ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Charleston County

Roger M. Young, Sr., Circuit Court Judge

RECEIVED

MAR 28 2019

S.C. SUPREME COURT

JASON A. WEST,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2018-001732

JOHNSON PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Was Petitioner's guilty plea rendered involuntary and unknowing due to plea counsel's erroneous advice that any motion to suppress the drug evidence based upon a defective search warrant was meritless where the search warrant contained numerous defects on its face?

STATEMENT

On December 10, 2013, a Charleston County grand jury indicted Petitioner for trafficking cocaine (2013-GS-10-7264). App. 114-115. Initially, Petitioner retained Leon Stavrinakis to represent him. App. 35, l. 25- App. 36, l. 1; App. 48, ll. 3-4; App. 5-9. The state offered to permit Petitioner to plead guilty in exchange for a sentence of three years imprisonment. App. 76, ll. 17-19. Later that offer was taken "off the table." App. 64, ll. 14-17; App. 76, ll. 19-20. While representing Petitioner, Stavrinakis informed the solicitor of at least two problems with the search warrant used to seize the drugs for which Petitioner was indicted. App. 39, ll. 10-14; App. 54, ll. 5-24; App. 55, ll. 2-4; App. 56, ll. 18-21. The search warrant listed two addresses, one of which was not the place searched. App. 54, ll. 12-20. Additionally, the search warrant return was dated beyond the ten-day statutory limit. App. 54, ll. 20-24. Stavrinakis indicated his intent to file a motion to suppress the evidence seized pursuant to the flawed search warrant, but he never did. App. 56, ll. 22-25; App. 57, ll. 1-2. Thereafter, Petitioner relieved Stavrinakis and retained Louis S. Moore, plea counsel. App. 40, ll. 14-23; App. 64, ll. 2-4.

On January 7, 2016, Petitioner entered a guilty plea to trafficking cocaine, first offense. App. 1. The Honorable Deadra Jefferson accepted Petitioner's guilty plea. App. 1. Chris Lietzow represented the state, and Louis. S. Moore represented Petitioner. App. 2. During the guilty plea hearing, the solicitor admitted there were "a few potential issues with the search warrant," but he opined "the search warrant would stand up." App. 9, ll. 1-3. "[T]o mitigate the risk of going to trial," the state offered a plea deal to Petitioner. App. 9, ll. 3-5. Judge Jefferson sentenced Petitioner to five years imprisonment in accordance with the negotiated plea deal. App. 4, ll. 5-7; App. 15, ll. 6-10; App. 76, l. 25 – App. 77, l. 1; App. 116.

On November 30, 2016, Petitioner filed an application for post-conviction relief (PCR). App. 17-23. The matter proceeded to an evidentiary hearing on May 21, 2018, before the Honorable Roger M. Young, Sr. App. 31. Kelly Oppenheimer represented the state, and Christopher Murphy represented Petitioner. App. 31. At the conclusion of the hearing, Judge Young granted the state's motion to hold the record open to allow the state to present testimony from plea counsel. App. 58, l. 8- App. 59, l. 14.

By an order filed on September 5, 2018, Judge Young denied Petitioner relief. App. 99-113. On September 20, 2018, Petitioner served his notice of appeal. This petition for writ of certiorari follows.

ARGUMENT

Petitioner's guilty plea was rendered involuntary and unknowing due to plea counsel's erroneous advice that any motion to suppress the drug evidence based upon a defective search warrant was meritless where the search warrant contained numerous defects on its face.

Relevant Facts

The search warrant used by the police to seize drug evidence from Petitioner's home suffered from multiple flaws. First, the signatures on the warrant purportedly signed by the magistrate looked different. App. 44, ll. 7-10; App. 48, ll. 15-17; App. 49, ll. 3-6; App. 65, ll. 1-12; App. 74, ll. 21-23. Second, the search warrant return was not prepared within the statutory allotted ten days. App. 54, ll. 23-24. Third, there was a problem with the address listed in the warrant. App. 65, ll. 16-19; App. 74, l. 25 – App. 75, l. 7. Finally, neither the search warrant nor the discovery provided by the state provided the date and time of the drug transaction allegedly conducted by the confidential informant. App. 41, ll. 19-24; App. 48, ll. 15-17; App. 85, ll. 6-8; App. 88, ll. 15-22. Despite these flaws, plea counsel advised Petitioner to accept the state's five-year plea offer. App. 66, ll. 20-22.

According to Petitioner, plea counsel induced him to plead guilty by telling him a motion to suppress had been filed and denied. App. 42, l. 6 – App. 43, l. 19; App. 44, ll. 13-15; App. 51, ll. 2-17; App. 85, l. 25 – App. 86, l. 9. Plea counsel denied making such a representation. App. 65, ll. 13-16; App. 78, ll. 2-6. It was undisputed that plea counsel never filed a motion to suppress based upon the faulty search warrant. App. 57, ll. 6-8; App. 66, ll. 8-13; App. 76, ll. 8-10. In fact, plea counsel claimed he did not "think there was a basis for it." App. 65, ll. 15-16. According to plea counsel, "Judge Jefferson at the time had already made some determination that there was basis for that." App. 65, ll. 22-24. Plea counsel then clarified that what he meant

was that "at [the] plea" Judge Jefferson made the determination there were no issues with the warrant or that any issues were harmless. App. 65, l. 24 – App. 66, ll. 7; App. 75, ll. 8-11.

During the PCR hearing, the solicitor indicated that he received several letters from Petitioner after the guilty plea. App. 55, ll. 7-12. In one of those letters, Petitioner indicated a concern about the apparently two different signatures on the search warrants. App. 55, ll. 12-16. According to the solicitor, "[t]hey were both of the same judge's signature; however, there was some slight alterations on the signature." App. 55, ll. 16-18.

The PCR judge denied Petitioner relief on this claim. The judge found plea counsel's testimony "very credible." App. 110. Additionally, the judge found the assistant solicitor's testimony "very credible." App. 110. Without explaining the judge found Petitioner's testimony was "not credible." App. 110. Although the judge initially recognized that the claim involved the search warrant's failure to "specify the date or time of the CI-buy," the judge appeared to alter the claim midway through his analysis by referring to case law governing when the identity of a confidential informant must be revealed. App. 110-112. When explaining that "even if the search warrant excluded the date and time of the drug transaction," the judge determined that a defendant, in a challenge to such a search warrant," would have to show that law enforcement deliberately lied or were reckless with the truth in providing the affidavit to the magistrate. App. 112. According to the PCR judge, Petitioner failed to make such a showing.

Discussion

The Sixth Amendment to the United States Constitution guarantees criminal defendants the right to the effective assistance of counsel. Strickland v. Washington, 466 U.S. 668 (1984). The right to the effective assistance of counsel extends to the plea-bargaining process. Lafler v. Cooper, 566 U.S. 156, 162 (2012); Missouri v. Frye, 566 U.S. 133, 141 (2012); Padilla v. Kentucky, 559

U.S. 356 (2010); Hill v. Lockhart, 474 U.S. 52, 57-59 (1985); Judge v. State, 321 S.C. 554, 471 S.E.2d 146 (1996), *overruled on other grounds by* Jackson v. State, 342 S.C. 95, 535 S.E.2d 926 (2000). "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland v. Washington, 466 U.S. 668, 686 (1984).

To prove ineffective assistance of counsel, "the defendant must show that counsel's performance was deficient" and "that the deficient performance prejudiced the defense." Id. "When a convicted defendant complains of the ineffectiveness of counsel's assistance, the defendant must show that counsel's representation fell below an objective standard of reasonableness." Id. at 687-688. "[T]he performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances." Id. at 688. Concerning prejudice, "a defendant need not show that counsel's deficient conduct more likely than not altered the outcome in the case." Rather, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694.

The two-pronged test adopted in Strickland "applies to challenges to guilty pleas based on ineffective assistance of counsel." Hill v. Lockhart, 474 U.S. 52, 58 (1985). "A defendant who enters a plea on the advice of counsel may only attack the voluntary and intelligent character of a plea by showing that counsel's representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's errors, the defendant would not have pled guilty, but would have insisted on going to trial." Rolen v. State, 384 S.C. 409, 413, 683 S.E.2d 471, 474 (2009). "[I]n the context of determining the

voluntariness of a guilty plea that is entered upon the advice of counsel," the deficiency prong of the Strickland test requires "an inquiry into whether counsel's advice was within the range of competence demanded of attorneys in criminal cases." Alexander, 303 S.C. at 542, 402 S.E.2d at 485. "The defendant's undisputed testimony that he would not have pled guilty to the charges but for trial counsel's advice is sufficient to prove that defendant would not have pled guilty." Smith v. State, 369 S.C. 135, 138, 631 S.E.2d 260, 261 (2006).

Due process of law requires that before a guilty plea can be entered voluntarily and intelligently, a defendant must be advised of his privilege against compulsory self-incrimination, the right to trial by jury, and the right to confront one's accusers. Boykin v. Alabama, 395 U.S. 238, 243-244 (1969); see also Burnett v. State, 352 S.C. 589, 591, 576 S.E.2d 144, 145 (2003). The record must show with certainty that the plea is "an intentional relinquishment or abandonment of a known right or privilege." State v. Patterson, 278 S.C. 319, 322, 295 S.E.2d 264, 265 (1982) *overruled on other grounds* State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991). Judges are required to give the defendant an explanation of the defendant's waiver of his constitutional rights and a realistic picture of all sentencing possibilities. State v. Armstrong, 263 S.C. 594, 598, 211 S.E.2d 889, 891 (1975). In order for a defendant to knowingly and voluntarily plead guilty, the defendant must have a full understanding of the consequences of the plea. Dover v. State, 304 S.C. 433, 405 S.E.2d 391 (1991) (citing State v. Hazel, 275 S.C. 392, 271 S.E.2d 602 (1980)). The judge must question the defendant about the possible punishment that could be imposed. Id. at 434-435.

The Fourth Amendment provides that the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." U.S. Const. amend. IV. The Fourth Amendment guarantees individuals the right to be free from unreasonable searches and seizures. U.S. Const. amend. IV. "No right is held more

sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law." Union Pacific Ry. Co. v. Botsford, 141 U.S. 250, 251 (1891). The essence of the Fourth Amendment is to protect a person's right to be free from unreasonable government intrusions in his own home. Kyllo v. United States, 533 U.S. 27, 31 (2001). The Fourth Amendment is a personal right and an individual must invoke its protections. Minnesota v. Carter, 525 U.S. 83, 88 (1998). The exclusionary rule prohibits the use of evidence obtained through an unlawful search and/or seizure. Wong Sun v. United States, 371 U.S. 471, 484-485 (1963); State v. Forrester, 343 S.C. 637, 643, 541 S.E.2d 837, 840 (2001); State v. Nelson, 336 S.C. 186, 192 n.3, 519 S.E.2d 786, 789 n.3 (1999); State v. Copeland, 321 S.C. 318, 323, 468 S.E.2d 620, 624 (1996).

"Generally, police seizures are *per se* unreasonable within the meaning of the Fourth Amendment unless such seizures are accomplished pursuant to judicial warrants issued *upon probable cause*." State v. Rodriquez, 323 S.C. 484, 490, 476 S.E.2d 161, 165 (Ct. App. 1996)(emphasis added). "[T]he police must, whenever practicable, obtain advance judicial approval of searches and seizures through the warrant procedure." Terry v. Ohio, 392 U.S. 1, 20 (1968).

The Fourth Amendment also 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 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 establishing the grounds for the warrant." S.C. Code Ann. § 17-13-140 (1985). "The affidavit must contain sufficient underlying facts and information upon which the magistrate may make a determination

of probable cause. State v. Dupree, 354 S.C. 676, 684, 583 S.E.2d 437, 441 (Ct. App. 2003) (citing 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." Dupree, 354 S.C. at 684, 583 S.E.2d at 441 (citations omitted). Oral testimony may also be used in to supplement search warrant affidavits which are facially insufficient to establish probable cause. See State v. Weston, 329 S.C. 287, 494 S.E.2d 801 (1997). However, "sworn oral testimony, standing alone, does not satisfy the statute." State v. Jones, 342 S.C. 121, 128, 536 S.E.2d 675, 678-79 (2000) (citing State v. McKnight, 291 S.C. 110, 352 S.E.2d 471 (1987)).

"A warrant is supported by probable cause 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). "The task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all 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 contraband or evidence of a crime will be found in a particular place." Illinois v. Gates, 462 U.S. 213, 238 (1983); see also State v. King, 349 S.C. 142, 150, 561 S.E.2d 640, 644 (Ct. App. 2002) ("This determination requires the magistrate to make a practical, common-sense decision of whether, given the totality of the circumstances set forth in the affidavit, including the veracity and basis of knowledge of persons supplying the information, there is a fair probability that contraband or evidence of a crime will be found in a particular place."). Put another way, there must be "a justifiable determination, based upon the totality of the circumstances and in view of all the

evidence available to law enforcement officials at the time of the search, that there exists a practical, nontechnical probability that a crime is being committed or has been committed and incriminating evidence is involved." State v. Bultron, 318 S.C. 323, 332, 457 S.E.2d 616, 621 (Ct. App. 1995).

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 determining whether a substantial basis exists, the crucial element is not whether the target of the search is suspected of a crime, but whether it is reasonable to believe that the items to be seized will be found in the place to be searched. Zurcher v. Stanford Daily, 436 U.S. 547, 556 & n. 6 (1978).

"In order for an affidavit in support of a search warrant to show probable cause, it must state facts so closely related to the time of the issuance of the warrant as to justify a finding of probable cause at that time." State v. Winborne, 273 S.C. 62, 64, 254 S.E.2d 297, 298 (1979) (internal quotation omitted). "The reason for this rule is that probable cause, with time, dissipates." Id. Relying upon State v. Baker, 251 S.C. 108, 160 S.E.2d 556 (1968), in which the Supreme Court held that a "search warrant had to be executed within a reasonable time, depending upon the circumstances," the Court concluded that the timing of information obtained used to justify the issuance of a warrant "should be sufficiently short to justify the conclusion that the evidence is likely still at the place where it was seen." Winborne, 273 S.C. at 65, 254 S.E.2d at 298. Where the police failed to provide in the search warrant application a date on which the confidential informant allegedly saw drugs at a particular residence, the Court concluded there was "no evidence from which a magistrate" or the reviewing court could "determine how long ago the evidence was seen." Id. Thus, "the affidavit was defective" and the evidence must be suppressed. Id.

According to the Court of Appeals, there is "no fixed standard or formula establishing a maximum allowable interval between the dates of events recited in an affidavit and the date of a search warrant." State v. Thompson, 363 S.C. 192, 206, 609 S.E.2d 556, 564 (Ct. App. 2005)(citing United States v. McCall, 740 F.2d 1331, 1336 (4th Cir. 1984)).

> While the lapse of time involved is an important consideration and may in some cases be controlling it is not necessarily so. There are other factors to be considered, including the nature of the criminal activity involved, and the kind of property for which authority to search is sought. Obviously, a highly incriminating or consumable item of personal property is less likely to remain in one place as long as an item of property which is not consumable or which is innocuous in itself or not particularly incriminating.

State v. Corns, 310 S.C. 546, 550-551, 426 S.E.2d 324, 326 (Ct. App. 1992)(quoting United States v. Steeves, 525 F.2d 33 (8th Cir. 1975)). Nevertheless, "delay in seeking and obtaining a search warrant may invalidate it." Steeves, 525 F.2d at 38. "It is axiomatic by now that under the fourth amendment the probable cause upon which a valid search warrant must be based must exist at the time at which the warrant is issued, not at some earlier time." Id. at 37.

Recognizing that a sixty-day delay between the time an informant allegedly saw items connected to armed robberies and the issuance of a search warrant was "long," the Court of Appeals held the delay was not so great as to invalidate the warrant as a matter of law. Corns, 310 S.C. at 551, 426 S.E.2d at 326. The Court explained "the delay was occasioned by the fact that the officers had information further criminal activity may occur and the house was thus under surveillance and the execution of a warrant may have interfered with this surveillance." Id. at 550, 426 S.E.2d at 326. Additionally, the Court was persuaded that "the items sought by the warrant," which "were ski masks, clothing and weapons used in an armed robbery" "were not incriminating in themselves and that people who own pistols generally keep them at home or on their persons." Id. at 550-551, 426 S.E.2d at 326.

In another case, the Court of Appeals found probable cause for a search warrant where the informant claimed to have seen the defendant in possession of crack cocaine within the past 72 hours. Thompson, 363 S.C. at 206, 609 S.E.2d at 564. In support of this conclusion, the Court was persuaded by the fact "that the information received from the informant was not an isolated incident" and the officer had informed the magistrate that the defendant "was the subject of an ongoing narcotics investigation conducted during the several months prior to obtaining the warrant." Id. Of particular importance to the Court was "the continuous nature of alleged drug activity." Id. at 207, 609 S.E.2d at 564.

The PCR judge erroneously placed the burden on Petitioner to show the search warrant was defective based upon a deliberate falsehood or reckless disregard for the truth by the affiant. Petitioner's complaint with the search warrant was not any alleged falsity of the information. Rather, Petitioner's complaint with the search warrant was that the affiant failed to provide the magistrate with the date and time that the confidential informant allegedly purchased drugs from Petitioner. The lack of the date affected the viability, or the staleness, of the information the police relied upon in seeking the warrant. It was undisputed that the search warrant affidavit failed to disclose when the confidential informant allegedly purchased the drugs; thus, the magistrate could not evaluate whether the information provided supported probable cause. Plea counsel induced Petitioner to accept a guilty plea offer by failing to challenging the search warrant on the basis that it lacked probable cause due to the missing critical information of the date and time of the confidential informant's alleged drug buy.

CONCLUSION

Petitioner respectfully requests this Court grant the petition for writ of certiorari and order full briefing on the issue presented.

Susan B. Hackett
Appellate Defender

ATTORNEY FOR PETITIONER

This 28th day of March, 2019.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Charleston County
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JASON A. WEST,

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for Jason A. West states:

1. She is an Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent Petitioner.

2. She has reviewed the record of Petitioner's post-conviction relief hearing before Judge Roger M. Young, Sr., which was held on May 21, 2018, and July 26, 2018. Based upon her review of the hearing transcripts, it is her opinion, the appeal is without legal merit sufficient to warrant a new trial.

3. Pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), she has briefed an arguable legal issue which arose during the post-conviction relief process.

Therefore, counsel requests that the Court relieve her as counsel for Jason A. West.

Respectfully Submitted,

Susan B. Hackett

Susan B. Hackett
Appellate Defender
ATTORNEY FOR PETITIONER

This 28th day of March, 2019.

STATE OF SOUTH CAROLINA

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Johnson Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon Benjamin Limbaugh, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Johnson Petition for Writ of Certiorari and a copy of the Appendix have been served on Jason A. West, at 320 Regent Street, , Summerville, SC 29483, this 28th day of March, 2019.

Susan B. Hackett
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 28th day of March, 2019.

(L.S)
Notary Public for South Carolina
My Commission Expires: May 12, 2027