

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Thursday the 5th day of April, 2018.

Daquon Jermaine Terry, Appellant,

against Record No. 170279
Circuit Court No. CR10-F-3621

Commonwealth of Virginia, Appellee.

Upon an appeal from a judgment rendered by the Circuit Court of the City of Richmond.

Upon consideration of the record, briefs, and argument of counsel for the appellee, the Court is of the opinion that, assuming without deciding that Daquon Jermaine Terry (“Terry”) alleged sufficient facts that, if proven, would have established extrinsic fraud in his 2010 conviction for possession of marijuana with intent to distribute, the circuit court did not err in finding that Terry failed to prove fraud by clear and convincing evidence.

In 2010, pursuant to a plea agreement, Terry pled no contest to a charge for possessing with intent to distribute more than one-half ounce but not more than five pounds of marijuana, and he was sentenced to five years’ imprisonment with four years and ten months suspended. In 2015, Terry and the Commonwealth’s Attorney for the City of Richmond filed a joint motion to vacate Terry’s 2010 conviction.¹

The motion to vacate asserted that Terry’s conviction arose from the execution of a March 2010 search warrant on a residence (“target residence”) and that former Richmond City Police Detective J. Norton supplied the affidavit supporting this warrant. After comparing a

¹ The Attorney General asserts on appeal that it is not bound by the legal positions taken by the Commonwealth’s Attorney in the joint motion to vacate on appeal. We agree. “It is apparent that the Commonwealth has assumed inconsistent positions. The Commonwealth’s Attorney, the only official legal representative of the Commonwealth in the trial court, acquiesced [to the motion] that the Attorney General now attacks. Nevertheless, the Commonwealth may not be estopped from repudiating the earlier position erroneously taken by the Commonwealth’s Attorney.” *In re: Dep’t of Corrections*, 222 Va. 454, 465, 281 S.E.2d 857, 863 (1981).

number of search warrants sought by Detective Norton, the Commonwealth had discovered a “substantial likelihood” that he intentionally made material misrepresentations regarding the qualifications and observations of a confidential informant (“CI”) when executing the affidavits supporting the warrant that led to the arrest of Terry, as well as others. The Commonwealth claimed that Detective Norton’s apparent misconduct constituted extrinsic fraud, thus rendering Terry’s conviction void.

During an initial hearing on the motion to vacate, the Commonwealth explained that it had successfully vacated six or seven convictions due to Detective Norton’s misdeeds. The Commonwealth also described what it regarded as numerous misstatements of material fact in Detective Norton’s affidavit supporting the warrant used in Terry’s case. For example, the affidavit represented that the CI stated that he purchased illegal drugs from a home. However, the CI previously told Federal authorities that he provided Detective Norton with information regarding “street corner buys and distributions from cars [but] never information related to houses.” Further, the Commonwealth noted that, although Detective Norton’s affidavit supporting the warrant in this case claimed that the CI witnessed Terry selling heroin from a “golf ball sized chunk” of the drug while he was inside the target residence, no heroin was recovered during the execution of the warrant at this residence. The circuit court ordered an evidentiary hearing.

At the hearing, Terry joined in the motion to vacate and noted that, but for his contested conviction, he would not be a felon. The Commonwealth offered into evidence five search warrants that Detective Norton sought between 2008 and 2012, including the warrant used in the prosecution of Terry. Each warrant relied in part on information supplied by the CI. Terry drew the court’s attention to “Section 7” of each of the affidavits supporting the warrants in which Detective Norton described the extent and success of the CI’s assistance to law enforcement. Terry highlighted how Detective Norton’s description of the CI’s accomplishments varied considerably and illogically among the affidavits. Specifically, Detective Norton’s affidavit supporting a May 2008 warrant claimed the CI facilitated two arrests on outstanding warrants, three arrests of individuals involved in the “illegal drug trade,” and a search warrant that resulted in one arrest and the seizure of narcotics.

By contrast, Detective Norton’s affidavit supporting a March 2009 warrant stated that the CI had worked with Detective Norton for two months. The affidavit also claimed the CI had

provided information facilitating six arrests on outstanding warrants, ten search warrants for individuals that led to ten arrests and the seizure of narcotics, fourteen search warrants for residences that yielded drugs and firearms, and arrests in two homicide cases.

Detective Norton's affidavit supporting an October 2009 warrant stated that the CI had worked with Detective Norton for ten months. The affidavit went on to claim the CI had provided information facilitating two arrests on outstanding warrants, three arrests of individuals involved in the "illegal drug trade," and three search warrants resulting in five arrests and the seizure of narcotics. The affidavit recounted the CI had "made several controlled narcotic purchases."

Detective Norton's affidavit supporting the warrant used in the case against Terry, dated March 2010, stated that the CI had worked with Detective Norton for two years. The affidavit claimed that the CI had provided information facilitating two arrests on outstanding warrants, thirteen arrests of individuals involved in the "illegal drug trade," and three search warrants resulting in five arrests and the seizure of narcotics. The affidavit recounted also that the CI had "made several controlled narcotic purchases." Detective Norton's description of the CI's qualifications in connection with Terry's warrant was almost identical to the stated qualifications of another confidential informant the Richmond police were using at the time.²

In another section of the affidavit, Detective Norton claimed the CI was inside the target residence and saw "a young black male [the CI knew as Daquon]" selling marijuana and heroin in various packaging. Detective Norton surveilled the target residence briefly and observed numerous people who appeared to be heroin users coming and going in a manner consistent with narcotics distribution. Additionally, Detective Norton had received several anonymous tips in the preceding 90 days complaining of a "young black male" selling drugs from the target residence. During the preceding 60 days, Norton had arrested several individuals who claimed they purchased "their heroin from a young black male named DAQUAN," and police records confirmed that Terry lived at the target residence.

Finally, Detective Norton's affidavit supporting a February 2012 search warrant stated that the CI had worked with Detective Norton for only two years. The affidavit went on to claim the CI had facilitated two arrests on outstanding warrants, six arrests of individuals involved in

² The additional warrant admitted to establish this fact is not in the record.

the “illegal drug trade,” and two search warrants resulting in three arrests and the seizure of narcotics. The affidavit also recounted the CI had “made several controlled narcotic purchases.”

Lieutenant B. Corrigan of the Richmond police department testified that he investigated the affidavit supporting the warrant for search of Terry’s residence, and discovered discrepancies between the records in the CI’s “file” and Norton’s account of the CI’s assistance to police. For example, (1) no records confirmed the CI provided information yielding two arrests on outstanding warrants, (2) records confirmed only three of the thirteen arrests with which Detective Norton claimed the CI assisted, (3) records indicated the CI facilitated four, not three, search warrants, and (4) no records confirmed the CI conducted controlled purchases of narcotics.

Lt. Corrigan explained that, per police department policy, each instance of the CI assisting police should have been documented on a separate “resume sheet” and an additional “N-10” form if the assistance involved expending police department funds. Lt. Corrigan acknowledged that, prior to his taking charge of maintaining the confidential informants’ files in August 2012, officers did not reliably generate “resume sheets” to document their work with confidential informants. Neither Detective Norton nor the CI testified.

The circuit court denied the motion to vacate stating:

Well, I think the evidence is inconclusive. I think it’s speculative. It does not reach the level of clear and convincing in my view. In my view, it is not extrinsic. It’s intrinsic to the extent there’s a problem. The evidence supported a finding of guilty, and Mr. Terry pled no contest. He could have contested it. He could have put the Commonwealth to its proof. But the fact of the matter is he was guilty, and I don’t think anyone is suggesting that he wasn’t. Whether this affidavit concerning the confidential informant is the false one or the others are false or they’re all false, I cannot say. I think there is one person who can say but he is not here. The 21-day rule applies to this case in my view. I’m going to deny the motion to set aside the conviction.

Terry appealed to the Court of Appeals. Relying on *Commonwealth v. Southerly*, 262 Va. 294, 299, 551 S.E.2d 650, 652-53 (2001), the Court of Appeals determined that it did not have jurisdiction to hear the appeal because a motion to vacate a criminal conviction is a civil collateral attack proceeding and granted the Commonwealth’s motion to transfer the case to this Court. See *id.* at 299, 551 S.E.2d at 653.

Terry presented two assignments of error for consideration on appeal.

1. The trial court erred in finding that evidence proffered and presented in support of the motion to vacate failed to establish extrinsic fraud upon the court, rendering the conviction void.
2. The Court of Appeals erred in holding that it lacks jurisdiction to hear this appeal.

For the following reasons, we will affirm.

First, the Court of Appeals did not err in determining that it did not have jurisdiction over this appeal. The Court of Appeals applied this Court's decision in *Southerly*, holding that:

In short, a motion to withdraw a guilty plea (whether or not timely filed) is simply a part of a criminal case. This motion to vacate a conviction, however, is a civil collateral attack on the conviction itself that would eviscerate the entire conviction. We conclude that the motion to vacate appellant's conviction before the circuit court was "in no sense a continuation of the criminal prosecution" and that the Supreme Court has exclusive jurisdiction to consider the collateral issue appellant now raises on appeal. *Southerly*, 262 Va. at 299, 551 S.E.2d at 653 (quoting *Crowley*, 227 Va. at 262, 316 S.E.2d at 443).

Terry v. Commonwealth, Record No. 0361-16-2, slip op. at 5 (Feb. 27, 2017). This Court previously likened motions to vacate a conviction to petitions for writs of habeas corpus, noting that

[a] petition for habeas corpus and an appeal from a judgment granting the writ both test the legality of the incarceration rather than the guilt or innocence of the prisoner. *See Lacey v. Palmer*, 93 Va. 159, 163, 24 S.E. 930, 931 (1896). The same is true of the motions to vacate filed in these cases and the appeals from the judgments dismissing those motions. We are of opinion that the proceedings conducted on the motions to vacate were civil in nature . . . and that these appeals are properly before this Court.

Virginia Dep't of Corrections v. Crowley, 227 Va. 254, 263, 316 S.E.2d 439, 443-44 (1984).

Here, the motion to vacate Terry's conviction was filed well after his conviction was final under Rule 1:1. The collateral attack on his conviction is not part of the criminal proceeding and is civil in nature. Therefore, because the Court of Appeals does not have jurisdiction over the matter as provided by statute, this Court does have jurisdiction and the Court of Appeals did not err in transferring the case to this Court.

Second, assuming without deciding that Terry alleged sufficient facts that, if proven, would have established extrinsic fraud in his 2010 conviction, the circuit court did not err in finding that that fraud was not proven by clear and convincing evidence. *Gulfstream Bldg. Assoc., Inc. v. Britt*, 239 Va. 178, 183, 387 S.E.2d 488, 491 (1990). “The burden is upon the party charging fraud to prove it by clear and convincing evidence.” *Winn v. Aleda Constr. Co.*, 227 Va. 304, 308, 315 S.E.2d 193, 195 (1984).

Clear and convincing evidence has been defined as “that measure or degree of proof which will produce in the mind of the trier of facts a firm belief or conviction as to the allegations sought to be established. It is intermediate, being more than a mere preponderance, but not to the extent of such certainty as is required beyond a reasonable doubt as in criminal cases. It does not mean clear and *unequivocal*.”

Fred C. Walker Agency, Inc. v. Lucas, 215 Va. 535, 540-41, 211 S.E.2d 88, 92 (1975) (citation omitted).

The trial court found that “the evidence is inconclusive. I think it’s speculative. It does not reach the level of clear and convincing in my view. In my view, it is not extrinsic. It’s intrinsic to the extent there’s a problem.” It is unclear whether the trial court was referring to extrinsic or intrinsic evidence as inconclusive and speculative. However, based on the evidence submitted to the trial court, we cannot say that the trial court erred in refusing to vacate Terry’s conviction. The parties argued that Detective Norton’s affidavits in support of the search warrants contained fraudulent information regarding the confidential informant. However, the trial court declined to find that the affidavit in Terry’s case was actually false. “Whether this affidavit concerning the confidential informant is the false one or the others are false or they’re all false, I cannot say.” The trial court’s finding was neither plainly wrong nor without evidence to support it. The discrepancies in the confidential informant history on the affidavits encompass the length of time the officer knew the informant and the number of arrests and/or search warrants the informant assisted in obtaining. No other evidence was admitted to show which of the affidavits was false. As the trial court found, the evidence was speculative as to whether the confidential informant’s information attached to the warrant for search of Terry’s residence was false. Accordingly, we hold that, assuming without deciding that Terry alleged sufficient facts that, if proven, would have established extrinsic fraud in his 2010 conviction, the trial court did

not err in denying the motion to vacate. The appellant shall pay to the Commonwealth of Virginia two hundred and fifty dollars damages.

This order shall be certified to the Circuit Court of the City of Richmond.

A Copy,

Teste:

Ruth L Harrington

Clerk