State of South Carolina

In the Supreme Court

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S.C. SUPREME COURT

Appeal from Richland County
Court of General Sessions
The Honorable Alison R. Lee, Circuit Court Judge

Case No. 2011-GS-4003359
Appellate Case No. 2016-002146

THE STATE,

Respondent,

v.

JOSHUA WILLIAM PORCH,

Petitioner.

PETITIONER'S REPLY BRIEF

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Petitioner Joshua William Porch did not appeal his conviction as being contrary to the weight of the evidence. He instead appealed and sought certiorari on two legal issues. While the State's brief correctly identifies these two issues, (Resp. Br. at ii), the State sidesteps them, including unnecessary and repetitive references to facts and precedent that have no bearing on the outcome of this appeal. The State does so to divert this Court's attention from the errors of the courts below.

The State devotes much of its brief to a parade of horribles. It suggests that a mountain of inculpatory evidence serves as a basis for ignoring the legal errors committed by the courts below. (Resp. Br. at 22–23, 25–30). For example, the State notes six times, that Porch failed polygraph examinations regarding his statements to police and his testimony. The State knows that polygraph results are generally inadmissible. *See State v. McHoney*, 344 S.C. 85, 96, 544 S.E.2d 30, 35 (2001). So too is the State aware that these polygraph results were not admitted at trial. (App. at 42).

In a similarly misguided attempt to divert the Court's attention from the central issues, the State twice argues that neither a judge nor jury believed Porch's testimony that Justin Mallory killed the victim. (Resp. Br. at 25, 30). The State essentially asks the Court to discount Porch's legal arguments because it could not convict another individual. The State is quick to forget that its prosecutors *did* believe Porch's testimony—twice—though the State did not see this information as being important enough for the magistrate to consider when the officer sought Porch's arrest warrant.

The State's parade of horribles is an unnecessary distraction from the issues on appeal. The record establishes that (1) in its *Franks* determination, the trial court improperly concluded that probable cause existed by considering evidence not presented to the magistrate, and (2) the trial court improperly limited Porch's testimony by threatening him with a Confrontation Clause violation. These errors require reversal.

I. The State concedes the limited scope of review applicable under *Franks* but ignores the failure of the courts below to properly apply that narrow standard.

The State devotes roughly three paragraphs of its fifty-page brief to the central issue before the Court: whether during its *post hoc* probable cause review the trial court improperly considered evidence that the officer who applied for the arrest warrant did not present to the magistrate. The remaining portions of the State's brief that purport to address this issue confuse the proper scope and procedure under *Franks*. The State's argument fails in three respects: (1) the trial court did not clearly err by determining that a preliminary hearing was necessary, (2) the probable cause determination is limited to what was presented to the magistrate, not what the officer knew at the time of the warrant application, and (3) the invited error doctrine has no applicability to the trial court's probable cause determination.

A. The Court should review the trial court's grant of an evidentiary hearing for clear error, not *de novo* as the State suggests.

The State fails to address Porch's argument that this Court should review the trial court's decision to grant a *Franks* hearing for clear error. The State relies only on *United States v. Tate*, 524 F.3d 449, 455 (4th Cir. 2008), to argue that the review is *de novo*, (Resp. Br. at 20), but overlooks the fact that this Court has not yet established the proper

standard of review for this threshold determination. Despite the State's failure to address Porch's argument, the Court should take this opportunity to establish the proper standard of review of a trial court's determination of whether the facts proffered by a defendant necessitate a hearing under *Franks*.

Clear error is the appropriate standard of review for this inherently discretionary decision. A trial court's application of *Missouri*'s "reckless disregard" standard is a mixed question of law and fact. *See United States v. Brown*, 631 F.3d 638, 642 (3d Cir. 2011). Because determining whether to grant a *Franks* hearing involves a mixed question, "as a matter of the sound administration of justice," the trial court "is better positioned than [the appellate court] to decide" this threshold issue case by case. *Id.* at 642–43 (citing *Miller v. Fenton*, 474 U.S. 104, 114 (1985)). Like the Third Circuit in *Brown*, this Court should follow the majority of circuits to have addressed this issue and conclude that clear error is the proper standard of review. Doing so would be consistent with this Court's precedent. *Cf. State v. Asbury*, 328 S.C. 187, 193, 493 S.E.2d 349, 352 (1997) ("In criminal cases, appellate courts are bound by fact findings in response to preliminary motions where there has been conflicting testimony or where the findings are supported by the evidence and not clearly wrong or controlled by an error of law.")

B. In arguing that probable cause existed, the State conflates what the officer knew with what he actually presented to the magistrate.

The State argues against itself on the question of whether the trial court improperly considered evidence not presented to the magistrate. Citing *State v. Driggers*, 322 S.C. 506, 473 S.E.2d 57 (Ct. App. 1996) and then *State v. Martin*, 347 S.C. 522, 556 S.E.2d 706 (Ct.

App. 2001), the State properly explains that "[t]he magistrate should determine probable cause based on all the information available to the magistrate at the time the warrant was issued. In determining the validity of the warrant, a reviewing court may consider only information brought to the magistrate's attention." (Resp. Br. at 12). This standard is correct—the trial court's probable cause determination is limited only to the evidence that the officer actually presented to the magistrate. *Driggers*, 322 S.C. at 510, 473 S.E.2d at 59 (reviewing "information available to the magistrate at the time the warrant was issued.").

Later in its brief, though, the State attempts to expand the scope of review to include what the officer knew when the warrant was issued, despite not presenting that evidence to the magistrate. (Resp. Br. at 25-26, 28-30). This expansion of the probable cause review collapses the two phases of a *Franks* analysis into one. The first phase of that analysis requires a trial court to review evidence proffered by a defendant to determine whether a hearing is appropriate. *Franks v. Delaware*, 438 U.S. 154, 171 (1978). With an omission, this necessarily requires the Court to review information known to the officer requesting the warrant, but which the officer did not present to the magistrate—that is the whole purpose of a *Franks* attack on a warrant that omits material information. *See State v. Missouri*, 337 S.C. 548, 554, 524 S.E.2d 394, 397 (1999). Once a hearing has been granted, though, the question before the trial court becomes whether probable cause existed based solely upon what the officer presented to the magistrate. *Driggers*, 322 S.C. at 510, 473 S.E.2d at 59. To determine whether probable cause existed in this second phase, the trial court includes the evidence recklessly omitted, but does not consider other inculpatory evidence if the officer did not present that evidence to the magistrate. *Id.*

The State justifies the trial court's expanded inquiry in two fleeting arguments. First, it argues that the officer and the magistrate both "testified at the *Franks* hearing that [the officer] told [the magistrate] other information than what was in the arrest warrant affidavit, such as background information on the case . . . ." (Resp. Br. at 16). The record does not support such a definitive reading. The record is instead silent on what information was presented outside of the affidavit. (App. at 72-73; 79-80; 95-97).

Second, the State again parades irrelevant evidence before the Court to try and establish that the officer believed he had probable cause. (Resp. Br. at 14-16, 25-26, 28-30). The State asserts that the trial court correctly determined probable cause existed because the officer who sought the warrant knew that Porch had made prior inconsistent statements, failed polygraph examinations, and was left-handed. (Resp. Br. at 30). The flaw in this argument is that it does not matter what the officer *knew*, but instead what he *presented* to the magistrate. *Driggers*, 322 S.C. at 510, 473 S.E.2d at 59. Nothing in the record confirms that the officer provided this information to the magistrate.

The State mistakenly relies on *State v. Baccus*, 367 S.C. 41, 49, 625 S.E.2d 216, 220 (2006), to support this position, arguing that the affidavit contained sufficient probable cause because "[p]robable cause exists when the totality of the circumstances *within the officer's knowledge* 'are sufficient to lead a reasonable person to believe that a crime has been committed by the person being arrested.'" (Resp. Br. at 24 (emphasis added)). *Baccus* is inapposite—it deals with the arrest of a suspect on-scene based on the officer's knowledge, not based on the officer first obtaining an arrest warrant. *Baccus*, 367 S.C. at 49, 625 S.E.2d at 220 ("We conclude [the arresting officer] had probable cause to make the

warrantless arrest based on the information he received from [the responding officer] and his own observations at [the susptect's] residence"). Such is not the case here. Instead, the focus is on what information the officer presented to the magistrate in the arrest warrant affidavit. The officer's knowledge is immaterial if he did not share it with the magistrate.

Because neither argument absolves the courts below from failing to limit the review to information actually presented to the magistrate, this Court should reverse.

C. The record does not support the State's invited error argument.

The State suggests that Porch invited the trial court's error by presenting a "Proposed Affidavit Excluding Misrepresentations and Including Exculpatory Evidence" to establish his entitlement to a *Franks* hearing. (Resp. Br. at 28 n.12; App. at 1261-62). The State misconstrues the record and again conflates the two phases of the *Franks* analysis.

The State notes twice that Porch mentioned his proposed affidavit to the trial court. (Resp. Br. at 18, 27). When adding the portion of the record not quoted by the State, it shows that the trial court was merely attempting to confirm the paper exhibits that Porch had presented prior to the *Franks* hearing. (App. at 43-45). After listing all the documents Porch presented, the Court asked, "Is there any—what about the remaining documents and all of the other information?" (App. at 45). Porch responded in part:

> We felt that if we'd met our burden for the hearing, once we got in the hearing, we think we could strongly contend that he left out a lot of stuff that he should have told Judge Newsom regarding the the affidavit; and then we'd make our argument that the whole thing should be suppressed.
>
> But - so we think a lot of that information would [come] out through Chief Wilson. But that -- that is all we had submitted at this time . . . which we felt was sufficient to get a hearing.

(App. at 43–45). Taking the excerpt quoted by the State in context, it is clear that the trial court was merely clarifying what documentation Porch had submitted to carry his burden of establishing entitlement to a *Franks* hearing. Porch was not hinging his entire argument on the proposed affidavit as the State would have the Court believe.

Regardless, introducing the proposed affidavit during the first phase of the *Franks* analysis does not affect the trial court's *post hoc* probable cause determination in phase two. Porch's introduction of the proposed affidavit was merely to satisfy his burden of showing that the officer recklessly omitted exculpatory facts from the warrant affidavit, making it materially misleading. This differs from Porch's argument that the trial court improperly considered testimony beyond what was presented to the magistrate when determining whether the affidavit established probable cause.

The State's argument is another distraction from the central issue in this case and should be rejected. This Court should reverse the courts below.

II. The Court should not be distracted by the State's attempts to overly complicate Porch's Confrontation Clause challenge.

A. Porch's argument has been consistent since first raised to the trial court.

The State argues that Porch did not object under the Confrontation Clause and that Porch has raised a new issue not presented to the Court of Appeals. (Resp. Br. 37–39). The State is wrong in both respects.

First, the State's assertion that "Porch did not object at any point under the Confrontation Clause" disregards the record before the Court. (Resp. Br. at 38 (emphasis omitted)). It even contradicts the State's own brief: "Even though the entire 3rd interview

was video-recorded on CD/DVD, and it contained Porch's responses to questioning . . . , Porch objected to admission of any of the 3rd interview on Confrontation Clause grounds . . . ." (Resp. Br. at 33 (emphasis omitted)). Even as the State concedes, Porch did object under the Confrontation Clause and *Crawford*. (App. at 147–48, 150–52, 210, 216, 221–22, 227–28, 975). Porch even explains that this Court has not yet resolved the issue of whether limited pretrial examination can satisfy the mandates of the Confrontation Clause:

> [The *Denno* hearing] was not a full cross-examination [of the California detective], your Honor. So I think that it is a *Crawford* violation. There aren't many cases on that whether you get a cross that is more limited and then you go in an actual trial—I can't find the information. Maybe this will be the case on that issue.

(App. at 151). The State cannot reasonably argue that Porch did not object under the Confrontation Clause given the State's own contradictory recitation of the record.

Porch also does not raise a new argument regarding the videotaped confession. (Resp. Br. at 37). As Porch explained to the trial court when raising his objection pretrial:

> Now because of [the California detective's absence], the defense is left in a position where we can't also present a complete and full defense because we cannot properly explain it. The only way for us to explain his position in that final hour is to introduce the six and a half hour interrogation or the polygraph, which we are not prepared to waive his right to [*Crawford*]."

(App. at 207).[1] This is consistent with Porch's explanation during trial, specifically referencing the final hour of the video: "[The State] sought to admit the final hour

[1] The Appendix actually reads "proffer," though this is likely a transcription mistake. Defense counsel previously argued that he was not ready to waive Porch's right of confrontation under *Crawford*. (App. at 206). Porch contends this is another such occasion.

interview with [the South Carolina investigators], and the whole discussion and the objection from the defense was, well, can you do this without [the California detective], number one? Is there a Crawford violation." (App. at 975). These objections are consistent with Porch's argument to the Court of Appeals. (App. at 1294–95, 1360–61).

The Court should reject the State's attempts to confuse the issue raised by Porch and instead address the merits of Porch's Confrontation Clause challenge.

B. The State improperly tries to justify the Court's violation of Porch's Confrontation Clause right by applying the hearsay rule.

The State attempts to negate Porch's confrontation clause challenge by asserting that compliance with the hearsay rule precludes a Confrontation Clause violation: "if the State had offered the video of this portion of the interview in reply it would not be hearsay . . . As a result, there was no Confrontation Clause violation." (Br. at 40; Br. at 42). Put another way, the State argues that a "statement introduced for any purpose other than to prove the truth of the matter asserted is not hearsay and does not violate the Confrontation Clause." (Resp. Br. at 43). By arguing that compliance with the hearsay rule insulates evidence from the Confrontation Clause, the State confirms that it misunderstands the precedent that has developed since *Crawford*. Courts have consistently rejected arguments similar to the State's contention that evidentiary rules can supplant a defendant's opportunity for adequate cross-examination. The State's argument must be rejected as inconsistent with the Confrontation Clause and precedent.

The State argues that "the questions asked by [the California detective] or even her statements are not hearsay and would not violate the Confrontation Clause," (Br. at 42).

To support this argument, the State claims that questions normally cannot be hearsay. (*Id*). But questions can be hearsay—the State recognizes this by citing this Court's recent opinion in *State v. Brewer*, 411 S.C. 401, 406-08, 768 S.E.2d 656, 658-60 (2015) (explaining police officers' interrogation questions may be hearsay). Failing that, the State also argues that the lack of a statement is not hearsay, citing to *State v. Price*, 368 S.C. 494, 499, 629 S.E.2d 363, 366 (2006). (Resp. Br. at 43 ("The video would have been admissible in reply because it would have shown what was not said by [the California detective], i.e. no threats or coercion." (emphasis omitted))). First, *Price* does not stand for the proposition that the absence of a statement is not hearsay evidence; rather, the opinion simply restates the general definition of hearsay. *Price*, 368 S.C. at 499, 629 S.E.2d at 366. Second, the State's contention is wrong; the absence of a hearsay statement can still be hearsay. *See Smith v. Korn Indus., Inc.*, 274 S.C. 182, 183, 262 S.E.2d 27, 27-28 (1980).

Regardless of the State's misunderstanding of this evidentiary rule, whether a hearsay exclusion or exception applies is unimportant under the Confrontation Clause analysis. In *State v. Mitchell*, the trial court admitted the prior statement of a third-party under Rule 804(b)(3), SCRE, despite the witness refusing to testify, being held in contempt, and being removed from the courtroom prior to completing direct-examination. 378 S.C. 305, 312-13, 662 S.E.2d 493, 497-98 (Ct. App. 2008), *cert. dismissed*, 386 S.C. 597 (2010). Our Court of Appeals reversed, explaining that although the trial court found that the statement complied with the hearsay exception, the defendant "had no opportunity to cross-examine [the declarant] about the statement because [the

declarant] had already been removed from the courtroom when the State moved to admit it." *Id.* at 312, 662 S.E.2d at 497.

Like *Mitchell*, the State's citation of hearsay exemptions and exceptions does not insulate the evidence from the Confrontation Clause. Many of South Carolina's hearsay exceptions are rooted in perceived reliability. *Cf. State v. Hill*, 331 S.C. 94, 99, 501 S.E.2d 122, 125 (1998) (explaining that basis of excited utterance hearsay exceptions is reliability—spontaneity has the effect of "reducing the likelihood of fabrication"). Whether testimony is sufficiently reliable to be admitted notwithstanding confrontation is the exact argument the United States Supreme Court rejected in *Crawford*: "Where testimonial statements are involved, we do not think the Framers meant to leave the Sixth Amendment's protection to the vagaries of the rules of evidence, much less to amorphous notions of 'reliability.'" 541 U.S. 36, 61 (2004). Thus, the Court must look to whether Porch had an adequate opportunity for cross-examination, not whether the statements were being offered for the truth or whether the statements were reliable enough to fall under a hearsay exception. Accepting the State's invitation to leave "the regulation of out-of-court statements to the law of evidence" in criminal cases because doing so would "render the Confrontation Clause powerless to prevent even the most flagrant inquisitorial practices." *Crawford*, 541 U.S. at 51.

The Court should reject the State's assertions that the trial court's improper limitation of Porch's testimony by threatening him with violating his Constitutional rights was permissible because the violation confirmed with the South Carolina hearsay rules. Because the admission of this evidence was not harmless, the Court should reverse.

CONCLUSION

The Court granted certiorari to review two legal issues wrongly decided by the courts below. Instead of addressing the merits of these issues, the State has put Porch on trial again, repeatedly referencing evidence and precedent that has no application to this appeal. The Court should look through the State's diversions to conclude that (1) under *Franks v. Delaware*, the trial court properly granted an evidentiary hearing but then improperly considered evidence not presented to the magistrate, and (2) under *Crawford v. Washington*, the trail court violated Porch's Confrontation Clause right—an error that he preserved and that was not harmless.

This Court should reverse on both issues.

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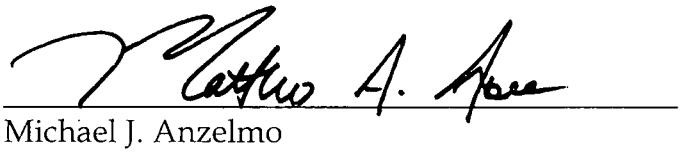
By: 

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Counsel certifies that Petitioner's Rely Brief complies with Rule 211(b), SCACR.

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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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