No. SC95719

In the
Supreme Court of Missouri

STATE OF MISSOURI,

Appellant,

v.

PHILLIP DOUGLASS and JENNIFER M. GAULTER

Respondents.

Appeal from the Circuit Court of Jackson County
Sixteenth Judicial Circuit
The Honorable Robert M. Schieber, Judge

APPELLANT'S SUBSTITUTE REPLY BRIEF

CHRIS KOSTER
Attorney General

RACHEL FLASTER
Assistant Attorney General
Missouri Bar No. 62890

P.O. Box 899
Jefferson City, Missouri 65102
Phone: (573) 751-3321
Fax: (573) 751-5391
Rachel.Flaster@ago.mo.gov

ATTORNEYS FOR APPELLANT
STATE OF MISSOURI

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rule

Other Authority

STATEMENT OF FACTS

The State relies on the statement of facts set forth in its opening brief. The State disagrees with the following assertions made in Defendants' statement of facts:

- "[T]he State acknowledged [Detective Estes checked the box next to the corpse clause] because the Fourth Amendment's requirement that searches be made with probable cause is a huge hassle which would have required Estes to obtain another warrant to investigate a corpse, if Estes had come across a corpse (referred to as a 'piggyback warrant')." (Defs.' Br. 1). The State did not "acknowledge" that complying with the Fourth Amendment is a "huge hassle"; the State quoted Detective Estes's testimony and the trial court's order (App.'s Br. 9-11).
- "The State's Brief also seems to accept the fact that casually checking the Corpse Clause (without probable cause) is standard procedure for the Kansas City Police Department ('KCPD')." (Defs.' Br. 1). The State did not "accept" that checking the corpse clause is standard procedure for the KCPD; the State quoted Detective Estes's testimony (App.'s Br. 9-11). Defendants have argued that Detective Estes's testimony "suggests that this may be a regular KCPD practice." (*See* Defs.' Br. 14).

- "The State's Statement of Fact is incomplete and omits a number of facts supporting the trial court's decision. These missing facts generally include (but are not limited to) the following: Other aspects of the underlying warrant's search also lacked probable cause (*e.g.*, 'Any person for whom a valid felony warrant is outstanding.')." (Defs.' Br. 1). The State noted in its opening brief that four other boxes on the search warrant were checked, that "Defendants did not raise any issue regarding these four boxes, and counsel for Defendants acknowledged that 'there may have been probable cause to believe that either of the [Defendants] may have had warrants outstanding for them." (App.'s Br. 8 n.3 (citing Tr. 17)). The State also argued that:

> As previously noted, another box was checked on the warrant indicating that there was probable cause to search for any person for whom a valid felony arrest was outstanding. Defendants did not challenge the probable cause to support that clause. The other three checked boxes described Ms. Garris's stolen property in general terms, and that property was specifically described in categories (1)-(9) above. Defendants did not challenge the probable cause to support those clauses either.

(App.'s Br. 20 n.8).

ARGUMENT

Defendants argue that the trial court "found the conduct at issue to be deliberate misconduct by the detective," and "[t]his Court must defer to the trial court's findings on facts and credibility." (Defs.' Br. 15). But according deference to the trial court's factual findings does not prevent this Court from finding the trial court should have redacted the warrant,[1] or that Detective Estes's conduct was not sufficiently culpable to warrant suppression.

The trial court found that Detective Estes intentionally checked a box identifying that probable cause existed knowing that probable cause did not exist, and that he "disingenuously failed to call the [trial court's] attention to the fact that he had checked that box." (L.F. 43). Although this Court must defer to the trial court's finding that Detective Estes intentionally checked

---

[1] As the State argued in its opening brief, an officer's lack of good faith should not categorically prevent a court from redacting a warrant. (App.'s Br. 22-27). Numerous cases have simultaneously redacted warrants and found that evidence should be suppressed because the officers did not act in good faith pursuant to *United States v. Leon*, 468 U.S. 897 (1984). *See, e.g., Virgin Islands v. John*, 654 F.3d 412, 418-22 & n.2 (3d Cir. 2011); *United States v. Washington*, 797 F.2d 1461, 1473 (9th Cir. 1986); *United States v. Nader*, 621 F. Supp. 1076, 1084-85 (D.D.C. 1985).

the box (as opposed to inadvertently), and that Detective Estes did not believe there was probable cause to search for a deceased corpse or fetus, or part thereof, this Court is to determine *de novo* the legal effect of such conduct *i.e.*, whether such conduct was sufficiently culpable to warrant suppressing all evidence seized. *See State v. Johnson*, 354 S.W.3d 627, 631-32 (Mo. banc 2011) ("It is a question of law whether the searches in these cases were permissible and whether the exclusionary rule applies to the evidence seized as a result of those searches.").

Further, the basis for the trial court's finding of "disingenuous" conduct was that Detective Estes failed to call the court's attention to the fact that he had checked the box. (L.F. 43). Detective Estes had no affirmative duty, however, to "call the court's attention" to what was plainly visible to the court from the warrant and affidavit/application. Merriam-Webster defines "disingenuous" as "lacking in candor." *See* Merriam-Webster, http://www.merriam-webster.com/dictionary/disingenuous (last visited Nov. 3, 2016). Detective Estes did nothing to conceal from the issuing judge the obvious lack of probable cause to search for corpses or fetuses. Although the trial court characterized Detective Estes's failure to point out that he checked the box as "disingenuous," the trial court's characterization is based on a clearly erroneous finding that an officer has an affirmative duty to point out to the judge what is plainly visible from the warrant and supporting

documents. In short, in deferring to the trial court's findings, this Court need not find Detective Estes's conduct sufficiently culpable to warrant application of the exclusionary rule.

In arguing that Detective Estes's conduct was sufficiently culpable to warrant suppressing all evidence seized, Defendants cite to *Weeks v. United States* and *Mapp v. Ohio*, as examples of cases in which the exclusionary rule was applied because of conduct that was "patently unconstitutional." (Defs.' Br. 14-15). But the officers' conduct in *Weeks* and *Mapp*—and the resulting abuse of the defendants' Fourth Amendment rights in those cases—were wholly unlike what occurred here.

In *Weeks*, the officers broke into the defendant's house without a warrant, searched his home, and took various papers and articles. 232 U.S. 383, 386 (1914). The officers returned later that day and seized more of the defendant's property. *Id.* The defendant was not present during either search, and no warrant for the defendant's arrest had been issued. *Id.* at 386, 393. The United States Supreme Court found that the officers could not have obtained a warrant to seize the defendant's property, even if they had tried. *See id.* at 393-94. Accordingly, the Court applied the exclusionary rule and suppressed the evidence seized from the defendant's home. *Id.* at 398-99.

In *Mapp*, officers arrived at the defendant's house without a search warrant, and were denied entry by the defendant. 367 U.S. 643, 644 (1961).

Once additional officers arrived, the officers kicked and broke the door to gain entry to the house. *Id.* at 644 & n.2. The officers would not let the defendant's attorney into the house. *Id.* at 644. The defendant demanded to see a warrant; a physical struggle ensued and the officers handcuffed the defendant. *Id.* at 644-45. When the defendant was physically restrained, the officers searched her home. *Id.* at 645. "At the trial no search warrant was produced by the prosecution, nor was the failure to produce one explained or accounted for." *Id.* The United States Supreme Court applied the exclusionary rule and suppressed the evidence seized from the defendant's home. *Id.* at 660.

Unlike the officers' conduct in *Weeks* and *Mapp*, Detective Estes's conduct was not flagrantly abusive of Defendants' Fourth Amendment rights. Detective Estes obtained a warrant: he completed an affidavit/application listing items belonging to Ms. Garris that be believed were at Defendants' home, he explained why he thought the items were at Defendants' home, and he particularly described the items. A neutral judge reviewed the affidavit/application, made corrections to the affidavit/application and the warrant, and issued the warrant. Officers conducted a search based on the warrant and found items that were described in the warrant. Defendants have never alleged nor argued that the officers' search exceeded the scope of the warrant.

Consequently, the purposes of the warrant requirement as described in *Christine v. United States* were served here: Defendants were protected from unfounded charges, Defendants had notice of the search, Defendants were not subject to the whims of law enforcement, Defendants were not subjected to a general search of their home, and a record was generated regarding the warrant procurement that allowed for subsequent judicial review. *See* 687 F.2d 749, 756-57 (3d Cir. 1982). Detective Estes did not flagrantly abuse Defendants' Fourth Amendment rights, and this Court should not hold that Detective Estes's conduct was comparable to the egregious conduct described in *Weeks* and *Mapp*.

Defendants also argue that redaction is "not available to salvage a general warrant" and that this was a general warrant because "it authorized the search of every molecule at the search location." (Defs.' Br. 16-17). Defendants argue that "[a]ny 'part' of a deceased human fetus or corpse would include any microscopic particle that attaches within it the signature of human DNA." (Defs.' Br. 17). Defendants argue that "[n]ecessarily, then, a corpse provision authorizes a search far more broad than anything else listed in the search warrant with any amount of specificity." (Defs.' Br. 17). But the corpse clause did not render this warrant a general warrant for two reasons.

First, the corpse clause should not be logically read as allowing for a search of "microscopic particles" that are not visible to the naked eye. All

physical evidence is made up of particles, and each clause in a warrant that allows a search for physical items and its parts does not, thereby, allow for special testing to search for microscopic particles without expressly stating so in the warrant. The language in the corpse clause authorizing a search for a "[d]eceased human fetus or corpse, or part thereof" did not permit the use of forensic or special testing to search for DNA evidence or "microscopic particles" invisible to the naked eye, and there was no evidence that any officer understood the warrant to authorize such a search.

Second, even if the corpse clause were read to permit a search for microscopic particles, the warrant would not be a general warrant. A warrant is not "general" because it permits a search for specific items that are so small they could be found anywhere in the defendant's home. Rather, a warrant is "general" if the officers have unbridled discretion on what to search for, *i.e.*, the officers—not the judge—make the decision as to what items are the object of the search. *See Christine*, 687 F.2d at 753 ("The warrant at issue cannot be invalidated as a general warrant for it does not vest the executing officers with unbridled discretion . . . . [T]he magistrate, rather than the officer, determined what was to be seized."). It is the indiscriminate nature of the search, not the size of the particular item searched for, that makes a search general. Accordingly, the fact that a warrant allows for a search for "microscopic particles" that could be found

anywhere in the home does not render the warrant general; indeed, otherwise any warrant that authorized a search for DNA or microscopic evidence would be a general warrant.

Next, Defendants argue that, "even if redaction were available for this warrant, it fails the 'redaction test' urged by the State." (Defs.' Br. 18). Defendants argue that, quantitatively, the invalid parts of the warrant make up the greater part of the warrant because three of the five "checkbox" categories were unsupported by probable cause.[2] (Defs.' Br. 19-20). Defendants then concede that their argument is irrelevant "given that *Sells* requires this Court to look to the practical effect of the various parts." (Defs.' Br. 20). Defendants maintain that, because the corpse clause rendered the warrant a general warrant, it qualitatively became the greater part of the warrant. (Defs.' Br. 21). But as discussed above, the corpse clause did not render this warrant a general warrant. For this reason, and the reasons stated in the State's initial brief, the corpse clause did not make up the greater part of the warrant.

Finally, Defendants argue that there are additional reasons why this Court should affirm the trial court's ruling. (Defs.' Br. 23-26). Defendants

[2] Until now, Defendants have never alleged or argued in this case that other provisions of the warrant were invalid or unsupported by probable cause.

argue that the "trial court's decision to suppress the evidence was correct" because the "search warrant was not 'executed . . . within the territorial jurisdiction of the officer executing the warrant,' as required by Section 542.286.2."[3] (Defs.' Br. 25). But the search warrant was executed within the territorial jurisdiction of the officers executing the warrant.

A search warrant shall "be executed within . . . the territorial jurisdiction of the officer executing the warrant." § 542.286.2, RSMo 2000. This requirement is satisfied if officers within the territorial jurisdiction participate in the execution of the warrant, notwithstanding that officers in other jurisdictions also participate in the execution of the warrant. *See State v. Elliott*, 845 S.W.2d 115, 119-21 (Mo. App. S.D. 1993) (that Springfield police officers participated in execution of a warrant outside their territorial jurisdiction did not violate § 542.286.2, because other officers that were within the territorial jurisdiction also participated in the execution); *see also* § 542.291.3, RSMo 2000 ("The officer may summon as many persons as he deems necessary to assist him in executing the warrant.").

[3] Defendants raised this issue in their motions to suppress, but the trial court's only basis for granting Defendants' motions was that the search warrant was invalid for lack of probable cause. (*See* L.F. 12, 42-44).

The evidence at the suppression hearing showed that officers from the Blue Springs Police Department participated in the execution of the warrant. (*See* Tr. 14 ("[Blue Springs] actually served the search warrant and made sure that the residence was cleared and then turned it over to [the Kansas City, Missouri Police Department]."). As such, the search warrant was not executed in violation of § 542.286.2. *See Elliott*, 845 S.W.2d at 121. Consequently, this is not a basis for the Court to uphold the trial court's ruling.

Defendants also argue that the "totality of the circumstances" requires suppression. (Defs.' Br. 25-26). Defendants argue that the State "failed to follow the mandate of investigation required under *Merriweather* and provided a motion which (1) argued that the Corpse Clause was checked as a 'typographical error' — *while Estes openly admitted the actual reason for checking the Corpse Clause as soon as he was asked* and (2) argued that failure to leave a receipt was a 'ministerial act' — *while Estes had proof that he left a receipt*." (Defs.' Br. 25-26 (emphasis in original)). Defendants argue that this conduct "must be deterred." (Defs.' Br. 26).

But *Merriweather v. State*, 294 S.W.3d 52 (Mo. banc 2009), did not create a general "mandate of investigation" for prosecutors in all aspects of

their cases. In *Merriweather*, this Court held that Rule 25.03[4]—a discovery rule that governs disclosure requirements in criminal proceedings—imposed on the State an affirmative duty of diligence to locate records requested by the defendant that were in the possession of "other governmental personnel," and analyzed whether the prosecutor's efforts to locate records were sufficient under that standard. 294 S.W.3d at 56-57. The Court's holding in *Merriweather* was specific to situations involving disclosures to the defendant under Rule 25.03. *See id.* at 55 (holding that, although *Brady v. Maryland* imposed no affirmative duty on the prosecution to discover items that it did not possess, the controlling law in the case was Rule 25.03, not *Brady*). Because disclosures to Defendants were not at issue here, Rule 25.03 is inapplicable. As such, *Merriweather* has no bearing on this case, and certainly does not serve as an independent basis to affirm the trial court's ruling.

[4] Rule 25.03 provides that if the defense requests disclosure of discoverable material in possession or control of the State, but which is in the possession or control of other governmental personnel, the State shall use diligence and make good faith efforts to cause such material to be made available to the defense. *See* Rule 25.03(c).

CONCLUSION

For the foregoing reasons, and for the reasons outlined in the State's opening brief, the trial court's judgments granting Defendants' motions to suppress in their entirety should be reversed.

Respectfully submitted,

CHRIS KOSTER
Attorney General

/s/ Rachel Flaster
RACHEL FLASTER
Assistant Attorney General
Missouri Bar No. 62890

P. O. Box 899
Jefferson City, MO 65102
Phone: (573) 751-3321
Fax: (573) 751-5391
Rachel.Flaster@ago.mo.gov

ATTORNEYS FOR APPELLANT
STATE OF MISSOURI

CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify:

1. That the attached brief complies with the limitations contained in Missouri Supreme Court Rule 84.06 and contains 2,843 words as calculated pursuant to the requirements of Supreme Court Rule 84.06, as determined by Microsoft Word software; and

2. That a copy of Appellant's Substitute Reply Brief was sent through the eFiling system on this 3rd day of November, 2016 to:

John Robert Humphrey
121 W. 63rd St., Suite 201
Kansas City, MO 64113

Clayton E. Gillette
600 E 8th St., Suite A
Kansas City, MO 64106

/s/ Rachel Flaster
RACHEL FLASTER
Assistant Attorney General
Missouri Bar No. 62890

P. O. Box 899
Jefferson City, MO 65102
Phone: (573) 751-3321
Fax: (573) 751-5391
Rachel.Flaster@ago.mo.gov

ATTORNEY FOR APPELLANT
STATE OF MISSOURI