STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Charleston County

Honorable William Jeffrey Young, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

KEVIN L. MIDDLETON,

APPELLANT

APPELLATE CASE NO 2017-000837

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

I. Whether the trial judge erred in denying Appellant's motion to suppress evidence found as the result of a warrantless search and seizure of Appellant, where Appellant was in the home of a third party and law enforcement had an arrest warrant for Appellant but did not have a search warrant at the time of entry into the home?

II. Whether the trial judge erred in allowing law enforcement officers to testify about the existence of arrest warrants involving Appellant, where the prejudicial effect significantly outweighed any probative value, where officers repeatedly referred to Appellant as a target and a fugitive, and where the trial judge failed to perform a balancing test?

STATEMENT OF THE CASE

A Charleston County Grand Jury indicted Appellant during its August 2013 term of court for trafficking cocaine base, possession with intent to distribute cocaine, and possession with intent to distribute heroin. R. 334 – 339. His case was called to trial on April 13, 2015 before the Honorable W. Jeffrey Young and a jury. Assistant Solicitors Edward Corvey, David Osborne, and Greg Voigt appeared on behalf of the State, and Seth Whipper represented Appellant. R. 1.

At the conclusion of the three-day trial, the jury found Appellant not guilty of trafficking cocaine base between ten and twenty-eight grams, guilty of trafficking cocaine base between twenty-eight and one hundred grams, guilty of possession with intent to distribute heroin, guilty of possession of cocaine, and not guilty of possession of intent to distribute cocaine. R. 309 l. 24 – R. 310, l. 21.

Judge Young sentenced Appellant to three years' incarceration on the charge of possession of cocaine, ten years on the possession with intent to distribute heroin, and sixteen years on the trafficking cocaine charge. R. 332 l. 12 – R. 333, l. 4.

This appeal follows.

ARGUMENT

Statement of Facts

Between four and five law enforcement officials with the City of North Charleston observed a home at 5:00 a.m. on the morning of April 20, 2013. R. 54, l. 23 – R. 57, l. 20; R. 121, l. 24 – R. 122, l. 9. Kristofer Gorman, one of the officers, testified that he surveyed the home for a relatively short period of time before knocking on the door. R. 57, ll. 21 – 25. He claimed to have heard music and people talking. Id.; R. 103, ll. 2 – 22.

After Gorman knocked, a white male answered the door and Gorman saw Appellant sitting inside on a couch. R. 59, l. 21 – R. 60, l. 6. Gorman made eye contact with Appellant and made his way over to him. R. 60, l. 10 – R. 61, l. 16. Law enforcement had been searching for Appellant. Id. Gorman testified that the entire home was detained within a minute of entry. R. 88, l. 3 – 9. Narcotics were allegedly located in front of Appellant on a table. R. 61, l. 17 – R. 62, l. 10. Testimony from one officer indicated that there was nothing on the coffee table during the law enforcement's initial approach. R. 97, ll. 17 – 23. Gorman also claimed that a black digital scale was in Appellant's lap. R. 63, ll. 5 – 20. Gorman indicated that multiple other people, along with baggies containing a white substance, were located within the home. R. 65, ll. 3 – 17.

Gorman testified that he detained Appellant and removed him from the home due to active arrest warrants. R. 69, l. 23 – R. 70, l. 4. Appellant was transported via Gorman's Tahoe to the jail. R. 70, ll. 5 – 10; R. 106, l. 25 – R. 107, l. 10.

After the jury was selected and prior to opening statements, Counsel for Appellant moved to suppress Appellant's arrest, the evidence which was seized, and to prevent any mention of Appellant's active arrest warrants. R. 9, l. 18 – R. 15, l. 20; R. 20, ll. 2 – 25. Counsel explained

that although there was a search warrant, it was procured after the initial intrusion into the home. R. 21, l. 21 – R. 22, l. 3. The trial court indicated its reluctance to suppress any testimony or evidence:

> Well, I think that's what their testimony is going to be, but I will tell you this: If they saw Mr. Middleton, they went in to make an arrest and drugs were there in plain view when they went in to arrest him, then that's - - all of my rulings, in all likelihood, it's going to be allowed, but I certainly will wait to hear the testimony.

R. 22, ll. 4 – 10.

During the pre-trial hearing, Kristopher Gorman offered testimony as an officer from the City of North Charleston. R. 23, l. 10 – R. 29, l. 10. He claimed to have received a tip from someone in the community that Appellant would be at a certain address. R. 24, ll. 17 – 22. On the night of April 19, 2013, he went to that address and surrounded the trailer with other members of law enforcement. R. 24, l. 17 – R. 25, l. 17. He heard multiple conversations over loud music and opted to "do a simple knock to see if anybody would answer the door." Id. After he knocked, a white male opened the door and "swung the door wide open." Id.

As soon as the door was opened, Gorman claimed to have seen Appellant. Id. At that time, Gorman "identified him as Mr. Middleton [and took] a direct path to Mr. Middleton on the couch and ordered him to the ground and placed him into custody." R. 25, ll. 18 – 22. Gorman also alleged that he saw "a large off-white rock-like substance that was sitting on the table in front of Mr. Middleton" that he identified as narcotics. R. 25, l. 23 – R. 26, l. 2.

On cross-examination, Gorman admitted that he went into the home as soon as the door opened. R. 27, l. 23 – R. 28, l. 1. Gorman admitted that he knew he was going to a house that did not belong to Appellant. R. 28, ll. 16 – 18. He also indicated that through his investigation, he was under the impression that Appellant was either staying at the home or would be present there. R. 28, ll. 11 – 15.

At the conclusion of Gorman's testimony, counsel for Appellant argued:

> Arrest warrants cannot be used to go into a residence that does not belong to the defendant, and that's what happened; therefore, what we have is officers at the residence unlawfully and illegally because that's an arrest warrant, and because of that, any of the contraband, any of the evidence, even if it's in plain view, has to be suppressed, because the Fourth Amendment protects expectation of privacy.

R. 29, ll. 13 – 21.

Counsel cited Steagald v. U.S., 451 U.S. 204, 101 S.Ct. 1642 (1981) for the notion that law enforcement cannot go into the residence of a third party to execute a search warrant for the defendant.[1] Seemingly in contravention to Katz v. U.S., 389 U.S. 347, 88 S.Ct. 507 (1967), the State then argued that the Fourth Amendment protects places, not people. R. 30, ll. 9 – 11. Relying on either hindsight or confirmation bias, the State also presumed that drugs were being used in the home due to the fact that "there was an active party going on, late into the night." R. 29, ll. 6 – 15.

The State also cited U.S. v. Gray and argued that when someone is using another's house as a commercial place to sell drugs, there was no reasonable expectation of privacy in another's home. There was no testimony elicited at the pre-trial hearing regarding the sale of drugs. 491 F.3d 138 (4th Cir. 2007).

Noting that Appellant could be seen once the door opened, the trial court found that probable cause existed. R. 32, ll. 7 – 20.

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[1] The case was transcribed as "Siegel vs. U.S." but a review of the discussion of the case, including the total weight of the cocaine (forty-three pounds) and the name of the individual who was listed on the arrest warrant (Lyons), it is readily apparent that the trial court and the parties were discussing Steagald.

Discussion

I. The trial judge erred in denying Appellant's motion to suppress evidence found as the result of a warrantless search and seizure of Appellant, where Appellant was in the home of a third party and law enforcement had an arrest warrant for Appellant but did not have a search warrant at the time of entry into the home.

In Steagald, a DEA agent received a tip that Ricky Lyons could be located in Atlanta, Georgia and provided a phone number where Lyons could be reached. 451 U.S. at 206, 101 S.Ct. 1642, 1644. Law enforcement obtained the address that corresponded to the telephone number and also discovered that Lyons was the subject of a six-month-old arrest warrant. Id.

As law enforcement officers approached the home two days later, they observed Steagald and Hoyt Gualtney standing outside. Id. These two men were frisked before agents proceeded inside. Id. at 206, 101 S.Ct. 1642, 1644-45. Gualtney's wife answered the door and informed the agents that she was alone in the home. Id. at 206, 101 S.Ct. at 1645. Lyons was not found inside the home.

However, during the search, law enforcement located a substance believed to be cocaine. Id. Following this discovery, law enforcement obtained a search warrant and performed two additional searches of the home. Id. They located forty-three pounds of cocaine. Id. at 207, 101 S.Ct. at 1645. Steagald moved to suppress all of the evidence based upon the agents' failure to obtain a search warrant before entering the home. Id. One law enforcement officer testified that although there was no "physical hinderance" which prevented him from securing a search warrant, he believed the arrest warrant was sufficient to justify the entry and search. Id.

In Steagald, the search at issue took place in the absence of consent or exigent circumstances. Id. at 211, 101 S.Ct. at 1647. Except in such special situations, the Supreme

Court has consistently held that the entry into a home to conduct a search or make an arrest is unreasonable under the Fourth Amendment unless done pursuant to a warrant. See Payton v. New York, 445 U.S. 573, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980); Johnson v. United States, 333 U.S. 10, 13–15, 68 S.Ct. 367, 368–369, 92 L.Ed. 436 (1948). Thus, the Court observed: "In terms that apply equally to seizures of property and to seizures of persons, the Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant." Payton v. New York, supra, 445 U.S., at 590, 100 S.Ct., at 1382. See, Coolidge v. New Hampshire, 403 U.S. 443, 474–475, 477–478, 91 S.Ct. 2022, 2042–2043, 2044, 29 L.Ed.2d 564 (1971); Jones v. United States, 357 U.S. 493, 497–498, 78 S.Ct. 1253, 1256–1257, 2 L.Ed.2d 514 (1958); Agnello v. United States, 269 U.S. 20, 32–33, 46 S.Ct. 4, 6, 70 L.Ed.2d 145 (1925).

Steagald differs slightly from the matter *sub judice*. The Fourth Amendment claim in Steagald was not raised by Ricky Lyons, the subject of an active search warrant. Instead, the challenge to the search was asserted by a person not named in the warrant who was convicted on the basis of evidence uncovered during a search of his residence for Lyons. However, the law remains relevant when it comes to Appellant.

The purpose of a warrant is to allow a neutral judicial officer to assess whether the police have probable cause to make an arrest or conduct a search. The placement of this checkpoint between the government and the citizen implicitly acknowledges that an "officer engaged in the often competitive enterprise of ferreting out crime," Johnson v. United States, supra, 333 U.S. at 14, 68 S.Ct., at 369, may lack sufficient objectivity to weigh correctly the strength of the evidence supporting the contemplated action against the individual's interests in protecting his own liberty and the privacy of his home. Coolidge v. New Hampshire, supra, 403 U.S., at 449–

451, 91 S.Ct., at 2029–2030; McDonald v. United States, 335 U.S. 451, 455–456, 69 S.Ct. 191, 193, 93 L.Ed. 153 (1948).

The Court in Steagald distinguished arrest warrants from search warrants:

> However, while an arrest warrant and a search warrant both serve to subject the probable-cause determination of the police to judicial review, the interests protected by the two warrants differ. An arrest warrant is issued by a magistrate upon a showing that probable cause exists to believe that the subject of the warrant has committed an offense and thus the warrant primarily serves to protect an individual from an unreasonable seizure. A search warrant, in contrast is issued upon a showing of probable cause to believe that the legitimate object of a search is located in a particular place, and therefore safeguards an individual's interest in the privacy of his home and possessions against the unjustified intrusion of the police.

Steagald v. United States, 451 U.S. 204, 212–13, 101 S. Ct. 1642, 1648, 68 L. Ed. 2d 38 (1981).

Discussing the arrest warrant, the Court concluded that "the warrant embodied a judicial finding that there was probable cause to believe [that] Ricky Lyons had committed a felony, and the warrant therefore authorized the officers to seize Lyons." Steagald, supra, at 213, 101 S.Ct. at 1648. The Court noted the dangers of allowing law enforcement to rely on arrest warrants to perform searches:

> However, the agents sought to do more than use the warrant to arrest Lyons in a public place or in his home; instead, **they relied on the warrant as legal authority to enter the home of a third person based on their belief that Ricky Lyons might be a guest there**. Regardless of how reasonable this belief might have been, it was never subjected to the detached scrutiny of a judicial officer...
>
> In the absence of exigent circumstances, the Supreme Court has consistently held that judicially untested determinations are not reliable enough to justify an entry into a person's home to arrest him without a warrant, or a search of a home for objections in the absence of a search warrant.

Id. (internal citations omitted) (emphasis added).

The Court found "**no reason to depart from this settled course when the search of a home is for a person rather than an object.**" Id. at 214, 101 S.Ct. at 1648 (footnote omitted) (emphasis added).

The Court sought to limit potential abuse. If "the police, acting alone and in the absence of exigent circumstances, [could] decide when there is sufficient justification for searching the home of a third party for the subject of an arrest warrant," the police could search all the homes of that individual's friends and acquaintances. Id. at 215, 101 S.Ct. at 1649. Additionally, as was the case in Chimel v. California[2], an arrest warrant could serve as the pretext for entering a home and searching extraneous rooms and desk drawers when police only have a suspicion but not probable cause that illegal activity is taking place. Id.

The Fourth Amendment is designed to prevent, not simply to redress, unlawful police action. Chimel at 766, n. 12, 89 S.Ct., at 2042, n. 12. Once this much is acknowledged, and once it is recognized that the Fourth Amendment protects people—and not simply 'areas'—against unreasonable searches and seizures it becomes clear that the reach of that Amendment cannot turn upon the presence or absence of a physical intrusion into any given enclosure. Katz v. United States, 389 U.S. 347, 353, 88 S. Ct. 507, 512, 19 L. Ed. 2d 576 (1967).

As was the case in Steagald, law enforcement in Appellant's case received a tip that the subject of an arrest warrant would be at a home. The police could have attempted to obtain a search warrant at that time. In the alternative, they could have obtained a search warrant after Gorman saw Appellant in the home. Three to four police officers, who had the home surrounded, could have remained on site while Gorman or another officer obtained a search warrant. A warrant could have even been requested by telephone. However, that was not done.

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2 395 U.S. 752, 767, 89 S.Ct. 2034, 2042 (1969).

As noted in Steagald, "the inconvenience incurred by the police is simply not that significant" and "the additional burden of obtaining a search warrant at the same time is miniscule." 451 U.S. at 223, 101 S.Ct. 1642, 1652. Accordingly, Appellant was seized in violation of his Fourth Amendment rights when the police entered the home of a third party without a search warrant in order to seize him. There were no exigent circumstances mentioned by Gorman; he simply saw Appellant and ran inside.

A similar analysis took place in Minnesota v. Olson, wherein the United States Supreme Court held that overnight houseguests have a legitimate expectation of privacy in their temporary quarters because "it is unlikely that [the host] will admit someone who wants to see or meet with the guest over the objection of the guest." 495 U.S. 91, 110 S.Ct 1684 (1990). If that customary expectation of courtesy or deference is a foundation of Fourth Amendment rights of a houseguest, it presumably should follow that an inhabitant of shared premises may claim at least as much, and it turns out that the co-inhabitant naturally has an even stronger claim. Georgia v. Randolph, 547 U.S. 103, 126 S.Ct 1515 (2006).

Law enforcement officers in Appellant's case overstepped their boundaries by entering the home of a third party to arrest Appellant. Appellant was not in his own home, as was the case with Payton v. New York, 445 U.S. 573, 100 S.Ct 1371 (1980). Furthermore, Appellant was not in a public place as was the defendant in United States v. Watson, 423 U.S. 411, 96 S.Ct 820 (1976). The police were not in hot pursuit of Appellant, nor did he attempt to flee upon seeing or hearing law enforcement.

The evidence which was obtained as a result of the search and seizure which occurred without a search warrant should have been suppressed in Appellant's case.

II. The trial judge erred in allowing law enforcement officers to testify about the existence of arrest warrants involving Appellant, where the prejudicial effect significantly outweighed any probative value, where officers repeatedly referred to Appellant as a target and a fugitive, and where the trial judge failed to perform a balancing test.

Appellant was repeatedly referred to in a negative and incriminating manner: Robert Kruger referred to him as a "target" and a "fugitive" throughout his testimony and the State referred to Appellant as a "fugitive" during closing argument. R. 116, ll. 5 – 6; R. 118, ll. 1 – 17; R. 124, l. 21 – R. 125, l. 4; R. 260, ll. 19 – 24; R. 264, ll. 3 – 11. Kruger characterized his team as a "fugitive arrest team" and repeatedly mentioned serving warrants. R. 120, ll. 17 – 24.

Prior to trial, defense counsel sought to prevent any mention of this by requesting that the trial court direct the State to tell its story "without prejudicing the chances of this man getting a fair trial." R. 9, ll. 18 – 21. The court heard argument pre-trial after the State moved to admit "res gestae material regarding defendant's outstanding warrants." R. 7, l. 24 – R. 9, l. 34. The assistant solicitor argued as follows:

> [Law enforcement] arrived and appeared, and then the drugs happened to be inside, which then prompted them to bring in the North Charleston narcotics unit to obtain a search warrant and survey and catalog the drugs. I believe one of the res gestae exceptions that we should be allowed to elicit testimony that the warrants existed, not for what they were for, but merely that that's what they were doing and that they were attempting to serve warrants on Kevin Middleton and not any of the other five individuals in that house.
>
> I think under that exception, I believe in the Adams case, it's pretty clear that anything that furnishes part of the context of the crime or is necessary or essential in completing kind of the total story or total picture of the crime is admissible under this exception, and furthermore, Your Honor, I think that failure to elicit that would prejudice the State in that the case law regarding res gestae is clear there's no need to fragmentize an event so long as that event and the things that are trying to be elicited goes to furthering the total the story and nothing beyond that.

> Of course, it's also up to the Court's decision in terms of admitting it under [SCRE] 403.

R. 8, l. 6 – R. 9, l. 3.[3]

The trial court responded by indicating that it would not allow the State to discuss the particular crimes listed in the arrest warrants, but defense counsel argued that there were "ways to get us their story without prejudicing [Appellant's] position." R. 10, ll. 8 – 15. In particular, counsel submitted that the jury did not need to know exactly why law enforcement needed to speak with Appellant, suggesting that Appellant may have been a witness in a case or a person of interest. Id.

The court indicated that refusing to allow law enforcement officers to speak about the warrants "kind of takes away from it." R. 12, ll. 8 – 21. The assistant solicitor interjected after the court suggested that the parties stipulate to the officers' lawful presence and claimed that the jury would be confused if the arrest warrants were not mentioned. R. 11, l. 1 – R. 13, l. 2. The court revealed that it was "leaning more towards saying that they were there for Kevin Middleton. They don't have to say they had an arrest warrant, because that heightens the level that most of the public thinks that if they got an arrest warrant for you, **then you're probably guilty**." R. 13, ll. 3 – 9. (emphasis added).

The assistant solicitor suggested that a curative charge would solve the prejudice, and the court concluded that law enforcement witnesses would be allowed to say "that they were there to issue a warrant for Mr. Kevin Middleton with nothing going into the details as to what they are," and then a curative charge would be offered. R. 15, ll. 14 – 20.

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[3] State v. Adams, 322 S.C. 114, 470 S.E.2d 366, 1996) was overruled on other grounds by State v. Giles, 407 S.C. 14, 754 S.E.2d 261 (2014), approximately fifteen months before Appellant's trial.

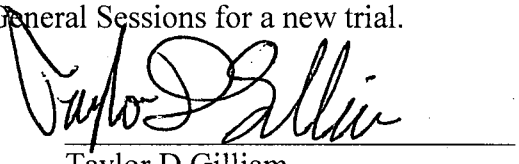
The res gestae theory recognizes that evidence of other bad acts may be an integral part of the crime with which the defendant is charged or may be needed to aid the fact finder in understanding the context in which the crime occurred. State v. Fletcher, 363 S.C. 221, 609 S.E.2d 572 (Ct.App.2005); State v. Wood, 362 S.C. 520, 608 S.E.2d 435 (Ct.App.2004).

When evidence is admissible to provide this "full presentation" of the offense, there is "no reason to fragmentize the event under inquiry by suppressing parts of the res gestae." State v. Sweat, 362 S.C. 117, 133, 606 S.E.2d 508, 517 (Ct.App.2004) (internal quotations omitted); see also State v. Preslar, 364 S.C. 466, 613 S.E.2d 381, 385 (Ct. App. 2005). Even if prior bad act evidence is clear and convincing and falls within an exception, it must be excluded if its probative value is substantially outweighed by the danger of unfair prejudice to the defendant. Rules 403 and 404(b), SCRE (although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice); State v. Gillian, 373 S.C. 601, 646 S.E.2d 872 (2007); State v. Braxton, 343 S.C. 629, 541 S.E.2d 833 (2001). The determination of the prejudicial effect of the evidence must be based on the entire record and the result will generally turn on the facts of each case. State v. Bell, 302 S.C. 18, 393 S.E.2d 364, cert. denied, 498 U.S. 881, 111 S.Ct. 227, 112 L.Ed.2d 182 (1990).

Regarding the allegations in the arrest warrants, Appellant was innocent until proven guilty. The arrest warrants were not indicative of prior bad acts; they were mere allegations. As defense counsel articulated, "the warrants are not a part of the crime, the charge. They're not at all a part of that, so by the black letter of the law, it's not res gestae." R. 11, l. 22 – R. 12, l. 3. Therefore, the State should have been prevented from eliciting testimony regarding Appellant's irrelevant arrest warrants. Additionally, the trial court erred by not conducting a balancing test as required by Rule 403, SCRE.

CONCLUSION

For the reasons listed above, Appellant requests this Court reverse his conviction and remand it to the Charleston County Court of General Sessions for a new trial.



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ATTORNEY FOR APPELLANT

This 28th day of August, 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."

August 28, 2018.

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