STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

RECEIVED
Oct 26 2020
SC Court of Appeals

Appeal from Kershaw County

Honorable Clifton Newman, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ANTHONY C. DAVIS,

APPELLANT

APPELLATE CASE NO 2019-001869

INITIAL BRIEF OF APPELLANT

JESSICA M. SAXON
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

STATEMENT OF ISSUES ON APPEAL 1

STATEMENT OF THE CASE 2

STATEMENT OF FACTS 3

STANDARD OF REVIEW 8

ARGUMENT

The trial court erred in denying Appellant's motion to suppress the narcotics and other items seized in the search of the apartment where the search warrant affidavit contained no information establishing the confidential informant's reliability and failed to establish sufficient probable cause. 9

The trial court erred in denying Appellant's motion pursuant to *Franks v. Delaware* where the affidavit contained misleading statements about the alleged controlled buy that was conducted at the apartment. 16

CONCLUSION 19

TABLE OF AUTHORITIES

Federal Cases

United States v. Cook, 949 F.2d 289 (10th Cir.1991) 14

Franks v. Delaware, 438 U.S. 154, 98 S.Ct. 2674 (1978).......... 1, 4, 16, 17

Illinois v. Gates, 462 U.S. 213, 230-235 (1983) 10, 12

Zurcher v. Stanford Daily, 436 U.S. 547, 556 & n. 6 (1978) 11

South Carolina Cases

State v. Arnold, 319 S.C. 256, 460 S.E.2d 403 (Ct. App. 1995) 8

State v. Bellamy, 336 S.C. 140, 519 S.E.2d 347 (1999).......... 10, 11, 14

State v. 192 Coin-Operated Video Game Machines, 338 S.C. 176, 525 S.E.2d 872 (2000)........ 10

State v. Davis, 354 S.C. 348, 360, 580 S.E.2d 778, 784 (Ct. App. 2003) 17

State v. Dunbar, 354 S.C. 479, 581 S.E.2d 840 (2003).......... 8

State v. Dupree, 354 S.C. 676, 583 S.E.2d 437 (Ct. App. 2003).......... 10, 14

State v. Forrester, 343 S.C. 637, 541 S.E.2d 837 (2001).......... 10

State v. Gore, 408 S.C. 237, 758 S.E.2d 717 (Ct. App. 2014).......... 16

State v. Jones, 342 S.C. 121, 536 S.E.2d 675 (2000).......... 8, 9

State v. King, 349 S.C. 142, 561 S.E.2d 640 (Ct. App. 2002).......... 8, 11, 16

State v. Martin 347 S.C. 522, 526, 566 S.E.2d 706, 708 (Ct. App. 2001).......... 13, 14

State v. Missouri, 337 S.C. 548 524 S.E.2d 394, (1999) 16

State v. Philpot, 317 S.C. 458, 454 S.E.2d 905 (Ct. App. 1995) 10

State v. Sachs, 264 S.C. 541, 216 S.E.2d 501 (1975).......... 17

State v. Thompson, 363 S.C. 192, 609 S.E.2d 556 (Ct. App. 2005).......... 17

State v. Weston, 329 S.C. 287, 494 S.E.2d 801 (1997).......... 17

Cases from other Jurisdiction

State v. Toler, 246 Kan. 269, 787 P.2d 711 (1990) 14

Langford v. State, 332 Ark. 54, 962 S.W.2d 358 (1998).. 14

Statutes

S.C. Code Ann. § 17-13-140 (1985) 9

Constitutional Provisions

Article I, § 10 of the South Carolina Constitution 9

Fourth Amendment of the United States Constitution.. 4, 9

STATEMENT OF ISSUES ON APPEAL

1.

Whether the trial court erred in denying Appellant's motion to suppress the narcotics and other items seized in the search of the apartment where the search warrant affidavit contained no information establishing the confidential informant's reliability and failed to establish sufficient probable cause?

2.

Whether the trial court erred in denying Appellant's motion pursuant to *Franks v. Delaware*[1] where the affidavit contained misleading statements about the alleged controlled buy that was conducted at the apartment complex?

[1] 438 U.S. 154 (1978)

STATEMENT OF THE CASE

During the February 2017 term of the Kershaw County grand jury Appellant was indicted for one count of trafficking in meth or cocaine base 28 to 100 grams, one count of trafficking cocaine 10 to 28 grams, one count of possession with intent to distribute cocaine within proximity of a school or park, and one count of possession with intent to distribute crack cocaine within proximity of a school or park. R. X (Indictments).

The state, represented by Jennifer McKellar and Samuel McGlothin, called the case to trial on August 7, 2017, before the Honorable Clifton B. Newman and a jury. R. 1. Appellant was represented by Arthur Aiken. R. 1. After a two-day trial the jury found Appellant guilt on all charges. R. 378-379. Appellant was sentenced to nine years imprisonment on each charge, to run concurrently, with 338 days credit for time served. App. 396-397.

Counsel Aiken filed a motion for a new trial on August 21, 2017. R. X. (Motion). A hearing was convened on the motion for a new trial on October 11, 2019. The trial court denied Appellant's motion for a new trial on October 23, 2019. R. X. (order). This appeal follows.

STATEMENT OF FACTS

In July of 2016, investigators with the Kershaw County Sheriff's Department began a narcotics investigation into a subject known only as "Black." Investigators believed that "Black" resided in the King Haigler apartment complex, apartment F, in downtown Camden, South Carolina, and drove a silver Lexus. R. 111, ll. 17-25. Investigators conducted surveillance of the apartment complex "on a few occasions" and noted what they believed to be activity[2] consistent with the sale of narcotics. R. 112, l. 18-R. 113, l. 8.

On July 11, 2016, Investigator Justin Spivey prepared a search warrant affidavit and presented it to Magistrate Judge James Davis, Jr. R. 47, ll. 6-21; R. x (Court's Ex. 1 – Search Warrant). Magistrate Davis was not provided with any supplemental documents or sworn oral testimony. R. 47, l. 22-R.48, l. 4. The body of the affidavit stated in relevant part:

> On July 8, 2016 agents with the Kershaw County Narcotics unit were conducting surveillance at King Heilger [sic] apartments and observed a dark colored SUV arrive at the apartment complex moments later the vehicle left and following a lawful traffic stop and lawful search agents located approximately 8 grams of marijuana that was located on one for [sic] the passengers' person. Agents then spoke with the occupants of the vehicle who stated that they just met with a black male known to them as "Black" at King Heigler [sic] apartments and purchased the marijuana from "Black."
>
> Within the past 72 hours agents with the Kershaw County Sheriff's Office Narcotics Unit utilized a reliable confidential informant purchased [sic] a quantity of cocaine from a black male only known as "Black." The confidential informant was wired and given recorded U.S. currency provided by the Kershaw County Sheriff's Office to make the purchase. The confidential informant met with "Black" at King Heigler [sic] apartments located at 206 Laurens Street apartment F in the Camden area of Kershaw

---

2 Investigator Bradley Lawson described this activity as "cars coming and going from a location and only staying for a few minutes and leaving, that is kind of consistent with what you would – what we hear of drug activity … So we were kind of able to corroborate the things that we had been hearing." R. 113, ll. 1-8.

> County, South Carolina 29020 to make the transaction. This incident was audio/visual recorded.

R. X (Court's Ex. 1 – Search Warrant).

Prior to the execution of the search warrant, officers conducted a traffic stop on a silver Lexus believed to be driven by "Black." The driver was identified as Anthony Davis, Appellant. R. 115, l. 2-22. The search warrant was executed on July 15, 2016, at King Haigler apartments, apartment F. R. 116, ll. 7-10. Appellant was located in an upstairs bedroom and was the only person in the apartment. R. 117, ll. 13-15. Upon being taken into custody, Appellant was read the search warrant and his Miranda rights. R. 117, ll. 15-19.

In the bedroom where Appellant was located, officers found what they believed to be a "cookie" of crack cocaine, individual bags of cocaine, a "drug ledger," digital scales, a copy of the lease of apartment F to Appellant, Appellant's Georgia driver's license, and two cellphones. R. 119-122; 125-126; 129-130. Officers also located various items they believed to be consistent with drug activity, such as Pyrex containers and smaller "distribution baggies" in the apartment. R. 132-133.

Prior to trial defense counsel Art Aiken filed two motions challenging the validity of the search warrant. The first was a "motion to suppress" arguing that the search warrant affidavit was facially invalid because it did not contain any factual basis for the conclusion that the confidential informant was reliable. The second motion was a "motion to controvert search warrant and to suppress evidence" arguing that the search warrant affidavit contained false or misleading statements under Franks v. Delaware.[3] Both motions asserted that the search of apartment F occurred in violation of the Fourth Amendment to the U.S. Constitution. R. X. (Copies of filed motions).

---

[3] 438 U.S. 154 (1978)

At the hearing on the motions Investigator Spivey testified that a confidential informant had provided law enforcement with information about drug activity at the King Haigler Apartment complex and other areas in Kershaw County. R. 36, ll. 7-9. Spivey testified that he met with the confidential informant to set up an undercover buy. At the hearing he testified that he searched the confidential informant and her vehicle prior to the buy, however this information was not provided to the magistrate who issued the search warrant. R. 36, l. 13-R. 37, l. 4. Magistrate Davis testified that he was only supplied with the information in the affidavit and nothing more. R. 47, l. 22-R.48, l. 4.

Spivey contended that the video of the undercover buy showed an actual hand to hand drug transaction "if you slowed it [the video] down," but the video was not provided to Magistrate Davis to help him determine probable cause. R. 39, ll. 17-22; R. 48, l. 11-13. Spivey also testified that the confidential informant was not paid. He could not recall if the confidential informant was "working off" charges by helping police. R. 40, ll. 9-12.

The state argued that the specific language in the search warrant affidavit did not say a "drug transaction" was audio and video recorded but only that "this incident was audio/video recorded," therefore it would be a "stretch to say they [law enforcement] blatantly lied by saying that there was a drug transaction audio visually recorded." R. 27, ll. 12-23. Further, the state argued that the controlled buy was properly conducted in that the confidential informant was searched prior to and after the buy and was monitored the entire time. R. 25, l. 15-R. 26, l. 2. However, again this information was never presented to the issuing magistrate. R. 47, l. 22-R. 48, l. 4.

In ruling that the search warrant was valid the trial court stated:

> "[W]hat the reviewing court is looking at is whether the magistrate had a substantial basis for concluding that probable cause existed,

and that the affidavit must contain sufficient underlying facts and information upon which the magistrate can make a determination of probable cause. And in reviewing the validity of the warrant, the reviewing court may consider only information brought to the magistrate's attention. In effect, hearing this motion to controvert the search warrant, and I think we pretty much heard the motion to suppress as well, we pretty much heard all the testimony.

So, in essence, then I guess is as to what information did the magistrate have in issuing the search warrant and whether or not that amounted to probable cause. And they had the information that the officers were conducting surveillance at this apartment, and the vehicle left, they made a stop, and the person was purchasing drugs -- I mean, they found the person had possession of the drugs.

Then the affidavit next says that within the past 72 hours they viewed the confidential informant to purchase drugs from the person known as Black, and the place where the confidential informant met with Black at the King Haigler Apartments, Apartment F. The officer's testimony is that they received information from the informant that these drugs were purchased from this particular apartment and they made a controlled purchase from that apartment, and that the informant was reliable based on it being, in effect, a controlled purchase.

I don't -- I find that the officers in this instance have not given misleading testimony.

…

In my mind, the circumstances of a controlled purchase -- I can't say that I have been given information of the informant being reliable based on the past history of working for law enforcement, but based on the controlled purchase, that provides sufficient reliability and a reasonable basis, substantial basis for the magistrate concluding that probable cause to issue the search warrant existed.

I have not watched the video, I do not believe my watching the video is going to place any -- cause me to discount the testimony, but I don't know that. And the video wasn't shown to the magistrate…But I guess on the prong of whether or not what was represented by the officers to the magistrate, whether it clearly wasn't shown in the video, I guess I need to look at the video of that purchase.

> …
>
> I reviewed the video. And, first, as I stated, the video wasn't presented to the magistrate … my view of the video is that it corroborates the circumstances indicated in the affidavit and does not contradict it.
>
> [T]he Defense has failed to meet its burden of proof as it relates to challenging the veracity of the search warrant, one, and has not met its burden of showing that the magistrate did not have probable cause to issue the search warrants."

R. 65, l. 19-R. 69, l. 9; R. 96, l. 9-R. 97, l. 6.

STANDARD OF REVIEW

An appellate court reviewing the decision to issue a search warrant should decide whether the magistrate had a substantial basis for concluding probable cause existed. State v. King, 349 S.C. 142, 561 S.E.2d 640 (Ct. App. 2002); State v. Arnold, 319 S.C. 256, 460 S.E.2d 403 (Ct. App. 1995). This review, like the determination by the magistrate, is governed by the "totality of the circumstances" test. State v. Jones, 342 S.C. 121, 536 S.E.2d 675 (2000); King, 349 S.C. at 148, 561 S.E.2d at 643. The appellate court should give great deference to a magistrate's determination of probable cause. Jones, 342 S.C. at 126, 536 S.E.2d at 678; State v. Dunbar, 354 S.C. 479, 581 S.E.2d 840 (2003) (Anderson, J., dissenting); King, 349 S.C. at 148, 561 S.E.2d at 643.

ARGUMENT

1.

The trial court erred in denying Appellant's motion to suppress the narcotics and other items seized in the search of the apartment where the search warrant affidavit contained no information establishing the confidential informant's reliability and failed to establish sufficient probable cause.

In Appellant's case the only information given to the issuing magistrate was the conclusory and imprecise statements made in the search warrant affidavit. The issuing magistrate was not provided with any additional information to aid him in making a determination of probable cause and could only rely on the information within the four corners of the search warrant affidavit. Without sworn oral testimony or additional documentation to substantiate the conclusory and imprecise statements, the issuing magistrate was not presented with sufficient information from which he could reasonably establish that probable cause existed to issue the search warrant.

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. Notably, the South Carolina General Assembly "has imposed stricter requirements than federal law for issuing a search warrant. Both the Fourth Amendment of the United States Constitution and Article I, § 10 of the South Carolina Constitution require an oath or affirmation before probable cause can be found by an officer of the court, and a search warrant issued." State v. Jones, 342 S.C. 121, 128, 536 S.E.2d 675, 678 (2000); 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 . . ." 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). Sufficient information must be presented to the magistrate to allow that official to determine probable cause for issuance of a search warrant; his action cannot be a mere ratification of the bare conclusion of others. Illinois v. Gates, 462 U.S. 213 (1983).

When a confidential informant is involved, it is necessary to examine the reliability and credibility of the informant in determining the existence of probable cause. See Illinois v. Gates, 462 U.S. 213, 230-235 (1983). In determining whether the information relied upon by law enforcement is reliable, no one factor is necessary or sufficient to establish probable cause. Id. Instead, probable cause arises from the totality of the circumstances, and "[a] deficiency in one [factor] may be compensated for, in determining the overall reliability of a tip, by a strong showing as to the other, or by some other indicia of reliability." Id. A warrant based solely on information provided by a confidential informant must contain information supporting the credibility of the informant and the basis of his knowledge. State v. 192 Coin-Operated Video Game Machines, 338 S.C. 176, 192, 525 S.E.2d 872, 881 (2000).

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). "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 [hearsay] information, there is a fair probability that contraband or evidence of a crime will be found in a particular place." State v. King, 349 S.C. 142, 150, 561 S.E.2d 640, 644 (Ct. App. 2002).

The appellate courts of this state have had numerous opportunities to address whether a search warrant affidavit contains sufficient underlying facts and information to support a finding of probable cause. In State v. Bellamy SLED was investigating the theft of various weapons from the Atlantic Beach Police Department. Bellamy, 366 S.C. 140, 141, 519 S.E.2d 347 (1999). Luther Stanley, an individual who was being held in the North Myrtle Beach jail on unrelated drug charges, claimed to have information about the stolen weapons. Id. A SLED officer interviewed Stanley who stated that he had seen the weapons at a particular apartment in Atlantic Beach. Id. Stanley described the weapons as a 25 mm pistol, a .38 caliber pistol, and a .22 caliber Derringer. The description fit three of the more than twenty weapons that had been stolen. Id. Stanley stated he was familiar with the location because he had lived at the apartment for days at a time and he gave the SLED officer the names of the other people who usually resided in the apartment. Id. Further, Stanley stated he had been present at the apartment late one evening when the weapons were fired. Id. at 141-142, 519 S.E.2d at 347-348.

In addition to the weapons, Stanley told the SLED officer that he had seen cocaine in the apartment on various occasions and that it was usually kept inside the refrigerator or microwave oven. Id. This information was used to secure a search warrant. During the search officers recovered crack cocaine in the kitchen and one of the bedrooms of the apartment. Id. Bellamy

was charged with possession with intent to distribute crack cocaine. At trial he moved to suppress the evidence seized pursuant to the search warrant arguing the search warrant affidavit was deficient because it failed to recite the reliability of Stanley, the in-custody informant. That motion was denied, and Bellamy was found guilty as charged. Id.

The South Carolina Supreme Court found that given "all of the circumstances set forth in the affidavit" there was a fair probability that evidence of a crime would be found in the place identified. Id. at 144, 519 S.E.2d. at 349. The Court stated that the informant was a witness to the events described, that the events were described with great specificity, and that the information was confirmed to the extent that the weapons described matched the weapons that had been stolen just days earlier. The Court ruled that "[a]lthough the affidavit was weak on the element of reliability of the informant, the deficiency was compensated for by the *strong showing of specificity, first-hand observation and partial corroboration*." Id. (emphasis added).

Notably, then Chief Justice Finney dissented from the majority. Chief Justice Finney argued that because the affidavit contained no information supporting the informant's reliability it was deficient. He stated that the specificity the majority cited to was "illusory" and thus it did not cure the deficiency in the affidavit.

> "[W]hile that deficiency **may** be compensated for by an "explicit and detailed description of alleged wrongdoing, along with a statement that the event was observed firsthand," Illinois v. Gates, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983), there was no such corroboration in the case. The "firsthand wrongdoing" detailed here consists of firing a gun in the city limits, and a vague reference to drugs on the premises - there is no firsthand observation of the relevant crime, the theft of the guns. While there is an assertion that the persons in the apartment possessed three weapons which were of the same caliber and/or make as three of the twenty guns stolen from the police department, there is simply nothing to link these common guns or the individuals to that crime."

Id. at 145-146, 519 S.E.2d. at 350. (C.J. Finney, dissenting).

In State v. Martin, the Gaffney City Police Department obtained a search warrant based on information from a confidential informant. The affidavit for the search warrant stated:

> "Affiant's belief is based upon information received from a Confidential Reliable Informant who has *provided information in the past that has proven true and correct*. This C.R.I. states that he/she has seen a quantity of marijuana at the above described location within the past 72 hours. Affiant knows this C.R.I. to know marijuana when seen by past information received from this C.R.I."

347 S.C. 522, 526, 566 S.E.2d 706, 708 (Ct. App. 2001) (emphasis added).

Upon execution of the search warrant police found marijuana on Martin's person. At trial Martin moved to suppress the evidence obtained during the search arguing that the affidavit was insufficient in that it failed to establish the credibility or reliability of the confidential informant. Id. At the pretrial hearing on the motion to suppress, both the officer who obtained the search warrant and the issuing magistrate testified that the magistrate asked a standard set of four questions regarding the information contained in the affidavit, which included an inquiry into the reliability of the informant. Id. at 528-529, 556 S.E.2d at 709-710.

This Court ruled that the issuing magistrate had a "substantial bases for concluding marijuana would be discovered in a search of [Martin's] home" because the affidavit provided the Magistrate with the facts that the confidential informant had worked with law enforcement before and had given true and correct information, thus establishing the confidential informant's veracity and reliability. Id. at 528, 556 S.E.2d at 709. Also, the affidavit supplied the magistrate with the informant's specific, first-hand knowledge of marijuana in Martin's home. Further, this Court ruled that even if the affidavit was insufficient on its face, it had been *properly supplemented by sworn oral testimony*. Id.

Unlike the search warrant affidavits at issue in Bellamy and Martin, *supra*, the information in the affidavit in Appellant's case was neither specific nor supplemented by oral testimony. There was nothing within the four corners of the search warrant, and no supplemental oral testimony, to support the credibility or reliability of the confidential informant. Admittedly, a properly conducted controlled buy can, on its own, establish the credibility of an informant and thus probable cause for a search warrant. See State v. Dupree, 354 S.C. 676, 583 S.E.2d 437 (Ct. App. 2003); see also United States v. Cook, 949 F.2d 289 (10th Cir.1991) (finding probable cause where informant was searched for money and drugs, was given money and seen to enter defendant's apartment, from which he exited and was searched again, revealing presence of crack cocaine and absence of money); Langford v. State, 332 Ark. 54, 962 S.W.2d 358 (1998) (declaring that controlled buy established probable cause where officer searched informants to ensure they had no drugs, watched them enter and leave the home where they purchased the drugs, and then received drugs from informants); State v. Toler, 246 Kan. 269, 787 P.2d 711 (1990) (ruling judge had substantial basis for concluding probable cause existed to issue search warrant where informant was searched before controlled buy, was kept in sight until he entered defendant's residence, and immediately upon exit turned drugs over to police).

However, there is nothing in the record that supports the conclusion that the issuing magistrate was aware that the alleged control buy was properly conducted in Appellant's case. The issuing magistrate was not told whether the confidential informant was searched prior to or after the alleged buy. There was no testing conducted, such as a field test kit, to support the contention that narcotics were purchased during the alleged controlled buy. The amount of money given to the CI was not recorded and there was nothing confirming that the confidential informant was observed by police for the duration of the alleged buy. The trial court found that

the warrant was not deficient because the controlled buy, in and of itself, conveyed reliability. While the state contended at the pretrial hearing that the buy was conducted properly, the magistrate had no knowledge of the procedure used and therefore could not reasonably conclude that the buy was actually controlled.

Appellant's case had none of the specificity or supplemental testimony needed to support a finding of probable cause. The confidential informant did not provide any firsthand observation or identification of narcotics within Apartment F. There were no indicia of the confidential informant previously providing reliable information. There was nothing supporting the contention that the undercover buy was actually a "controlled" buy. Here, the magistrate improperly rested his finding of probable cause on the bare conclusion in the affidavit. The trial court further compounded that error by finding that the buy was properly conducted which supported the confidential informant's credibility and thus supported the finding of probable cause.

The affidavit of the search warrant in Appellant's case merely asserted conclusions. There is nothing in the four corners of the document that support the finding of probable cause. Additionally, the deficiency in the affidavit was not cured by sworn oral testimony provided to supplement the document, nor by specificity of detailed statements, corroborating investigation or firsthand observations. As such, the trial court erred when it ruled the search warrant was sufficient and admitted the evidence obtained pursuant to the search.

2.

The trial court erred in denying Appellant's motion pursuant to *Franks v. Delaware* where the affidavit contained misleading statements about the alleged controlled buy that was conducted at the apartment.

The search warrant affidavit in Appellant's case stated that a controlled buy was conducted at King Haigler Apartments, Apartment F, and that "this incident was audio/visual recorded." However, the recording[4] of the "incident" does not show the confidential informant being supplied with US currency, does not show the CI making an actual hand to hand transaction, does not show the CI in possession of any narcotics, does not identify anyone as "Black," and does not show the individual alleged to be "Black" receiving any money. In short, the "incident" was not recorded as was stated in the search warrant. The statement that "the incident was audio/video recorded" was misleading and made with reckless disregard for the truth. As such that statement, and the incident it described should have been struck from the search warrant.

In reviewing a challenge to the veracity of a search warrant, South Carolina employs the two-prong test outlined in Franks v. Delaware, 438 U.S. 154, 98 S.Ct. 2674 (1978). State v. Gore, 408 S.C. 237, 244, 758 S.E.2d 717, 721 (Ct. App. 2014) (citing Franks, 438 U.S. at 155–56, 98 S.Ct. 2674); State v. Missouri, 337 S.C. 548, 553–54, 524 S.E.2d 394, 396–97 (1999) (applying the two-prong Franks test). First, there must be "allegations of deliberate falsehood or of reckless disregard for the truth as to statements included in the warrant affidavit, and those allegations must be accompanied by an offer of proof." Id. The burden is on the accused to prove the allegations of perjury or reckless disregard for the truth by a preponderance of the evidence. Id. "Second, if a deliberate falsehood or a reckless disregard for the truth has been

[4] Court's Exhibit 4 – the CI video – is on file with this Court.

established, the court must exclude the false material and consider the remainder of the affidavit to determine if it is sufficient to establish probable cause." Id. at 245, 758 S.E.2d at 721 (citing State v. Davis, 354 S.C. 348, 360, 580 S.E.2d 778, 784 (Ct. App. 2003)). If the court determines that in light of the false material no probable cause exists, then "the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit." Id. (citing Franks, 438 U.S. at 155–56, 98 S.Ct. 2674).

Oral testimony may also be used in this state 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); see also State v. Sachs, 264 S.C. 541, 216 S.E.2d 501 (1975). However, "[i]n reviewing the validity of a warrant, an appellate court may consider only information brought to the magistrate's attention." State v. Thompson, 363 S.C. 192, 200, 609 S.E.2d 556, 560 (Ct. App. 2005).

In Appellant's case the phrase "this incident was audio/visual recorded" was misleading. Had the issuing magistrate been shown the video of the alleged control buy the magistrate would have seen that not only was a drug transaction not recorded but nothing stated in the paragraph describing the "incident" was recorded. However, the magistrate was not provided with the video, presumably because it does not show what the officer claimed it showed.

At the pretrial hearing the state attempted to minimize the misleading statement by arguing that the warrant did not say a "drug buy" was recorded but only that "this incident" was recorded. By making that equivocation the state was acknowledging the misleading nature of the statement – the alleged controlled buy of narcotics was not clearly captured on the video. A review of the video shows neither a drug buy, nor, more importantly, the circumstances described in the search warrant affidavit were captured in the "audio/visual" recording.

The trial court based in ruling in large part on the testimony of the officers that the buy was properly conducted. Notably, after watching the confidential informant video, the court did not find that the video captured a drug transaction nor that the video showed what the affidavit alleged it showed – the court ruled merely that the video supported what the affidavit alleged. This ruling did not take into account that the statement was misleading as to what the video actually captured and therefore was made with reckless disregard for the truth.

Once the defense had shown that the statement was misleading, the trial court was required to strike the misleading information from the search warrant affidavit and evaluate the remaining information to determine if that was sufficient to establish probable cause. In Appellant's case once the misleading statement and the information it related to were removed from the affidavit, there was nothing left that established sufficient probable cause to issue the search warrant.

CONCLUSION

By reason of the foregoing arguments, Appellant respectfully request that this Court reverse his convictions and sentences and remand this case to the Kershaw County Court of General Sessions for a new trial.

s/Jessica M. Saxon
Jessica M. Saxon
Appellate Defender

ATTORNEY FOR APPELLANT

This 26th day of October, 2020.

RECEIVED
Oct 26 2020
SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Kershaw County

Honorable Clifton Newman, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ANTHONY C. DAVIS,

APPELLANT

CERTIFICATE OF SERVICE

Pursuant to the Supreme Court's Order "RE: Operation of the Appellate Courts During the Coronavirus Emergency," dated March 20, 2020, the undersigned hereby certifies a true copy of the Initial Brief of Appellant and Designation of Matter has been served upon opposing counsel this 26th day of October, 2020 by sending to opposing counsel's primary e-mail address as listed in the Attorney Information System (AIS); and a copy of the Initial Brief of Appellant and Designation of Matter have been served on Anthony C. Davis, #373518, at Wateree River Correctional Institution, PO Box 189, Rembert, SC 29128-0189.

s/Jessica M. Saxon
Jessica M. Saxon
Appellate Defender
ATTORNEY FOR APPELLANT