STATE OF LOUISIANA	NO. 18-K-458
VERSUS	FIFTH CIRCUIT
KELLY FOLSE	COURT OF APPEAL
	STATE OF LOUISIANA

August 16, 2018

Mary E. Legnon
Chief Deputy Clerk

IN RE KELLY FOLSE

APPLYING FOR SUPERVISORY WRIT FROM THE TWENTY-FOURTH JUDICIAL DISTRICT COURT, PARISH OF JEFFERSON, STATE OF LOUISIANA, DIRECTED TO THE HONORABLE SCOTT U. SCHLEGEL, DIVISION "D", NUMBER 17-8027

Panel composed of Judges Susan M. Chehardy,
Marc E. Johnson, and Ellen Shirer Kovach, Pro Tempore

WRIT GRANTED

In this writ application, relator, Kelly Folse, seeks review of the district court's June 27, 2018 ruling denying her motion to suppress. After our supervisory review, we find relator is entitled to relief, grant this writ, reverse the ruling of the district court, and remand the matter.

FACTUAL AND PROCEDURAL HISTORY

Relator is facing charges of aggravated cruelty to animals (La. R.S. 14:102.1(B)), illegal use of weapons (La. R.S. 14:94), possession of Methacarbamol (La. R.S. 40:1060.13), and possession of Diazepam (La. R.S. 40:969(C)) in connection with the December 13, 2017 shooting death of her neighbor's dog. Relator has entered pleas of not guilty to these charges.

On June 19, 2018, relator filed, among several pre-trial motions, a motion to suppress evidence seized from her cellular telephone. This matter came for a hearing on June 25, 2018. At that hearing, evidence was adduced establishing that

on December 19, 2017, Detective Kristen Livers of the Jefferson Parish Sheriff's Office and other JPSO detectives executed an arrest warrant and a search warrant at relator's residence. After relator had been arrested and transported to the detective bureau, an Apple iPhone was seized from relator's person and which she acknowledged was hers. At that time, relator declined consent for a search of her phone. Based on the detectives' belief that relator's cell phone "may contain text messages, emails, pictures and/or videos that may contain information relative to the…case[,]" they sought and obtained a search warrant for the phone on December 19, 2017.

Thereafter, the detectives were contacted by relator's attorney seeking return of her phone. On January 3, 2018, relator and her attorney arrived at the bureau to retrieve her phone. At that time, relator's phone had not yet been searched pursuant to the warrant. The detectives advised relator and her attorney of the search warrant for the phone and that her phone would be turned over after the data had been downloaded from it. The detectives asked relator, in the presence of her attorney, to supply the passcode to unlock her phone. She did, the data was downloaded, and relator's phone was returned to her that day.

In her motion to suppress, relator argued that the information seized from her cell phone must be excluded for two reasons. First, the search warrant lacked sufficient information to establish probable cause. And second, the search was unlawful since at the time of its execution, the warrant was expired pursuant to La. C.Cr.P. art. 163(C).

At the conclusion of the hearing, the court denied relator's motion to suppress based on three findings. First, the court found that the warrant contained sufficient information to establish probable cause. Second, the court found that the search was unlawful because the warrant was expired at the time of its execution. And third, the court found that suppression would be merited except for the fact

that relator consented to the search and seizure when she provided her passcode in the presence of counsel in exchange for the return of her phone.

DISCUSSION

In relator's writ application, relator argues that the district court erred in denying her motion to suppress the evidence seized from her cell phone. She does not challenge the district court's first and second findings, but challenges the court's third finding, arguing that the court erred in its determination that she consented to the search of her phone

A trial court's denial of a motion to suppress is afforded great weight and will not be set aside unless the preponderance of the evidence clearly favors suppression. *State v. Ables*, 16-538 (La. App. 5 Cir. 2/8/17), 213 So.3d 477, 482, *writ denied*, 17-488 (La. 11/28/17), 230 So.3d 221.

Relator argues that the evidence must be suppressed because her consent was not lawfully obtained, and that the State cannot rely on the search warrant to avoid suppression because noncompliance with La. C.Cr.P. art. 163(C) mandates suppression.

In support of this latter contention, relator primarily relies on dicta from the Louisiana Supreme Court, in which the court suggested that noncompliance with La. C.Cr.P. art. 163 compels suppression. La. C.Cr.P. art. 163(C) provides: "Except as authorized by Article 163.1,[1] a search warrant cannot be lawfully executed after the expiration of the tenth day after its issuance." Interpreting this provision, the Louisiana Supreme Court, in dicta,[2] stated: "Implicit in [La. C.Cr.P. art. 163] is the idea that evidence must be suppressed if seized pursuant to a search

[1] La. C.Cr.P. art. 163.1 governs searches for bodily samples and is not germane to the present case.

[2] This finding was dicta because the court was not confronted with a violation of La. C.Cr.P. art. 163, the search warrant having been executed seven days after its issuance.

warrant executed later than ten days following its issuance." *State v. Bruno*, 427 So.2d 1174, 1177 (La. 1983).[3]

In response, the State concedes noncompliance with La. C.Cr.P. art. 163(C) and acknowledges the dicta in *Bruno*, but argues that this noncompliance does not merit suppression because it would not serve the underlying purpose of the exclusionary rule: to deter future Fourth Amendment violations. *See Davis v. United States*, 564 U.S. 229, 236-37, 131 S.Ct. 2419, 2426, 180 L.Ed.2d 285 (2011) ("The [exclusionary] rule's sole purpose, we have repeatedly held, is to deter future Fourth Amendment violations.").

The U.S. Supreme Court has explained that application of the exclusionary rule is proportionate to its deterrence value: "Where suppression fails to yield appreciable deterrence, exclusion is clearly unwarranted." *Davis*, 564 U.S. at 237, 131 S.Ct. at 2426-27 (citation omitted). But, in determining whether to apply the exclusionary rule, the social costs exacted by exclusion must also be taken into account:

> Exclusion exacts a heavy toll on both the judicial system and society at large. It almost always requires courts to ignore reliable, trustworthy evidence bearing on guilt or innocence. And its bottom-line effect, in many cases, is to suppress the truth and set the criminal loose in the community without punishment. Our cases hold that society must swallow this bitter pill when necessary, but only as a "last resort." For exclusion to be appropriate, the deterrence benefits of suppression must outweigh its heavy costs.

Id. (citations omitted).

As a result, the ultimate determination of whether to apply the exclusionary rule is a cost-benefit analysis:

> [T]he deterrence benefits of exclusion "vary with the culpability of the law enforcement conduct" at issue. When the police exhibit

[3] The version of La. C.Cr.P. art. 163 in effect at the time of the *Bruno* decision provided: "A search warrant cannot be lawfully executed after the expiration of the tenth day after its issuance."

> "deliberate," "reckless," or "grossly negligent" disregard for Fourth Amendment rights, the deterrent value of exclusion is strong and tends to outweigh the resulting costs. But when the police act with an objectively "reasonable good-faith belief" that their conduct is lawful, or when their conduct involves only simple, "isolated" negligence, the "'deterrence rationale loses much of its force,'" and exclusion cannot "pay its way."

Id., 564 U.S. at 238, 131 S.Ct. at 2427-28.

The State contends that the detectives' conduct in this case was not sufficiently in bad faith such that if the evidence is excluded, the costs of exclusion would outweigh any deterrent value. The State submits that the facts only support finding that the detectives acted in good faith and their reliance on the expired warrant was simply an honest mistake. In our view, it seems these facts just as equally support the inference that the detectives, recognizing that the warrant was expired, decided to obtain relator's consent rather than obtaining another warrant. This also conveniently resolved the obstacle of the phone's passcode: relator simply unlocked it for them. Under this view of the facts, we cannot rule out bad faith, especially in consideration of the following.

For the consent exception to the warrant requirement to be valid, the consent must be (1) free and voluntary, in circumstances that indicate the consent was not the product of coercion, threat, promise, pressure or duress that would negate the voluntariness; and (2) given by someone with apparent authority to grant consent, such that the police officer reasonably believes the person has the authority to grant consent to search. *State v. Howard*, 15-1404 (La. 5/3/17), 226 So.3d 419, 425-26. The State has the burden of proving the consent was given freely and voluntarily when it relies on consent to justify a warrantless search. *Ables*, *supra*. Voluntariness is a question of fact to be determined by the trial judge under the totality of the circumstances. *Id.*

In *Bumper v. North Carolina*, 391 U.S. 543, 548, 88 S.Ct. 1788, 1791, 20 L.Ed.2d 797 (1968), the United States Supreme Court confronted the issue of

"whether a search can be justified as lawful on the basis of consent when that 'consent' has been given only after the official conducting the search has asserted that he possesses a warrant." The Court held that "there can be no consent under such circumstances." *Id.*

The Court explained:

> When a law enforcement officer claims authority to search a home under a warrant, he announces in effect that the occupant has no right to resist the search. The situation is instinct with coercion—albeit colorably lawful coercion. Where there is coercion there cannot be consent.

Bumper, 391 U.S. at 550, 88 S.Ct. at 1792.

Bumper makes clear that a law enforcement officer cannot rely upon the authority of a warrant to obtain a person's consent to a search of his or her property. Such conduct is coercive and, in our view, indicative of bad faith.

We find this conduct occurred in the case before us. The detectives advised relator that they had a search warrant for her cell phone before requesting she unlock and permit a search of her phone. As in *Bumper*, relator was in effect advised that she had no right to resist the search. This, on its own, is sufficient to vitiate her consent. Yet, the voluntariness of relator's consent is further called into question by the fact that her consent was also induced by the detectives' promise to return her phone after the search. Under such circumstances, we find that the district court abused its discretion in determining that relator freely and voluntarily consented to the search of her phone.

As a result of this finding, we see no need to determine whether noncompliance with La. C.Cr.P. art. 163(C), on its own, mandates suppression. This is because the evidence does not suggest that the detectives simply made an honest mistake by relying on an expired warrant to conduct a search. Instead, they relied on the expired warrant as an assertion of lawful authority to obtain relator's

consent through subtle tactics of coercion. Under these circumstances, the deterrent value of exclusion outweighs the resulting costs.

We therefore conclude the evidence seized from relator's cell phone must be suppressed. We grant this writ, reverse the district court's June 27, 2018 ruling denying relator's motion to suppress the evidence seized from her cell phone, and remand the matter to the district court.

Gretna, Louisiana, this 16th day of August, 2018.

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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 **08/16/2018** 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

CHERYL Q. LANDRIEU
CLERK OF COURT

18-K-458

E-NOTIFIED

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