ct. 223 (1964)).

If the dates were added in the affidavit to the past observations of drugs being hidden, without any verbal information to what the magistrate read, he would have never been able to find probable cause. "Why", because Gates 103 S. Ct. at 2328 says although (CI's) veracity, reliability and basis of knowledge are relevant, they are no longer independent requirements. While omissions may not be per se immune from inquire - U.S. vs. Owens 882 F. 2d 1493 (10th Cir. 1989) & U.S. vs. Reivich 793 F. 2d at 961, the affirmative inclusion of false information in an affidavit is more likely to present a question of impermissible official conduct than a failure to include a matter that might be construed as exculpatory.

The point is that both false and omitted information can be argued in Petitioners case, but the false information will be most likely to guarantee a reversal because there is no information on the record of Officer Hutchins saying that the (CI) told him that she saw Petitioner selling and exchanging drugs for money within the seventy-two hours period but what the record does show is how Officer Hutchins

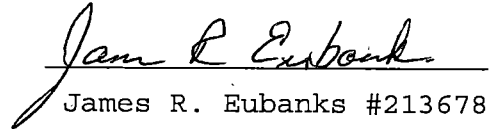
is admitting that the word observed is a common language the Sheriff's Office uses to describe a drug buy in a search warrant - see - Tr. I. p. 55, line 17 - Tr. I. p. 56, line 5.

The record shows that Officer Hutchins is talking for the (CI) of what he thinks she saw because she participated in a drug buy, not because of what she said. Petitioner's conviction should be reversed because the defense counsel was ineffective for failure to move for an evidentiary hearing under Franks, after hearing the testimony Officer Hutchins gave concerning probable cause.

CONCLUSION

For the foregoing reasons, Petitioner respectfully asks the Court to grant his writ of certiorari with the ultimate relief of a new trial.

Respectfully Submitted,

A handwritten signature in cursive script, reading "James R. Eubanks", is written over a horizontal line.

James R. Eubanks #213678

430 Oaklawn Road

Pelzer, SC. 29669

State of South Carolina
In the Court of Appeals

RECEIVED

SEP 16 2015

S.C. SUPREME COURT

Certiorari to Greenville County
Deadra L. Jefferson, Circuit Court Judge

JAMES R. EUBANKS,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

PROOF OF SERVICE

I certify that I have served a Petition for Writ of Certiorari to the S.C. Supreme Court, addressed to Daniel E. Shearouse, Clerk of Court, Post Office Box 11330, Columbia, S.C. 29211 by depositing the original copy in the United States mail, postage prepaid, on _____, 2015.

Respectfully Submitted,

James R. Eubanks #213678
430 Oaklawn Road
Pelzer, SC. 29669