STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Charleston County

Honorable Robin B. Stilwell, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

FILICIANO JERMAINE SMITH,

APPELLANT.

APPELLATE CASE NO. 2018-002039

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1.

Did the trial judge abuse his discretion by denying Appellant's motion to suppress evidence seized as a result of his warrantless arrest when the arresting officers, who were under the belief active arrest warrants had been obtained, lacked probable cause to make the arrest as they knew little about the investigation, and where, under South Carolina law, the knowledge of the lead investigator could not be imputed to the arresting officers?

2.

Did the trial judge abuse his discretion by denying Appellant's motion to suppress evidence seized from his residence when the affidavit in support of the search warrant failed to establish probable cause since it merely alleged Appellant was a suspect in the burglary and had been located at the address to be searched ten days after the offense, but did not provide the magistrate with a substantial basis to find probable cause that the items sought would be found at the particular address?

STATEMENT OF THE CASE

A Charleston County grand jury indicted Appellant on October 9, 2017 for first degree burglary, first degree criminal sexual conduct (CSC), kidnapping, and unlawful carrying of a pistol. R. 1. His case was called to trial on November 5, 2018 before the Honorable Robin Stilwell, and a jury. R. 1. Solicitor Scarlett Wilson and Assistant Solicitor Chad Simpson represented the state. Jason King and Steven Bowden represented Appellant. R. 1.

On November 8, 2018, the jury found Appellant guilty as indicted. R. 642, l. 6 – 643, l. 15. He was sentenced to forty-five years for first degree burglary, thirty years for kidnapping, thirty years for first degree CSC, and one year for unlawful carrying of a pistol. R. 657, ll. 2-14. All sentences were ordered to be served concurrently. R. 657, ll. 2-14.

This appeal follows.

STANDARD OF REVIEW

"In criminal cases, the appellate court sits to review errors of law only." State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006) (citing State v. Wilson, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001)). "This Court is bound by the trial court's factual findings unless they are clearly erroneous." Id. (citing State v. Quattlebaum, 338 S.C. 441, 452, 527 S.E.2d 105, 111 (2000)). "The trial judge's factual findings on whether evidence should be suppressed due to a Fourth Amendment violation are reviewed for clear error." Id. at 48-49, 625 S.E.2d at 220 (citing State v. Brockman, 339 S.C. 57, 66, 528 S.E.2d 661, 665-666 (2000)).

ARGUMENT

1.

The trial judge abused his discretion by denying Appellant's motion to suppress evidence seized as a result of his warrantless arrest when the arresting officers, who were under the belief active arrest warrants had been obtained, lacked probable cause to make the arrest as they knew little about the investigation, and where, under South Carolina law, the knowledge of the lead investigator could not be imputed to the arresting officers.

Relevant Facts

Appellant moved pretrial to suppress all evidence seized as a result of his unlawful arrest, particularly a handgun, a flashlight, some change, and other various items. Defense counsel explained that Appellant was arrested at two o'clock on June 1, 2017. However, law enforcement did not obtain warrants for his arrest until 3:30 pm that afternoon. The arresting officers, who were part of the Quick Response Squad, were told and were under the impression that police had active warrants at the time of arrest. Because the arresting officers had little knowledge of the investigation, counsel argued they lacked probable cause to make the arrest. Consequently, counsel asserted that Appellant's arrest was illegal and moved to suppress all evidence obtained "from the fruit of the poisonous tree." R. 50, l. 20 – 53, l. 5.

The state conceded the warrant for Appellant's arrest was not signed until 3:30 pm, approximately an hour and a half after Appellant was arrested. R. 59, l. 24 – 60, l. 11. However, the assistant solicitor argued the arresting officers were aware (1) of the "home invasion" that occurred ten days earlier (2) that the arrest they were making that day was associated with this incident, and (3) that "there was a DNA hit." R. 53, ll. 14-25. The solicitor claimed this knowledge amounted to probable cause for Appellant's arrest. R. 54, ll. 6-13. In the alternative,

the solicitor argued that under the "collective knowledge or vertical collective knowledge or the fellow officer rule" law enforcement had probable to arrest Appellant without a warrant. Under this theory, because Detective Daniel Wilson, the lead investigator on the case, had sufficient knowledge to establish probable cause to arrest Appellant, that knowledge was imputed to the three arresting officers. R. 54, l. 14 – 56, l. 24.

In response, defense counsel cited to State v. Baccus, 367 S.C. 41, 49, 625 S.E.2d 216, 220 (2006), which held "probable cause for a warrantless arrest exists when the circumstances within the arresting officer's knowledge are sufficient to lead a reasonable person to believe that a crime had been committed by the person being arrested." Counsel emphasized that under South Carolina law and the South Carolina Constitution "the arresting officer has to have knowledge, has to have probable cause." R. 61, ll. 6-13; R. 63, ll. 2-11. He argued the arresting officers were not involved in the investigation and were "acting on bad information." These officers maintained Appellant was arrested because "there were active warrants . . . with the Charleston Police Department." R. 62, ll. 2-23. Counsel further asserted that the state failed to cite to any South Carolina case law that holds "the knowledge of Detective Wilson would be somehow imputed to these arresting officers." R. 63, ll. 2-11.

The state ultimately proffered the testimony of Andrew Lupisella, one of the arresting officers with the Quick Response Squad. Lupisella admitted that when he arrested Appellant he was under the belief that the Charleston Police Department had active warrants for Appellant's arrest. He later discovered that this was not true. There was a delay between the arrest and the signing of the warrants. R. 68, ll. 2-19. Despite this misunderstanding, Lupisella was aware there was a recent "home invasion" in West Ashley. He was also "aware that our central detectives . . . had put out a DNA hit. Again, I don't know the specifics of exactly how that

works, but a hit had come back on somebody's DNA and that's the reason that brought us to where we were at that time on June 1st." R. 68, l. 20 – 69, l. 16. Lupisella later admitted that he was not involved in the investigation, that he did not know what evidence had been collected, that he had not read any of the reports related to the case, and that he had not interviewed the complainant. R. 70, ll. 7-25. Lastly, Lupisella admitted that he had no idea of the specific charges Appellant was being arrested on. R. 71, l. 14 – 72, l. 23. He was merely acting under the orders and requests of other officers. R. 73, ll. 15-17.

Subsequent to Lupisella's testimony, defense counsel asserted:

> The officer testified that he knew there was an active warrant or warrants. He didn't know what the specific charges were. He wasn't involved in the investigation. He didn't know what evidence had been collected. He knew that there was some kind of DNA hit. I mean, basically, this is just rumors around the police department I think is what he knew because it was a big deal in the police department. I think it will come out in trial a lot of detectives were assigned to this trying to catch this person. I think . . . just because he knew some very general information around the . . . police station doesn't mean that he had specific facts and knowledge that there was probable cause for the arrest. He's going there to arrest on what he believes is an active warrant and as he testified no one informed him of what he was being arrested for. He didn't specifically know what the charges were to even tell him [Appellant].

R. 74, ll. 5-21.

The trial judge ultimately denied the motion. He found "the arresting officer on the street did have sufficient knowledge to support probable cause based on the totality of the information that was available to him." R. 74, l. 24 – 75, l. 3; R. 76, ll. 20-24. The judge further found "it's appropriate under the law to impute the specific arresting officer's knowledge of the collective, that is the organization of the investigation officer who directed him to make the arrest." R. 75, ll. 3-7.

Discussion

"The Fourth Amendment to the United States Constitution guarantees the right of the people to be free from unreasonable searches and seizures and provides that no warrants shall be issued except upon probable cause, supported by oath or affirmation and particularly describing the place to be searched and the persons or things to be seized." McHam v. State, 404 S.C. 465, 475, 746 S.E.2d 41, 47 (2013) (citing U.S. Const. amend. IV). "In parallel with the protection of the Fourth Amendment, the South Carolina Constitution also provides a safeguard against unlawful searches and seizures." State v. Forrester, 343 S.C. 637, 643, 541 S.E.2d 837, 840 (2001) (citing S.C. Cont. art. I. § 10). "In addition to language which mirrors the Fourth Amendment, S.C. Cont. art. 1 § 10 contains an express right to privacy: The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures and *unreasonable invasions of privacy* shall not be violated." Id. at 644, 541 S.E.2d at 840-841 (emphasis in original).

"The fundamental question in determining the lawfulness of an arrest is whether probable cause existed to make the arrest." State v. Baccus, 367 S.C. 41, 49, 625 S.E.2d 216, 220 (2006). "Probable cause for a warrantless arrest exists when the circumstances *within the arresting officer's knowledge* are sufficient to lead a reasonable person to believe that a crime has been committed by the person being arrested." Id. (citing State v. George, 323 S.C. 496, 509, 476 S.E.2d 903, 911 (1996)) (emphasis added). "Whether probable cause exists depends upon the totality of the circumstances surrounding the information at the officer's disposal." Id. (citing George, 323 S.C. at 509, 476 S.E.2d at 911); See Beck v. Ohio, 379 U.S. 89, 91 (1964) (a court must consider "whether, at the moment the arrest was made, the officers had probable cause to make it—whether at that moment the facts and circumstances within their knowledge and of

which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the [Appellant] had committed ... an offense.").

In this case, the arresting officers, who were members of the Quick Response Squad, arrested Appellant under the mistaken belief that the Charleston Police Department had active warrants for his arrest. However, it is undisputed that the warrants were not obtained until at least an hour and a half after Appellant's arrest. The arresting officers did not personally have sufficient knowledge to establish probable cause to arrest Appellant. At trial, the assistant solicitor conceded, and Officer Lupisella later confirmed, that the officers who arrested Appellant merely knew there had been a "home invasion" in West Ashley that was the subject of an active investigation, that the arrest that day was related to this investigation, and that there had been a "DNA hit." See R. 53, ll. 14-25; R. 68, l. 7 – 69, l. 16. This knowledge is insufficient to establish probable cause for Appellant's warrantless arrest.

Moreover, while the "collective knowledge doctrine" may be recognized by other jurisdictions, it has never been recognized in this state. See United States v. Hensley, 469 U.S. 221 (1985). In order for probable cause for a warrantless arrest to exist in South Carolina "the circumstances *within the arresting officer's knowledge*" must be sufficient to lead a reasonable person to believe that a crime has been committed by the person being arrested." See Baccus, 367 S.C. 41, 49, 625 S.E.2d 216, 220. Consequently, Detective Wilson's knowledge could not be imputed to the arresting officers in this case.

Because Appellant was arrested without a warrant and without probable cause, the trial judge should have granted the motion to suppress and excluded the evidence seized as a result of Appellant's unlawful arrest. See Wong Sun v. United States, 371 U.S. 471, 484 (1963) (The

exclusionary rule prohibits the use of evidence obtained directly or indirectly through an unlawful search or seizure under the fruits of the poisonous tree doctrine.).

Respectfully, this Court should hold the trial judge abused his discretion by denying Appellant's motion to suppress the evidence seized as a result of Appellant's warrantless arrest, reverse Appellant's convictions and sentence, and remand for a new trial.

2.

The trial judge abused his discretion by denying Appellant's motion to suppress evidence seized from his residence when the affidavit in support of the search warrant failed to establish probable cause since it merely alleged Appellant was a suspect in the burglary and had been located at the address to be searched ten days after the offense, but did not provide the magistrate with a substantial basis to find probable cause that the items sought would be found at the particular address.

Relevant Facts

Appellant was arrested on June 1, 2017 at his apartment located at 178 America Street, Apartment B, Charleston, SC. Law enforcement obtained a search warrant to search Appellant's apartment later that same day. The affidavit in support of the search warrant, which was marked as Court's Exhibit No. 16, stated:

> On 05-22-2017 between the hours of 0200 and 0400hrs, the victim Fran Collins, reported that an unknown black male in his late twenties to early thirties of a medium build, with shoulder length dreadlock hair, gained entry into her residence at [REDACTED] Chadwick Dr, Charleston SC 29407. The subject entered the victim's bedroom, awakened her with a flashlight, stated that he had a firearm and bound her hands behind her back with an orange cope while wearing latex gloves. Once the victim was fully incapacitated, the subject obtained a white kitchen trash bag from the kitchen which he improvised as a contraceptive and sexually assaulted the victim by penetrating her vagina with his penis for approximately one hour. The suspect then forced the victim to perform oral sex while he was still wearing the trash bag. Upon conclusion of the assault, Ms. Collins notified the City of Charleston Police Department and during the investigation, the victim discovered her vehicle had been broken into. In addition, multiple vehicle break ins were reported by residents adjacent to [REDACTED] Chadwick Dr. and in the surrounding neighborhood. The victim was taken for a sexual assault examination where biological specimens were obtained and evidence was collected from the crime scene, which contained the DNA profile of Filiciano Jermaine Smith (B/M, DOB: REDACTED), as analyzed by Richland County Sheriff's Office. A CODIS hit matched the suspect DNA at the crime scene to Mr. Smith. Mr. Smith was subsequently arrested for the above offense. He was located on 6/1/17 at 178 America St., Apt. B.

> It should be noted that Filiciano Jermaine Smith matches the suspect description as provided by Ms. Collins in that he is a black male, in his 20s, with shoulder length dread lock style hair and a medium, athletic build.
>
> It is believed that material evidence of the crime may be located at 178-B America St.

R. 672.

Appellant moved pretrial to suppress the evidence seized from his apartment, namely a black latex glove, arguing the affidavit in support of the search warrant lacked probable cause because it failed to establish why it was reasonable to believe that the items sought to be seized would be found in the apartment. R. 658 (Court's Exhibit No. 2 – Motion to Suppress). The affidavit simply states that Appellant was located at the address ten days after the burglary and assault. R. 658 (Court's Exhibit No. 2 – Motion to Suppress).

Defense counsel asserted that all the magistrate knew was that a crime had been committed, that there was evidence Appellant committed the crime, and that Appellant was found at the address sought to be searched ten days after the crime. Counsel argued this information was insufficient to establish probable cause that evidence of the crime would be found at the address. R. 82, ll. 3-16.

The assistant solicitor admitted that the affiant of the search warrant "did not supplement the warrant orally in any way to the magistrate." R. 81, ll. 3-13. He asserted that "what you need [to establish probable cause] is merely information providing a timely and direct nexus between the contraband sought and the location to be searched." The solicitor contended that "while just one sentence, that sentence in the search warrant satisfies that requisite nexus." He argued the magistrate was aware "there was probable cause to believe that Filiciano Smith [Appellant] had committed a very serious offense and that that offense had occurred I would argue a relatively short time before the day [the] magistrate was reviewing the probable cause,

about ten days, and at that very moment hours before the magistrate was signing a warrant Filiciano Smith had been seen at 178-B America Street." R. 83, ll. 5-22. Lastly, the solicitor contended "a magistrate can make common sense assumptions from a warrant and here the assumption [is] that there's probable cause to believe that a person might have put evidence at a residence he was just seen at." R. 84, ll. 12-19.

In response, defense counsel argued the affiant could have informed the magistrate that officers had set up surveillance, that they had seen Appellant coming in and out of the residence, and that the apartment was Appellant's home. However, for whatever reasons, the affiant failed to do so. He contended the single sentence in the warrant was insufficient to establish probable cause. R. 86, ll. 15-23.

The trial judge ultimately denied the motion to suppress. He found the affidavit in support of the search warrant was sufficient to establish probable cause. He ruled, "I think the nexus of the person to the location was established and it was close enough to make the issuance of the search warrant appropriate." R. 86, l. 24 – 87, l. 4.

Discussion

"The Fourth Amendment to the United States Constitution guarantees the right of the people to be free from unreasonable searches and seizures and provides that no warrants shall be issued except upon probable cause, supported by oath or affirmation and particularly describing the place to be searched and the persons or things to be seized." McHam v. State, 404 S.C. 465, 475, 746 S.E.2d 41, 47 (2013) (citing U.S. Const. amend. IV). "In parallel with the protection of the Fourth Amendment, the South Carolina Constitution also provides a safeguard against unlawful searches and seizures." State v. Forrester, 343 S.C. 637, 643, 541 S.E.2d 837, 840 (2001) (citing S.C. Cont. art. I. § 10). "In addition to language which mirrors the Fourth

Amendment, S.C. Cont. art. 1 § 10 contains an express right to privacy: The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures and *unreasonable invasions of privacy* shall not be violated." Id. at 644, 541 S.E.2d at 840-841 (emphasis in original).

"In South Carolina, search warrants may be issued 'only upon affidavit sworn to before the magistrate ... establishing the grounds for the warrant.'" State v. Baccus, 367 S.C. 41, 50-51, 625 S.E.2d 216, 221 (2006) (quoting S.C. Code Ann. § 17-13-140 (2003)); See State v. McKnight, 291 S.C. 110, 352 S.E.2d 471 (1987). "The affidavit must set forth particular facts and circumstances underlying the existence of probable cause to allow the magistrate to make an independent evaluation of the matter." Id. (citing Franks v. Delaware, 438 U.S. 154, (1978)).

"In determining whether a search warrant is supported by probable cause, 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*." State v. Thompson, 419 S.C. 250, 256, 797 S.E.2d 716, 719 (2017) (citing Zurcher v. Stanford Daily, 436 U.S. 547, 556 (1978)) (emphasis in original). "In South Carolina, the judicial officer asked to issue a search warrant must make a practical, common sense decision concerning whether, under the totality of the circumstances set forth in the affidavit, *there is a fair probability that evidence of a crime will be found in the particular place to be searched*." Id. at 256-257, 797 S.E.2d at 719 (citing State v. Tench, 353 S.C. 531, 534, 579 S.E.2d 314, 316 (2003)) (emphasis in original); See State v. Weston, 329 S.C. 287, 494 S.E.2d 801 (1997); State v. Philpot, 317 S.C. 458, 454 S.E.2d 905 (Ct. App. 1995). "If no supplemental oral testimony is taken, an issuing judge's probable cause determination is limited to the four corners of the search warrant

affidavit." Id. at 257, 797 S.E.2d at 719 (citing State v. Kinloch, 410 S.C. 612, 616, 767 S.E.2d 153, 155 (2014)).

"The duty of the reviewing court is to ensure the issuing judge had a substantial basis for concluding probable cause existed." Id. (citing Kinloch, 410 S.C. at 616, 767 S.E.2d at 155). "Although great deference must be given to an issuing judge's conclusions, the judge may only issue a search warrant upon a finding of probable cause." Id. (citing State v. Jones, 342 S.C. 121, 126, 536 S.E.2d 675, 678 (2000)); See State v. Bellamy, 336 S.C. 140, 519 S.E.2d 347 (1999).

"The appellate courts of this state have routinely held that information contained in an affidavit providing a timely and direct nexus between the contraband sought and the location to be searched—e.g., *inter alia*, specific details of surveillance of a suspect conducting a drug transaction immediately upon leaving a residence—is sufficient to support a search warrant." Id. at 257, 797 S.E.2d at 719-720 (citing Kinloch, 410 S.C. at 618, 767 S.E.2d at 156; State v. Gore, 408 S.C. 237, 248, 758 S.E.2d 717, 722-723 (Ct. App. 2014); and State v. Scott, 303 S.C. 360, 362-363, 400 S.E.2d 784, 785-786 (Ct. App. 1991)).

In this case, the affidavit in support of the search warrant for Appellant's apartment failed to establish "a timely and direct nexus between the contraband sought and the location to be searched." Thompson, 419 S.C. at 257, 797 S.E.2d at 719-720. The affidavit merely stated that a burglary and criminal sexual conduct had been committed, that Appellant was a suspect in this crime, and that Appellant was located at the address sought to be searched on June 1, 2017, which was *ten days after the crime*. See Zurcher, 436 U.S. at 556 ("The critical element in a reasonable search is not that the owner of the property is suspected of crime but that there is reasonable cause to believe that the specific 'things' to be searched for and seized are located on the property to which entry is sought."). The affidavit failed to set forth any reasoning as to why

the police believed the items to be seized would be found at the address sought to be searched. See Thompson, 419 S.C. at 256, 797 S.E.2d at 719. The affiant could have informed the magistrate that officers had conducted surveillance on the apartment, had seen Appellant coming and going from the address, and that the residence was in fact Appellant's apartment, but, for whatever reason, failed to do so.

Because the affidavit in support of the search warrant failed to establish probable cause, the trial judge should have granted the motion to suppress and excluded the evidence unlawfully seized from Appellant's apartment. See Wong Sun v. United States, 371 U.S. 471, 484 (1963) (The exclusionary rule prohibits the use of evidence obtained directly or indirectly through an unlawful search or seizure under the fruits of the poisonous tree doctrine.).

Respectfully, this Court should hold the trial judge abused his discretion by denying Appellant's motion to suppress the evidence seized from Appellant's apartment, reverse Appellant's convictions and sentence, and remand for a new trial.

CONCLUSION

Based on the foregoing argument, Appellant respectfully requests this Court reverse his convictions and sentence and remand for a new trial.

Respectfully submitted,

s/Lara M. Caudy
Appellate Defender

ATTORNEY FOR APPELLANT

This 5th day of June, 2020.

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."

June 5, 2020.

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