

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

On Writ of Certiorari to the Court of Appeals
Appeal from Spartanburg County
Honorable J. Derham Cole, Circuit Court Judge
Appellate Case No. 2015-002221

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S.C. SUPREME COURT

THE STATE,

Respondent,

vs.

ALPHONSO CHAVES THOMPSON,

Petitioner.

RESPONDENT'S PETITION FOR REHEARING

On February 22, 2017, this Court issued a published opinion in which it reversed a decision of the Court of Appeals that had affirmed Petitioner Alphonso Chaves Thompson's convictions and the circuit court judge's order denying Thompson's motion to suppress his illegal drugs and other incriminating items. State v. Thompson, Op. No. 27706 (S.C. Sup. Ct. filed Feb. 22, 2017). In reversing the Court of Appeals, this Court concluded the search warrant affidavit used to obtain the search warrant for the River Street residence where the incriminating evidence was found failed to establish a fair probability the evidence sought would be found at that residence at the time of the search. Based on that conclusion, this Court ruled the Court of Appeals erred in affirming the denial of Thompson's suppression motion without mentioning or discussing the applicability or lack of applicability of the good faith exception to the exclusionary rule. Pursuant to Rule 221(a), SCACR, Respondent, the State, respectfully

petitions for rehearing because the State believes this Court misapprehended and overlooked the facts and the law in finding the search warrant for the River Street residence was invalid and suppression of the evidence was the appropriate remedy for that purported constitutional violation under the circumstances of Thompson's case.

Sufficiency of the Search Warrant Affidavit

Initially, although this Court correctly concluded the information contained in the search warrant affidavit "tie[d] drug activity to [the River Street address]," this Court overlooked the State's argument and misapprehended the facts by concluding the information contained in the search warrant affidavit did not establish "a sufficiently specific indication that the drugs Thompson was selling were being accessed at [the River Street] address on or near May 2010" while also failing to show "any connection between drug-related activity and [the River Street address] after February 2009." In reaching that conclusion, this Court failed to discuss or analyze the significance of the ongoing, continuous, and uninterrupted nature of Thompson's undisputed drug activity in finding the information contained in the search warrant affidavit was too stale to support a reasonable belief drugs and other incriminating evidence would be located at the River Street residence at the time the search warrant was issued. Critically, because the information provided by the informants established Thompson was involved in a continuous, ongoing, successful enterprise involving cocaine trafficking, the fact Thompson's drug activity was not directly connected to the River Street address after February of 2009 did **not** establish there was no reasonable probability drugs would be located at that address roughly fifteen months later. See United States v. Ortiz, 143 F.3d 728, 732-733 (2nd Cir. 1998) ("[I]n investigations of ongoing narcotics operations, intervals of weeks or months between the last described act and the application for a warrant did not necessarily make the information stale.

Indeed, narcotics conspiracies are the very paradigm of the continuing enterprises for which the courts have relaxed the temporal requirements of non-staleness.” (citations and internal quotations omitted)); United States v. Snow, 919 F.2d 1458, 1460 (10th Cir. 1990) (“Defendant was being investigated for running an ongoing, continuous operation to defraud the government. Such ongoing and continuous activity makes the passage of time less critical.”); United States v. Bascaro, 742 F.2d 1335, 1346 (11th Cir. 1984) (“Protracted and continuous activity is inherent in large-scale drug trafficking operations. In such cases, then, the staleness issue should be construed liberally.” (citation omitted)), abrogated on other grounds by United States v. Lewis, 492 F.3d 1219 (11th Cir. 2007); United State v. McCall, 740 F.2d 1331, 1336 (4th Cir. 1984) (“In some circumstances, the very nature of the evidence sought may suggest that probable cause is not diminished solely by the passage of time.”); see also Illinois v. Gates, 462 U.S. 213, 246 (1983) (“[P]robable cause does not demand the certainty we associate with formal trials.”). That is true because – as numerous courts have recognized – evidence of an ongoing drug enterprise defeats a claim of staleness raised by the defendant in light of the logical and reasonable inferences that can be drawn from evidence of an ongoing and continuous enterprise, such as the entirely logical inference a successful, long-standing drug enterprise would not simply be abandoned or discontinued for no apparent reason. See United States v. Kennedy, 427 F.3d 1136, 1142 (8th Cir. 2005) (“[I]nformation of an unknown and undetermined vintage relaying the location of mobile, easily concealed, readily consumable, and highly incriminating narcotics could quickly go stale **in the absence of information indicating an ongoing and continuing narcotics operation.**” (emphasis added)); United States v. Farmer, 370 F.3d 435, 439 (4th Cir. 2004) (holding it is reasonable to conclude an ongoing, extended criminal scheme will not simply be abandoned or discontinued); see also United States v. Carter, 566 F.3d 970, 975 (11th

Cir. 2009) (“[W]hen considering the staleness of information, we must consider whether the crime is ongoing or isolated. We conclude that there is no staleness problem here. While it is true that Carter’s arrest for possession with intent to distribute ecstasy and possession of cocaine was 20 months prior to the search, there was evidence giving rise to a reasonable suspicion that Carter was engaging in criminal conduct up until January 7, 2008, just two weeks before the search. . . . This pattern of conduct is sufficient to create a reasonable suspicion that Carter was engaged in ongoing criminal conduct. Accordingly, we conclude that there was reasonable suspicion to search Carter’s townhome.” (citations omitted)); United States v. Greene, 250 F.3d 471, 481 (6th Cir. 2001) (“Greene first argues that the information concerning drug trafficking activity at 2139/2141 Ashland is stale. In the affidavit, the confidential informant noted that he had last purchased drugs at 2139/2141 Ashland in February 1997. Since the search was not executed until January 1999, 23 months after the confidential informant’s last purchase, Greene argues that the information is stale. Greene’s argument is unpersuasive. Evidence of ongoing criminal activity will generally defeat a claim of staleness. Moreover, where the criminal activity occurred in a ‘secure operational base,’ the passage of time becomes less significant.” (citation omitted)); United States v. Vaandering, 50 F.3d 696, 700 (9th Cir. 1995) (holding twenty-two-month-old information regarding drug activity was not stale and was “an allowable basis upon which to find probable cause” where the information detailed an ongoing criminal business and was coupled with more recent information); Wagner v. State, 2010 Ark. 389, 9, 368 S.W.3d 914, 923 (Ark. 2010) (“The crimes of selling narcotics and illegal liquor have been recognized as types of ongoing criminal activity that are considered protracted or continuous, thus establishing a course of conduct.”). In light of the fact the search warrant affidavit included information connecting Thompson’s continuous, long-standing drug activity to the River Street

residence and establishing Thompson was still involved in that illegal activity just two days before the search warrant was sought and obtained, the search warrant affidavit in Thompson's case sufficiently established a probable cause basis to believe drugs would be located at the River Street residence at the time of the search based on the recent, continuous, and uninterrupted nature of Thompson's criminal enterprise, which he had been actively involved in for a period of at least three years. Cf. United States v. Canan, 48 F.3d 954, 958-959 (6th Cir. 1995) (finding a search warrant affidavit contained a substantial basis for a finding of probable cause because, although the affidavit did not contain any information regarding criminal conduct occurring at the residence to be searched for approximately **four years** before the warrant was issued, the information contained in the warrant was not stale despite its age due to the fact the drug activity described was ongoing and continuous). Accordingly, because this Court failed to consider or address the significance of the ongoing and continuous nature of Thompson's drug activity, this Court should grant rehearing, reconsider its decision, and ultimately affirm the decisions of the Court of Appeals and the trial judge along with Thompson's convictions.

Inapplicability of the Exclusionary Rule Even Assuming a Constitutional Violation Occurred

Furthermore, in reversing the decisions of the Court of Appeals and the trial judge, this Court appears to have overlooked or misapprehended the law regarding the exclusionary rule, the rationale behind that rule, and the good faith exception to that rule. In fact, this Court did not conduct any analysis whatsoever as to whether the good faith exception was applicable under the particular facts and circumstances of Thompson's case or whether the rationale justifying the exclusionary rule would be served by the application of that rule to the evidence discovered in

the search of the River Street residence.¹ Instead, this Court simply found the search warrant affidavit in Thompson's case was insufficient to provide the issuing judge with a substantial basis for a finding of probable cause before reversing the decision of the Court of Appeals and citing to language from an appellate court decision relying on the United States Supreme Court's decision in Mapp v. Ohio, 367 U.S. 643 (1961) for the proposition "[e]vidence seized in violation of the Fourth Amendment must be excluded from trial." Importantly though, as the United States Supreme Court and this Court have recognized subsequent to the Mapp decision, the exclusion of evidence is **not** always invariably warranted or required when it is determined some challenged evidence was discovered as a result of an unconstitutional search. See Hudson v. Michigan, 547 U.S. 586, 591 (2006) ("Expansive dicta in Mapp . . . suggested wide scope for the exclusionary rule. . . . But we have long since rejected that approach."); United States v. Leon, 468 U.S. 897, 918-921 (1984) ("[S]uppression of evidence obtained pursuant to a warrant should be ordered only on a case-by-case basis and only in those unusual cases in which exclusion will further the purposes of the exclusionary rule. . . . Penalizing the officer for the [issuing judge]'s error, rather than his own, cannot logically contribute to the deterrence of Fourth Amendment violations."); see also State v. Brown, 401 S.C. 82, 88-89, 736 S.E.2d 263, 266 (2012) ("[J]udicially-created exceptions have been established to ameliorate the harsh effects of the judicially-created exclusionary rule."); State v. Sachs, 264 S.C. 541, 556, 216 S.E.2d 501, 509 (1975) ("Exclusion of evidence is not the only means available to insure that warrants are properly issued."). Instead, the remedy of exclusion is a **last resort** that should only be applied in limited circumstances in which the objectives of the exclusionary rule would be most efficaciously served. See Hudson, 547 U.S. at 591 ("Suppression of evidence, however,

¹ Notably, this Court failed to conduct an analysis of the good faith exception despite the fact the issue of good faith being a potential bar to the application of the exclusionary was addressed in both the State's brief and Thompson's brief and during the oral argument before this Court. (Pet. Br. pp. 26-28; Resp. Br. p. 1; pp. 10-11; pp. 24-31).

has always been our last resort, not our first impulse. The exclusionary rule generates substantial social costs, . . . which sometimes include setting the guilty free and the dangerous at large. We have therefore been cautious against expanding it, . . . and have repeatedly emphasized that the rule's costly toll upon truth-seeking and law enforcement objectives presents a high obstacle for those urging its application We have rejected indiscriminate application of the rule . . . and have held it to be applicable only where its remedial objectives are thought most efficaciously served . . . – that is, where its deterrence benefits outweigh its substantial social costs” (citations, brackets, and internal quotations omitted)); see also Elkins v. United States, 364 U.S. 206, 217 (1960) (“The [exclusionary] rule is calculated to prevent, not to repair.”); see generally Herring v. United States, 555 U.S. 135, 144 (2009) (“To trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system.”). For that reason, the United States Supreme Court and this Court have recognized several exceptions to the exclusionary rule, including the good faith exception. See State v. Adams, 409 S.C. 641, 647, 763 S.E.2d 341, 345 (2014) (recognizing the fact a constitutional violation has occurred does **not** necessarily mean the exclusionary rule must be applied and noting several exceptions to the exclusionary rule have been adopted by the courts); see also Leon, 468 U.S. at 906 (“Whether the exclusionary sanction is appropriately imposed in a particular case, our decisions make clear, is ‘an issue separate from the question whether the Fourth Amendment rights of the party seeking to invoke the rule were violated by police conduct.’ ” (citation omitted)); State v. Weston, 329 S.C. 287, 293, 494 S.E.2d 801, 804 (1997) (recognizing the good faith exception to the exclusionary rule can be applicable to constitutional violations and instructing suppression is appropriate only in limited situations, including when an affidavit is so lacking in indicia of

probable cause as to render official belief in its existence entirely unreasonable); State v. McKnight, 291 S.C. 110, 113, 352 S.E.2d 471, 473 (1987) (“Exclusion of evidence is not the only means available to insure that warrants are properly issued.”).

Significantly, a full and complete analysis of whether exclusion of the evidence was warranted in Thompson’s case establishes it was not based on the relevant state and federal law. See Stone v. Powell, 428 U.S. 465, 486 (1976) (“[T]he [exclusionary] rule is not a personal constitutional right. It is not calculated to redress the injury to the privacy of the victim of the search or seizure[.]”). Looking to the pertinent facts and circumstances related to the warrant issue, the information included in the lengthy and detailed search warrant affidavit used to obtain the search warrant for the River Street residence could not reasonably be described as bare bones, and that information demonstrated Thompson had been engaged in an ongoing, continuous, uninterrupted drug enterprise for nearly three years at a minimum that, as this Court appears to acknowledge in its opinion, was **directly** linked to the River Street residence just fifteen months before the search warrant was executed and Thompson’s illegal items were discovered. Cf. Leon, 468 U.S. at 926 (finding an officer’s reliance on a search warrant was not objectively unreasonable despite the fact the search warrant affidavit did not contain sufficient information to establish probable cause where the warrant was supported by more than a “bare bones” affidavit). Beyond that, the officers involved in the investigation into Thompson’s drug activity acted in an objectively-reasonable manner by obtaining a search warrant before searching the River Street residence, and, notwithstanding this Court’s contrary finding regarding the sufficiency of the search warrant affidavit, the search warrant affidavit used to obtain that search warrant – whether right or wrong – has been found to be sufficient upon review by multiple judges. See Messerschmidt v. Millender, 565 U.S. 535, 546 (2012) (“Where

the alleged Fourth Amendment violation involves a search or seizure pursuant to a warrant, the fact that a neutral magistrate has issued a warrant is the clearest indication that the officers acted in an objectively reasonable manner or, as we have sometimes put it, in 'objective good faith.' ” (citation omitted)); see also United States v. Martin, 833 F.2d 752, 756 (8th Cir. 1987) (“When judges can look at the same affidavit and come to differing conclusions, a police officer’s reliance on that affidavit must, therefore, be reasonable.”). Therefore, the officers’ reliance on the search warrant was not objectively unreasonable in Thompson’s case, which means suppression of the incriminating evidence discovered in the search of the River Street residence is simply not warranted under either the federal constitution, the state constitution, or under our state statutory provisions. See Leon, 468 U.S. at 927 (“Officer Rombach’s application for a warrant clearly was supported by much more than a ‘bare bones’ affidavit. The affidavit related the results of an extensive investigation and, as the opinions of the divided panel of the Court of Appeals make clear, provided evidence sufficient to create disagreement among thoughtful and competent judges as to the existence of probable cause. Under these circumstances, the officers’ reliance on the magistrate’s determination of probable cause was objectively reasonable, and application of the extreme sanction of exclusion is inappropriate.”); see also United States v. Otero, 495 F.3d 393, 398 (7th Cir. 2007) (recognizing a defendant must rebut the presumption of good faith that arises when an officer obtains a search warrant). Accordingly, in light of the fact this Court appears to have overlooked the need for an analysis as to whether the exclusionary rule should have been applied in Thompson’s case even if a constitutional violation occurred and such an analysis establishes exclusion was **not** warranted, this Court should grant rehearing, reconsider its decision, and ultimately affirm the decisions of the Court of Appeals and the trial

judge rejecting Thompson's contentions the evidence discovered in the search of the River Street residence should have been suppressed.

Conclusion

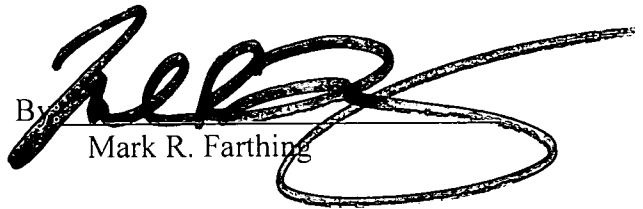
In conclusion, the issuing judge properly issued a search warrant for the River Street residence because the search warrant affidavit contained sufficient information to establish drugs and other incriminating evidence would be found at that location in light of the continuous, ongoing, and uninterrupted nature of Thompson's large-scale drug activity, and both a majority of the Court of Appeals, the trial judge, and the circuit court judge who issued the search warrant correctly concluded the search warrant affidavit provided a substantial basis for a finding of probable cause. As a result, the search of the River Street residence did not violate the mandates of the Fourth Amendment, and this Court's conclusion to the contrary was erroneous. Moreover, even if the search warrant affidavit was somehow defective and the search of the River Street residence violated Thompson's constitutional rights, the exclusionary rule was nonetheless not applicable to Thompson's case because the officers' actions in obtaining the search warrant and conducting the search of the River Street residence were undertaken in good faith, which this Court failed to consider or discuss in its opinion reversing Thompson's convictions. For the foregoing reasons coupled with the arguments raised in the Brief of Respondent and during oral argument before this Court, the State respectfully urges this Court to rehear this matter pursuant to Rule 221, SCACR, reconsider its decision, vacate its previous opinion, and affirm the decision of the Court of Appeals that affirmed the circuit court judge's ruling along with Thompson's convictions. In the alternative, the State respectfully urges this Court to rehear this matter pursuant to Rule 221, SCACR, reconsider its decision, vacate its previous opinion, and remand

Thompson's case to the circuit court to allow for further proceedings concerning the applicability of the good faith exception under the specific facts and circumstances of Thompson's case.

Respectfully submitted,

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March 9, 2017

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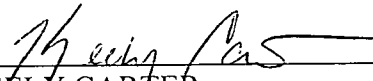
Petitioner.

PROOF OF SERVICE

I, Keely Carter, certify that I have served the within Respondent's Petition for Rehearing on Petitioner by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Michael P. Scott, Esquire
Nexsen Pruet, LLC
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I further certify that all parties required by Rule to be served have been served.
This 9th day of March, 2017.



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