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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

State of West Virginia,
Plaintiff Below, Respondent

vs.) No. 20-0519 (Monongalia County 19-F-72)

Andre Parrish,
Defendant Below, Petitioner

MEMORANDUM DECISION

Petitioner Andre Parrish, by counsel Ryan C. Shreve, appeals the Circuit Court of Monongalia County's June 30, 2020, order sentencing him to concurrent terms of incarceration of not less than one nor more than fifteen years for his burglary conviction and to not less than one nor more than five years for his conspiracy conviction. Respondent State of West Virginia, by counsel Patrick Morrisey and Lara K. Bissett, filed a response.

This Court has considered the parties' briefs and the record on appeal. The facts and legal arguments are adequately presented, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the briefs, and the record presented, the Court finds no substantial question of law and no prejudicial error. For these reasons, a memorandum decision affirming the circuit court's order is appropriate under Rule 21 of the Rules of Appellate Procedure.

According to Officer D.J. Moore's police report, he was dispatched on November 25, 2018, to an apartment on Cornell Avenue in Morgantown, West Virginia, for a burglary report. The officer spoke with the occupants of that apartment, who reported that their apartment was broken into while they were home for Thanksgiving break. One of the occupants, Andrew Peck, reported that his Bluetooth speaker had been stolen along with a twelve-gun firearm safe that contained approximately $1,500, Mr. Peck's social security card, his passport, and three twelve-gauge shotguns.

Officer Moore spoke to Mr. Peck's neighbor, Madeline Hughes, who informed him that she observed a white U-Haul van with side doors backed into the driveway of the victim's apartment on November 25, 2018, between 1:00 a.m. and 2:00 a.m. Ms. Hughes recalled seeing two individuals get out of the van, and she saw them carry "a large, heavy chest or box" out of the apartment. Officer Moore noted "a fresh tire track in the mud adjacent to the driveway" and determined that the tire track would have been made by the rear passenger side tire.

The following day, November 26, 2018, Officer Moore contacted the West Virginia U-Haul Traffic Office to inquire about U-Haul cargo vans rented over the weekend in the Morgantown area. Officer Moore was informed that at least three vans had been rented over the weekend that fit the description he was given. Two were Ford Transit vans and the third was a Chevrolet van. Based on the evidence he obtained at the scene of the burglary, the officer determined that the vehicle would likely have mud on the rear passenger tire and mud inside the van. Two vans he examined were relatively clean, and he observed nothing that would indicate that either was used in the burglary. In addition, Officer Moore returned to Ms. Hughes, who, after being shown pictures by the officer, confirmed that the van she saw was a Ford Transit.

Officer Moore proceeded to Exit 1 Storage, LLC, ("Exit 1 Storage") to examine the third van, a Ford Transit, which had been rented from Saturday, November 24, 2018, at 4:45 p.m. to Sunday, November 25, 2018, at 9:57 a.m. The manager of Exit 1 Storage, James Mitchell, informed the officer that he charged the renter a $25 cleaning fee when the van was returned because the inside of the van was "covered in mud." Although the inside had been cleaned by the time Officer Moore examined it, the outside had not. Officer Moore observed "mud approximately halfway up the sidewall" of the rear passenger tire. "None of the other three tires on the vehicle had mud on them." Officer Moore also noted that "[t]he mud on the tire was consistent with the soil at the crime scene," and the tire tread was "consistent with the impressions left in the mud at the crime scene."

Mr. Mitchell provided Officer Moore with the rental invoice, which identified DeRon Parrish as the renter and provided a Brockway Avenue apartment address. The van was rented to Mr. Parrish with 7130 miles on the odometer and returned with 7146 miles. The officer determined that "[t]he 16 miles traveled would be consistent with the distance traveled from the U[-]Haul dealer to Cornell Avenue, then to Parrish's apartment on Brockway and back to the U[-]Haul dealer." Officer Moore traveled to the Brockway Avenue address listed on the rental paperwork and observed that the apartment's mailbox was labeled "A. Parrish."

On November 27, 2018, Officer Moore completed an "Affidavit and Complaint for Search Warrant" seeking a search warrant for the Brockway Avenue apartment. The officer detailed that

> [o]n 11/25/2018, the victim called 911 for a burglary report. I responded and discovered that the victim's residence had been forceably [sic] entered and several items stolen, including a 12 gun safe containing two shotguns and $1500 cash. A witness stated that she had seen the suspects in a U-Haul van. I located the suspect van which had been rented to a "DeRon Parrish" at [the Brockway Avenue address], at the time of the incident.

A search warrant was issued, and Officer Moore executed it on November 27, 2018. The officer seized a large grey gun safe, three twelve-gauge shotguns, a jar containing $2,992 and receipts, Mr. Peck's passport, Mr. Peck's social security card, one pair of muddy shoes, and a jar containing packaged cannabis.

Petitioner and DeRon Parrish were subsequently indicted in January of 2019 on one count of burglary, one count of grand larceny, and one count of conspiracy to commit burglary and/or grand larceny.

Petitioner moved to suppress all evidence obtained pursuant to the search warrant. Petitioner argued that the phrase "I located the suspect van" indicated that "*the* vehicle in question" had been conclusively identified," though that was not the case. Petitioner argued that the presence of mud, given how common mud is, was insufficient to conclude that the van seen by the officer was "the suspect van." Additionally, the officer reached this conclusion after contacting only rental locations in the immediate Morgantown area. Petitioner further argued that removing the inaccurate phrase left the affidavit with no information connecting the rental of a U-Haul van to Mr. Parrish.

The parties appeared before the circuit court in June of 2019 for a hearing on petitioner's motion to suppress. The court found nothing untruthful or misleading:

> If you think about it[,] another way to look at it is the witness stated that she had seen suspects in a U-Haul van. The next step I located the suspect van, blah, blah, blah. So, I think it's a perfectly fine search warrant and I will not suppress it.

In its written order, the court concluded that the officer's statement did not "rise[] to the level of misleading or false information," nor was it made "in reckless disregard for the truth."

In addition to the State court proceedings that are the subject of this appeal, petitioner and DeRon Parrish were indicted in federal court, and petitioner also filed a motion to suppress in the federal proceedings.[1] At the August 16, 2019, federal court hearing on petitioner's motion to suppress, Officer Moore testified to, among other things, the steps he undertook to obtain the search warrant.[2] Officer Moore testified that he drafted and signed the affidavit for the search warrant but that another officer gave the signed affidavit to the magistrate in Morgantown. Officer Moore was unable to identify who gave the signed affidavit to the magistrate, but he testified that

> [i]t's common practice for Morgantown Police Department to—if I have an affidavit that's after regular business hours for magistrate court, it's common practice to just leave it on the sergeant's desk and whoever goes to take the next arrestee for arraignment, they'll just swear to my affidavit or complaint, and then have it signed.

Officer Moore testified that "[e]verything I put in [the affidavit] was the truth." Officer Moore further explained that, since he started working with the Morgantown Police Department, he had worked the midnight shift.

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[1] Petitioner's motion to suppress in federal court was denied, and, ultimately, petitioner and DeRon Parrish entered conditional guilty pleas to the federal charges.

[2] The testimony given at the federal suppression hearing was the first testimony offered by Officer Moore in federal court.

> [S]o rather than paying us overtime and having us come in to have our own warrants and complaints sworn to, everybody on dayshift, whoever goes to take our arrestees for arraignment, they'll just walk up to the magistrate and say, hey, while you're—it's—it's pretty informal. We just say, you know, "Your Honor, whenever you have a second, would you mind looking over this and signing it, if you have probable cause." The magistrate, if he finds probable cause, will sign it, and then hand it back to us, and they'll stick it in our mailbox at work so that we can pick it up and execute it when we come into work for shift.

As for whether the magistrate placed the individual who presented the affidavit under oath, Officer Moore could say only that such practice was customary: "The magistrate always puts us under oath before we—before he signs anything." But he had no knowledge of whether that occurred with respect to the affidavit he prepared.

Following this testimony, petitioner filed a second motion to suppress in the circuit court, arguing that Officer Moore, in seeking the search warrant, did not deliver the application he signed to the on-call magistrate, did not know which officer delivered it to the magistrate, did not brief any other officers on the details of his investigation or the information contained within the application, and did not know whether the officer who delivered the application was placed under oath.

The circuit court heard argument on the second motion to suppress on November 4, 2019. Office Moore testified that he had "changed shifts three times over the past year" and could not specifically recall taking his affidavit before the magistrate, but after testifying in the federal matter, he learned that he, in fact, had taken the affidavit before the magistrate. Together with another officer, Officer Moore reviewed call logs and dispatch logs, and Officer Moore's "memory was refreshed." The State represented that it had "the call logs that show that he actually did check in, he actually was present when this executed search warrant." Office Moore was asked,

> Is it your testimony today that this policy of swearing to other officers[']affidavits without knowing anything beyond what's on the four line or complaint there on the affidavit, that that policy exists and occurs, but is it your testimony that just didn't occur in this instance as you previously testified?

Officer Moore answered, "Yes, sir. . . . We do swear out other complaints and affidavits for other officers but it did not happen this time. I just forgot." When asked to explain the testimony he gave in federal court, Officer Moore said,

> I thought that whenever I investigated this that I was on midnight shift. That's how we did things when we were on midnight shift. It wasn't until later on that I realized that yeah, I did this on afternoon shift. And I realized that I just—frankly I remembered it wrong.

The court denied petitioner's second motion to suppress "because [petitioner] based it on the grounds that he wasn't there." The court further found that it is "in charge of credibility, . . . and I believe that this young officer is mortified about his testimony in federal court. . . . But I believe that he made an honest mistake." In its written order, the court "found that the officer was

credible in his corrected testimony [before the circuit court] this day and made a mistake in his federal testimony." The court further found that Officer Moore "did take the affidavit and search warrant before the Magistrate on November 27, 2018."

Petitioner and the State thereafter entered into a conditional plea agreement, which was accepted by the circuit court. Under the terms of this agreement, petitioner agreed to plead guilty to burglary and conspiracy in exchange for the dismissal of the grand larceny charge, and he reserved the right to appeal the denial of his motions to suppress. The court sentenced petitioner to not less than one nor more than fifteen years of incarceration for his burglary conviction and to not less than one nor more than five years for his conspiracy conviction. The court ordered the sentences to run concurrently with one another but consecutively to the sentence imposed in federal court; however, the court further ordered that, upon completion of his federal sentence, petitioner be placed on probation for two years. Petitioner now appeals.

On appeal, petitioner assigns as error the circuit court's denial of his motions to suppress. Petitioner argues that the court erred in denying his first motion to suppress because it contained a false or misleading statement, i.e., "I located the suspect van." Petitioner contends that this phrase indicates that the van "had been conclusively and positively identified through objective means." He offers that "a suspect van" or "possible suspect van" should have been used to indicate that the identification was not unconditional. Because the affidavit "leaves no doubt in the reader's mind that the vehicle was the same," the sentence forms "the critical connective tissue that arguably established probable cause in the magistrate's mind." Petitioner claims that the sentence informs the magistrate that the officer "had found *the* van." And, without the challenged sentenced, petitioner claims that the warrant lacks any information connecting the van's rental to petitioner, so "there is no remaining avenue for a finding of probable cause." Petitioner also submits that the officer's investigation of U-Haul vans should have extended beyond Morgantown.

With regard to the second motion to suppress, petitioner recites Officer Moore's testimony in petitioner's federal proceeding and argues that these practices violate his constitutional rights. Petitioner argues that the search warrant indicates that Officer Moore was placed under oath, but, relying on the officer's testimony in the federal proceeding, petitioner states that we know Officer Moore was not placed under oath. As a result, petitioner argues that the warrant application was not properly submitted to the magistrate. Petitioner discounts Officer Moore's subsequent testimony before the circuit court that the procedure described in the federal proceeding did not occur here, asserting that the officer's "recanted testimony cannot be said to be more credible than the original." Petitioner characterizes the circuit court's "adoption of this recantation" as "concerning" because the "recantation places serious doubt over the entirety of the search warrant."

Our review of the circuit court's orders denying petitioner's motions to suppress is as follows:

> [W]e first review a circuit court's findings of fact when ruling on a motion to suppress evidence under the clearly erroneous standard. Second, we review *de novo* questions of law and the circuit court's ultimate conclusion as to the constitutionality of the law enforcement action. Under the clearly erroneous

> standard, a circuit court's decision ordinarily will be affirmed unless it is unsupported by substantial evidence; based on an erroneous interpretation of applicable law; or, in light of the entire record, this Court is left with a firm and definite conviction that a mistake has been made. . . . When we review the denial of a motion to suppress, we consider the evidence in the light most favorable to the prosecution.

State v. Farley, 230 W. Va. 193, 196, 737 S.E.2d 90, 93 (2012) (citations omitted). In addition,

> [w]hen reviewing a ruling on a motion to suppress, an appellate court should construe all facts in the light most favorable to the State, as it was the prevailing party below. Because of the highly fact-specific nature of a motion to suppress, particular deference is given to the findings of the circuit court because it had the opportunity to observe the witnesses and to hear testimony on the issues. Therefore, the circuit court's factual findings are reviewed for clear error.

Syl. Pt. 1, *State v. Lacy*, 196 W. Va. 104, 468 S.E.2d 719 (1996).

For petitioner to have successfully challenged the search warrant on the ground that it included the officer's statement that "I located the suspect van," petitioner needed to have established "by a preponderance of the evidence that the affiant, either knowingly and intentionally or with reckless disregard for the truth, included a false statement therein." Syl. Pt. 1, in part, *State v. Lilly*, 194 W. Va. 595, 461 S.E.2d 101 (1995). "[A] statement in a warrant is not false, however, merely because it summarizes facts in a particular way; if a statement can be read as true, it is not a misrepresentation." *Id.* at 601, 461 S.E.2d at 107 (citation omitted). The challenged statement is not false, and despite petitioner's protestations, it does not amount to an assertion that the officer found *the* van. Rather, the use of the word "suspect" denotes a lack of certainty. *See suspect*, Merriam-Webster.com, http:merriam-webster.com/dictionary/suspect (last visited Sept. 29, 2021) ("1: regarding or deserving to be regarded with suspicion: SUSPECTED . . . 2: DOUBTFUL, QUESTIONABLE"). The statement further summarizes Officer's Moore's investigation up to that point, which included interviewing a neighbor and assessing the crime scene; contacting U-Haul regarding vans rented during the relevant timeframe; reinterviewing the neighbor to confirm the make and model of the van she saw; inspecting, and ruling out, the vans rented during the relevant timeframe; and, once the list of possible vans was narrowed down, comparing the distance traveled with that expected to have been traveled based on the locations of the rental company, petitioner's home, and the burgled apartment. Summarizing his investigation, it certainly can be said that the van was suspected to have been used in the burglary Officer Moore was investigating. Accordingly, the court did not err in denying petitioner's first motion to suppress.

Likewise, the circuit court did not err in denying petitioner's second motion to suppress. As stated in *Lacy*, we give "particular deference . . . to the findings of the circuit court because it had the opportunity to observe the witnesses and to hear testimony on the issues." 196 W. Va. at 107, 468 S.E.2d at 722, Syl. Pt. 1, in part. The court found Officer Moore's testimony to be credible and determined that he made an "honest mistake" during his federal testimony. The State further submitted that it had the call and dispatch logs to corroborate that Officer Moore, in fact, presented the warrant application to the magistrate. The court's finding that the procedure Officer Moore

testified to in federal court did not occur here was not clearly erroneous. And because petitioner's second motion was predicated on something that the court justifiably found did not occur here, there was no basis on which to grant the second motion; accordingly, we find no error in the court's denial of it.

For the foregoing reasons, we affirm.

Affirmed.

ISSUED: January 12, 2022

CONCURRED IN BY:

Chief Justice John A. Hutchison
Justice Elizabeth D. Walker
Justice Tim Armstead
Justice Evan H. Jenkins
Justice William R. Wooton