No. 20-8029

IN THE
SUPREME COURT OF THE UNITED STATES

Steven Warren., Petitioner

v.

State of Indiana, Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO

THE SUPREME COURT OF INDIANA

PETITION FOR WRIT OF CERTIORARI

Steven Warren
DOC # 186258
3038 West 850 South
Bunker Hill, IN 46914

Question(s) Presented

1) Whether a search warrant application that fails to provide any particularized nexus between an individual's alleged drug trafficking activity and the individual's residence can provide probable cause for a warrant to search the residence.

2) Whether a defendant who has been denied a continuance to investigate critical evidence belatedly disclosed by the State causing a Brady Violation by not allowing the defendant to use must prove that a proper investigation would have undermined confidence in the verdict.

3) Whether the trial court committed reversible error during jury deliberations by offering the jury at an impasse supplemental closing arguments by counsel without first consulting with the defendant and against his objection.

4) Whether the Court of Appeals properly found that the State proved the trial court's ex parte jury communication was harmless

List of Parties

All parties appear in the caption of the case on the cover page.

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Opinions Below

This decision has not been published.

Jurisdiction

This Court has jurisdiction to hear this cause because the Indiana Supreme Court denied hearing this case on September 3rd, 2020.

Statement of the Case

On October 25th, 2018 the State charged Warren with count 1, Possession of Cocaine with intent to Deal, a Level 2 felony; counts 2-5, Dealing in Cocaine, Level 4 felonies; and count 6, Possession of Marijuana, a class B misdemeanor. On March 8th, 2019 the State filed a Response to Defendant's Motion to Suppress. On April 22nd, 2019 Warren filed a Motion to Incorporate Supplemental Memorandum of Law, and the trial court conducted a hearing and

denied the motion. Warren filed a Motion for Certification of Interlocutory Order, which the trial court denied.

On the day of trial, Warren filed a Motion to Dismiss, or in the Alternative, Continue Jury Trial due to belated discovery. During trial, Warren moved for a mistrial because of the denial of the continuance.

On August 26th, 2019 the jury acquitted Warren of counts 2-5 and convicted on counts 1 and 6. On September 13th, 2019, the trial court sentenced Warren on count 1 to twenty-five years executed in the Department of Correction with five years suspended and on count 6 to 180 days executed. The trial court ordered the sentences to run concurrently.

Reasons for Granting the Petition

This case presents an important question under the 4th Amendment that has divided both the federal courts of appeals and state courts of last resort. The 4th Amendment guarantees that "the right of the people to be secure in their persons, houses, papers, and effects." The federal courts of appeals and state courts of last resort are sharply split on whether probable cause for a warrant to search a residence can be established merely through evidence that an individual residing there has engaged in drug trafficking activity somewhere else. The Seventh Circuit, like several other federal circuits and state courts of last resort, answers that question in the affirmative, holding that a search warrant application need not contain any specific nexus between the alleged drug trafficking activity and the residence to be searched. Defendant is correct that the chief evil deterred by the fourth amendment is invasion of the home. *Payton v. New York*, 445 U.S. 573 (1990).

The Appellate Court erroneously rendered a decision in upholding the search warrant by using information from sell phone pings that were not in the four corners of the search warrant

affidavit. "Whether probable cause exists in a particular case turns on the totality of the circumstances and facts known to the officers and court when the warrant is applied for.

The reviewing court also erroneously included in its decision to uphold the warrant that within the totality of evidence was "the use of the same dark blue fluid to conduct each controlled buy with the C.I. was parked in the garage on the day the warrant was executed." The Court's review must not be tainted by hindsight but instead should be based upon whether a reasonable and prudent man, having the knowledge possessed by the officer at the time of arrest would believe the defendant committed the offense.

Warren asserts that the trial court abused its discretion when it omitted the evidence form search, because the search warrant issued for Edgehill Avenue locked probable cause in violation of the fourth amendment to the United States Constitution and was unreasonable under Article 1 section 11 of the Indiana Constitution. The fourth Amendment and the Indiana search and seizure clause then both set forth two underlying requirements that searches and seizures must be reasonable and that probable cause must support search warrants.

Warren disputed that Edgehill Avenue was his residence and cited Merritt and Vance, which contended that the affidavit did not allege a sufficient connection between him and the place to be searched because the affidavit alleges only info gathered from the October 4th buy in which a stop was made in between Edgehill and the controlled buy. "There must be in other words a nexus between the place to be searched and the evidence sought. *United States v. Brown*, 360 F.3d 43, 49 (1st Cir. 2005)

Detective Master's omitted in the affidavit that a records search and license plate registration of the defendants come back to a different address and she stated based on her experience drug traffickers keep firearms in their residences which misled the magistrate to

believe the defendant had a nexus to the Edgehill residence. In *Aguilar v. Texas*, 378 U.S. 108, the U.S. Supreme Court held mere affirmance of belief absent any statement of adequate supporting facts is not enough to establish probable cause and insufficient to support a search warrant.

The Magistrate Judge was Misled by False Information in the Affidavit

The magistrate was misled by omission and false statements in search warrant as the Seventh Circuit explained, it does not require such a nexus because "in the case of drug dealers, this circuit has recognized evidence is likely to be found where the dealers live." *United State v. Laman*, 930 F.2d 1183, 1188 (7th Cir. 1991)

The Third, Fourth, Eighth, Ninth and D.C. circuits similarly have both held that evidence a defendant is engaged on drug dealing away from his home-either alone or in conjunction only with an officer's general statement that evidence of drug-related crimes is often kept in the home-can be sufficient to establish probable cause for a warrant to search his home. *United States v. Job*, 871 F.3d 852, 864 (9th Cir. 2017)

Allen County Superior Court thus held that the evidence in the affidavit pertaining to Petitioner's alleged drug dealer activities combined with detective Master's statements about her experience with drug dealers and her belief that drug dealers store drugs and drug proceeds in their homes, were sufficient to suggest that evidence of a crime would be found at the Edgehill Avenue residence. To that end sufficient information must be presented to the magistrate to allow the magistrate to determine probable cause, as his action cannot be a mere ratification of the bare conclusions of others.

The Seventh Circuit has repeatedly stated that "in the case of drug dealers, evidence is likely to be found where the dealers live" and has repeatedly upheld searches of individual's homes on that basis. *U.S. v. Orozco*, 576 F.3d 745 (7th Cir. 2009)

Detective Master's omission from the affidavit that a record search showed a different address for Warren than Edgehill Avenue mislead the magistrate. The law in Indiana states: "Whether a drug dealer is an occupant of, or simply a visitor to, a residence is information that could conceivably affect a probable cause determination." *State v. Vance*, 119 NE.3d 626, 632 (Ind. App. 2019) "The likelihood that evidence of a crime will be found at the home of a dealer is arguably greater than the likelihood that evidence of a crime will be found at a residence he visited." *Id.*

In *Vance,* the police wrote the affidavit that made it seem like that target was the same person who occupied the home to be searched. *Id.* At 632. Had the police included in the affidavit that the targeted dealer was different than the occupant of the home he entered prior to the buy, the magistrate would have known there was no connection between the residence being searched and the target. *Id.* Due to the misleading omission, the Court refused to apply the good faith exception. *Id.*

Just like in *Vance*, the affidavit is misleading without the omitted information. Had the magistrate known that Warren was not a renter, owner or even on record as living at Edgehill Avenue, he would have realized there was not a connection between Warren and the house. The omitted information made a weal connection even weaker.

As the Court explained in *Vance*, the difference between being a resident or a guest is relevant to whether and how long a person will keep drugs at the residence. Thus any evidence providing more information about Warrens' connection to the house was highly relevant and

critical to an accurate determination of probable cause. The trial courts finding otherwise was legally erroneous.

The trial court also relied on personal experience to find that officers did not intentionally mislead the magistrate. But even innocent mischaracterizations that are critical to the determination of probable cause may bar the application of the good faith doctrine. In *Jaggers v. State*, 687 NE.2d 180 (Ind. 1997) the officer implied that marijuana plants were found close to Jaggers' home when they were really two to six miles from the home. The Court explained that "although perhaps an innocent mischaracterization, this representation was critical when viewed on the factual context." *Id.* at 184. "Placing the plots near Jaggers residence implied a link between Jaggers and the plats that was not supported by the evidence," and "certainly approaches misleading the magistrate to the degree that prevents invocation of *Leon.*

"In applying *Leon*, Indiana cases have stressed the importance of accurately presenting all relevant information to the magistrate. *Id.* Not only did the police fail to explain that there were no records of Warren renting or owning ort being associated with Edgehill address, law enforcement wrote the affidavit as if they saw Warren deliver drugs during the controlled buy. At the suppression hearing, Detective Masters admitted that she did not see the dealer during any of the buys.

Because Detective Masters omitted information relevant to the determination of probable cause, the trial court erred by applying the good faith exception.

Whether the trial court abused its discretion by denying the motion To continue

The trial court abused its discretion in denying the motion to continue because: 1) the trial court's finding that the motion to continue was a stalling tactic rather than a result of the State's discovery violation is against the logic and effect of the facts and circumstances in front

of the court; and 2) as a matter of law, the assurances of Warren's fundamental right to present a defense due to the critical nature of the call report outweighs the State's vague and irrelevant concerns over the CI's safety in a different case.

First, in its reasoning for denying the motion to continue, the trial court never acknowledge that it was the State who caused the need for the continuance by violation a discovery order. In Indiana, a continuance is usually the proper remedy for the State's failure to comply with discovery. *Vanway v. State*, 541 NE.2d 523 (Ind. 1989) Here the parties do not dispute that the State violated the discovery order by disclosing critical phone records ten months after they had subpoenaed them. The fact that the prosecutor did not know of the records means little. " The State may not avoid discovery by deliberately or even negligently failing to inform itself as to its case." *Long v. State*, 431 NE.2d 875 (Ind. App. 1982) The prosecutor is charged with the knowledge of the police. *Penley v. State*, 734 NE.2d 287, 289 (Ind. App. 2000); *Reid v. State*, 372 NE.2d 1149, 1154 (1978)("Only by charging the prosecution with knowledge held by the State's investigators can we be assured that the prosecutor, rather than the police will be in control of the State's case.") Regardless of whether the State's violation was intentional or negligent, the harm to the defense was the same. Had there been evidence that the violation was intentional, the proper remedy would have been dismissal. *Montgomery v. State*, 901 NE.2d 515, 523 (Ind. App. 2009)(affirming dismissal due to the State's belated discovery of photos in an arson case).

Rather than acknowledge the discovery violation and the untenable predicament it placed the defense, the trial court found that this his motion to continue was a "stalling tactic." The record does not support this assertion. There had been three continuances in Warren's case, and two of these were do to a State's witness' unavailability and one was made by the State.

(unopposed defense motion to continue based on ongoing discovery) This case was only ten months old. The trial court's accusation of "stalling" on the part of the defense has no basis.

Likewise, the trial court blamed trial counsel for not being able to review the 198 pages while also being in a murder trial. An attorney has other cases. The system must provide him a reasonable time to review and investigate evidence. *Grngerich v. State*, 979 NE.2d 694, 713 (Ind. App. 2012)(four days was insufficient time to prepare for a juvenile waiver hearing in a murder case). Had the State disclosed a ten minute interview f a new witness, it may be reasonable to infer that trial counsel had time to investigate. But investigating 198 pages of phone records within a week while also preparing opening, closing, direct and cross-examinations for trial is unreasonable and unfair. As the defense counsel noted, a week is not enough time to go through the records the State has had before Warren was even arrested. *Montgomery* 901 N.E.2d at 523 (a month was not sufficient time to review, investigate and consult with expert about new photographs of arson.)

Finally, the trial court abused its discretion by finding that the State's concern over safety of the CI that had nothing to do with Warren or his case trumps Warren's need to review the critical phone records. Although the State broadly asserts the CI's safety, neither the State nor the trial court explain its concern or the connection to a continuance. Nor did the trial court consider even a short continuance.

On the hand other hand, Warren was specific about the harm to him from a denial of the continuance. He even proffered the discovery he received. The phone was critical to his defense because it was used by the dealer to set up the buys. If the people being texted or called are associated with either Warren's brother or his uncle, it would support Warren's argument that they were dealing drugs. I fact, the defense determined that one of the numbers was sent to

Stewart, Warren's uncle's girlfriend. Warren should have had the opportunity to prove the phone belonged to someone else. Further, when and how often the CI called the dealer may have impeached his testimony. The harm to Warren in denying the continuance far outweigh and inconvenience to the State in granting the continuance.

Whether Warren Was Prejudiced by the Denial of The Continuance

Warren was prejudiced by the denial of the continuance. First, the call detail report struck at the heart of his defense of misidentification. Whoever owns the phones is the person who committed the controlled buys and possessed the cocaine. The first thing the defense told the jury is that this is a case of misidentification.

Second, the State used the part of the report they timely disclosed, i.e., the ping report, offensively to prove constructive possession. Warren should have been able to use the rest of the report, i.e., the call log, to paint a full picture and defend himself. The State argued that the phone was found by Warren's wallet was the target phone because the pings followed the phone to the police station and stopped when the phone was put on airplane mode. When the trial court asked the parties to give a short supplemental arguments on constructive possession of the cocaine., the State again made this argument.

> Remember the phone pings, they put him there. The same phone that is found on top of the dresser that is found in a drawer with his wallet. This is the phone that is taken. The phone that is used in the buys each and every buy. It then goes to the Fort Wayne Police department. These are his things. This is his house. This is his cocaine.

Tr. Vol. 4, p 4.

Had the State timely disclosed the full report, i.e., the ping report and the call detail log, Warren could have investigated and connected the numbers in the log to people associated with his uncle or brother. Connecting the phone to another would have undermined the officer's

interpretation of the ping data, which the State used to tie him to the phone while also proving his defense of misidentification.

Warren was harmed by the denial of the continuance because the target phone was critical to both sides. The fact the jury only heard about half the report on the phone violated Warren's right to present a defense and a fair trial. Only when the full story is heard can the jury determine where the truth lies.

Conclusion

Wherefore, Warren request this Court Grant this request for review, and all other relief just and proper in the premises.

Proof of Service

I certify that a copy of the foregoing Motion for Leave to Proceed in Forma Pauperis and Petition for a Writ of Certiorari has been served upon the parties listed below by U.S. mail, first class postage, prepaid on this 28 day of APRIL, 2021.

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