

STATE OF SOUTH CAROLINA)
)
 COUNTY OF BERKELEY)
)
 STATE OF SOUTH CAROLINA,)
)
 Plaintiff,)
)
 -versus-)
)
 MICHAEL COLUCCI,)
)
 Defendant.)
 _____)

IN THE COURT OF GENERAL SESSIONS
 FOR THE NINTH JUDICIAL CIRCUIT
 INDICTMENT NUMBER: 2016-GS-08-02603
 WARRANT NUMBER: 2016A0810400692

MOTION TO SUPPRESS

FILED
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 MARY R. SPURDIN
 CLERK OF COURT
 BERKELEY COUNTY, SC

Michael Colucci move this Court to suppress all evidence obtained as the result of the execution of the search warrant issued on August 28, 2018, for the search of records of James A. Dyal Funeral Home for the files of the funerals for Sara Lynn Moore-Colucci and Doris Duana Colucci. The information sought is totally irrelevant to the criminal charge brought against Mr. Colucci, and the affidavit in support of the warrant utterly fails to establish probable cause for the issuance of the warrant. Therefore, the search warrant was issued in violation of the Fourth Amendment to the United States Constitution, article I, section 10 of the South Carolina Constitution, and section 17-13-140 of the South Carolina Code. Therefore, the evidence seized must be suppressed.

STATEMENT OF THE FACTS

Mr. Colucci has been indicted and charged with murder in the death of his wife, Sara Colucci, who died on May 20, 2015. The affidavit in support of the search warrant briefly sets out the events of Sara Colucci's death by asphyxiation, and states that Mr. Colucci, as the husband of Sara, handled her funeral arrangements.

[Handwritten signature]

The affidavit further states that Mr. Colucci also handled the funeral arrangements for his mother, Doris Duane Colucci, who died on April 14, 2017. According to the affidavit, Doris Duane Colucci was murdered by her husband, Ivo Colucci.

After setting forth the foregoing information the affidavit simply states:

This search is to obtain a complete copy of the James A. Dyal Funeral Home files on Sara Colucci and Doris Duane Colucci.

The affidavit believes this search is warranted by the facts of the case outlined in this affidavit and in Berkeley County Sheriff's case number 201505026290 and South Carolina Law Enforcement Division (SLED) Case # 31150074. These records are needed to further this investigation.

(Affidavit). Nothing further is set forth concerning probable cause.

ARGUMENT

THE AFFIDAVIT IN SUPPORT OF THE SEARCH WARRANT FAILS TO ESTABLISH PROBABLE CAUSE TO SEARCH FOR THE RECORDS SOUGHT

The Fourth Amendment guarantees

"[t]he right of the people to be secure . . . [from] unreasonable searches and seizures." U.S. Const. amend. IV. "In parallel with the protection of the Fourth Amendment, the South Carolina Constitution also provides a safeguard against unlawful searches and seizures."

State v. Gentile, 373 S.C. 506, 512, 646 S.E.2d 171, 174 (Ct. App. 2007). Evidence obtained in violation of the Fourth Amendment is inadmissible in both state and federal court. *Id.*

In discussing the specific requirements for issuing a search warrant, the South Carolina Supreme Court has explained:

The General Assembly has imposed stricter requirements than federal law for issuing a search warrant. Both the Fourth Amendment of the United States Constitution and Article I, § 10 of the South Carolina Constitution require an oath or affirmation before probable cause can be found by an officer of the court, and a search warrant issued. U.S. Const. amend. IV; S.C. Const. art. I, § 10. Additionally, the South Carolina Code mandates that a search warrant "shall be issued only upon affidavit sworn to before the magistrate, municipal judicial officer, or judge of a court of record. . . ." S.C. Code Ann. § 17-13-140 (1985). Oral

testimony may also be used in this state to supplement search warrant affidavits which are facially insufficient to establish probable cause. *See State v. Weston*, 329 S.C. 287, 494 S.E.2d 801 (1997). However, "sworn oral testimony, standing alone, does not satisfy the statute." *State v. McKnight*, 291 S.C. 110, 352 S.E.2d 471 (1987).

State v. Jones, 342 S.C. 121, 128, 536 S.E.2d 675, 678-79 (2000).

Id. at 513, 646 S.E.2d at 174.

A search warrant may issue only upon a finding of probable cause, and in passing on the validity of the warrant, a reviewing court may consider only information brought to the magistrate's attention. *State v. Owen*, 275 S.C. 586, 274 S.E.2d 510 (1981); *State v. Martin*, 347 S.C. 522, 556 S.E.2d 706 (Ct. App. 2001); *State v. Arnold*, 319 S.C. 256, 460 S.E.2d 403 (Ct. App. 1995); *see* S.C. Code Ann. § 17-13-140. If the affidavit, standing alone, is insufficient to establish probable cause, it may be supplemented by sworn oral testimony before the magistrate. *Weston*, 329 S.C. 287; *Arnold*, 319 S.C. 256; *Martin*, 347 S.C. 522.

A totality-of-the-circumstances test is applicable in determining whether probable cause exists to issue a search warrant. *State v. Dill*, 423 S.C. 534, 816 S.E.2d 557 (2018); *Jones*, 342 S.C. 121; *Martin*, 347 S.C. 522; *see Illinois v. Gates*, 462 U.S. 213, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983). The task of a magistrate when determining whether to issue a warrant is to make a practical, common-sense decision as to whether, under the totality of the circumstances set forth in the affidavit, there is a fair probability that evidence of a crime will be found in a particular place. *Gentile*, 373 S.C. 506; *Arnold*, 319 S.C. 256. Affidavits are viewed in a common-sense and realistic fashion. *Id.* A reviewing court's task is to decide whether the magistrate had a substantial basis for concluding that probable cause existed. *Id.* The term "probable cause" does not import absolute certainty. *Arnold*, 319 S.C. 256. Rather, in determining whether a search warrant should be issued, magistrates are concerned with probabilities and not certainties. *Id.* Searches based on warrants will

be given judicial deference to the extent that an otherwise marginal search may be justified if it meets a realistic standard of probable cause. *Id.*

Mere conclusory statements, however, that give the magistrate no basis to make a judgment regarding probable cause are insufficient. *Dill*, 816 S.E.2d at 562; *Weston*, 329 S.C. 287. While the probable cause requirement of the Fourth Amendment does not require certainty before a search warrant may be issued, the courts have made it clear that something more than a mere suspicion is necessary. *Brinegar v. United States*, 338 U.S. 160, 69 S. Ct. 1302, 93 L. Ed. 1879 (1949); *United States v. Giacalone*, 541 F.2d 508 (6th Cir. 1976). Probable cause cannot be established by affidavits that are conclusory, provide little in the way of detail, or merely recite that the affiant or some informant believes that probable cause exists. *United States v. Tropp*, 725 F. Supp. 482 (D. Wyo. 1989); see *State v. Smith*, 301 S.C. 371, 392 S.E.2d 182 (1980). The Fourth Amendment requires that the magistrate judge who issues a search warrant be provided with information from which he can make an independent evaluation of probable cause. *United States v. Ruiz*, 822 F. Supp. 708 (D. Kan. 1993). While it is recognized that a magistrate's determination of probable cause should be paid deference by reviewing courts, such deference "is not boundless." *United States v. Leon*, 468 U.S. 897, 914, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984). The Supreme Court has consistently stressed that reviewing "courts must continue to conscientiously review the sufficiency of affidavits on which warrants are issued." *Illinois*, 462 U.S. at 239. Evidence obtained in violation of the Fourth Amendment is inadmissible in both state and federal court. *Dill*, 423 S.C. 534; *State v. Missouri*, 352 S.C.121, 572 S.E.2d 467 (Ct. App. 2002), *rev'd*, 361 S.C. 107, 603 S.E.2d 594 (2004).

The affidavit in this case is totally devoid of information establishing probable cause to believe that the funeral records sought are relevant to the investigation of the crime charged. As

stated, probable cause requires a showing that there is a fair probability that evidence of a crime will be found. *Gentile*, 373 S.C. at 513. For probable cause to be found, it must be shown that the records sought are relevant to the alleged crime being investigated. *See, Andresen v. Maryland*, 427 U.S. 463, 483, 96 S. Ct. 2737, 49 L. Ed. 2d 627 (1976); *United States v. Young*, 260 F. Supp. 3d 530, 549 (E.D. Va. 2017). "The evaluation of whether a search warrant is supported by probable cause turns first on whether the items to be seized are evidence of criminal activity..." *United States v. Wienke*, 733 F. App'x 65, (4th Cir. 2018) (citing *Zurcher v. Stanford Daily*, 436 U.S. 547, 556 n. 6, 98 S. Ct. 1970, 56 L. Ed. 2d 525 (1978)). The factual showing that is required to justify the search for records or a specific item of "mere evidence" stems from the Fourth Amendment's nexus requirement, i.e. there must be a showing of "probable cause...to believe that the evidence sought will aid in a ... conviction." *Andresen*, 427 U.S. at 483; *see, United States v. Zayas-Diaz*, 95 F.3d 105, 111-112 (1st Cir. 1996) (under the nexus requirement, the warrant application must demonstrate that the enumerated evidence is relevant to the probable criminality); *State v. Allen*, 269 S.C. 233, 242, 237 S.E.2d 64, 68 (1977) (there was sufficient nexus between items sought and the criminal activity at issue to sustain their seizure under the federal warrant). There must be a showing by substantial evidence that "the items sought are in fact seizable by virtue of being connected with criminal activity." *Wienke*, 733 F. App'x 65 at 70 (quoting *Zurcher*, 436 U.S. at 556 n. 6).

Here, the affidavit in support of the search warrant provided absolutely no showing that the funeral records sought are relevant or in any way related to the alleged murder charged against Mr. Colucci. Indeed, the affidavit does not even purport to show such relevance or relationship. It merely states that Mr. Colucci was arrested for his wife's murder, briefly describes the circumstances of her death, and states that Mr. Colucci handled the arrangements of her funeral, as well as those of his mother, who was murdered by her husband, and summarily states: "These records [funeral home files

for Defendant's wife and mother] are needed to further this investigation." No explanation is given for why such files are needed for such purpose and, obviously, there is none. Files related to the funeral arrangements for Mr. Colucci's wife and mother could have no bearing or relevance to the investigation and could not be used as evidence at trial due to a lack of relevance.

Even in the case of the use of a subpoena to obtain documents, the Fourth Amendment imposes a reasonableness standard and requires that it be issued for a legitimate and authorized governmental purpose, and that it be relevant to the inquiry. *In re Subpoenas*, 692 F. Supp. 2d 602, 604 (W.D. Va. 2010) (citing *In re Subpoena Duces Tecum*, 228 F.3d 341 (4th Cir. 2000)). The legitimate and authorized governmental purpose prohibits the government from engaging in arbitrary fishing expeditions and from selecting targets of investigation out of malice or an intent to harass. *In re Subpoena Duces Tecum*, 228 F.3d at 349 (citing *United States v. R. Enterprises, Inc.*, 498 U.S. 292, 299, 111 S. Ct. 722, 112 L. Ed. 2d 795 (1991)).

The affidavit in this case clearly fails to show the relevance of the funeral files sought and fails to establish the required probable cause for the issuance of the search warrant. Therefore, the evidence seized must be suppressed.

Finally, even assuming (beyond logic), that the files pertaining to Mr. Colucci's wife can somehow be deemed relevant, those of his mother cannot. Therefore, at the very least, the warrant was overbroad and the files related to Mr. Colucci's mother must be suppressed. *See State v. Thompson*, 363 S.C. 192, 609 S.E.2d 556 (Ct. App. 2005) (warrant overbroad).

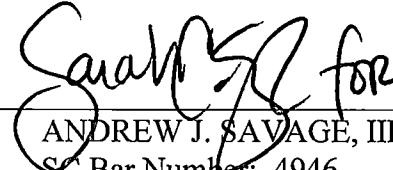
CONCLUSION

For all the foregoing reasons, the evidence seized pursuant to execution of the warrant must be suppressed.

Respectfully submitted,

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BY:

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October 9/27, 2018.

COURTESY OF
LUNA SHARK MEDIA