

 ORIGINAL

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Pickens County

Honorable Edward W. Miller, Circuit Court Judge

RECEIVED
DEC 27 2018
SC Court of Appeals

THE STATE,

RESPONDENT,

V.

LUTHER BRIAN MARCUS (2),

APPELLANT

APPELLATE CASE NO. 2017-002623

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the trial court erred when it denied Appellant's motion to suppress the evidence derived from the GPS monitoring of a pick-up truck that Appellant drove, where the affidavit used to support the warrant was invalid because it contained misstatements to the judge who issued the warrant, and where the evidence derived from the GPS monitoring was crucial in convicting Appellant?

STATEMENT OF THE CASE

Appellant was indicted for indecent exposure by the Pickens County Grand Jury during the May 2017 term. R. 124 – 125. Appellant's trial was held on December 11 and 12, 2017, in front of the Honorable Edward W. Miller. R. 1. Shannon Swords Odom represented the state. Id. David D. Cantrell, Jr. represented the Appellant. Id.

Prior to the start of the trial, Appellant made a motion to suppress evidence. R. 5, ll. 9 – 16. The court denied that motion. R. 6, ll. 2 – 4.

Appellant was found guilty as indicted. R. 117, ll. 21 – 24. Judge Miller sentenced Appellant to three years' imprisonment, and then revoked his probation in full. R. 123, ll. 6 – 7.

This appeal follows.

STANDARD OF REVIEW

“In criminal cases, this Court only reviews errors of law.” State v. Gamble, 405 S.C. 409, 415, 747 S.E.2d 784, 787 (2013) (citing State v. Jacobs, 393 S.C. 584, 586, 713 S.E.2d 621, 622 (2011)). “On appeals from a motion to suppress based on Fourth Amendment grounds, this Court applies a deferential standard of review and will reverse if there is clear error.” State v. Tindall, 388 S.C. 518, 521, 698 S.E.2d 203, 205 (2010) (citing State v. Khingratsaiphon, 352 S.C. 62, 70, 572 S.E.2d 456, 459 (2002)). However, this Court reviews questions of law de novo. State v. Whitner, 399 S.C. 547, 552, 732 S.E.2d 861, 863 (2012) (citations omitted). State v. Adams, 409 S.C. 641, 646–47, 763 S.E.2d 341, 344 (2014).

ARGUMENT

The trial court erred when it denied Appellant's motion to suppress the evidence derived from the GPS monitoring of a pick-up truck that Appellant drove, where the affidavit used to support the warrant was invalid because it contained misstatements to the judge who issued the warrant, and where the evidence derived from the GPS monitoring was crucial in convicting Appellant.

Introduction

As will be seen below, the police obtained a warrant to place a GPS device on appellant's truck based on an affidavit that contained inaccurate and misleading statements that were not outright false, or were, at best made with a reckless disregard for the truth. Franks v. Delaware, 438 U.S. 154, 155 (1978). These false statements pertained to the facts of past burglaries which the police mischaracterized as similar to the string of burglaries the warrant in this case involved. From there, the illegal warrant allowed the police, inter alia, to obtain a photograph of appellant by following him in his pick-up truck with the GPS device. The subsequent items obtained by the police were used to obtain an identification of Appellant as the man allegedly indecently exposing himself were all the fruit of the poisonous tree. Wong Sun v. U.S., 371 U.S. 471 (1963).

Relevant Facts

The state alleged that on December 13, 2016, Appellant willfully exposed himself in a public place. R. 2, l. 20 – 3, l. 3.

Prior to the trial, Appellant made a motion to suppress, "any and all evidence or testimony related to - - or derived from ... a GPS device that was attached to a vehicle that was driven... by the [Appellant]." R. 5, ll. 9 – 16. The police attached the GPS device to Appellant's pick-up truck because they suspected he was involved in a series of burglaries in the area. R. 7, l. 23 – 8, l. 12.

Officer Art Taylor created an affidavit to support the warrant he sought for the GPS monitoring of Appellant's pick-up truck. R. 6, ll. 10 – 14. One of the supporting facts in the affidavit for the warrant was that a game camera recorded a pick-up truck leaving the scene of one of the burglaries in the area. R. 15, l. 1 – 16, l. 2. Officer Taylor assumed that it was used in all eight of the burglaries. Id. Notwithstanding the differences in appearance between the pick-up truck seen on the game camera and Appellant's pick-up truck, Officer Taylor believed the pick-up truck seen on the game camera video was Appellant's. R. 16, l. 12 – 18, l. 3.

Officer Taylor testified to some surveillance photographs of the suspect in the string of burglaries. R. 18, ll. 4 – 18. Although the only photographs presented at trial showed the burglar with his face concealed, officer Taylor stated in the affidavit supporting the warrant that the burglar on the surveillance photographs bore a, "striking resemblance," to Appellant. Id.; R. 20, ll. 11 – 13. Officer Taylor, "did not at any point in [the] affidavit, state that all of the pictures or videos of the suspect had the suspect wearing a mask." R. 24, ll. 4 – 9. The affidavit and warrant were both signed on November 16, 2016. R. 20, ll. 14 – 18.

On December 8, 2016, five days prior to the alleged incident, police officers placed a GPS monitor on a pick-up truck that they believed had been, "driven by [Appellant]." R. 6, l. 6 – 7, l. 7; R. 20, ll. 19 – 22. Although, the pick-up truck was registered to relatives of Appellant, the police had seen Appellant drive that pick-up truck before. R. 7, ll. 15 – 22; R. 72, l. 24 – 73, l. 7.

On December 13, 2016, the GPS monitor's battery was dying and police officers followed Appellant to the Pickens County courthouse. R. 21, l. 15 – 22, l. 9. The officers witnessed Appellant park the pick-up truck and enter the courthouse. R. 79, ll. 3 – 9. The police photographed Appellant at the courthouse. R. 23, l. 23 – 24, l. 1. While Appellant was inside the courthouse, the officers attached a new GPS device to Appellant's pick-up truck. R. 79, l. 7 – 80, l. 10. The officers would

not have been at the Pickens County courthouse on December 13, 2016 to take the photograph of Appellant but for the replacement of the GPS monitor. R. 74, ll. 15 – 25.

Less than an hour later, Samuel Owen, an assistant principle at Pickens Middle School, reported a man outside of the school exposing himself and called the school's SRO (school resource officer). R. 40, l. 17 – 42, l. 1; R. 47, ll. 3 – 11. Owen saw the man drive away in a pick-up truck. R. 42, ll. 19 – 20. Owen was given a photo-id lineup and identified Appellant as the man he saw outside of the school. R. 31, l. 8 – 32, l. 22.

On November 16, 2016, twenty-seven days earlier, officer Art Taylor signed and submitted the supporting affidavit that alleged Appellant was involved in a series of convenience store break-ins in the Pickens County area. R. 7, l. 23 – 8, l. 12. The supporting affidavit had a number of inaccuracies and misstatements. Taylor stated in the affidavit that he believed the series of robberies were connected because the robberies happened at convenience stores and the burglars entered **all** the stores through the wall. R. 8, ll. 13 – 16. (emphasis added) Contrary to Taylor's attestation, the record shows that not all of the break-ins' entry points were through a wall. R. 8, l. 17 – 9, l. 22.

Defense counsel pressed Taylor on the questionable details he provided in the affidavit supporting the warrant for GPS monitoring of Appellant. In paragraph 16 of the affidavit, Taylor attested that it was likely Appellant was behind the string of robberies because he was arrested in 2008 for breaking into buildings through cinder block walls. R. 10, ll. 8 – 19. However, Taylor admitted that other break-ins using a similar entry technique occurred while Appellant was still incarcerated. Id.

Taylor testified that it was reasonable to believe that Appellant was a viable suspect, "on these eight-break-ins" based on his investigation and that of "forensic personnel." R. 11, ll. 9 – 21. However, Taylor admitted that the "forensic personnel" were not mentioned in the affidavit he

presented to the judge for the GPS monitoring warrant. R. 11, ll. 22 – 24. Taylor further admitted that the affidavit he presented to the judge for the warrant was, “exclusively based on [his] opinion.” R. 11, l. 25 – 12, l. 3.

Taylor testified that a “game camera” recorded video of a pick-up truck leaving one of the robbed convenience stores and he assumed that that pick-up truck was involved in all the robberies. R. 15, l. 16 – 16, l. 2. Defense counsel pointed out differences in the appearance of the pick-up truck Appellant drove and the pick-up truck in the video. R. 16, l. 12 – 17, l. 21.

Defense counsel had Taylor mark on a map the locations of the burglaries. R. 12, l. 9 – 15, l. 8. Although, Taylor attested in the affidavit to the magistrate that the burglary locations were close in proximity, defense counsel showed that none of the burglary locations were within “five to seven miles of each other.” R. 27, l. 23 – 28, l. 2.

Taylor also attested in the affidavit supporting the warrant that there were photographs from surveillance equipment in the stores that were burgled that showed a suspect who held a “striking resemblance to [Appellant].” R. 18, ll. 4 – 16. However, in the affidavit, officer Taylor neglected to mention that **all** the surveillance photographs showed the suspect with his face concealed. R. 24, ll. 4 – 9. (emphasis added) Taylor claimed that, “[T]here’s another - - couple pictures that I had,” that showed the suspect’s face, but he did not present them at trial. R. 24, l. 15 – 25, l. 2. No explanation was given for why the photographs that allegedly showed the suspect’s face were not presented at trial. Taylor also testified that he never met Appellant nor “observed him before.” R. 26, ll. 16 – 25.

The affidavit stated that the alleged “unique” method of operation in the current series of burglaries and the method from Appellant’s past burglary conviction in 2008 matched. R. 11, l. 9 – 12, l. 4. However, Appellant’s “unique” method of entry was through cinder-block walls, and there is no evidence presented that any of the walls were made of cinder-block. R. 10, ll. 8 – 14.

Furthermore, not all the locations were broken into via the wall, one was broken into via the door and another via the window. R. 8, l. 13 – 9, l. 22; R. 10, ll. 8 – 14. In addition, there were other burglaries in Pickens County, where the suspect entered through the wall, that occurred while Appellant was still incarcerated. R. 10, ll. 15 – 19.

At the close of the suppression hearing, defense counsel articulated his full argument that the affidavit upon which the warrant was based did not give probable cause for the warrant. R. 27, l. 8 – 28, l. 25. The affidavit contained, “misstatements, not just inaccuracies, but misstatements.” R. 27, ll. 8 – 10. The judge who issued the warrant did not see **any** of the photograph or video evidence, and took Taylor’s word that there were photographs or videos that showed a resemblance between the suspect and Appellant. R. 27, ll. 11 – 13. (emphasis added)

Defense counsel argued that the “game camera” footage of the truck showed conclusively that Appellant’s truck was different than the one seen on camera because the license plate was set in a, “totally different location,” on the back of the truck. R. 27, ll. 14 – 19. “The judge was told that it was the same truck, and it was not,” defense counsel contended. Id.

Defense counsel pointed out that, “[N]o pictures in this case have been presented to the Court that come anywhere near close to appearing to be [Appellant], and the judge was told that [the photographs] did [match Appellant’s description].” R. 27, ll. 22 – 23. “Paragraph 18: a striking resemblance to [Appellant]. That’s - - that’s going well past, ‘I think it looks like him,’ or, ‘it could be him.’ The same thing about the truck.” R. 28, ll. 16 – 20.

Defense counsel concluded that Taylor’s affidavit was, “full of statements that the pictures and testimony today show were not accurate, and an inaccurate affidavit should be [in]sufficient and does not give probable cause to believe that [Appellant] was involved in those break-ins at all.” R. 28, ll. 21 – 25.

The trial court denied Appellant's motion to suppress because it thought, "it's a matter of subjective opinion." R. 29, ll. 2 – 4. Appellant's case continued and he was found guilty of indecent exposure. R. 117, ll. 21 – 24.

In its case in chief, the state's key witness, Samuel Owen, claimed he saw a man masturbating outside Pickens Middle school during recess. R. 40, l. 17 – 42, l. 1. Owen described what the man was wearing, "he was wearing jeans, and he was wearing a sweater. And I noticed it was kind of like a Christmassy color. I know it was a red, white and a dark colored stripe sweater. He had a stocking cap on with a beanie, red beanie hat." R. 42, l. 21 – 43, l. 1. Owen then testified that the man ran to a truck and drove off. R. 43, ll. 5 – 13.

Owen's description of the suspect corresponded with Appellant's appearance in the photograph outside of the Pickens County courthouse. R. 69, ll. 2 – 19. The state would not have been able to match Owen's description of the suspect's appearance on the day of the incident with Appellant's appearance on that day if not for the photograph taken of Appellant outside of the courthouse while police officers replaced the GPS monitor.

Owen's testimony that the man he saw at the school that day was Appellant, was the only evidence the state presented that linked Appellant to the crimes alleged.

Officer Art Taylor testified during the state's case in chief to the GPS monitoring of Appellant's movements on December 13, 2016. R. 76, l. 2 – 78, l. 23. He testified that he saw Appellant get out of the pick-up truck in the courthouse parking lot. R. 79, ll. 3 – 11. Taylor testified that after Appellant left the courthouse the GPS device tracked the pick-up truck to a location near Pickens Middle school. R. 76, l. 22 – 77, l. 7.

Officer Taylor testified that he watched Appellant's movements through the GPS tracking on December 13, 2016. R. 77, ll. 20 – 21. However, "it was only the following day that I found out

what had happened [at the middle school] because I had overheard a Pickens city unit on their radio calling out X Patrol on Queens Court.” R. 77, ll. 23 – 25. It was only after seeing Appellant’s movements on the GPS and speaking to other investigators that Officer Taylor went to, “check and see if this is going to be the same suspect that I’ve been watching.” R. 78, ll. 6 – 7. If the GPS device was not attached to the pick-up truck, Taylor would not have any reason to think Appellant was the suspect in this case.

Taylor confirmed that the GPS tracking showed that Appellant’s pick-up truck was near the middle school around the time the suspect was seen there by Owen. R. 78, ll. 8 – 11. Taylor then sent a photograph of Appellant to Lieutenant Samuel Byers at the Pickens City police department, for use in a photo-id lineup to show to Owen. R. 54, l. 24 – 55, l. 6. Owen was given the photo-id lineup and identified Appellant as the man he saw outside of the middle school. R. 46, ll. 15 – 18.

Taylor would never have spoken to Lieutenant Byers about the, “suspect that [he had] been watching,” without the GPS tracking putting Appellant’s pick-up truck near the school. Therefore, without the evidence from the GPS tracking, Taylor would not have provided Appellant’s photograph for the photo-id lineup. If Appellant’s photograph was not in the photo-id lineup, Owen would not have identified Appellant as the alleged perpetrator.

In its closing argument, the state used the GPS evidence to undercut the defense’s argument that the suspect seen at the middle school was not Appellant, “I’m not quite sure what Mr. Cantrell will say to you, so I want to do a little anticipating. There’s not a whole lot to say. Maybe that maybe it wasn’t the defendant. Well, you’ve got the tracker on the truck.” R. 98, ll. 4 – 8.

The state emphasized the importance of the photograph taken at the courthouse of what Appellant was wearing on December 13, 2016, because Owen’s testimony corroborated that the suspect was, “wearing the exact same thing [Appellant] was just wearing at the courthouse.” R. 98,

ll. 9 – 10. The state argued to the jury that the GPS evidence proved that Appellant was the suspect at the middle school that day, and the only issue left is if Owen was telling the truth when he testified he saw the suspect masturbating. R. 98, ll. 17 – 21.

The warrant for the GPS monitoring would not have been issued if not for the misstatements and inaccuracies that officer Taylor attested to in the supporting affidavit. If the supporting affidavit was deficient, then the warrant lacked probable cause. If the warrant lacked probable cause, then the police officers had no right to attach a GPS monitor to Appellant's truck and had not right to replace it on December 13, 2016.

Without the warrant based on the deficient affidavit, the police officers would not have been at the courthouse to replace the GPS monitor on December 13, 2016. If police officers had not replaced the GPS monitor they would not have taken the photograph of Appellant outside of the courthouse that corroborated Owen's description of the suspect, and Taylor would not have contacted Lieutenant Byers with Appellant's photograph for the photo-id lineup.

Therefore, the trial judge's denial of Appellant's suppression motion was an error, and that error prejudiced Appellant.

Discussion

The trial court erred when it refused to suppress the evidence derived from the GPS monitoring device because the warrant affidavit was facially insufficient to establish probable cause. The affidavit was based on unreliable information, which misled the magistrate into issuing the warrant. *See United States v. Leon*, 468 U.S. 897, 923 (1984) (citing *Franks v. Delaware*, 438 U.S. 154 (1978) (noting that suppression remains an appropriate remedy if the magistrate issuing a warrant was misled by information in an affidavit that the affiant knew was false or would have

known was false except for his reckless disregard of the truth)); Accord United States v. Colkley, 299 F.2d 297 (4th Cir. 1990); State v. Missouri, 337 S.C. 548, 524 S.E.2d 394 (1999).

The Fourth Amendment of the United States Constitution guarantees “[t]he right of the people to be secure . . . [from] unreasonable searches and seizures.” U.S. Const. amend. IV. The Fourth Amendment requires an oath or affirmation before probable cause can be found by an officer of the court, and a search warrant issued. U.S. Const. amend. IV. The South Carolina Code also mandates that a search warrant “shall be issued only upon affidavit sworn to before the magistrate, municipal judicial officer, or judge of a court of record...” S.C. Code Ann. § 17-13-140 (1985). Evidence obtained in violation of the Fourth Amendment is inadmissible in both state and federal court. *See State v. Forrester*, 343 S.C. 637, 643, 541 S.E.2d 837, 840 (2001).

“The affidavit must contain sufficient underlying facts and information upon which the magistrate may make a determination of probable cause. State v. Philpot, 317 S.C. 458, 454 S.E.2d 905 (Ct. App. 1995)). 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 magistrate should determine probable cause based on all of the information available to the magistrate at the time the warrant was issued.” State v. Dupree, 354 S.C. 676, 684, 583 S.E.2d 437, 441 (Ct. App. 2003).

In terms of a court's review of the magistrate's decision, “[t]he duty of the reviewing court is to ensure the issuing magistrate 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).

In the instant case, the affidavit submitted to the magistrate contained misstatements, inaccuracies, and withheld exculpatory information from the magistrate. R. 27, ll. 11 – 19; R. 28, ll.

21 – 25. Therefore, the warrant issued, based on the flawed affidavit, lacked probable cause to attach the GPS monitor Appellant's pick-up truck.

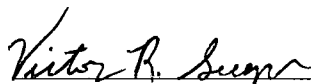
Since there was no probable cause to justify the issuance of the warrant, the GPS monitor should never have been attached to Appellant's pick-up truck. If the GPS monitor was never attached, police officers would not have been at the courthouse to replace the dying GPS monitor on December 13, 2016. R. 74, ll. 15 – 25. If police officers were not at the courthouse to replace the dying GPS monitor on December 13, 2016, the photograph of Appellant, that corroborated Samuel Owen's description of the suspect, would not have been taken. Additionally, Officer Taylor would not have known that the pick-up truck was near Pickens Middle school around the time of the incident.

Officer Taylor only thought Appellant was a potential suspect in the incident because the GPS device tracked the pick-up truck's movement and showed the pick-up truck stopped near the middle school on December 13, 2016. R. 77, l. 20 – 78, l. 7. Without the GPS evidence Taylor would not have been able to "check and see if this is ... the same suspect that I've been watching." R. 78, ll. 6 – 7. Without the GPS tracking evidence, Officer Taylor would not have thought to contact Lieutenant Byers with Appellant's information. Therefore, without the GPS device tracking his pick-up truck, Appellant would not have been placed in the photo-id lineup for Owen to identify him.

Therefore, since the warrant authorizing the use of GPS monitoring was based on an insufficient affidavit, the trial court erred when it admitted the evidence that derived therefrom. The admission of the evidence derived from the GPS monitor prejudiced Appellant because without it the state could not connect Appellant to the incident, and if that evidence was properly excluded the outcome of Appellant's trial would have been different.

CONCLUSION

By reason of the foregoing arguments Appellant respectfully requests that his conviction be reversed, and this case remanded to the Pickens County Court of General Sessions for a new trial.



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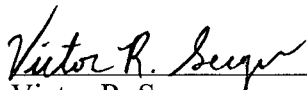
ATTORNEY FOR APPELLANT

This 27th day of December, 2018.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

December 27, 2018.



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