FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D18-4157

DION LATWON WINGATE,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

On appeal from the Circuit Court for Okaloosa County.
John T. Brown, Judge.

February 6, 2020

WINOKUR, J.

Authorities searched Dion Wingate's home pursuant to a search warrant. Based on what was found, the State charged Wingate with several drug-related crimes, including possession and trafficking. Wingate moved to suppress evidence found during the search, contending that the search warrant was invalid. The trial court denied the motion, and Wingate pleaded nolo contendere, reserving his right to appeal the denial of his suppression motion, which the State and court agreed was dispositive. We have jurisdiction, *see* Fla. R. App. P. 9.140(b)(2)(A), and we affirm.

On appeal, Wingate argues that the affidavit on which the warrant was based presented insufficient probable cause to

support the search. In making this argument, Wingate cites *Garcia v. State*, 872 So. 2d 326, 330 (Fla. 2d DCA 2004), for the proposition that evidence seized pursuant to a warrant is subject to suppression where the warrant's affidavit fails to establish probable cause. We reject this claimed rule of exclusion, because it misapplies the proper analysis for determining whether evidence seized pursuant to a warrant should be suppressed.

I.

The Fourth Amendment proscribes unreasonable searches or seizures.[1] Amend. IV, U.S. Const. An important principle of Fourth Amendment jurisprudence is the preference given to searches and seizures conducted pursuant to warrant.[2] *See Murray v. State*, 155 So. 3d 1210, 1216 (Fla. 4th DCA 2015) (quoting *Illinois v. Gates*, 462 U.S. 213, 236 (1983) (recognizing that "[a] grudging or negative attitude by reviewing courts toward warrants is inconsistent with the Fourth Amendment's strong preference for searches conducted pursuant to a warrant")).

The exclusionary rule requires suppression of evidence gathered in a manner that violates the guarantees of the Fourth Amendment. *See Clayton v. State*, 252 So. 3d 827, 830 (Fla. 1st DCA 2018). The rule, however, is a judicially-created prophylactic measure designed to deter police misconduct that is distinct from

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[1] The Florida Constitution also provides protection from unreasonable searches and seizures, but mandates that the right "be construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court." Art. I, § 12, Fla. Const.

[2] This preference recognizes that "[t]he warrant requirement ensures that a 'neutral and detached magistrate [stands] between the citizen and the officer engaged in the often competitive enterprise of ferreting out crime.'" *Clayton v. State*, 252 So. 3d 827, 829-30 (Fla. 1st DCA 2018) (quoting *United States v. Karo*, 468 U.S. 705, 717 (1984)).

the amendment's mandate.[3] As a result, whether the exclusionary rule applies in a particular case is a separate issue from whether an individual's Fourth Amendment rights were violated. *See State v. Teamer*, 151 So. 3d 421, 430 (Fla. 2014) (citing *United States v. Leon,* 468 U.S. 897, 906 (1984)). In other words, the fact that police obtained evidence in a manner that violated a defendant's right against unreasonable searches and seizures does not necessarily require that a trial court exclude it.

Three conditions must be met before a court applies the exclusionary rule: 1) misconduct by police or their adjuncts; 2) a conclusion that applying the exclusionary rule will appreciably deter the misconduct; and 3) a conclusion that the benefit of applying the rule does not outweigh its costs. *United States v. Herring*, 492 F.3d 1212, 1217 (11th Cir. 2007). Consistent with this approach, the United States Supreme Court has held that the exclusionary rule does not apply when officers obtain evidence in reasonable reliance on a search warrant even if it is later found that the warrant was unsupported by probable cause. *Leon*, 468 U.S. at 926. The *Leon* rule recognizes that "[p]enalizing the officer for the magistrate's error, rather than his own, cannot logically contribute to the deterrence of Fourth Amendment violations."[4] *Id*. at 921.

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[3] The United States Supreme Court created the exclusionary rule in *Weeks v. United States*, 232 U.S. 383 (1914) and incorporated it against the States in *Mapp v. Ohio*, 367 U.S. 643 (1961). The Court has since described the rule as "a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved." *United States v. Calandra*, 414 U.S. 338, 348 (1974).

[4] The *Leon* holding is often described as a "good-faith exception." The use of this phrase may have created some confusion regarding the scope of *Leon*. *Leon* creates a *rule* (not an exception) that "evidence obtained by officers acting in reasonable reliance on a search warrant issued by a detached and neutral magistrate but ultimately found to be unsupported by probable cause" is not subject to suppression. *Leon*, 468 U.S. at 900. This rule has several exceptions, discussed below. But calling the

The *Leon* court also noted that deference to a judge's probable cause determination is not absolute and that the rule it creates prohibiting exclusion does not apply when 1) the affiant misleads the trial court by providing information in the warrant's affidavit that he knew to be false or should have known, but for his reckless disregard of the truth; 2) the trial court wholly abandoned its role as a neutral and detached gatekeeper; 3) the warrant is so lacking in indicia of probable cause as to render an objective officer's belief in its existence entirely unreasonable; or when 4) the warrant is so facially deficient that the executing officers cannot reasonably presume it to be valid. 468 U.S. at 923. The third exception is the only one concerning the quantum of evidence supporting probable cause and requires suppression only when the warrant is so lacking in indicia of probable cause that no objective officer would rely on it. Thus, not only is the mere "lack of probable cause" supporting a warrant not a reason to suppress, but to do so would render *Leon* meaningless, since the whole point of *Leon* was to preclude suppression of evidence seized in reasonable reliance on a warrant that was *not* properly supported by probable cause.

In short, the "so lacking in indicia of probable cause" exception does not just seek to determine whether sufficient probable cause exists. "[M]ere insufficiency of the affidavit to support probable cause will not preclude the application of the *Leon* good faith exception." *United States v. Doyle*, 650 F.3d 460, 470 (4th Cir. 2011). Instead, the "so lacking in indicia of probable cause" exception applies only where the "affidavit is 'bare bones,' i.e., 'it fails to provide a colorable argument for probable cause.'" *United States v. Jobe*, 933 F.3d 1074, 1077 (9th Cir. 2019) (citations omitted). "'Bare bones' affidavits contain wholly conclusory statements, which lack the facts and circumstances from which a magistrate can independently determine probable cause." *United States v. Satterwhite*, 980 F.2d 317, 321 (5th Cir. 1992).[5] Unless

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general rule an exception improperly implies that the prosecution cannot benefit from *Leon* unless it can establish that the general rule (presumably the exclusionary rule) does not apply.

[5] *See also United States v. Christian*, 925 F.3d 305, 312, 318 (6th Cir. 2019) ("We reserve th[e 'bare bones'] label for an affidavit that merely states suspicions, or conclusions, without providing

the affidavit is "bare bones" containing "wholly conclusory statements," the "so lacking in indicia of probable cause" exception does not apply.

II.

That exception plainly does not apply here. The affidavit included information showing, among other things, that Wingate was associated with the residence at issue and that Wingate had sold drugs to a confidential informant in a controlled buy at that residence. Considering all of the affidavit's contents, and applying the standards above, we find no basis to conclude that the warrant was so lacking in indicia of probable cause as to render an officer's belief in its existence entirely unreasonable.

III.

Wingate relies on *Garcia* for the proposition that where a warrant's affidavit fails to establish probable cause, the good-faith exception is inapplicable. As noted above, this assertion vitiates the holding in *Leon*, and creates an exception that swallows the rule. A closer reading of *Garcia* reveals that the language highlighted by Wingate is a misstatement of the proper law, and does not provide the basis for its holding.

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some underlying factual circumstances regarding veracity, reliability, and basis of knowledge. . . . An affidavit exceeds the *Leon* bar when it contains *some* connection between the illegal activity and the place to be searched, even if that connection is remote and supported by only a slight modicum of evidence.") (citations and internal quotation marks omitted); *United States v. Huerra*, 884 F.3d 511, 515 (5th Cir. 2018) ("[A]ffidavits that merely state that the affiant has cause to suspect and does believe or has received reliable information from a credible person and does believe that contraband is located on the premises are bare bones.") (internal quotation marks omitted); *United States v. Johnson*, 4 Fed. App'x 169, 172 (4th Cir. 2001) ("A 'bare bones' affidavit is one in which an affiant merely recites the conclusions of others—usually a confidential informant—without corroboration or independent investigation of the facts alleged.").

In *Garcia*, the defendant appealed the trial court's denial of his suppression motion, arguing that the search warrant "lacked sufficient probable cause to indicate that cocaine was located within [his] home." 872 So. 2d at 327. The Second District found that the warrant's affiant omitted key facts from the warrant's affidavit. *Id*. at 328-29. As a result, the court held that the "good-faith exception" was not applicable and suppressed the contraband seized from the defendant's home. *Id*. at 330.

In its analysis, *Garcia* held that "[w]here, as here, the supporting affidavit fails to establish probable cause to justify a search, Florida courts refuse to apply the good faith exception." *Id*. Wingate highlights this language to bolster his argument. This portion of *Garcia*, however, misconstrues the *Leon* rule and the few instances where it is inapplicable. The Second District refused to apply the *Leon* rule because of the factual omissions made by police in the warrant's affidavit, triggering the *Leon* rule's first exception. *Leon*, 468 U.S. at 923.

It is also worth noting that the Fifth District recently reversed a trial court's suppression of evidence, finding in *State v. McGill*, 125 So. 3d 343, 350 (Fla. 5th DCA 2013) that "the trial court appeared to have been misled in its understanding of the good faith exception by the unfortunate language in *Garcia*." The court emphasized that absent any "misrepresentations or omitted material facts . . . [allegations] that the magistrate abandoned his role of neutrality [or] technical deficien[cies]" that "the good faith exception applies as long as the affidavit was not so lacking in indicia of probable cause as to render official belief in its validity unreasonable." *Id*. at 352.

Therefore, even if the search of Wingate's home was not supported by probable cause, Wingate would not be entitled to suppression. The record does not contain any evidence that the warrant was so bare bones, supported only by wholly conclusory statements, that an objective reasonable officer would doubt its validity.[6] Accordingly, the trial court did not err in denying his motion to suppress.

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[6] The concurrence correctly notes that *Pagan v. State*, 830 So. 2d 792, 806 (Fla. 2002), states, "[i]n determining whether probable

IV.

The language at issue in *Garcia* is an inexact explanation of the *Leon* rule that finds no support in *Leon* itself, and did not provide a basis for its holding. Wingate's claim that a warrant lacking probable cause requires suppression runs contrary to precedent and would eviscerate the holding of *Leon*—that the social costs of the exclusionary rule are not justified when police reasonably rely on the presumptive validity of a warrant issued by a judge. To this end, courts should take care to limit the "so lacking in indicia of probable cause" exception to warrants supported by "bare bones" affidavits containing "wholly conclusory statements."

AFFIRMED.

B.L. THOMAS, J., concurs; BILBREY, J., concurs in result only with opinion.

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cause exists to justify a search, the trial court must make a judgment, based on the totality of the circumstances, as to whether from the information contained in the warrant there is a reasonable probability that contraband will be found at a particular place and time." *See also State v. Sabourin*, 39 So. 3d 376, 380 (Fla. 1st DCA 2010) (asserting that "[o]ur task is to review the trial court's ruling regarding whether the issuing magistrate made a proper probable cause determination prior to issuing a search warrant"). Under these authorities, the concurrence contends that our analysis of "what should happen when a warrant is not supported by probable cause" is unnecessary because sufficient probable cause supported the warrant. However, neither case ruled that evidence was subject to suppression because the search warrant was not supported by probable cause. Until such a case does, we hold that the correct analysis is *not* to determine whether the warrant was supported by probable cause, but to determine whether *Leon* applies, and if so, whether an exception to *Leon* exists. Because officers searched the apartment in reasonable reliance on a search warrant, *Leon* applies. And no exception to *Leon*—in particular the exception that the warrant was so lacking in indicia of probable cause that a reasonable officer would not rely on it—exists.

Not final until disposition of any timely and authorized motion under Fla. R. App. P. 9.330 or 9.331.

BILBREY, J., concurring in result only.

I agree we are correct to affirm the denial of the motion to suppress but would do so based on the facts of the case. The majority devotes much of its opinion discussing the limits of the exclusionary rule when a warrant is not supported by probable cause without discussing the relevant facts here. Respectfully, the majority's discussion of what should happen when a warrant is not supported by probable cause is unnecessary here since the trial court correctly determined that the affidavit "contained sufficient probable cause to have permitted issuance of the search warrant."

The affidavit offered in support of the search warrant stated that in August 2017, an experienced narcotics officer with the Okaloosa County Sheriff's Office had obtained information from a confidential information indicating that Wingate and a female suspect were involved in drug sales in the area and lived together at the target apartment. Vehicles associated with Wingate and the female suspect were observed at the apartment on various occasions in September and October 2017. The female suspect was listed in online databases and through utility providers as residing at the apartment.

The affidavit then stated that a controlled purchase of crack cocaine had been conducted with Wingate as the seller at the target apartment within the preceding ten days. The affidavit stated that prior to the buy, the CI's person and vehicle were searched for contraband by an investigator and that no contraband was located. The CI was fitted with an "electronic monitoring device, briefed, and provided with recorded police drug buy monies." Investigators then surveilled the CI to the target apartment, where the CI purchased crack cocaine with the provided money. The CI was then surveilled back to a rally point

where the CI turned the crack cocaine over to investigators. The CI's person and vehicle were again searched, and no additional contraband was located. The contraband purchased by the CI was field tested and showed as presumptive positive for cocaine.

The affidavit then set forth how, based on the officer's training and experience, the above information established probable cause to believe that the target contraband would be located at the apartment. A search warrant was then issued by a circuit judge based on the affidavit.

Upon execution of the warrant, over 180 grams of marijuana, over 28 grams of cocaine, over 28 grams of methamphetamine, over 10 grams of MDMA, over 35 dosage units of Alprazolam, scales, smoking devices, and packaging material, were found in the bedroom shared by Wingate and the female suspect. In a post *Miranda* interview, the female suspect admitted that Wingate resides in the apartment and distributes narcotics from the apartment.

On appeal, Wingate argues that the affidavit on which the warrant was based was insufficient to support the search. "In determining whether probable cause exists to justify a search, the trial court must make a judgment, based on the totality of the circumstances, as to whether from the information contained in the warrant there is a reasonable probability that contraband will be found at a particular place and time." *Pagan v. State*, 830 So. 2d 792, 806 (Fla. 2002). "Our task is to review the trial court's ruling regarding whether the issuing magistrate made a proper probable cause determination prior to issuing a search warrant." *State v. Sabourin*, 39 So. 3d 376, 380 (Fla. 1st DCA 2010).

The warrant here was clearly supported by probable cause. A recent controlled buy establishes "probable cause to justify the warrant." *State v. Gieseke*, 328 So. 2d 16, 17 (Fla. 1976). *See also Clark v. State*, 635 So. 2d 1010 (Fla. 1st DCA 1994) (holding that probable cause for issuance of a warrant existed and CI's reliability is established based on a controlled buy). That should be the end of our discussion per the holdings in *Pagan* and *Sabourin*, and we are correct to affirm. But the majority, without stating how probable cause was in doubt here, goes on to discuss the limits of

the exclusionary rule. I respectfully submit that this discussion is surplusage, and I would affirm without opining on what we should do if the affidavit had lacked probable cause.

Andy Thomas, Public Defender, and Laurel Cornell Niles, Assistant Public Defender, Tallahassee, for Appellant.

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