

STATE OF LOUISIANA

NO. 21-K-252

VERSUS

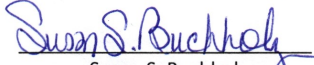
FIFTH CIRCUIT

DJUAN MACKEY

COURT OF APPEAL

STATE OF LOUISIANA

FIFTH CIRCUIT COURT OF APPEAL
A TRUE COPY OF DOCUMENTS AS
SAME APPEARS IN OUR RECORDS


Susan S. Buchholz
First Deputy, Clerk of Court

July 12, 2021

Susan Buchholz
First Deputy Clerk

IN RE STATE OF LOUISIANA

APPLYING FOR SUPERVISORY WRIT FROM THE FORTIETH JUDICIAL DISTRICT COURT,
PARISH OF ST JOHN THE BAPTIST, STATE OF LOUISIANA, DIRECTED TO THE HONORABLE
VERCELL FIFFIE, DIVISION "A", NUMBER 18,157

Panel composed of Judges Susan M. Chehardy,
Fredericka Homberg Wicker, and Jude G. Gravois

WRIT GRANTED; RULING REVERSED; MATTER REMANDED

Relator, the State of Louisiana, seeks this Court's supervisory review of the trial court's May 10, 2021 ruling which granted defendant Djuan Mackey's motion to suppress. For the reasons that follow, we grant the State's writ application, reverse the trial court ruling which granted defendant's motion to suppress, and remand the matter to the trial court for further proceedings.

FACTS AND PROCEDURAL HISTORY

On July 23, 2018, a St. John the Baptist Parish Grand Jury returned an indictment charging defendant, Djuan Mackey, with two counts of being a principal to second degree murder in violation of La. R.S. 14:24 and La. R.S. 14:30.1, and one count of being a principal to attempted second degree murder in violation of La. R.S. 14:24, La. R.S. 14:27, and La. R.S. 14:30.1.

On January 16, 2019, defendant filed a motion to suppress evidence arguing that his constitutional rights, as guaranteed by the Fourth and Fourteenth

Amendments to the United States Constitution and by the Louisiana Constitution, were violated in that the evidence to be used against him had been “unlawfully and illegally obtained.”

The motion came for a hearing on September 11, 2019,¹ where the State called Detective Tindell Murdock, Jr., with the New Orleans Police Department (“NOPD”), to testify. Detective Murdock testified that he became involved in a homicide investigation when Detectives Rodriguez and Watkins, with the St. John the Baptist Parish Sheriff’s Office, traveled to New Orleans and informed him that they were investigating a murder that had occurred in St. John the Baptist Parish. The detectives said that an individual, Derrance Greenup, had been positively identified in a photographic lineup by an eyewitness as having committed the homicide. The detectives told Detective Murdock that they believed Mr. Greenup was living at or had visited a residence at 2018 North Broad Street in New Orleans, and they suspected that the residence could contain evidence. Detective Murdock testified that the St. John the Baptist Parish detectives discussed the weapon as possibly being a “7.62 by 39 caliber.” Based on this information, on October 9, 2015, Detective Murdock authored a search warrant, and it was signed by a neutral and detached magistrate.²

Detective Murdock testified that on the same day soon after obtaining the search warrant, he and other officers arrived at the North Broad Street residence. Before executing the search warrant, the owner of the residence was informed that the officers were present to execute a search warrant, and the search warrant was presented to the owner.³ Detective Murdock provided that he and the other officers

¹ This hearing was conducted before 40th Judicial District Court Judge Madeline Jasmine.

² Detective Murdock testified that the residence described in the search warrant matched the residence located at 2018 North Broad Street in New Orleans.

³ Detective Murdock testified that Mr. Greenup was not present at the residence upon their arrival to execute the search warrant.

then began searching all areas of the residence, including the attic. Detective Murdock explained that he observed another officer go up the attic stairs. The officer then verbally announced that he observed a weapon and came down from the attic with the weapon in his hand. This officer then turned the weapon, a 7.62 caliber rifle, over to Detective Murdock. Detective Murdock confirmed that he maintained possession of the gun and then gave it to the evidence department in the New Orleans Police Department. Nothing else was recovered from the residence except the gun, and Detective Murdock had no further involvement in the homicide investigation.

Detective Murdock testified that he did not wear a body camera during the search, but there were several task force officers that were on the perimeter during the search who wore body cameras. He testified that to his knowledge, the officer who went into the attic and found the weapon was not wearing a body camera.

At the end of the hearing, defense counsel requested that the trial court leave the matter open. Counsel explained that he believed the State would be calling the officer who actually located the weapon. Further, counsel stated that he needed the State to turn over the body camera footage, which may be relevant to the outcome of the hearing. Counsel confirmed that the only evidence he sought to have suppressed was the weapon. The trial court ordered that the matter be held open.

On February 10, 2021, the hearing on the motion to suppress was reopened.⁴ At the hearing, defense counsel explained the circumstances of the search of the residence which led to the discovery of the weapon.⁵ He stated that testing of the weapon revealed defendant's fingerprints and that defendant did not live at the

⁴ The reopened hearing on the motion to suppress was conducted before 40th Judicial District Court Judge Vercell Fiffie, who was elected to replace Judge Madeline Jasmine who retired from the district court bench. Judge Fiffie ultimately issued the ruling on the subject motion.

⁵ Defense counsel introduced a copy of the transcript of the September 11, 2019 hearing at the reopened hearing without objection from the State.

subject residence. Counsel claimed that the State's position was that Detective Murdock was the officer who found the weapon and logged it into evidence; however, the detective's testimony contradicts the State's position. Counsel argued that the State did not establish a clear chain of custody in this matter, and it remained unknown who found the weapon and where it was located. Counsel argued that based on this information, the weapon should be suppressed. He also stated that he received discovery from the State in relation to the body camera footage, but it was not footage of the actual search.

The State responded that it had not been able to determine the identity of the officer who physically seized the gun out of the attic. The State argued, however, that this information is irrelevant on the question of suppression of the search warrant, and the court should look within the four corners of the search warrant to determine if there was probable cause. In response, defense counsel argued that the four corners of the search would actually consist of the chain of custody that existed with the evidence that was allegedly found.

The trial court stated that it did not appear the search warrant had been challenged, and therefore "we would have to assume that the warrant was good." The trial court stated that certain aspects of the warrant had to be looked at once it was executed. The trial court took the matter under advisement.

On May 10, 2021, the trial court issued and signed a judgment with written reasons granting the motion to suppress evidence. In its judgment, the trial court found that the record in this case did not substantiate that it was more probable than not that the evidence submitted was the same evidence seized on the day in question. The trial court stated that Detective Murdock did not testify that an evidence report was used for tracking the chain of custody, and neither the officer who purportedly retrieved the firearm nor the evidence custodian testified as to the

item's authenticity. The trial court found that because of this, the initial link in the chain of custody was not proven, introduced, or established.

Further, the trial court pointed out that the State called a witness, who was neither the officer who initially found the gun nor the evidence custodian, to affirm the authenticity of a weapon retrieved during the execution of a search warrant. The trial court held that "in choosing an ancillary detective and using evidence discovered by an out-of-court witness, the State deprives the defendant of his right to cross-examine the unavailable witness." Also, the trial court stated that this matter was held open in order for the State to produce the officer who retrieved the weapon and the officer's body camera footage, or both, but the State failed to produce either of the foregoing after indicating the evidence existed and was in its possession. The trial court then stated that it was "concerned about the veracity of the statements therein and compliance with Louisiana Code of Criminal Procedure Article 723, requiring evidentiary disclosures pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny."

Additionally, the trial court reasoned that defendant's right to compulsory process does attach to pretrial settings, citing to *State v. Morgan*, 315 So.2d 632 (La. 1975). The trial court held that defendant's inability to subpoena the retrieving officer who initially discovered the weapon presently being used to prosecute defendant is a constitutional violation, which is to be imputed to the prosecution. Also, the trial court stated that it "has seen no effort by the State to locate the retrieving officer or other evidence that would demonstrate who that official may be." The trial court stated that the court transcript and minutes indicated that officer body camera footage of the search exists, which would possibly identify the initial officer. The trial court stated that the State had been unable or unwilling to produce such footage even after a request by defendant. The trial court found "this mishandling of evidence suspicious, given that such

information is germane to substantive and procedural issues at hand.” The trial court found that defendant’s motion to suppress was legally warranted when considering the totality of the circumstances.

ANALYSIS

In its writ application, the State contends that the officers seized the rifle pursuant to a valid search warrant and that neither defendant nor the trial court alleged any improprieties with the search warrant. The State asserts that the trial court erred in suppressing the evidence because there is no evidence of any constitutional violation in connection with the search. The State argues that defendant and the trial court did not identify any misrepresentations in the search warrant and that the trial court erroneously suppressed the evidence because of a defect in the chain of custody since the individual who first located the rifle could not be identified. The State argues the trial court’s reasoning that this matter was distinguishable because the State could not establish who initially seized the weapon was not a valid ground for suppression of the evidence. Also, the State argues that defendant did not have a right to confront a witness, such as the NOPD officer, at a pretrial hearing. Finally, the State maintains that it is not withholding any evidence and that defendant failed to show any bad faith by the State in making the evidence unavailable.

In response, defendant argues that the facts show that the State failed to ever establish a chain of custody relative to the seizure of the weapon.

The Fourth Amendment to the United States Constitution and Article 1, § 5 of the Louisiana Constitution prohibit unreasonable searches and seizures. *State v. Thomas*, 08-390 (La. App. 5 Cir. 1/27/09), 8 So.3d 80, 83, writ denied, 09-626 (La. 11/25/09), 22 So.3d 170. If evidence is derived from an unreasonable search or seizure, the proper remedy is to exclude the evidence from trial. *Id.* A defendant who is adversely affected may move to suppress evidence from use at the trial on

the merits on the ground that it was unconstitutionally obtained. La. C.Cr.P. art. 703(A).

As a general rule, searches and seizures must be conducted pursuant to a validly executed search warrant or arrest warrant. *State v. Bonilla*, 15-529 (La. App. 5 Cir. 2/24/16), 186 So.3d 1242, 1259, writ denied, 16-567 (La. 5/2/16), 206 So.3d 881, cert. denied, -- U.S. --, 137 S.Ct. 239, 196 L.Ed.2d 183 (2016); *State v. Gaubert*, 14-396 (La. App. 5 Cir. 12/16/14), 167 So.3d 110, 114. A search warrant may be issued only upon probable cause established to the satisfaction of a magistrate, by the affidavit of a credible person, particularly describing the person or place to be searched and the things to be seized. *Id.* Probable cause for the issuance of a search warrant exists when the facts and circumstances within the affiant's knowledge and of which he has reasonably trustworthy information, are sufficient to support a reasonable belief that an offense has been committed and that evidence or contraband may be found at the place to be searched. *Id.* The determination of probable cause does not rest on an officer's subjective beliefs or attitudes but turns on a completely objective evaluation of all the circumstances known to the officer at the time of his challenged action. *Id.* A search warrant must establish a probable continuing nexus between the place sought to be searched and the property sought to be seized. *Id.*

When evidence is seized pursuant to a search warrant, the defendant bears the burden of proof at a hearing on his motion to suppress that evidence. La. C.Cr.P. art. 703(D); *State v. Falcon*, 13-849 (La. App. 5 Cir. 3/12/14), 138 So.3d 79, 88, writ denied, 14-769 (La. 11/14/14), 152 So.3d 877. A trial court has great discretion when ruling on a motion to suppress, and its ruling will not be disturbed absent an abuse of that discretion. *Id.*

Upon review, we find the trial court abused its discretion in granting defendant's motion to suppress evidence. A motion to suppress is not the proper

vehicle for a defendant to challenge the introduction of evidence based on a deficient chain of custody. La. C.Cr.P. art. 703 only applies to the suppression of evidence obtained by an unconstitutional search (and not to challenges of relevancy or prejudicial effect). *State v. Broadway*, 16-275 (La. App. 1 Cir. 9/16/16), 2016 WL 4962775 (unpublished opinion), *writ denied*, 16-1912 (La. 9/6/17), 224 So.3d 980. *See also* La. C.Cr.P. art. 703(A); *State v. Joseph*, 454 So.2d 237, 242 (La. App. 5 Cir. 1984) (question of relevancy and/or chain of custody is not properly within the scope of a motion to suppress). Ultimately, a chain of custody or connexity of the physical evidence is a factual matter for determination by the jury. *Broadway, supra*.

In the present case, defendant challenged the introduction of the gun based on a deficient chain of custody. At the February 10, 2021 hearing, the trial court stated that it did not appear the actual search warrant was being challenged. The parties did not argue and trial court did not find that the evidence was obtained by an unconstitutional search of the residence. *See* La. C.Cr.P. art. 703. In light of the foregoing, we find that a motion to suppress was not the proper vehicle for defendant to challenge the introduction of the evidence based on a deficient chain of custody.

Further, we find that the presence of the unknown NOPD officer who found the gun was not required at the pre-trial hearing on defendant's motion to suppress evidence. The Sixth Amendment to the United States Constitution provides that in all criminal prosecutions, the accused shall enjoy the right to be confronted with the witnesses against him. The Louisiana Supreme Court has specifically held that the right to confrontation contained in the United States and the Louisiana Constitutions is not implicated in a pre-trial matter. *State v. Harris*, 08-2117 (La. 12/19/08), 998 So.2d 55. Thus, defendant's right to confrontation was not implicated in this pre-trial motion hearing. Additionally, the State did provide the

testimony of Detective Murdock at the hearing, and the State explained that it had been unable to locate the unknown police officer who initially found the gun. We find that the trial court erroneously found that defendant's constitutional rights were violated because the unknown officer did not testify at a pre-trial motion hearing.

CONCLUSION

Based on the foregoing, we find that the trial court abused its discretion in granting defendant's motion to suppress evidence based on an alleged defect in the chain of custody. Accordingly, we grant the State's writ application, reverse the trial court ruling which granted defendant's motion to suppress, and remand the matter to the trial court for further proceedings.

Gretna, Louisiana, this 12th day of July, 2021.

**JGG
SMC
FHW**

SUSAN M. CHEHARDY
CHIEF JUDGE

FREDERICKA H. WICKER
JUDE G. GRAVOIS
MARC E. JOHNSON
ROBERT A. CHAISSON
STEPHEN J. WINDHORST
HANS J. LILJEBERG
JOHN J. MOLAISSON, JR.

JUDGES



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NOTICE OF DISPOSITION CERTIFICATE OF DELIVERY

I CERTIFY THAT A COPY OF THE DISPOSITION IN THE FOREGOING MATTER HAS BEEN TRANSMITTED IN ACCORDANCE WITH **UNIFORM RULES - COURT OF APPEAL, RULE 4-6** THIS DAY **07/12/2021** TO THE TRIAL JUDGE, THE TRIAL COURT CLERK OF COURT, AND AT LEAST ONE OF THE COUNSEL OF RECORD FOR EACH PARTY, AND TO EACH PARTY NOT REPRESENTED BY COUNSEL, AS LISTED BELOW:

CURTIS B. PURSELL
CLERK OF COURT

21-K-252

E-NOTIFIED

40th District Court (Clerk)
Honorable Vercell Fiffie (DISTRICT JUDGE)
Justin B. LaCour (Relator)

Honorable Bridget A. Dinvaut (Relator)
Randy J. Dukes (Respondent)

MAILED