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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Charleston County

Honorable R. Markley Dennis, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

DAQUAN JAVOR CRUMMEY,

APPELLANT

APPELLATE CASE NO 2020-000537

FINAL BRIEF OF APPELLANT

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II. Whether the trial court erred in admitting two photographs from social media of Appellant and his co-defendant, where the probative value of the photographs was substantially outweighed by the danger of unfair prejudice, where the photographs showed the two individuals holding money and smoking, and where the photographs were cumulative to the testimony offered by the witness who encountered the photographs on social media?

III. Whether the trial court erred in admitting a recorded jail call wherein Appellant referred to the Facebook page a witness identified him from, where the call was cumulative and where the danger of unfair prejudice substantially outweighed the probative value of the call?

IV. Whether the court erred by not finding that a search warrant was deficient, where no probable cause existed on the face of the warrant, where no specifics were alleged, and where the magistrate who signed the warrant was unable to validate the warrant based on the lapse in time between signing and the date of trial?

STATEMENT OF THE CASE

Appellant was indicted by a Charleston County grand jury in February 2018 for burglary in the first degree, possession of a weapon during the commission of a violent crime, two counts of assault and battery in the first degree, and five counts of armed robbery. R. 1157. Along with co-defendant Denali White, Appellant proceeded to trial before the Honorable R. Kirk Griffin and a jury on March 9, 2020. R. 1. Appellant had also been indicted on five kidnapping charges, but the state did not try those offenses. R. 5, ll. 16 – 21. Phillip Daniel Summa and Teresa Norris represented Appellant; Daniel Cooper and Jennifer Shealy appeared on behalf of the state.

After a weeklong trial, the jury found Appellant guilty as indicted as to every charge except one armed robbery indictment. R. 1140 l. 20 – 1142, l. 11. Co-defendant White was acquitted on every offense. R. 1129, l. 20 – 1130, l. 24. Judge Griffin sentenced Appellant to fifteen years on the burglary in the first degree charge, fifteen years on each of the armed robbery charges, ten years on each of the armed robbery offenses, and five years for the possession of a weapon charge. R. 1153, l. 18 – 1154, l. 15. The sentences were crafted to run concurrently. Id.

This appeal follows.

ARGUMENT

I. The trial court erred in admitting a photographic lineup identification, where the lineup was cumulative, suggestive, and not probative, where the identification was unreliable, and where the witness allegedly identified Appellant via a Facebook account and then was asked to perform a photographic lineup containing a photograph of the individual she had already identified via social media.

Standard of review

"[W]hether an eyewitness identification is sufficiently reliable is a mixed question of law and fact." State v. Moore, 343 S.C. 282, 288, 540 S.E.2d 445, 448 (2000) (finding show-up identification unreliable as a matter of law); see also State v. Traylor, 360 S.C. 74, 81-82, 600 S.E.2d 523, 526-27 (2004) (citing Moore and holding that photographic line-up procedure was "patently suggestive"). "Generally, the decision to admit an eyewitness identification is at the trial judge's discretion and will not be disturbed on appeal absent an abuse of such, or the commission of prejudicial legal error." Moore at 288, 540 S.E.2d at 448. "In reviewing mixed questions of law and fact, where the evidence supports but one reasonable inference, the question becomes a matter of law for the court." Id. Questions of law are reviewed *de novo*. Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016).

Relevant facts

Dulce Martinez-Garcia was in a mobile home in Charleston County on July 23, 2017 when two young men knocked on the door and came inside uninvited. R. 136, l. 9 – 140, l. 1. Martinez-Garcia testified that both individuals were armed and told the occupants of the mobile home to give up their money. R. 142, l. 25 – 143, l. 12. Martinez-Garcia could not remember how long the event lasted but claimed to have gotten a good look at both young men. R. 145, ll.

10 – 25; R. 147, ll. 2 – 13. She described their clothes and indicated that she recognized one of the boys from school. R. 147, ll. 14 – 22.

Multiple people, including Martinez-Garcia, called 911. R. 147, l. 23 – 148, l. 3. After being treated at the hospital, Martinez-Garcia went with an officer, Zulfiqar Khan, to her high school to look through a yearbook in order to identify one of the young men. R. 148, l. 4 – 149, l. 6. Martinez-Garcia was unable to identify either of the young men from the yearbook. Id.

On July 26, three days after the incident, Martinez-Garcia contacted Khan. R. 151, l. 23 – 153, l. 14. Martinez-Garcia alleged to have seen one of the suspects, the taller of the two, on her Facebook news feed. Id. The individual she believed to have been involved with the robbery was supposedly broadcasting on Facebook, live from Florida. Id. Martinez-Garcia testified pre-trial that the name associated with the Facebook account was Runacheckup Youngn. Id. Martinez-Garcia observed multiple photographs of the individual on the account. Id. Khan was asked to come to the sheriff's office for a lineup. Id. Martinez-Garcia showed law enforcement the Facebook page containing pictures of the individual she believed was responsible for the robbery. R. 160, ll. 14 – 25. In looking through photographs on the Facebook account, Martinez-Garcia also claimed to have located the second individual. R. 159, l. 21 – 160, l. 7.

In addition to the Facebook page, Martinez-Garcia testified that she also recognized the taller of the two individuals from her father's mechanic shop. R. 167, ll. 1 – 24. On cross-examination at a pre-trial identification hearing, Martinez-Garcia testified that she recognized the people in the photographic lineup from Facebook. R. 176, ll. 5 – 14.

The state contended the photographic lineup was admissible. R. 185, l. 13 – 186, l. 20. At the outset of Appellant's argument in reply, counsel outlined the problematic nature of the identification:

> [W]e just think that it's unreliable, the lineup itself. I mean, obviously they then got who the Facebook belonged to, showed them in a lineup. She of course was going to pick the person that she had already seen and decided this person, from a different photograph. They didn't show her a lineup at the time, and I think that was on purpose.
>
> So, Your Honor, I think that just generally it's an unreliable identification. And I want to be clear for the record. They show a lot of photographs here from the State, so we're going to object to those under [SCRE] 403 and 401.

R. 187, ll. 4 – 18. Counsel for co-defendant White joined in the objection, pointing out how there are actually two different identification procedures: a self-identification "done entirely of her own volition" and then the one initiated by law enforcement. R. 187, l. 20 – 258, l. 10. What the state did was bolster its own witness's testimony by including a photograph of an individual Martinez-Garcia had already identified, according to the argument of counsel for co-defendant White:

> So what we're having is I'm providing you with multiple pictures of people and then you're going to take them, sanitize them in some way, you know, because you're using official photographs, and not these so we don't have to worry about drugs, weed, guns, gang signs, whatever, and showing them back to you, **thereby confirming your initial identification**. What that really is … in its essence, is bolstering. It's bolstering and it's suggestive because if you're going to show - - if a person has screenshots and spent hours looking at photographs of certain individuals and then within a couple of days you're going to turn around and show them some sort of neutral lineups of these individuals, that is, in its very nature, suggestive.

R. 189, l. 18 – 190, l. 6. (emphasis added). Counsel, referring to the process as punitive, concluded the request for exclusion by correctly articulating that Martinez-Garcia basically regurgitated, "through the official State lineup procedure, what she's already given to the State in

the first place." R. 190, l. 19 – 191, l. 10. That process, counsel claimed, was "inherently unreliable." Id.

Relying on Neil v. Biggers, 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972), the trial court found that "there was no level of suggestion" and ruled that the identification was admissible. R. 191, l. 11 – 193, l. 16. After the trial court noted both defense counsel took exception with the ruling, counsel for Appellant moved to exclude the in-court identification of the other witnesses. R. 193, ll. 19 – 21. The solicitor indicated that most of the other witnesses could not identify Appellant in the courtroom. R. 193, l. 22 – 194, l. 8. This bore out at trial, where Rey Rodriguez testified that he was never shown a six-pack of photographs. R. 333, ll. 19 – 22. Other than Martinez-Garcia, witnesses for the state were unsure whether they could identify the two young men who came into the home. R. 368, l. 3 – 369, l. 6; R. 676, ll. 15 – 25.

Martinez-Garcia testified before the jury with an interpreter. R. 415. She recalled meeting with Khan to perform a photographic lineup. R. 456, ll. 3 – 12. The two met in a room at the sheriff's department to review lineups. R. 460, l. 20 – 462, l. 16. Over objection, State's Exhibit 88 was admitted. R. 471, ll. 2 – 22. As seen on the exhibit, Martinez-Garcia advised law enforcement that she had seen the individual she identified at school before, as well as at her father's work. R. 472, ll. 2 – 7. She described him as the taller of the two individuals from the mobile home robbery. R. 472, ll. 14 – 18. Martinez-Garcia clarified on the stand that she actually recognized the shorter individual, co-defendant White, from school. R. 473, ll. 10 – 21. Martinez-Garcia nonetheless identified someone in the courtroom at trial as the taller man she picked out of State's Exhibit 88, although the record does not contain an indication that she identified Appellant. R. 473, l. 22 – 474, l. 3.

After the conclusion of Martinez-Garcia's testimony, defense counsel for co-defendant White moved to reconsider the admissibility of the identification based on the fact that it was "fundamentally defective." R. 550, ll. 2 – 24. Counsel also moved for a mistrial, and counsel for Appellant joined in the entirety of the motions. Id. The trial court denied the motion as to the suggestive nature of the lineup and withheld ruling on the remainder. R. 551, ll. 8 – 21.

Appellant presented evidence from Bernard Blaney, a high school assistant administrator, that Appellant and Martinez-Garcia never attended the same school at the same time. R. 963, l. 25 – 964, l. 22.

Discussion

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Rule 403, SCRE.

The purpose of photographic lineups, to pick out an individual when identity was not previously known, was neither accomplished nor necessary in this instance. Martinez-Garcia had already identified a Facebook account containing multiple pictures of Appellant, and she claimed he was the taller of the two individuals who allegedly entered the mobile home in July 2017.

"A criminal defendant may be deprived of due process of law by an identification procedure arranged by police which is unnecessarily suggestive and conducive to irreparable mistaken identification." State v. Traylor, 360 S.C. 74, 81, 600 S.E.2d 523, 526 (2004). "An in-court identification of an accused is inadmissible if a suggestive out-of-court identification procedure created a very substantial likelihood of irreparable misidentification." Id.

In Neil v. Biggers, the United States Supreme Court set forth a two-pronged inquiry to determine whether due process requires suppression of an eyewitness identification. Due process requires courts to assess, on a case-by-case basis, whether the identification resulted from unnecessary and unduly suggestive police procedures, and if so, whether the out-of-court identification was nevertheless so reliable that no substantial likelihood of misidentification existed. Biggers, 409 U.S. at 198, 93 S.Ct. 375. Under the totality of the circumstances, the factors to be considered in assessing the reliability of an otherwise unduly suggestive identification procedure are: (1) the witness's opportunity to view the perpetrator at the time of the crime, (2) the witness's degree of attention, (3) the accuracy of the witness's prior description of the perpetrator, (4) the level of certainty demonstrated by the witness at the confrontation, and (5) the length of time between the crime and the confrontation. Manson v. Brathwaite, 432 U.S. 98, 114, 97 S.Ct. 2243, 53 L.Ed.2d 140 (1977) (citing Biggers, 409 U.S. at 199–200, 93 S.Ct. 375).

The Supreme Court of the United States has repeatedly emphasized "that due process concerns arise only when law enforcement officers use an identification procedure that is both suggestive and unnecessary." Perry v. New Hampshire, 565 U.S. 228, 238-39, 132 S.Ct. 716, 724, 181 L.Ed. 2d 694, 707 (2012) (citing Manson v. Brathwaite, 432 U.S. 98, 107, 109, 97 S.Ct. 2243, 2249, 2250, 53 L.Ed. 2d 140, 149, 151 (1977), and Biggers, 409 U.S. at 198, 93 S.Ct. at 382, 34 L.Ed. 2d at 411); see also Liverman, 398 S.C. at 138, 727 S.E.2d at 426 (describing the trial court's task under the first prong as determining "whether the identification resulted from unnecessary and unduly suggestive police procedures")."[W]hat triggers due process concerns is police use of an unnecessarily suggestive identification procedure...." Perry, 565 U.S. at 232 n.1, 132 S.Ct. at 721 n.1, 181 L.Ed. 2d at 703 n.1.

When evidence's prejudicial effect outweighs its probative value, it should be excluded, even if otherwise relevant. State v. Lyles, 379 S.C. 328, 665 S.E.2d 201 (Ct. App. 2008). Unfair prejudice, for purposes of Rule 403, SCRE, means an undue tendency to suggest a decision on an improper basis. State v. Tallent, 430 S.C. 438, 845 S.E.2d 508 (Ct. App. 2020).

In State v. Lawson, this Court held that the trial court erred in allowing testimony that a ten-print card law enforcement used to identify fingerprints on a car in a breaking into a motor vehicle case. 424 S.C. 51, 817 S.E.2d 509 (Ct. App. 2018). The state's case against Lawson was circumstantial and relied almost entirely on the fingerprints to connect him to the crime. Id. Testimony that the fingerprints were collected at a correctional institution more than ten years before indicated that Lawson had a prior criminal record; such evidence was prejudicial because it could have influenced the jury's verdict. Id.

Similarly, the photographic lineup was unnecessary and prejudicial in the matter *sub judice*. Martinez-Garcia had already identified a Facebook account containing pictures that appeared to depict the one of the individuals she believed had robbed her and others in July 2017. Thus, as pointed out by defense counsel, the state was merely bolstering her testimony by showing that she was capable of picking out from a lineup an individual she had already identified on her own. There was no chance she would have picked anyone else. The photographic lineup was unnecessary and cumulative, and the suggestion that the process was probative is disingenuous. The lineup was an illusory confirmation of something that had already been determined. The evidence resulted in detrimentally unfair prejudice, and Appellant is entitled to a new trial.

The identification by Martinez-Garcia was incompetent evidence. Evidence is incompletely if it could create dangers such as prejudice, undue delay, confusion of the issues,

tendency to mislead the jury, waste of time, or cumulative presentation. State v. Lyles, 379 S.C. 328, 665 S.E.2d 201 (Ct. App. 2008). There was little likelihood, if any, that Martinez-Garcia would be unable to identify Appellant in the photographic lineup, especially following her individual research on Facebook. By selecting his picture, she gave undeserved credibility to her pre-trial identification.

II. The trial court erred in admitting two photographs from social media of Appellant and his co-defendant, where the probative value of the photographs was substantially outweighed by the danger of unfair prejudice, where the photographs showed the two individuals holding money and smoking, and where the photographs were cumulative to the testimony offered by the witness who encountered the photographs on social media.

Standard of review

The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion." State v. Hatcher, 392 S.C. 86, 91, 708 S.E.2d 750, 753 (2011) ("quoting State v. Pagan, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006)). " An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." Id.; see also State v. Brockmeyer, 406 S.C. 324, 340, 751 S.E.2d 645, 653 (2013).

Relevant facts

Martinez-Garcia screenshot two pictures on the Runacheckup Youngn Facebook page which were admitted over objection as state's Exhibit 84 and 85. Previously, counsel for Appellant moved to suppress both of them. Exhibit 84 depicted money being held by both individuals shown in the photograph. Counsel therefore correctly argued:

> I think the jury is going to look at it, see that [they have] money, and just imply that, oh, that's the money [from the robbery] or something like that. And obviously there's money involved in this case. But, you know, I just don't - - I just think the probative [value] is very low. I think there's a danger of unfair prejudice when you have the defendant with a bunch of cash that is not being offered to show he has the cash.

R. 401, l. 20 – 402, l. 2. The trial judge denied the motion. R. 402, ll. 17 – 24.

Regarding state's exhibit 85, counsel for co-defendant White argued:

> I think there are two problems with that photograph and why they're - - it's more prejudicial than probative. One is the hand gestures that my client is making, which are nonstandard hand gestures that may be interpreted as either invitations to violence or gang signs. I think there is also, in that particular picture, the short man, the one crouching, is holding what appears to be a Black & Mild or a blunt of some sort, which may give rise to an inference that they're smoking dope or doing drugs or something otherwise improper.

R. 403, l. 19 – 404, l. 4. Counsel for Appellant concurred, noting the nonexistent probative value and cumulative nature of the photograph. R. 404, ll. 16 – 25. The trial judge denied the motion to suppress, finding that the probative value of the photograph is that the two people shown in the photograph know each other. R. 405, ll. 1 – 16. Notably, as part of the judge's decision, he advised the state that "any other photos for identification purposes would be cumulative evidence at this point." R. 411, ll. 10 – 21.

Discussion

The slight relevance of the photographs showing that Appellant and his co-defendant knew each other was vastly outweighed by the danger of unfair prejudice. Therefore, the trial court exceeded its discretion by admitting the photographs. Admission of the photograph did not accomplish much, except to attack the character of Appellant and his co-defendant and suggest that the jury render a guilty verdict for improper reasons.

Proving that the two young men knew each other was something the state was prepared to achieve through other means. The state elicited testimony from James Greenawalt, a former

officer with the North Charleston Police testimony, about a traffic stop on July 29, 2017. R. 604, l. 24 – 606, l. 4. Although neither Appellant nor co-defendant White were driving, a vehicle they were riding in was pulled over for speeding. Id. The state therefore obtained this testimony and made the point that the two young men knew each other.

What little relevance and probative value the photograph had was outweighed by its danger of unfair prejudice and as a result was an abuse of discretion. The photographs were irrelevant to the elements of the charged offenses.

The trial court therefore exceeded its discretion in admitting it. Morin v. Innegrity, LLC, 424 S.C. 559, 576, 819 S.E.2d 131, 140 (Ct. App. 2018) ("Abuse of discretion occurs when the ruling rests on a legal error or inadequate factual support."). See State v. Hawes, 423 S.C. 118, 129, 813 S.E.2d 513, 519 (Ct. App. 2018) ("To be classified as unfairly prejudicial, photographs must have a 'tendency to suggest a decision on an improper basis, commonly, though not necessarily, an emotional one.' " (quoting State v. Torres, 390 S.C. 618, 623, 703 S.E.2d 226, 228–29 (2010))); see also State v. Langley, 334 S.C. 643, 515 S.E.2d 98 (1999) (holding photograph of murder victim in high school graduation regalia irrelevant to prove the defendant's guilt, victim's identity was not in issue, and photo was an attempt to distance victim from drug dealing activity); State v. Livingston, 327 S.C. 17, 488 S.E.2d 313 (1997) (holding photograph of victim and husband taken before she was killed in an automobile accident irrelevant to the determination of defendant's guilt for felony DUI).

Appellant was prejudiced by the admission of the photographs. As noted by counsel, the money shown in the photographs was not linked to the alleged robbery. However, the jury could have assumed it was. Martinez-Garcia was capable of testifying and did in fact inform the jury of the photographs she located on Facebook and screenshot. The prejudicial effect arose from

the additional items depicted in the photographs: the smoking, hand gestures, and money. Those additions were irrelevant and contained no probative value. Further, they could not be redacted. The trial judge erred in admitting them.

III. The trial court erred in admitting a recorded jail call wherein Appellant referred to the Facebook page a witness identified him from, where the call was cumulative and where the danger of unfair prejudice substantially outweighed the probative value of the call.

Standard of review

The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion." State v. Hatcher, 392 S.C. 86, 91, 708 S.E.2d 750, 753 (2011) ("quoting State v. Pagan, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006)). " An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." Id.; see also State v. Brockmeyer, 406 S.C. 324, 340, 751 S.E.2d 645, 653 (2013).

Relevant facts

On the fourth day of trial, the solicitor advised the judge that the state intended to publish a jail call made by Appellant. R. 699, l. 7 – 712, l. 24. The solicitor suggested that the call would "link officially his Facebook to him." Id. Counsel for Appellant objected and pointed out how this call would be duplicative of prior testimony linking Appellant to the account. Counsel argued that "the only thing the jury is going to get from this is just, oh, he's a criminal." Id. Counsel further repeatedly characterized the call as prejudicial. Counsel for co-defendant White also objected on the bases that the evidence was cumulative and that it emphasized the incarceration of Appellant, without any probative value. Id.

The trial judge ruled that the call was admissible. R. 712, ll. 5 – 24. The call was published to the jury as State's Exhibit 101 through Loretta Mitchum, an employee at the detention center. R. 728, l. 15 – 730, l. 25.

Discussion

The limited probative value of the recording was outweighed by the unfair prejudice to Appellant. The recording made clear that Appellant was incarcerated at the county jail. The jury was reminded of Appellant's status as an inmate at the time. See State v. Cheeseboro, 346 S.C. 526, 547, 552 S.E.2d 300, 311 (2001) ("Evidence is unfairly prejudicial if it has an undue tendency to suggest a decision on an improper basis, such as an emotional one."

In State v. King, 422 S.C. 47, 810 S.E.2d 17 (2017), the South Carolina Supreme Court held that it was error for the trial court to admit a fifteen minute recording which was offered to prove the defendant's ownership of a cell phone to call for a taxi. Unlike King, however, the error in admitting the evidence in Appellant's case was not harmless.

Martinez-Garcia had already identified Appellant multiple times before. She located a Facebook account containing pictures of him, participate in a photographic lineup, and testified at trial. The jail call was unnecessarily cumulative, especially considering, as noted by defense counsel, that Appellant had not yet disputed that the Facebook account belonged to Appellant. R. 708, l. 1 – 709, l. 17.

The probative value of the call vastly outweighed the probative value. The jury was reminded, with audio proof, that Appellant had been arrested and incarcerated. Publishing the call in the courtroom reestablished the fact that the police believed Appellant was the one who committed this crime. The call from the jail offered no probative value to anything that the state had not yet already established. Martinez-Garcia testified that she identified the Facebook

account and then picked Appellant out of a photographic lineup. Admission of the call was unnecessary, duplicative, and improper; the trial judge's error in allowing the call to be published to the jury greatly prejudiced Appellant.

IV. The court erred by not finding that a search warrant was deficient, where no probable cause existed on the face of the warrant, where no specifics were alleged, and where the magistrate who signed the warrant was unable to validate the warrant based on the lapse in time between signing and the date of trial.

Standard of review

"In criminal cases, the appellate court sits to review errors of law only." State v. Wilson, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). We are bound by the trial court's factual findings unless they are clearly erroneous. State v. Quattlebaum, 338 S.C. 441, 452, 527 S.E.2d 105, 111 (2000). "A deferential standard of review likewise applies in the context of a Fourth Amendment challenge to a trial court's fact-driven affirmation of probable cause." State v. Thompson, 363 S.C. 192, 199, 609 S.E.2d 556, 560 (Ct.App.2005).

Relevant facts

Appellant moved to suppress eleven search warrants that failed to comport with the requirements of the Fourth Amendment. R. 8, l. 2 – 10, l. 12. Counsel for Appellant argued that the warrants contained "mere conclusory statements" that "a robbery happened" and Appellant and his co-defendant were developed as suspects. Id. As a result of the motion, the trial court heard testimony from Khan, a detective with the Charleston County Sheriff's Office. R. 12, ll. 1 – 6. The first search warrant presented to Khan was Court's Exhibit 1, a search warrant for a Samsung phone. R. 13, ll. 3 – 18.

As noted by counsel, the warrant contained merely conclusory language without specificity or particularity:

> That on July 23, 2017, Charleston County Sheriff's Office units responded to [address], North Charleston, in reference to a home invasion and assault. Upon arriving responding units discovered that suspects had forced their way into the residence at gunpoint, held the occupant/victims at gunpoint and then robbed them of their money. The victims also advised that during the home invasion two victims were assaulted by the suspects. During the investigation [Appellant] and [co-defendant White] **were developed as the suspects for this home invasion.** [Appellant] was arrested for his outstanding warrants. After [Appellant] was arrested he stated that the above listed cell phone was his property. It is the affiant's belief that a forensic examination of [Appellant's] cell phone may aid in furthering this investigation and may reveal communications between the two co-defendants. Any and all evidence recovered as a result of this search will be compared to other evidence already obtained in the investigation.

R. 1181 (Court's Exhibit 1) (emphasis added). The warrant was signed by a judge on August 25, 2017. Id.

Khan testified *generally* about the search warrant process and how he typically obtains a judge's signature. R. 13, l. 19 – 14, l. 9. Khan explained that, in his general experience, a magistrate would inquire about the reasoning behind a requested warrant. R. 15, ll. 4 – 10. Khan testified that he was prepared to share information with the magistrate and would "normally share that kind of information," but the record was devoid of specific reference to what he actually told the magistrate in this case. R. 16, ll. 1 – 7. Khan testified that he is sworn to provide oral supplementation. R. 19, ll. 2 – 5. However, without a record of that sworn testimony, the trial court heard only his generalized practice. Khan was only able to testify about how the magistrate signed the warrants after "maybe" asking him some questions. R. 25, ll. 5 – 13. Khan had no notes from meetings with the magistrate. R. 46, ll. 7 – 13; R. 46, ll. 22 – 24.

Notably, Khan testified that **he did not remember specifically what questions the magistrate asked him**. R. 46, ll. 14 - 21. In a final remark while being cross-examined by

counsel for co-defendant White, Khan truthfully admitted that he based his entire recollection on "[w]hat is normally the procedure to obtain a search warrant." R. 53, ll. 10 – 13.

Counsel for co-defendant White objected frequently as to Khan's recollections regarding oral supplementation. R. 28, l. 22 – 37, l. 12. The state presented additional search warrants: Court's Exhibits 2, 3, and 4. R. 20, ll. 18 – 19.

After Khan's pre-trial testimony, the trial judge shared with the parties what he believed to be the crux of the matter:

> So the issue that I'm wrestling with is whether that oral testimony is sufficient to supplement this conclusory - - these conclusory affidavits enough to rise to the level of establishing probable cause.

R. 76, ll. 1 – 24.

At the beginning of the second day of trial, the trial judge heard testimony from Ellen Steinberg, a magistrate in West Ashley. R. 90, ll. 2 – 10. She explained the process of signing warrants. Officers will come by any time of the day and speak with her in chambers. R. 91, l. 18 – 93, l. 4. She testified that she always reads the search warrant and asks questions. She does not record any oral supplementation. Id. As important as her role is, she does not keep notes of her conversations with officers. R. 95, ll. 10 – 16.

Regarding the search warrants in Appellant's case, Judge Steinberg did not recall anything specific. R. 94, ll. 5 – 16; R. 96, ll. 9 – 21. She outright stated that she was unable to recall what facts Khan **specifically** told her that led her to believe a phone was utilized in the commission of a crime. R. 97, ll. 6 – 18.

After hearing Judge Steinberg's testimony, the trial judge heard additional argument from defense counsel:

> Judge, the purpose of suppression for search warrants is deterrence. It's to deter violating people's [F]ourth [A]mendment rights against unlawful search and seizures. That's the purpose of it.
>
> And I argue that no one is going ot be deterred if they don't have to put any probable cause in their affidavit and they can just come in and say, oh, yeah, I did all this, after reviewing the case two and a half years after. There is no deterrent factor. As it stands right now, every time that they get a warrant, they can just come in and explain it away. Judge, that's not how it's supposed to work and we think suppression is appropriate in this instance, given the factors of the case.

R. 100, l. 17 – 101, l. 5.

Counsel for Appellant's co-defendant pointed out to the judge that he was the only person who asked Judge Steinberg a direct question about what was supplemented. Notably, counsel argued "there was no answer that the Court could use to say that this particular fact was used to supplement this deficient warrant." R. 102, ll. 5 – 10. Counsel further noted that the court heard testimony about what is normally done, "as opposed to specifically what he did." R. 102, ll. 11 – 17. Without specificity, counsel contended, "[t]here is nothing about this particular procedure that would give any of us confidence that this wouldn't be a repeated problem." R. 103, ll. 1 – 5. Counsel argued vociferously that the warrant and the items seized and discovered as a result should have been suppressed:

> As the Court correctly noted yesterday, within the four corners of the affidavit there is not probable cause established. There are conclusory statements. And they're not even that conclusory, Your Honor. I've seen better conclusory statements from the ones I saw on those warrants.
>
> We don't have any specifics as to how that record was orally supplemented. That's problematic. The fact that nobody in this particular chain of the detective, the Sheriff's Department, and the county magistrate, no one on these particular warrants thought that they were special in any way, worthy of any sort of notation or any amendment, which is easy to do with a pen. All you have to do is write on it. I see them all the time. We all do, okay.

R. 103, ll. 5 – 19.

The trial judge found that the magistrate had a substantial basis for concluding probable cause existed and denied the motion to suppress. R. 106, l. 25 – 108, l. 8. The court ruled that although there were not sufficient facts within the four corners of the document submitted to the magistrate, oral supplementation provided the necessary probable cause. Id.

Discussion

The Fourth Amendment guarantees "[t]he right of the people to be secure ... [from] unreasonable searches and seizures." 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); S.C. Const. art. I, § 10. Evidence obtained in violation of the Fourth Amendment is inadmissible in both state and federal court. *Forrester,* 343 S.C. at 643, 541 S.E.2d at 840.

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). "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." State v. King, 349 S.C. 142, 150, 561 S.E.2d 640, 644 (Ct.App.2002). "The affidavit must contain sufficient underlying facts and information upon which the magistrate may make a determination of probable cause. 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) (citations omitted).

In discussing the specific requirements for issuing a search warrant, our supreme court has explained:

> The 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. U.S. Const. amend. IV; S.C. Const. art. I, § 10. Additionally, 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). 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). However, "sworn oral testimony, standing alone, does not satisfy the statute." State v. McKnight, 291 S.C. 110, 352 S.E.2d 471 (1987).

State v. Jones, 342 S.C. 121, 128, 536 S.E.2d 675, 678-79 (2000).

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 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).

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). However, "sworn oral testimony, standing alone, does not satisfy the statute." State v. McKnight, 291 S.C. 110, 352 S.E.2d 471 (1987).

In State v. Gentile, 373 S.C. 506, 646 S.E.2d 171 (Ct. App. 2007), this Court held that the affidavit and supplemental oral testimony were, under the totality of the circumstances, insufficient to provide the magistrate for which to find probable cause to issue a search warrant.

Similar reasoning can be applied to Appellant's case. Khan admitted on cross-examination that he did not recall what questions the magistrate asked him. It therefore follows that he did not remember what information he may have verbally relayed to her, either. His testimony, refreshed at trial, was based on his knowledge of the case, not his memory of what transpired in the magistrate's chambers.

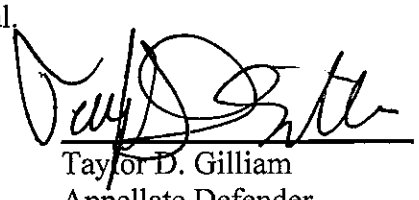
In State v. Robinson, this Court concluded that an affidavit that did not provide a magistrate with sufficient information to make a probable cause determination was nonetheless properly supplemented by sworn oral testimony. 335 S.C. 620, 518, S.E.2d 269 (Ct. App. 1999). However, the oral testimony in that case was considerably different than the record in this case. In Robinson, the officer recalled, with particularity, verbally informing the magistrate about the basis for probable cause to search Robinson's residence. Id. at 630-31, 518 S.E.2d at 275. He included in his testimony facts about reliability and veracity. Id. at 631, 518 S.E.2d at 275. Further, "[t]he magistrate swore [the officer] not only to the information contained in the affidavit, but also retroactively to the information first presented in the form of oral testimony." Id. This Court distinguished the oral testimony under oath from a conversation that was held to be insufficient in State v. York, 250 S.C. 30, 156 S.E.2d 326, 1967). Id. at 632, 518 S.E.2d at 275-76.

Further, in State v. Dill, the South Carolina Supreme Court held that an officer's oral testimony "did not provide any information as to the source of the information that an active [methamphetamine] lab was in operation; therefore, there was nothing presented to the magistrate to support a finding of probable cause that there was an active lab in operation." 423 S.C. 534, 543, 816 S.E.2d 557, 563 (2018). There was no specificity mentioned in Khan's testimony.

Neither the officer nor the magistrate could testify as to any specific conversations that occurred in 2017 when some of the warrants were signed. Coupled with a finding that the warrants on their face were deficient, reliance upon standard procedure or unreliable recollections was insufficient to conclude that probable cause was established. The trial court erred in denying the motion to suppress.

CONCLUSION

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



Taylor D. Gilliam
Appellate Defender

ATTORNEY FOR APPELLANT

This 26th day of May, 2021.

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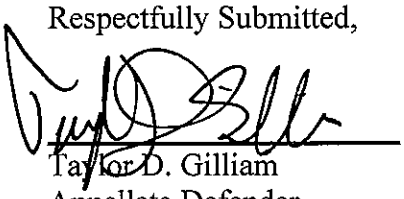
May 26 2021
SC Court of Appeals

CERTIFICATE OF COUNSEL FOR APPELLANT

Counsel for appellant certifies that this Final Brief of Appellant complies to the best of my ability 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."

Respectfully Submitted,



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This 26th day of May, 2021.