The Supreme Court of South Carolina

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29211
1231 GERVAIS STREET
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE: (803) 734-1080
FAX: (803) 734-1499
www.sccourts.org

May 18, 2016

The Honorable Liz Godard
PO Box 583
Aiken SC 29802-0583

REMITTITUR

Re: The State v. Antonio Miller
Lower Court Case No. 2010GS0201526, 2010GS0201527,
2010GS0201529, 2010GS0201578
Appellate Case No. 2015-000365

Dear Clerk of Court:

The above referenced matter is hereby remitted to the lower court or tribunal. A copy of the judgment of this Court along with the earlier decision of the South Carolina Court of Appeals is enclosed.

Very truly yours,

CLERK

cc: Robert Michael Dudek, Esquire
J. Anthony Mabry, Esquire
James Strom Thurmond, Jr., Esquire
Donald J. Zelenka, Esquire

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Antonio Miller, Petitioner.

Appellate Case No. 2015-000365

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Aiken County
Doyet A. Early, III, Circuit Court Judge

Memorandum Opinion No. 2016-MO-009
Heard January 12, 2016 – Filed March 30, 2016

REVERSED

Chief Appellate Defender Robert Michael Dudek, of Columbia, for Petitioner.

Attorney General Alan McCrory Wilson, Chief Deputy Attorney General John W. McIntosh, Senior Assistant Deputy Attorney General Donald J. Zelenka, and

Assistant Attorney General J. Anthony Mabry, all of Columbia, and Solicitor James Strom Thurmond, Jr., of Aiken, for Respondent.

PER CURIAM: We granted certiorari to review the Court of Appeals' decision affirming the trial judge's finding that the affidavit supporting the search warrant issued for petitioner's residence established the requisite probable cause. *See State v. Miller*, Op. No. 2014-UP-409 (S.C. Ct. App. filed Nov. 19, 2014). We find the affidavit, which was not supplemented with oral testimony, failed to establish probable cause that evidence of a crime may be contained within the residence sought to be searched. *See State v. Kinloch*, 410 S.C. 612, 616, 767 S.E.2d 153, 155 (2014) (applying the fair probability standard and stating the duty of a reviewing court is to ensure the magistrate had a substantial basis for its probable cause determination (citing *State v. Bellamy*, 336 S.C. 140, 143–45, 519 S.E.2d 347, 348–49 (1999))); *State v. Tench*, 353 S.C. 531, 534, 579 S.E.2d 314, 316 (2003) (asserting the magistrate must make a practical, common sense decision concerning whether, under the totality of the circumstances set forth in the affidavit, there is a fair probability that evidence of a crime will be found in the particular place to be searched (citation omitted)); *State v. Jones*, 342 S.C. 121, 126, 536 S.E.2d 675, 678 (2000) ("Although great deference must be given to a magistrate's conclusions, a magistrate may only issue a search warrant upon a finding of probable cause." (citation omitted)); *State v. Smith*, 301 S.C. 371, 373, 392 S.E.2d 182, 183 (1990) (finding mere conclusory statements which give a magistrate no basis to make a judgment regarding probable cause are insufficient as the magistrate's actions "cannot be a mere ratification of the bare conclusions of others" (quoting *Illinois v. Gates*, 462 U.S. 213, 239 (1983))); *State v. Viard*, 276 S.C. 147, 149, 276 S.E.2d 531, 532 (1981) (noting the affidavit supporting a search warrant must contain sufficient underlying facts and information upon which the magistrate may make a determination of probable cause); *State v. Owen*, 275 S.C. 586, 588, 274 S.E.2d 510, 511 (1981) ("[I]n passing upon the validity of the warrant, a reviewing court may consider only the information brought to the magistrate's attention."). Accordingly, we reverse petitioner's convictions, and note should the State seek to retry petitioner, it will be permitted to argue the evidence seized pursuant to the invalid search warrant may be admissible on some basis independent of our finding that the affidavit did not establish the requisite probable cause.

REVERSED

PLEICONES, C.J., BEATTY, KITTREDGE, HEARN, JJ., and Acting Justice James E. Moore, concur.

THE 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

Unpublished Opinion No. 2014-UP-409
Heard October 6, 2014 – Filed November 19, 2014

AFFIRMED IN PART AND VACATED IN PART

Chief Appellate Defender Robert Michael Dudek, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson, Chief Deputy Attorney General John W. McIntosh, Senior Assistant Deputy Attorney General Donald J. Zelenka, Assistant Attorney General J. Anthony Mabry, all of Columbia, and Solicitor James Strom Thurmond, Jr., of Aiken, for Respondent.

PER CURIAM: Antonio Miller appeals his convictions of murder, kidnapping, burglary in the first degree, and possession of a firearm during the commission of a violent crime. Miller argues (1) the trial court erred in denying his motion to suppress the evidence located in a residence because the search warrant affidavit did not provide the magistrate with a reliable sufficient nexus to provide probable cause that the residence was his home and he was hiding drugs, weapons, or the fruits of a murder within the home and (2) his sentence for kidnapping should be vacated because it was improper due to his sentence for murder. We affirm in part and vacate in part.

1. We find the trial court did not err in denying Miller's motion to suppress the evidence located in a residence 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. *See State v. Dupree*, 354 S.C. 676, 684, 583 S.E.2d 437, 441 (Ct. App. 2003) ("A magistrate may issue a search warrant only upon a finding of probable cause."); *State v. Bellamy*, 336 S.C. 140, 143, 519 S.E.2d 347, 348 (1999) ("The South Carolina General Assembly has enacted a requirement that search warrants may be issued 'only upon affidavit sworn to before the magistrate . . . establishing the grounds for the warrant.'" (quoting S.C. Code Ann. § 17-13-140 (1985))); *Dupree*, 354 S.C. at 684, 583 S.E.2d at 441 ("The affidavit must contain sufficient underlying facts and information upon which the magistrate may make a determination of probable cause."); *id.* ("The magistrate should determine probable cause based on all of the information available to the magistrate at the time the warrant was issued."); *id.* at 685, 583 S.E.2d at 442 ("The magistrate's task in determining whether to issue a search warrant is to make a practical, common sense decision concerning whether, under the totality of the circumstances set forth in the affidavit, including the veracity and basis of knowledge of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in the particular place to be searched."); *State v. Sullivan*, 267 S.C. 610, 617, 230 S.E.2d 621, 624 (1976) (providing affidavits should be viewed in a common sense and realistic fashion because they are not meticulously drawn by lawyers); *id.* ("Search warrants are constitutionally preferred and in determining whether they should issue, magistrates are concerned with probabilities and not certainties."); *Dupree*, 354 S.C. at 683, 583 S.E.2d at 441 ("The appellate court should give great deference to a magistrate's determination of probable cause."); *id.* at 684, 583 S.E.2d at 441 ("In determining the validity of the warrant, a reviewing court may consider only information brought to the magistrate's attention."); *id.* at 683, 583 S.E.2d at 441 ("Our task is to decide whether the magistrate had a

substantial basis for concluding probable cause existed."); *id.* (stating the term "probable cause" does not import absolute certainty); *id.* at 683-84, 583 S.E.2d at 441 ("Searches based on warrants will be given judicial deference to the extent that an otherwise marginal search may be justified if it meets a realistic standard of probable cause.").

2. We find Miller's sentence for kidnapping was improper due to his sentence for murder and should be vacated. *See* S.C. Code Ann. § 16-3-910 (2003) ("Whoever shall unlawfully seize, confine, inveigle, decoy, kidnap, abduct or carry away any other person by any means whatsoever without authority of law, except when a minor is seized or taken by his parent, is guilty of a felony and, upon conviction, must be imprisoned for a period not to exceed thirty years *unless sentenced for murder* as provided in Section 16-3-20." (emphasis added)); *State v. Vick*, 384 S.C. 189, 201, 682 S.E.2d 275, 281 (Ct. App. 2009) ("Our courts have long held, where an appellant has been sentenced for murder of a victim, this code section precludes a sentence for kidnapping of that victim, and any such sentence should be vacated."); *id.* at 202, 682 S.E.2d at 282 ("[O]ur courts have, in the past, 'summarily vacated' sentences for kidnapping where such sentences were precluded by § 16-3-910 because the defendant received a concurrent sentence under the murder statute."); *Owens v. State*, 331 S.C. 582, 585, 503 S.E.2d 462, 463 (noting the appellate courts have "summarily vacated" sentences for kidnapping when the defendant received a concurrent sentence under the murder statute). Therefore, we affirm Miller's conviction for kidnapping, but vacate his sentence for kidnapping. *See Vick*, 384 S.C. at 203, 682 S.E.2d at 282 (affirming Vick's convictions, but vacating the clearly erroneous kidnapping sentence in the interest of judicial economy "because the State concedes the kidnapping sentence was erroneously imposed" and "our courts recognize there may be exceptional circumstances allowing the appellate court to consider an improper sentence even though no challenge was made to the sentence at trial and have further summarily vacated in matters such as the one at hand").

AFFIRMED IN PART AND VACATED IN PART.

HUFF, SHORT, and KONDUROS, JJ., concur.