DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT
July Term 2010

MARCUS PERRY,
Petitioner,

v.

RIC BRADSHAW, SHERIFF OF PALM BEACH COUNTY,
Respondent.

No. 4D10-3207

[September 15, 2010]

PER CURIAM.

Marcus Perry filed an emergency petition for writ of habeas corpus, challenging the trial court's finding of probable cause at his adversary preliminary hearing. On August 19, 2010, we directed his release "on recognizance subject to the condition that he . . . appear at all court proceedings," Florida Rule of Criminal Procedure 3.133(b)(5), with an opinion to follow.

Perry was arrested for murder, and after the state failed to charge him by indictment or information within twenty-one days, he moved for an adversary preliminary hearing pursuant to Florida Rule of Criminal Procedure 3.133(b).[1] At the hearing, the state presented two witnesses: an individual who testified that her friend was shot, but she could not identify the shooter; and a detective who testified, over defense hearsay objections, to what he was told by other individuals who were present at the shooting. The only testimony by the detective to which the defense did not object was his testimony as to Perry's statements, in which Perry admitted being present when the shooting took place but denied either possessing or firing a gun at that time or driving the vehicle or firing a gun at police during the high-speed chase that followed the shooting.

Defense counsel argued that hearsay could not be used as the basis for a finding of probable cause at an adversary preliminary hearing,

[1] Prior to the hearing, the defendant was charged by information with second-degree murder with a firearm, but that did not eliminate his entitlement to the hearing. Fla. R. Crim. P. 3.133(b)(1).

citing *Evans v. Seagraves*, 922 So. 2d 318 (Fla. 1st DCA 2006). Nevertheless, the trial court found that probable cause existed to believe Perry committed the crime of second-degree murder.

Florida Rule of Criminal Procedure 3.133(b)(3) provides that, at an adversary preliminary hearing, "[a]ll witnesses shall be examined in the presence of the defendant and may be cross-examined." If, from the evidence presented at the hearing, the judge makes a finding of probable cause "that an offense has been committed and that the defendant has committed it, the judge shall cause the defendant to be held to answer to the circuit court." Fla. R. Crim. P. 3.133(b)(5). If an information has been filed, and the judge finds no probable cause exists, the prosecution is not voided and "the defendant shall be released on recognizance subject to the condition that he . . . appear at all court proceedings or shall be released under a summons to appear before the appropriate court at a time certain." *Id.*

We agree with Perry that the trial court erred in relying on nothing but inadmissible hearsay to find probable cause that he committed the offense.[2] *See Evans*, 922 So. 2d at 319; *Stangherlin v. Kelly*, 419 So. 2d

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[2] As the First District explained in *Evans*, 922 So. 2d at 321-22:

> Hearsay may well be an important part of the "totality of the circumstances" giving law enforcement officers probable cause for an arrest in a given case. *See Illinois v. Gates*, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983). Hearsay may, indeed, suffice in proceedings under Rule 3.133(a), which provides for a *nonadversary* probable cause determination within forty-eight hours of the defendant's arrest, where the arrest was not made pursuant to an arrest warrant. Rule 3.133(a)(3) specifically sets forth the standard of proof for these nonadversary probable cause determinations, and explicitly provides that—in determining probable cause justifying an arrest after the fact—the judge shall apply the standard for issuance of an arrest warrant. Findings under Rule 3.133(a) may be based on *ex parte* sworn complaints, other affidavits, or depositions under oath, and need not (but may also be) based on competent evidence.
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> In contrast, Rule 3.133(b) provides for an *adversary* preliminary hearing when the state fails to charge a defendant by information or indictment within twenty-one days of the arrest. Unlike Rule 3.133(a), Rule 3.133(b) does not permit the state to rely wholly on a complaint (even if sworn), on another affidavit or on any other evidence inadmissible at trial. Rule 3.133(b)(3) provides instead that all witnesses shall be examined in the presence of the defendant and may be cross-examined. Rule 3.133(b)(5) provides that the judge shall cause

1154 (Fla. 5th DCA 1982); *Pierce v. Mims*, 418 So. 2d 273 (Fla. 2d DCA 1982). Accordingly, we grant the petition.

"Of course, [Perry's] release does not preclude further prosecution by information." *Pierce*, 418 So. 2d at 274; *see also* Fla. R. Crim. P. 3.133(b)(5) ("Such release does not, however, void further prosecution by information or indictment but does prohibit any restraint on liberty other than appearing for trial.").

Petition Granted.

HAZOURI and LEVINE, JJ., concur.
GERBER, J., dissents with opinion.

GERBER, J., dissenting.

I respectfully dissent for reasons similar to those which Judge Thomas expressed in his dissent in *Evans v. Seagraves*, 922 So. 2d 318 (Fla. 1st DCA 2006).

The majority opinion in *Evans*, which the majority follows here, interprets Florida Rule of Criminal Procedure 3.133(b) as prohibiting a finding of probable cause based on hearsay alone at an adversary preliminary hearing simply because the rule requires the state to produce witnesses and allows the defendant to cross-examine those witnesses. *Evans*, 922 So. 2d at 321-22. I disagree with that interpretation. Instead, I agree with Judge Thomas's interpretation that "[t]he rule simply provides [a defendant] with an enhanced process to better test the reliability of the State's evidence." 922 So. 2d at 325-26 (Thomas, J., dissenting).

The reasonableness of this latter interpretation is best demonstrated by comparing a nonadversary probable cause determination under rule 3.133(a) to an adversary preliminary hearing under rule 3.133(b). The most common nonadversary probable cause determination occurs at first appearance. *See* Fla. R. Crim. P. 3.133(a)(1) ("This determination shall

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the defendant to be held to answer to the circuit court, only if it appears to the judge "from the evidence" that there is probable cause to believe that the defendant has committed the offense.

be made if the necessary proof is available at the time of the first appearance as required under rule 3.130 . . . ."). The first appearance judge simply reviews the probable cause affidavit to determine whether there is probable cause for detaining the defendant pending further proceedings. *See* Fla. R. Crim. P. 3.133(a)(3).

At an adversary preliminary hearing, however, the defendant can challenge the probable cause affidavit. As occurred in this case, the state presumably would call as its witness the officer who completed the probable cause affidavit. The officer would testify about how the investigation established the elements which led to the defendant's arrest. The defendant would be able to cross-examine the officer and call his own witnesses to rebut the state's showing. The rights to cross-examine and call witnesses are great advantages which simply do not exist at a nonadversary probable cause determination.

I would deny the petition for writ of habeas corpus and would certify conflict with *Evans.* I also would encourage the Florida Bar's criminal rules committee and our Supreme Court to clarify the proper scope of an adversary preliminary hearing by including a "standard of proof" definition in rule 3.133(b). Rule 3.133(a)(3) includes a "standard of proof" definition for a nonadversary probable cause determination, but rule 3.133(b) contains no such definition for an adversary preliminary hearing.

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Petition for writ of habeas corpus to the Circuit Court for the Fifteenth Judicial Circuit, Palm Beach County; Stephen A. Rapp, Judge; L.T. Case No. 2010CF006484AXX.

Carey Haughwout, Public Defender, and Travis Dunnington, Assistant Public Defender, West Palm Beach, for petitioner.

Bill McCollum, Attorney General, Tallahassee, and Heidi L. Bettendorf, Assistant Attorney General, West Palm Beach, for respondent.

Not final until disposition of timely filed motion for rehearing.