

State vs. Jonathan

Question: Did the Court of Appeals err in affirming the circuit court's finding probable cause did not exist to support issuance of a search warrant and in granting Respondent's motion to suppress evidence?

STATEMENT OF THE CASE - *Petitioner*

Procedural History

In April 2008, the Charleston County Grand Jury indicted Respondent on charges of trafficking in heroin, trafficking in cocaine, and possession with intent to distribute heroin within proximity of a park. The Honorable Roger M. Young, Sr., held a suppression hearing January 11-12, 2010, to determine whether to suppress evidence seized as a result of the execution of a search warrant the Honorable James B. Gosnell, Jr., signed on January 2, 2008. Judge Young granted the motion to suppress.

On January 12, 2010, the State served and filed a Notice of Appeal pursuant to State v. McKnight, 287 S.C. 167, 168, 337 S.E.2d 208, 209 (1985), because the circuit court's ruling effectively precluded further prosecution of the charges against Respondent. The South Carolina Court of Appeals affirmed the circuit court's suppression of the evidence.

Factual Background

On January 2, 2008, after receiving anonymous tips regarding heroin and cocaine transactions at 609A Pleasant Grove Lane, narcotics officers Investigators Hurteau and Costanzo began surveillance of the property. (T.9-11; 38-39; 55; Court Exhibit 1, Search Warrant Affidavit; R.9-11; 38-39; 55; 98). During the investigation, Investigators Hurteau and Costanzo witnessed several individuals approach Respondent outside the residence under surveillance. The parties engaged in hand-to-hand transactions in which

Respondent exchanged something for money. (T.55-57; 69-70; Ct. Exhibit 1, Affidavit; R.55-57; 69-70; 99). After each of the exchanges, Respondent was seen counting money and entering and exiting the residence, 609A. (T.56-57; Ct. Exhibit 1, Affidavit; R.56-57; 98). Respondent had and used a key to gain access to the residence at 609A. (T.57; 71; Ct. Exhibit 1, Affidavit; R.57; 71; 99).

During surveillance, another individual was seen with Respondent in front of the residence at 609A during the transactions. The other individual was seen entering and exiting the residence at 609A with Respondent. (T.55-57; R.55-57). Later during the surveillance, Investigators Costanzo and Hurteau saw this individual leave the residence at 609A and head to between a Pizza Hut and BP gas station. (T.44-45; R.44-45). Investigator Walker then picked up surveillance of the individual and witnessed him meeting with Redondo Burns, whom Investigator Walker knew by name and sight. (T.24; R.24).

Investigator Walker witnessed a hand-to-hand transaction between Burns and the individual who left the residence at 609A just prior to the meeting. (T.19-20; 25; R.19-20; 25). Investigator Walker knew Burns was involved in narcotics based on prior encounters. (T.19; R.19). The individual from the residence at 609A gave Burns something in a clear plastic bag in exchange for cash. (T.21-22; 25; Court Exhibit 1, Affidavit; R.21-22; 25; 99). Burns took the item wrapped in plastic and put it in his pocket. (T.26; R.26). Investigator Walker then followed the individual back to the residence at 609A after other officers took over surveillance of Burns. (T.31-32; R.31-32).

After Investigator Walker radioed them about the transaction, Investigators Costanzo and Hurteau watched Burns near the BP gas station. (T.44; R.44). When he exited the BP patrol officers Jacobson and Deeg approached Burns. Burns then threw a bag containing a powdered substance onto the ground. The bag was retrieved and field tested positive for heroin. (T. 27-28; 44; 67; 71-72; Court Exhibit 1, Affidavit; R.27-28; 44; 67; 71-72; 99).

As a result, Investigator Walker completed an affidavit for a search warrant and obtained a search warrant to search the residence at 609A. (Court Exhibit 1; R.98). The affidavit relayed the results of the surveillance and detailed the hand-to-hand transactions in front of the residence at 609A, the transaction between Burns and the other individual after he left the residence at 609A, and the fact the bag thrown to the ground by Burns tested positive for heroin. (Ct. Exhibit 1, Affidavit; R.99). The search of the residence produced several bags containing powdery substances. (Ct. Exhibit 1, Return; R.102).

As a result of the search of the residence at 609A, Respondent was charged with trafficking in heroin and cocaine, and with possession with intent to distribute heroin in proximity to a park. Prior to trial, Respondent moved to suppress the evidence seized on the grounds the magistrate lacked probable cause to issue the search warrant based on the affidavit provided. (T.5; Motion to Suppress Evidence; R.5; 104).

The circuit court found the magistrate lacked probable cause to issue the search warrant. He concluded based on the affidavit provided for the search warrant, there was insufficient evidence establishing a nexus between the residence at 609A and drugs. (T.92-96; R.92-96). He acknowledged the evidence of transactions taking place in front of the residence, but indicated there is nothing to link drugs to the inside of the residence.

(T.93; R.93). Further, the court discussed the transaction between Burns and the other individual seen exiting the residence at 609A. (T.94-95; R.94-95). He found there was no information in the affidavit directly linking the drugs to the residence at 609A.

STATEMENT OF FACTS - Respondent

On January 2, 2008, officers with the _____ Police Department executed a search warrant for 609 Pleasant Grove Lane Apartment A, _____, South Carolina 29407, Respondent's residence. During the search of the residence, officers found several bags containing powdery substances. As a result of the search, Respondent was arrested and charged with trafficking in heroin and cocaine, and with possession with intent to distribute heroin within the proximity of a park.

The search warrant was signed by Judge Gosnell on January 2, 2008. The only information provided to the magistrate was contained in the affidavit in support of the search warrant:

That on January 2, 2008, the Charleston Police Narcotics Unit conducted surveillance at 609 A Pleasant Grove Lane, Charleston, South Carolina 29407 which is located in the city and county of Charleston, South Carolina. Over the past several months the CPD Narcotics unit has received numerous complaints about heroin and cocaine transactions taking place at the above mentioned residence.

On January 2, 2008 at approximately 2:00 P.M. CPD narcotics officers Cpl. C. Costanzo and Cpl. Todd Hurteau were conducting stationary surveillance at 609 apt A, Pleasant Grove Lane. CPD Officers observed two white males meet with a black male wearing a red shirt, red pants and red hat. All parties entered the residence for approximately one minute. The white males exited the residence and walked in the direction of Hwy 17.

On approximately three to four other incidences the black male wearing all red clothing exited 609 A Pleasant Grove Lane and met with unknown parties at the north side of the duplex. Cpl. Hurteau and Cpl. Costanzo observed a quick hand-to-hand transaction between the the black male wearing all red and other unknown parties at the corner of this residence. Cpl. Hurteau and Cpl. Costanzo noticed that the party dressed in all red was counting money after the transactions as he walked back into the residence. During

each transaction the subject wearing all red clothing was accompanied by a black male wearing a black puffy jacket with fur around the hood and dark blue jeans. Cpl. Costanzo and Cpl. Hurteau observed this subject walking into and out of 609 A Pleasant Grove Lane, Apt A on several occasions.

On January 2, 2008, at approximately 1700 hours Cpl. Costanzo and Cpl. Hurteau observed a black male wearing a black puffy jacket with fur around the hood and dark pants exited the residence at 609 A Pleasant Grove Lane. Investigators followed the above described subject, who was walking toward the B.P. gas station located at Hwy 17 and Wapoo Road. Inv. Walker observed the above described subject meet with a an unknown black male, who was later identified as Redondo Burns. Inv. Walker observed the unknown subject hand Burns one clear plastic wrapping in exchange for an undertermined amount of U.S. currency. After the transaction was made Cpl. Hurteau observed Burns enter the B.P. gas station. Cpl. Hurteau maintained a constant visual on Burn while he was inside the gas station. A short time later Cpl. Hurteau and Cpl. Costanzo observed Burns exit the B.P. gas Station and walk south bound on Hwy 17.

Patrol officers Jacobson and Deeg approached Burns on foot at which time he discarded a clear plastic baggy containing an off-white powdered substance and a white glassine bag onto the ground between two parked cars. Cpl. Hurteau immediately retrieved the substance that field-tested positive for heroine. After the transaction with burns, Inv Bruder observed the unknown black male walk back to and enters 690 A Pleasant Grove Lane, Charleston, South Carolina 29407.

Based on the above fact there is probable case to believe that heroine and the proceeds of heroine are stored inside 609 A Pleasant Grove Lane, Charleston, South Carolina 29407.

(R. pp. 99-100).

Prior to trial, Respondent moved to suppress the drug evidence, filing a written motion to suppress. (R. p. 104). During the suppression hearing, Sergeant Walker, the affiant on

the search warrant, testified that he presented no additional information to the magistrate other than the information provided in his affidavit. (R. p. 6, lines 15-20).

Important exculpatory information was omitted from the affidavit in support of the search warrant but revealed during the suppression hearing by Corporal Costanzo, one of the officers involved in the investigation. Corporal Costanzo revealed that two different vehicles came to the apartment during the course of their surveillance, a burgundy GMC Tahoe and a white BMW. (R. p. 39, lines 6-10; p. 41, lines 17-22). The people in these vehicles pulled up, entered the apartment and then left. (R. p. 64, lines 4-10). Both vehicles were stopped upon leaving the apartment. Drugs were not found in either of the vehicles. (R. p. 40, lines 9 – p. 41, 42, lines 1-16). The information in regard to the stop of the two vehicles was kept from the magistrate.

Corporal Costanzo also testified that during the course of their surveillance he observed people entering both apartment A and apartment B at 609 Pleasant Grove Lane. (R. p. 47, lines 14 – p. 48, lines 1-16). One of the individuals seen entering **both** apartment A and B was a black male with a puffy jacket and a New York Yankee hat. This is the same individual referenced in the affidavit for the search warrant making an exchange with Redondo Burns near the BP station and Pizza Hut on Highway 17. The information regarding activity at apartment B was kept from the magistrate.

Respondent argued that pursuant to State v. Gentile, 373 S.C. 506, 646 S.E.2d 171 (Ct.App. 2008), the drug evidence found inside the apartment pursuant to the search warrant should be suppressed. (R. pp. 73-80). The judge agreed and granted the motion to suppress. The judge found that the magistrate lacked probable cause to issue the search warrant. The judge found that the affidavit in support of the search warrant did not support a finding of

probable cause to search the apartment at 609A because there was no evidence to link drugs to the inside of the apartment. (R. pp. 92-96).