IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

STATE OF FLORIDA,

Appellant,

v. Case No. 5D19-3390

KEVIN TYLER HART,

Appellee.

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Opinion filed November 20, 2020

Appeal from the Circuit Court
for Orange County,
Gail A. Adams, Judge.

Ashley Moody, Attorney General, Tallahassee, and Bonnie Jean Parrish, Assistant Attorney General, Daytona Beach, for Appellant.

Thomas D. Sommerville, of Law Offices of Thomas D. Sommerville, P.A., Orlando, and Stuart I. Hyman, of Stuart I. Hyman, P.A., Orlando, for Appellee.

LAMBERT, J.

The State of Florida appeals the trial court's order granting Appellee's motions to suppress evidence obtained by the State under three separate search warrants that were previously issued by three different magistrates. At the conclusion of the hearing that was held on the motions, the trial court determined that the statements contained in each

of the affidavits submitted in support of the search warrants were simply "conclusions," not facts, and thus did not establish probable cause for the issuance of the search warrants. Concluding that the trial court erred when it failed to apply the appropriate standard of deferential review to the magistrates' earlier findings of probable cause for the search warrants, we reverse.

THE AFFIDAVITS—

The respective affidavits submitted in support of each of the three search warrants issued in this case were executed by Corporal Richard Behrenshouser with the Florida Highway Patrol. Behrenshouser, who indicated in each affidavit that he had investigated or assisted in the investigation of over fifty homicide crashes, stated in his first affidavit that on May 11, 2017, shortly after 2:27 a.m., he had been dispatched to and responded to the scene of a traffic fatality at the intersection of Buck Road and Dean Road in Orange County. This affidavit, executed by Behrenshouser later on the same day of the crash, related that the right front of a 2013 Hyundai vehicle that Appellee was driving had collided with the rear of the victims' vehicle that had been stopped at the intersection and thereafter described the post-collision final resting locations of the vehicles at points outside of the intersection. Behrenshouser's affidavit further provided that the right front passenger in the victims' car was pronounced dead at the scene and that the driver of the vehicle had been transported to a local hospital, where he too died from injuries that he sustained in the crash.

This first affidavit also stated that Sergeant Brad Roberts, with the Orange County Sheriff's Department, had arrived at the accident scene moments after the crash

occurred. Sergeant Roberts identified Appellee by his Florida Driver's License,[1] observed Appellee in the driver's seat of the aforementioned 2013 Hyundai vehicle, and determined that the registered owner of this vehicle was Kevin Arthur Hart.[2] The affidavit further described that Appellee had burns on his upper left shoulder extending across his chest "consistent with that of a seat belt burn a driver would receive after being involved in a vehicle crash."

Corporal Behrenshouser's affidavit also set forth certain comments attributed to Appellee's front-seat passenger, Marc Anson Boscico. According to the affidavit, Boscico stated that Appellee was driving the Hyundai at the time of the collision and that Appellee was "impaired and drinking too much prior to driving the vehicle."

Appellee was transported from the accident scene to Orlando Regional Medical Center. The affidavit related that Florida Highway Patrol Trooper Deborah Hawkins observed Appellee at this hospital for signs of impairment. The affidavit described that Appellee had "bloodshot glassy eyes [and] a slurred speech, and was drooling out of the left side of his mouth, all being consistent with being under the influence." Additionally, Trooper Hawkins requested Appellee's consent to a voluntary blood sample for toxicology testing. Appellee declined Hawkins's request, but he did confirm to her that he was the driver of the Hyundai vehicle.

[1] According to the driver's license, Appellee was twenty-one years old at the time of the crash.

[2] Although the relationship between Appellee and Kevin Arthur Hart, the registered owner of the vehicle, is not provided in the affidavit, the owner's name and the Appellee's name, Kevin Tyler Hart, are substantially similar, suggestive of a familial relationship.

Behrenshouser's affidavit concluded by requesting that a search warrant be issued to allow him to seize a blood sample from Appellee for purposes of toxicology screening to "determine the presence and quantity of any drugs," as well as the "level of alcohol from the blood samples." The magistrate presented with this first affidavit found that probable cause for the seizure of a sample of Appellee's blood for testing had been sufficiently demonstrated and issued the first search warrant that same day.

The second affidavit for a search warrant was executed by Behrenshouser four days later on May 15, 2017. This affidavit basically set forth the same facts from the first affidavit. Behrenshouser requested that a warrant be issued authorizing a search of Appellee's now-impounded vehicle to allow him to obtain, among other things, fingerprint, fabric, and fiber evidence, and the air bag cushions from both the driver's and front passenger seats, plus the vehicle's Event Data Recorder and the electronic memory contained therein. The magistrate issued the search warrant for the vehicle, finding that there was probable cause to believe that the laws of Florida had been violated and that relevant evidence to the prosecution of Appellee was located in the vehicle.

Corporal Behrenshouser's third affidavit for a search warrant in this case was executed approximately one month later. This affidavit again related essentially the same facts described in the two previous affidavits. The third affidavit specifically sought DNA buccal swab samples from Appellee so that a comparison of Appellee's DNA could be made against a sample retrieved from the driver's side air bag cushion obtained from the second search warrant. A third magistrate issued the search warrant, finding, like the first two magistrates, that probable cause had been sufficiently established in Behrenshouser's affidavit to support and justify the search.

TRIAL COURT PROCEEDINGS—

Appellee was charged with two counts of DUI manslaughter. Appellee later filed three separate, but substantially similar, motions to suppress the evidence that was obtained by the State from each of the three search warrants. As previously indicated, the trial court held a hearing on the motions to suppress. The three affidavits and the corresponding search warrants were admitted into evidence. No testimony or other evidence was presented at this hearing. Following counsels' arguments, the trial court granted the suppression motions, agreeing with Appellee that the statements of the front-seat passenger about Appellee being impaired and the observations by Trooper Hawkins of Appellee's physical appearance at the hospital were "all conclusions." The trial court concluded by stating that it did not "see any evidence that would give rise to probable cause" for the search warrants. It then entered an unelaborated written order granting the motions, from which the State has timely appealed.

ANALYSIS—

Review of an order granting a motion to suppress requires that an appellate court defer to a trial court's factual findings but apply a de novo review to the trial court's application of law to those facts. *State v. Carreno*, 35 So. 3d 125, 129 (Fla. 3d DCA 2010) (citing *Brachlow v. State*, 907 So. 2d 626, 628 (Fla. 4th DCA 2005)). Here, the trial court made no separate findings of fact. Therefore, our task is to determine whether the trial court correctly applied the established law when it essentially disagreed with the probable cause findings made by the three magistrates and instead concluded that there were insufficient facts presented in the affidavits to justify the issuance of the search warrants.

Our resolution of this appeal requires that we examine a trial court's scope of review when ruling on an initial magistrate's finding of probable cause for a search warrant.

Preliminarily, neither party disputes that the issuance of a search warrant must be supported by probable cause. To establish the requisite probable cause for the search warrant, the affidavit submitted in support of the warrant must set forth facts establishing two elements: (1) the commission element—that a particular person has committed a crime; and (2) the nexus element—that evidence relevant to the probable criminality is likely to be located in the place searched. *State v. McGill*, 125 So. 3d 343, 348 (Fla. 5th DCA 2013) (citing *State v. Felix*, 942 So. 2d 5, 9 (Fla. 5th DCA 2006)). The standard of probable cause for the issuance of a search warrant does not require a prima facie showing of criminal activity, just "probable" criminality. *State v. Rabb*, 920 So. 2d 1175, 1181 (Fla. 4th DCA 2006) (quoting *United States v. Syphers*, 426 F.3d 461, 464 (1st Cir. 2005)).

Where, as here, it is a magistrate who is first presented with an affidavit requesting the issuance of a search warrant, the magistrate's duty is to examine solely the content of the affidavit—or what is commonly referred to as the "four corners" of the affidavit—and, from there, "simply to make a practical, common sense decision whether, given all the circumstances before him, there is a fair probability that contraband or evidence of a crime will be found in a particular place." *State v. Price*, 564 So. 2d 1239, 1241 (Fla. 5th DCA 1990) (citing *Illinois v. Gates*, 462 U.S. 213, 238 (1983); *State v. Jacobs*, 437 So. 2d 166, 166 (Fla. 5th DCA 1983)). This commonsense, realistic approach required of magistrates when evaluating whether probable cause has been sufficiently shown in the supporting affidavit for the issuance of a search warrant is in recognition that these

affidavits are usually drafted by non-lawyers in the midst of a criminal investigation. *Younger v. State*, 433 So. 2d 636, 639–40 (Fla. 5th DCA 1983) (citing *United States v. Ventresca*, 380 U.S. 102, 108 (1965)). Stated somewhat differently, affidavits for search warrants are not to be scrutinized for technical niceties. *Id.* at 639 (citing *State v. Heape*, 369 So. 2d 386, 388 (Fla. 2d DCA 1979)).

Once a magistrate specifically finds probable cause and thereafter issues a search warrant, that finding is accorded a presumption of correctness and is not to be disturbed by the later-reviewing trial court absent a clear determination that the issuing magistrate abused his or her discretion. *Price*, 564 So. 2d at 1241 (citing *Jacobs*, 437 So. 2d at 166); *accord Carreno*, 35 So. 3d at 128 ("[O]nce a Magistrate has found probable cause and has issued a warrant, his judgment is conclusive unless arbitrarily exercised . . . ." (quoting *United States v. Giacalone*, 541 F.2d 508, 513 (6th Cir. 1976))). Importantly, the trial court does not conduct a de novo review; instead, it must give "great deference" to the magistrate's finding of probable cause, *see State v. Abbey*, 28 So. 3d 208, 210 (Fla. 4th DCA 2010), and is limited to simply ensuring "that the magistrate had a substantial basis for . . . concluding that probable cause existed." *Mesa v. State*, 77 So. 3d 218, 221 (Fla. 4th DCA 2011) (quoting *Rabb*, 920 So. 2d at 1180).

We conclude that, in granting the motions to suppress here, the trial court misapplied the law by not giving the requisite great deference to each magistrate's original finding of probable cause. *See Carreno*, 35 So. 3d at 130 (reversing the trial court's order suppressing the evidence obtained as a result of a search warrant because the trial court failed to use the proper standard of review of according great deference to the original probable cause determination). Simply put, Behrenshouser's affidavits contained

sufficient facts to establish probable cause that Appellee had committed two counts of DUI manslaughter and that evidence of these crimes would be found in the vehicle Appellee was driving and in his blood and DNA samples.

First, each affidavit presented by Behrenshouser in support of the search warrants provided that, according to Appellee's front-seat passenger, Appellee was "impaired and drinking too much" just prior to the accident. Although the passenger's comments may have been hearsay, an affidavit supporting a search warrant can be based on hearsay information. *See Line v. State*, 395 So. 2d 1268, 1270 (Fla. 4th DCA 1981) ("On the question of hearsay, it is universally accepted that an affidavit supporting a search warrant may be based on hearsay information." (citing *State v. Wolff*, 310 So. 2d 729, 731–32 (Fla. 1975))).

Second, each affidavit described for the issuing magistrate the observations made by Trooper Hawkins of Appellee having bloodshot glassy eyes and slurred speech and drooling from the mouth at the hospital shortly after the accident. Each affidavit also had Sergeant Roberts placing Appellee as the driver of the vehicle that caused the two deaths. Under the "fellow officer" rule, Behrenshouser was entitled to rely upon the factual observations of these officers made during the course of their investigation and then to include this supplied information in his probable cause affidavits for the search warrants. *See State v. Bowers*, 87 So. 3d 704, 707 (Fla. 2012) (explaining that the fellow officer rule provides that "one officer may rely on the knowledge and information possessed by another officer to establish probable cause for an arrest for a felony or misdemeanor offense or to establish probable cause for a search" (internal citation omitted) (quoting *Bowers v. State*, 23 So. 3d 767, 770 (Fla. 2d DCA 2009))); *State v. Evans*, 692 So. 2d

216, 218 n.3 (Fla. 4th DCA 1997) ("This so-called fellow officer rule has been applied to search warrants as well as arrests . . . ." (quoting 14 Fla. Jur. 2d *Criminal Law* § 650 (1993))).

Accordingly, we reverse the trial court's order granting Appellee's motions to suppress.

REVERSED.

WALLIS and EISNAUGLE, JJ., concur.