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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to the Court of Appeals
Appeal From Aiken County
Hon. R. Lawton McIntosh, Circuit Court Judge
Appellate Case No. 2020-000653

The State, Respondent,

v.

Kelvin Jones, Petitioner.

RETURN TO PETITION FOR REHEARING

On December 22, 2021, Petitioner served and filed a Petition for Rehearing of this Court's Opinion, State v. Jones, Op. No. 28074 (S.C. Sup. Ct. Filed December 8, 2021). On December 23, 2021, the State received this Court's request for a Return to the Petition for Writ of Certiorari.

In his Petition[1] for Rehearing, Petitioner seeks to have this Court apply the long-outdated standard of Aguilar v. Texas, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964) and Spinelli v. United States, 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969). Instead of looking at the totality of the circumstances, Petitioner implores this Court to parse the various portions of the search warrant affidavit and find fault with individual components—primarily the reliability of the anonymous tips regarding short-term traffic at the residence.

[1] The overwhelming majority of the argument presented by Petitioner is identical to the argument made in his Brief of Petitioner. This argument has already been addressed by the State in its Brief of Respondent, and the State craves reference to its Brief for any additional consideration.

Many courts around the country read Aguilar and Spinelli to require a formalized test to determine whether to even consider anonymous or other tips. The test required the tip or information "first had to adequately reveal the 'basis of knowledge' of the [tipster or informant]—the particular means by which he came by the information given in his report. Second, it had to provide facts sufficiently establishing either the 'veracity' of the affiant's informant, or, alternatively, the 'reliability' of the informant's report." Illinois v. Gates, 462 U.S. 213, 228–29, 103 S. Ct. 2317, 2327, 76 L. Ed. 2d 527 (1983). Almost forty years ago, the United States Supreme Court expressly rejected the requirement Petitioner now seeks to reinstate, and instead, articulated very clearly the "totality of the circumstances" test utilized correctly by this Court in its analysis of the merits of this case:

> The task of the issuing magistrate is simply to make a practical, common-sense decision whether, **given all the circumstances** set forth in the affidavit before him, including the "veracity" and "basis of knowledge" of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place.

Id. at 238 (emphasis added). Shortly after the United States Supreme Court's rejection of the Aguilar and Spinelli tests and the clear adoption of the totality of the circumstances test, this Court affirmed the test to be applied. State v. Pressley, 288 S.C. 128, 131, 341 S.E.2d 626, 628 (1986). This Court also reminded: "Determination of probable cause to search made by a neutral and detached magistrate is entitled to **substantial deference.**" Id. (emphasis added).

It would be error for this Court to return to the piecemeal consideration of the search warrant affidavit rejected by the United States Supreme Court. This Court should affirm its use of the totality of the circumstances consideration and its deference given to the neutral and detached magistrate who had a substantial basis to conclude probable cause existed.

This Court correctly utilized the standard set forth by the United States Supreme Court and properly found probable cause existed. This Court properly cited to Kaley v. United States, 571 U.S. 320, 338, 134 S.Ct. 1090, 188 L.Ed.2d 46 (2014), for the proposition: "Probable cause, we have often told litigants, is **not a high bar**: It requires only the 'kind of 'fair probability' on which 'reasonable and prudent [people,] not legal technicians, act.'" Id. (emphasis added). "[W]e have repeatedly said that after-the-fact scrutiny by courts of the sufficiency of an affidavit should not take the form of de novo review. A magistrate's 'determination of probable cause should be paid great deference by reviewing courts.'" Gates, 462 U.S. at 236.

Applying the standard of review giving great deference to the magistrate's determination, as well as the United States Supreme Court's articulation that review should favor upholding a warrant, this Court properly determined probable cause existed when considering the ongoing complaints of short-term traffic at the residence juxtaposed to the trash pull conducted the day before obtaining the warrant in which marijuana and baggies indicative of "packaging of marijuana for resale" were located in the trash outside Petitioner's residence. While the tips presented may not have established probable cause alone, and may even have an innocent explanation, when combined with the very recent trash pull finding evidence of marijuana resale, the magistrate had a substantial basis to believe probable cause existed.[2] As the United States Supreme Court opined:

> As discussed previously, probable cause requires only a probability or substantial chance of criminal activity, not an actual showing of such activity. By hypothesis, therefore, innocent behavior frequently will provide the basis for a showing of probable cause; to require otherwise would be to *sub silentio* impose a drastically more rigorous definition of probable cause than the security of our

[2] Again, the State craves reference to its Brief of Respondent for any detailed discussion of case law or factual analysis as the analysis conducted by Petitioner in his Petition for Rehearing is identical to that presented previously to the Court.

> citizens demands. . . . In making a determination of probable cause the relevant inquiry is not whether particular conduct is "innocent" or "guilty," but the degree of suspicion that attaches to particular types of non-criminal acts.

Gates, 462 U.S. at 245.

Accordingly, assuming this Court gets to the merits of the validity of the search warrant,[3] the proper test to apply is the totality of the circumstances test applied by this Court. Once properly applied, and given the substantial deference to the magistrate, this Court properly found the low bar of probable cause was met through the combination of the anonymous reports of short-term traffic and the items indicative of marijuana resale found in the trash pull. Therefore, this Court properly affirmed the admission of evidence seized as a result of the search warrant executed at Petitioner's residence.

[3] The State still submits, as it has in its Petition for Rehearing, that any issue is not properly preserved for review on appeal and should be considered waived, especially in light of counsel's repeated statement of "no objection" when the State sought to admit the evidence.

CONCLUSION

For all of the foregoing reasons, the State requests the Court deny Petitioner's Petition for Rehearing and uphold its prior opinion.

Respectfully submitted,

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