

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of General Sessions

The Honorable Alison Renee Lee
Circuit Court Judge

Case No. 2011-GS-40-03359
Appellate Case No. 2016-002146

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DEC -1 2016

S.C. SUPREME COURT

The State, Respondent,

v.

Joshua William Porch, Petitioner.

REPLY TO PETITION FOR WRIT OF CERTIORARI

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ARGUMENT

I. The Court of Appeals, the trial court, and the State misconstrued the proper standard under *Franks v. Delaware*.

In its Return, the State acknowledged that probable cause must be “based on all of the information available *to the magistrate* at the time the warrant was issued.” (Return at 6–7.) Nevertheless, the State’s brief failed to address the trial court’s explicit consideration of evidence that was not presented to the magistrate when it determined at the *Franks v. Delaware* hearing that probable cause existed to support the issuance of the arrest warrant for Porch. This oversight—just like the oversight of the trial court and the Court of Appeals—must be corrected by this Court. Failing to do so would amount to sanctioning an inconsistent position, namely that a trial court can review *any* evidence to determine whether probable cause exists under *Franks*, not just that evidence presented to a magistrate when the warrant application is made.

A. To make its probable cause determination, the trial court improperly considered evidence not presented to the magistrate.

The State conceded that a trial court’s review under *Franks v. Delaware*, 438 U.S. 154 (1978) and *State v. Missouri*, 337 S.C. 548, 524 S.E.2d 394 (1999), is limited. Specifically, the State noted that “[w]hen determining the propriety of the issuance of a warrant, the duty of this Court is simply to determine whether *the magistrate* had a substantial basis for concluding probable cause existed.” (Return at 6 (emphasis added).) The State also explained that “[i]n determining the validity of the warrant, a reviewing court may consider *only* information brought to the magistrate’s attention.” (Return at 7 (emphasis added).) But the State’s brief did not address the evidence considered by the trial court despite that evidence not being presented to the magistrate. The State placed great weight on (1) the different statements Porch gave to police, (Return at 3, 8–9, 24–25); (2) the fact that the suspect and Porch are both left-handed, (Return at

9, 25); and (3) the newly discovered DNA evidence on the victim's shirt, (Return at 9, 25). The State emphasized this evidence in its Return even though this information was not presented to the magistrate. The State erred in doing so, especially because the trial court improperly based its finding of probable cause on these three pieces of evidence. (App. at 107–08, 128, 1259.)

Instead of focusing on what the affiant actually presented to the magistrate, the State sought to parade what it believes to be a mountain of evidence before this Court as a basis for denying the present Petition. (Return at 9–10.) In passing, the State attempted to justify its parade of evidence—and the trial court's improper consideration of it—by relying on testimony regarding other “background information” presented to the magistrate. However, as conceded by the State, the warrant affiant and the magistrate could not remember any “background information” that was presented. (Return at 10 n.10.) In essence, the State urged this Court to append material to the record *post hoc* based on the time that passed between issuing the warrant and the *Franks* hearing. The lapse of time serves as no excuse. The State is bound by the record on appeal, which is silent as to any evidence presented to the magistrate other than what was contained within the warrant affidavit. The State cannot assume that the evidence relied upon by the trial court was presented to the magistrate as a part of the “background information.” The Court should not make that assumption either. It should instead rely on the record, which confirms that the trial court improperly considered more than what was presented to the magistrate when the trial court made its probable cause determination at the *Franks* hearing.

B. The Court of Appeals erred when it failed to reach the issue by conducting a *de novo* review of the trial court's decision to hold a *Franks* hearing.

Instead of correcting the trial court's improper consideration of evidence not presented to the magistrate, the Court of Appeals concluded that the trial court was incorrect to even grant the *Franks* hearing in the first place. (App. at 1373 (“While we commend the trial court in this case

for holding a Franks hearing out of an abundance of caution, we find Porch failed to overcome his heavy burden to establish he was entitled to such a hearing”).) To arrive at this conclusion, the Court of Appeals reviewed the trial court’s finding that Porch was entitled to a *Franks* hearing *de novo*, relying only on Fourth Circuit precedent. (App. at 1373 (citing *United States v. Tate*, 524 F.3d 449, 455 (4th Cir. 2008)).) This Court has not yet determined the proper standard for reviewing a trial court’s finding that a defendant is entitled to a *Franks* hearing.

In its Return, the State appeared to disagree with the Court of Appeals in this regard, suggesting that the proper standard of review should be an abuse of discretion. (Return at 19.) However, the Court need not determine this open question to grant certiorari because the record supports the trial court’s determination that a *Franks* hearing was warranted. For instance, it is indisputable that the State relied on Porch’s testimony at two trials, though it did not present this information to the magistrate. The State attempted to side-step this problem by twice stating that neither a judge nor jury believed Porch’s testimony that Justin Mallory killed the victim. (Return at 16, 19 n13.) The State was quick to forget, however, that the Solicitor, acting as an arm of the State, *did* believe Porch’s testimony—twice. It is immaterial whether Justin Mallory was convicted (or whether some other aspect of the two trials led to him being found not guilty). What is material is that the magistrate was not provided this information when he made the initial probable cause determination. Failing to do present this information to the Magistrate violated *Franks* and *Missouri*.

Applying either standard of review, this Court can properly reach the question of whether the trial court erred in considering evidence not presented to the magistrate when the trial court made its probable cause determination under *Franks*. This Court should reach the question by granting certiorari and reversing.

II. Porch properly objected to the limitations placed on his testimony to preserve his objection under the Confrontation Clause and *Crawford*.

The State boldly claimed that Porch raised no objection to the trial court's violation of his Confrontation Clause right under *Crawford v. Washington*, 541 U.S. 36, 62 (2004). This argument ignored three specific points in the trial where Porch objected to the introduction of the video or the limitations placed on his testimony. (App. at 144–154, 205–08, 225, 221–22, 227–28, 233–34, 900–01, 1082–83.) Porch specifically referenced the Confrontation Clause, *Crawford*, or his right to confront witnesses against him in those objections. (App. at 147, 150–152, 206, 212, 221–22, 227–28, 1082–83.) Indeed, the State even cited *Crawford* in its response to Porch's argument. (App. at 156, 207–08.) Likewise, the Court referenced *Crawford* in its discussion of the objection and its ruling. (App. at 150, 216, 219.) Thus, the State was wrong to argue that “Porch did not object at any point under the Confrontation Clause.” (Return at 21.)

The State also tried to have this Court believe that Porch conceded the issue. (*Id.*) On the contrary, Porch's decision to press forward with trial by limiting his testimony was his only option, lest his right to confront the Los Angeles County police officer at trial be violated. (App. at 205–07; 1082–83.) This can hardly be construed as a concession of the issue where the State—not Porch—failed to make the officer available for cross-examination before the jury.¹ In its Return, the State argued that Porch's right to confront the officer was satisfied by his cross-examination of the officer at the limited *Jackson v. Denno* hearing held eight months earlier. (Return at 22–23, 24.) However, the State did not cite to any South Carolina precedent

¹ As Porch has consistently argued, the Confrontation Clause does not have a “best efforts” exception, *i.e.* just because the State used its best efforts to subpoena the officer does not give it license to violate Porch's Confrontation Clause right when she did not appear at trial. (Pet. at 16–17.) Moreover, nothing in the record suggests that the State exhausted all available resources to make the officer present for trial. For example, the record is silent as to any appeal of the California court's order permitting the officer to avoid appearing in South Carolina.

confirming that a limited cross-examination satisfies the mandates of the Confrontation Clause and *Crawford*. This is because, as Porch argued to the trial court and the Court of Appeals, cross-examination at a limited hearing will not satisfy the Constitutional directive. (App. at 219.)

Nor did Porch fail to preserve the issue. Contrary to the State's argument, (Return at 21–22), Porch did not have to proffer any testimony to preserve his Confrontation Clause objection because the trial court did not exclude any evidence or testimony. *See Ellis v. Oliver*, 323 S.C. 121, 132, 473 S.E.2d 793, 799 (1996) (failing to proffer excluded medical records); *Greenville Mem'l Auditorium v. Martin*, 301 S.C. 242, 244, 391 S.E.2d 546, 547 (1990) (failing to proffer excluded testimony). The State implicitly conceded this point by citing numerous cases in which evidence and testimony were excluded. (Return at 22.) These cases are inapposite because, as the State argued, the trial court did not exclude any evidence or testimony here. (Return at 24.) Instead, the trial court improperly instructed Porch that his Confrontation Clause right would be violated were he to testify fully to place the six-hour gap during his interrogation in context. This was in error. Because the Court of Appeals improperly failed to reach this issue, the Court should grant certiorari to entertain the merits of Porch's Confrontation Clause argument. Doing so will allow the Court to correct the trial court and Court of Appeal's errors.

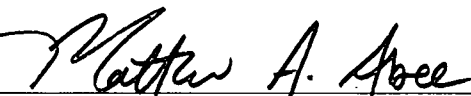
CONCLUSION

On the *Franks* issue, both sides agree with the law that should be applied. They agree that *State v. Missouri* makes *Franks v. Delaware* applicable to an error of omission, that the trial court at a *Franks* hearing must determine whether sufficient evidence was presented to the magistrate to support probable cause, and that probable cause is determined under the *Gates* totality of the circumstances test. Porch does not disagree with the law in this regard; however, he disputes that the trial court improperly considered evidence not presented **to the magistrate**.

Apparently, the State does not disagree, because not a single page of its brief is devoted to this finer point. The State choose instead to paint with a broad brush in an attempt to have this Court also overlook the trial court's error. The Court should not be fooled. It should instead grant certiorari and reverse.

The Court should also grant certiorari and reverse the trial court's directive leading to the violation of Porch's Confrontation Clause rights. The Court should reach the merits of Porch's argument on this issue by granting certiorari to properly apply South Carolina's error preservation rules.

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PROOF OF SERVICE

I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Joshua William Porch, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified at the following address(es):

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December 1, 2016