

2016-000281

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

Appeal from Beaufort County

Carmen T. Mullen, Circuit Court Judge

**RECEIVED**  
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SC Court of Appeals

THE STATE,

RESPONDENT,

V.

TREVIN MILLIDGE,

APPELLANT

APPELLATE CASE NO. 2015-000281

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

I. Did the trial court err in denying the motion of Trevin Millidge to suppress the evidence obtained by the search warrant which was supported by an affidavit that failed to provide information sufficient to assess the veracity, reliability or basis of knowledge of the confidential informant?

II. Did the trial court err in denying the motion of Trevin Millidge to suppress the alleged confession when the alleged confession was fruit of the poisonous tree obtained as a result of the defective search warrant, and when Trevin Millidge was not advised of his rights to remain silent and to an attorney, under the Fifth and Sixth Amendments to the United States Constitution?

## STATEMENT OF THE CASE

On July 28, 2011, a search warrant was issued, authorizing a search of premises located at 6 Miranda Circle, Port Royal, South Carolina, for evidence of criminal conduct by Trevin Millidge. *Court's Exh. 1*. After the execution of the search warrant, Trevin Millidge was ultimately indicted for (1) trafficking in cocaine base or crack cocaine, 10 grams to 28 grams, (2) possession with intent to distribute cocaine, or powder cocaine, (3) possession with intent to distribute Alprazolam, a Schedule IV controlled substance, (4) possession of oxycodone, a Schedule II controlled substance, and (5) possession of a weapon during the commission of a violent crime. *Trial Transcr. pp. 484-487*. Trevin Millidge was tried in the Beaufort County Court of General Sessions, beginning on January 26, 2015 and ending on January 28, 2015, with the Honorable Carmen T. Mullen as the presiding judge. *Trial Transcr. pp. 1*. After a jury trial, Trevin Millidge was convicted of (1) trafficking in cocaine base or crack cocaine, 10 grams to 28 grams, (2) possession with intent to distribute cocaine, or powder cocaine, (3) simple possession of Alprazolam, and (4) possession of a controlled substance, Oxycodone, a Schedule II controlled substance. *Trial Transcr. pp. 508-509*. Trevin Millidge appeals, and the notice of appeal was filed on February 3, 2015.

## STATEMENT OF FACTS

On July 28, 2011, law enforcement officer Justyna Lindahl executed a search warrant affidavit. *Court's Exh. 1*. The search warrant affidavit relies heavily on information obtained from a confidential informant. *Id.* The affidavit references the informant as a "Reliable and Confidential Informant," but does not provide any information regarding the past experience of the informant in regards to other investigations, the length of time in which the informant has assisted law enforcement, or the types of information obtained from the informant in regards to other investigations. *Id.* A search warrant was granted by the presiding magistrate judge that same day. *Id.*

On July 30, 2015, at approximately 5:00 a.m., law enforcement arrived at the address of the subject property to execute the search warrant. *Trial Transcr. pg. 310, para. 13-16*. Shortly after law enforcement arrived, Trevin Millidge was put in handcuffs and placed in a patrol vehicle with Sergeant Walker Michaud. *Trial Transcr. pp. 310-311*. Sergeant Michaud interviewed Trevin Millidge while Mr. Millidge was in handcuffs, *Trial Transcr. pg. 313, para. 1-3*, and the interview took place at or after the time that law enforcement began executing the search warrant, *Trial Transcr. pg. 310, para. 24 to pg. 311, para. 2*. Counsel for Trevin Millidge moved to suppress the alleged confession of Trevin Millidge, and a pretrial hearing was held regarding the admissibility of the alleged confession. *Trial Transcr. pp. 101-110*. At the *Jackson v. Denno*<sup>1</sup> hearing and during the State's case in chief, Sergeant Walker Michaud testified that Trevin Millidge was advised of his right to remain silent and his right to an attorney. *Trial Transcr. pg. 104, para. 19-23; Trial Transcr. pg. 314, para. 4-15*. Trevin Millidge, through his attorney, denied ever being

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<sup>1</sup> See *Jackson v. Denno*, 378 U.S. 368, 394 (1964) (requiring that for purposes of a jury trial the initial hearing to determine the voluntariness of a confession must be held outside the presence of the jury).

advised of his rights under *Miranda v. Arizona*, 384 U.S. 436 (1966), and denied making any confession. *Trial Transcr. pg. 445, para. 4-8.*

Sergeant Walker Michaud failed to obtain a written or audio-recorded waiver of *Miranda* rights by Trevin Millidge. *Trial Transcr. pg. 334, para. 2-7; Trial Transcr. pg. 316, para. 6-19.* Sergeant Walker Michaud confirmed in his testimony at trial that after the search concluded there was nothing that prevented him from taking Mr. Millidge to the detective office, *Trial Transcr. pg. 331, para. 24 to pg. 332, para. 1*, where there was recording equipment; he confirmed that the Sheriff's Office has multiple interview rooms with video and audio recording equipment, *Trial Transcr. pg. 332, para. 24 to pg. 333, para. 3*; that the interview room contained written *Miranda* forms used to obtain a written acknowledgement of a waiver of *Miranda* rights, *Trial Transcr. pg. 333, para. 4-14*; that Mr. Michaud had a notepad and pen on him that could have been used to obtain a written confirmation of waiver, *pg. 333, para. 24 to pg. 334, para. 7*; and that there was a video recorder on-scene that could have been used to film the interview of Mr. Millidge, *Trial Transcr. pg. 336, para. 1-12.*

Counsel for Trevin Millidge moved to suppress the search warrant at a pretrial hearing, *Trial Transcr. pg. 110*, and moved to suppress the alleged confession at a pretrial hearing, *Trial Transcr. pg. 101*. Defense counsel moved for a directed verdict at the close of the state's case. *Trial Transcr. pg. 390, para. 2-4*. After the defense rested, defense counsel renewed all motions, pretrial motions, objections and grounds for a directed verdict. *Trial Transcr. pg. 392, para. 8-10*. After the jury handed down its verdict, defense counsel again renewed all motions, post-trial motions for a new trial, motions for a directed verdict, motions to suppress, and moved for a new trial. *Trial Transcr. pg. 518, para. 17-24.*

## ARGUMENT

1. The trial court erred in denying the motion of Trevin Millidge to suppress the evidence obtained by the search warrant which was supported by an affidavit that failed to provide information sufficient to assess the veracity, reliability or basis of knowledge of the confidential informant.

The United States Constitution and the South Carolina Constitution prohibit “unreasonable searches and seizures.” *U.S. Const. amend. IV; S.C. Const. art. I, Sec. 10.* South Carolina requires a search warrant to be issued “only upon affidavit sworn to before the magistrate, municipal judicial officer, or judge of a court of record establishing the grounds for the warrant.” *S.C. Code Sec. 17-13-140* (2014). The issuance of a search warrant requires a finding of probable cause, and the reviewing court must ensure that the issuing judge had a substantial basis upon which to conclude that probable cause existed. *State v. Baccus*, 367 S.C. 41, 50; 625 S.E.2d 216, 221 (2006).

Probable cause to issue a warrant exists “if, given the totality of the circumstances set forth in the affidavit, there is a fair probability that contraband or evidence of a crime will be found in a particular place.” *State v. Kinloch*, 410 S.C. 612, 617; 767 S.E.2d 153, 155 (2014). Under the totality of the circumstances test, “the task of the issuing magistrate is simply to make a practical, common sense decision whether, given the circumstances set forth in the affidavit before him, *including the ‘veracity’ and ‘basis of knowledge’ of persons supplying hearsay information*, there is a fair probability that [evidence] will be found in a particular place.” *Illinois v. Gates*, 462 U.S. 213, 238 (1983). The reviewing court must “ensure that the magistrate had a substantial basis for concluding that probable cause existed.” *Id.* at 238-239 (internal citation omitted).

In *State v. Johnson*, 302 S.C. 243; 395 S.E.2d 167 (1990), the Court held that, by itself, an affidavit stating that a confidential informant had seen a quantity of cocaine in the defendant's home within seventy-two (72) hours of the request for a warrant, was not sufficient to establish probable cause. 302 S.C. 243, 248; 395 S.E.2d 167, 169. A primary reason for the Court's holding was that the warrant did not "set forth any information as to the reliability of the informant." *Id.* The Court cited the concern of the United States Supreme Court that the issuance of a search warrant without information concerning the reliability of a confidential informant may result in "the inferences from the facts which lead to the complaint" being drawn "by a police officer 'engaged in the often competitive enterprise of ferreting out crime,' or [ . . . ] by an unidentified informant," instead of "a neutral and detached magistrate' as the Constitution requires." *Id.* (citing *Aguilar v. Texas*, 378 U.S. 108, 115 (1964) (modified by *Illinois v. Gates*, 462 U.S. 213 (1983))).

At the pretrial hearing, counsel for Trevin Millidge moved to suppress the evidence obtained pursuant to the search warrant because the affidavit supporting the warrant failed to establish probable cause. Apart from inferences based on the prior record of Mr. Millidge and the affiant's expertise and prior experiences, the affidavit supporting the warrant relies almost exclusively on information obtained through the confidential informant. Although the affidavit references the informant as a "Reliable and Confidential Informant," the affidavit does not contain sufficient information to establish a substantial basis for a magistrate to determine the veracity or reliability of the informant. The affidavit does not provide any information relating to the past experience of the informant in regards to other investigations, the length of time in which the informant has assisted law enforcement, or the types of information obtained from the informant in regards to other investigations.

2. The trial court erred in denying the motion of Trevin Millidge to suppress the alleged confession when the alleged confession was fruit of the poisonous tree obtained as a result of a defective search warrant, and when Trevin Millidge was not advised of his rights to remain silent and to an attorney, under the Fifth and Sixth Amendments to the United States Constitution.

2(a). Fruit of the Poisonous Tree

Evidence of a crime “must be excluded if it would not have come to light but for the illegal actions of the police, and the evidence has been obtained by the exploitation of that illegality.” *State v. Copeland*, 321 S.C. 318, 323; 468 S.E.2d 620, 624 (1996). This rule, excluding evidence obtained by illegal police activity, has become known as the “fruit of the poisonous tree” doctrine. *Id.* (referencing *Wong Sun v. United States*, 371 U.S. 471 (1963)).

The officer who interviewed Trevin Millidge and obtained the alleged confession appeared at the address of the property as part of the team executing the search warrant, and would not have made contact with Mr. Millidge if the search warrant had not been issued. Law enforcement was carrying out the search contemporaneously with the interview of Trevin Millidge, and the interviewing officer’s communication with Mr. Millidge would not have occurred but for the erroneously issued search warrant.

2(b). Right to Remain Silent and Right to Counsel

The confession of a defendant made during a custodial interrogation is not admissible unless it is voluntarily given after the defendant has been advised of his right against self-incrimination and his right to assistance of counsel. *See generally, Miranda v. Arizona*, 384 U.S. 436 (1966) (citing the fifth and sixth Amendments to the United States

Constitution). These rights are now commonly referred to as “*Miranda* warnings” or “*Miranda* rights.” See, e.g., *State v. Easler*, 322 S.C. 333; 471 S.E.2d 745 (Ct. App. 1996); *State v. Peele*, 298 S.C. 63; 378 S.E.2d 254 (1989); *State v. Doby*, 273 S.C. 704; 258 S.E.2d 896 (1979).

In criminal cases, an appellate court is not bound by a trial court’s factual findings that are clearly erroneous. *State v. Baccus*, 367 S.C. 41; 625 S.E.2d 216 (2006). The conclusion of a trial court in regards to facts concerning the voluntariness of a confession will not be disturbed unless there is an abuse of discretion. *State v. Rochester*, 301 S.C. 196, 200; 391 S.E.2d 244, 247 (1990). An abuse of discretion occurs when a trial court’s finding of fact is without evidentiary support. *State v. Jennings*, 394 S.C. 473, 477-478; 716 S.E.2d 91, 93 (2011). When reviewing a trial court’s ruling concerning voluntariness, the appellate court “determines whether the trial court’s ruling is supported by any evidence.” *State v. Saltz*, 346 S.C. 114, 136; 551 S.E.2d 240, 252 (2001).

At trial, the state conceded that Trevin Millidge was in custody at the time of the alleged confession. *Trial Transcr. pg. 313, para. 1-3*. A review of the record would cast doubt on the trial court’s decision to allow the alleged confession into evidence as a voluntary statement made after the administering of *Miranda* warnings. The interviewing officer testified at trial that the interview took place while Mr. Millidge was in handcuffs at the location of the subject property while the police were carrying out the search warrant. The interviewing officer failed to obtain a written waiver of *Miranda* rights, even though the officer had a notepad and pen in his possession. The interviewing officer confirmed that after the conclusion of the search there was nothing that prevented him from taking Mr. Millidge to the detective officer where there was recording equipment, or to the Sheriff’s

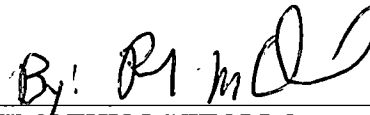
office that had multiple interview rooms with video and audio recording equipment. Finally, the interviewing officer confirmed that there was a video recorder on-scene that could have been used to film the interview of Mr. Millidge.

## CONCLUSION

The trial court erred in admitting the evidence obtained by the search warrant. The affidavit supporting the search warrant relied heavily on information obtained from a confidential informant, and failed to provide information sufficient to assess the veracity, reliability or basis of knowledge of the informant. The affidavit failed to provide any information regarding the past experience of the informant in regards to other investigations, the length of time in which the informant has assisted law enforcement, or the types of information obtained from the informant in regards to other investigations, and failed to provide the issuing magistrate with a substantial basis upon which to conclude that there was probable cause. Therefore, the Appellant's criminal convictions should be reversed.

In addition, the trial court erred in admitting the alleged confession of the Appellant. The interviewing officer had the opportunity to interview Mr. Millidge as part of the execution of the search warrant, and the officer would not have had the opportunity to communicate with Mr. Millidge if the search warrant had not been issued, making the alleged confession "fruit of the poisonous tree" derived from the erroneous issuance of the search warrant. The record contains overwhelming evidence that the interviewing officer had ample opportunity to obtain a written, audio and/or video record of the Appellant's alleged confession and waiver of *Miranda* rights, and that the officer failed to do so, such that the trial court's admission of the alleged confession amounted to an abuse of discretion. Therefore, the Appellant's criminal convictions should be reversed.

Respectfully submitted,

By: 

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This 18th day of July, 2016.