STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Allendale County

Honorable Courtney Clyburn-Pope, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

PAULETTE J. SIMS,

APPELLANT

APPELLATE CASE NO. 2021-001202

FINAL BRIEF OF APPELLANT

LARA M. CAUDY
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Constitutional Provisions

STATEMENT OF ISSUES ON APPEAL

1.

Did the trial judge abuse her discretion by admitting footage from the dash camera inside Officer Jacob Linder's patrol vehicle and Linder's body worn camera in violation of Rule 401, SCRE, and Rule 403, SCRE, where the evidence was not relevant and any probative value of the evidence was substantially outweighed by the danger of unfair prejudice as the footage shows Appellant kneeling over the body of the decedent, who is covered in blood, Appellant being repeatedly tased by multiple law enforcement officers, and Appellant's bizarre behavior immediately following, particularly where the judge did not view the videos before ruling they were admissible and permitting the state to publish the videos to the jury?

2.

Did the trial judge err by denying Appellant's motion to suppress pursuant to the Fourth Amendment, Article 1, § 10 of the South Carolina Constitution, and S.C. Code Ann. § 17-13-140 when the affidavit in support of the search warrant to obtain a buccal swab from Appellant, and thereby her known DNA standard, failed to provide the magistrate with a substantial basis for determining the existence of probable cause?

STATEMENT OF THE CASE

An Allendale County Grand Jury indicted Appellant on June 18, 2021 for two counts of murder and possession of a weapon during the commission of a violent crime. R. 323. Appellant's case was called to trial on October 11, 2021 before the Honorable Courtney Clyburn Pope, and a jury. R.1. Assistant Solicitor Julie Kate Keeney represented the state. R. 1. Steven Plexico represented Appellant. R.1.

On October 14, 2021, the jury found Appellant guilty as indicted. R. 305, l. 25 – 306, l. 12. She was sentenced to thirty-eight years for each count of murder and five years for the weapons offense. R. 316, l. 21 – 317, l. 6. All sentences were ordered to be served concurrently. R. 317, ll. 4-5.

This appeal follows.

ARGUMENT

1.

The trial judge abused her discretion by admitting footage from the dash camera inside Officer Jacob Linder's patrol vehicle and Linder's body worn camera in violation of Rule 401, SCRE, and Rule 403, SCRE, where the evidence was not relevant and any probative value of the evidence was substantially outweighed by the danger of unfair prejudice as the footage shows Appellant kneeling over the body of the decedent, who is covered in blood, Appellant being repeatedly tased by multiple law enforcement officers, and Appellant's bizarre behavior immediately following, particularly where the judge did not view the videos before ruling they were admissible and permitting the state to publish the videos to the jury.

Relevant Facts

Appellant moved pretrial to exclude the in car camera footage from Officer Jacob Linder's patrol vehicle as well as footage from Linder's body worn camera pursuant to Rule 401, SCRE, and Rule 403, SCRE. R. 2, l. 20 – 3, l. 2; R. 4, ll. 5-10. Linder, a patrol officer with the Allendale Police Department, was the first officer to arrive on scene after dispatch received calls regarding an ongoing assault in the parking lot of the Oakland Apartments. R. 20, l. 21 – 21, l. 11. The assistant solicitor described the content of the videos for the benefit of the judge:

> The State has three videos that we're intending to admit. One is the body camera of the deputy, Officer Linder of the Allendale Police Department, the body cam, and in car video. There are two separate disks. So his in car shows him rolling up into the apartment complex, and you can see, who, I guess, we're alleging to be his [defense counsel's] client [Appellant] over Carolyn Cook's body with a knife in her hand do this (indicating) - - stabbing for the court reporter - - so we believe that is highly relevant to the murder charge considering that Carolyn Cook died of a stab wound, or multiple stab wounds.
>
> And the other video is the body camera of Officer Linder who gets out of his car, goes to who we are claiming is the defendant, and is attempting to restrain her. He ends up tasing the defendant. You can see her face in the video.

R. 3, ll. 3-20.

Defense counsel countered that the footage from Linder's body worn camera is "essentially the video of her [Appellant] getting tased and getting arrested. There's no stabbing going on. What is done is done." R. 4, ll. 5-10.

The solicitor asserted the videos were admissible to prove identity. R. 4, ll. 11-21. She further maintained the footage from the body camera was the "most probative evidence" in that it showed "a knife right there" and "stabbing the victim." While recognizing the evidence was prejudicial, the solicitor claimed it was "about as good as you can get in a murder case, actual video footage of one of the murders." R. 3, l. 20 – 4, l. 4.

The judge immediately stated she would "allow all three videos over your objection" without watching any of them. R. 4, ll. 22-23. When defense counsel expressed confusion regarding the content of the third video, the assistant solicitor explained it was "Officer Evans's in car camera and it just shows, like EMS treating - - probably treating both. Getting Bobby Heath [the decedent] and taking him out. There's really not much to it." R. 4, l. 24 – 5, l. 5.

Defense counsel also objected to this third video arguing it was not relevant since it was mainly of the decedent receiving medical treatment. R. 5, ll. 6-7. He also argued Officer Evans's dash camera footage was "redundant" and a "waste of time." R. 5, ll. 16-18.

The trial judge sought clarification as to what the three videos showed:

> The Court: So the first video is dash-cam. The second video is body worn camera of the arrest. And the third video is - -
>
> Ms. Kenney [Solicitor]: Dash-cam of Officer Evans who is second on scene who helped apprehend the defendant. And it showed - - it ends with - - the point that I want to play is when the defendant is being brought to the police car and apprehended.

R. 5, ll. 8-15.

After receiving clarification, the judge stated, "Thank you for that clarification. Somehow the description originally, I thought there were three body cameras from the same - - three videos from the same officer. However, I'm going to allow the first two in. I think that will - - I think those are probative. That third one, I think is redundant to show that. So the first two videos." R. 6, l. 22 – 7, l. 4. The judge again ruled *without having viewed* any of the videos.

The footage from Linder's dash camera was later marked and admitted as State's Exhibit No. 8, while the footage from Linder's body worn camera was marked and admitted as State's Exhibit No. 9, both over Appellant's contemporaneous objection. R. 35, l. 10 – 36, l. 23. Each exhibit was subsequently published to the jury in its entirety. R. 37, l. 2 – 38, l. 17.

Standard of Review

"In criminal cases, the appellate court sits to review errors of law only." State v. Collins, 409 S.C. 524, 529-530, 763 S.E.2d 22, 25 (2014) (quoting State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006)) (internal quotation marks omitted). "This Court is bound by the trial court's factual findings unless they are clearly erroneous." Id. at 530, 763 S.E.2d at 25 (quoting Baccus, 367 S.C. at 48, 625 S.E.2d at 220) (internal quotation marks omitted). "The admission or exclusion of evidence is a matter addressed to the sound discretion of the trial court and its ruling will not be disturbed in the absence of a manifest abuse of discretion accompanied by probable prejudice." Id. (quoting State v. Wise, 359 S.C. 14, 21, 596 S.E.2d 475, 478 (2004)) (internal quotation marks omitted). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." Id. (quoting Wise, 359 S.C. at 21, 596 S.E.2d at 478) (internal quotation marks omitted).

Discussion

The trial judge abused her discretion by admitting State's Exhibit No. 8, footage from Linder's dash camera, and State's Exhibit No. 9, footage from Linder's body worn camera, in violation of Rule 401, SCRE, and Rule 403, SCRE, as the evidence was not relevant and any probative value of the evidence was substantially outweighed by the danger of unfair prejudice. The footage showed Appellant kneeling over the bloody body of the decedent, Appellant being repeatedly tased as law enforcement tried to apprehend her, and Appellant's bizarre and crazed behavior immediately afterward. The videos should have been excluded because they were not relevant. Instead, they were intended to arouse the sympathy and prejudice of the jury and had a tendency to suggest a decision on an improper basis, namely an emotional one. Moreover, the judge did not weigh the probative value of the footage against its prejudicial effect *nor did she even view the videos before finding they were admissible*, thereby failing to exercise her discretion at all.

As a general rule, all relevant evidence is admissible. Rule 402, SCRE. "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401, SCRE. "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . ." Rule 403, SCRE. Unfair prejudice pursuant to Rule 403 "is the tendency of the evidence to suggest a decision based on something other than the legitimate probative force of the evidence." State v. Phillips, 430 S.C. 319, 328, 844 S.E.2d 651, 656 (2020) (citing State v. Gray, 408 S.C. 601, 616, 759 S.E.2d 160, 168 (Ct. App. 2014)); See State v. Torres, 390 S.C. 618, 623, 703 S.E.2d 226, 228-229 (2010).

First and foremost, the trial judge completely failed to exercise her discretion as she did not view the exhibits before ruling they were admissible. She merely had the assistant solicitor vaguely describe what the videos showed. However, the arguments of counsel are not evidence. Notably, defense counsel disagreed at times with the solicitor's description of the footage. See Harper v. Bolton, 239 S.C. 541, 562, 124 S.E.2d 54, 64 (1962) ("the statements of counsel in an argument are not evidence but are merely the expression of his individual view"). The judge could not possibly have determined whether the videos were relevant nor could she have properly balanced the probative value of the footage against its prejudicial effect without viewing the exhibits. Surprisingly, the judge initially admitted all three videos the state sought to admit without even hearing a description of the third video. See R. 4, ll. 22-23.

If the judge had watched the videos, later admitted as State's Exhibit No. 8 and State's Exhibit No. 9, she would have discovered they were not relevant to any matter in controversy. The state claimed the videos were relevant to prove Appellant's identity. However, Appellant admitted at trial that she stabbed the decedents, but maintained she acted in self-defense. Therefore, the videos were not needed to prove identity as Appellant's identity was not disputed.

Not only were the exhibits not relevant, but any probative value was clearly outweighed by the danger of unfair prejudice. State's Exhibit No. 9, footage from Linder's body worn camera, showed Appellant kneeling over the decedent's body, which was covered in blood. The woman was obviously already deceased. The video then showed Appellant being violently tased and eventually apprehended. Throughout the entire video, Appellant is acting extremely bizarre and crazed, screaming incomprehensibly. State's Exhibit No. 8, the dash camera footage from Linder's patrol vehicle, showed the same events with the addition of Linder's initial arrival into

the parking lot. This footage captured Appellant allegedly making a stabbing motion over the decedent's body, which again is covered in blood. Both videos are extremely difficult to watch.

The detailed testimony of the eyewitnesses, including Gerald Penn, April Bostick, Chandre Grant, and Jacob Linder, was sufficient to enable the state to establish the elements of the offenses without the disturbing and unfairly prejudicial videos. The exhibits were unfairly prejudicial because they had the tendency "to suggest a decision based on something other than the legitimate probative force of the evidence." See Phillips, 430 S.C. at 328, 844 S.E.2d at 656. They were clearly intended to arouse the sympathy and prejudice of the jury. The jury was likely prejudiced against Appellant based on her crazed behavior and the extremely alarming sight of the bloodied body and violent arrest of Appellant. The jury likely convicted Appellant on an improper basis, namely an emotional one.

Respectfully, this Court should hold the trial judge abused her discretion, reverse Appellant's convictions, and remand for a new trial.

2.

The trial judge erred by denying Appellant's motion to suppress pursuant to the Fourth Amendment, Article 1, § 10 of the South Carolina Constitution, and S.C. Code Ann. § 17-13-140 as the affidavit in support of the search warrant to obtain a buccal swab from Appellant, and thereby her known DNA standard, failed to provide the magistrate with a substantial basis for determining the existence of probable cause.

Relevant Facts

On March 1, 2020, David Owen with the South Carolina Law Enforcement Division obtained a search warrant to collect buccal swabs, among other evidence, from Appellant. R. 318 (Court's Exhibit No. 3 – Search Warrant). The "description of premises (person, place, or thing) to be searched" on the affidavit for the warrant was listed as: "The person to be searched [is] a black female named Ashley Simms, with a date of birth of [redacted]. Simms is currently in custody at Allendale County Detention Center, Allendale, SC." R. 319 (Court's Exhibit No. 3 – Search Warrant). Handwritten next to the typed name of Ashley Simms was "AKA: Paulette Sims." R. 319 (Court's Exhibit No. 3 – Search Warrant).

The "description of property sought" was listed as: "Any and all instrumentalities of the crime of Murder, to include but not limited to, DNA Samples, via Buccal (salvia) swabs and fingerprints, from the subject Ashley Simms, a black female. , illegal contraband, electronic devices, mass media storage devices, recording equipment, personal identification cards, identifying paperwork, miscellaneous paperwork and/or notes determined to be of evidentiary value." R. 319 (Court's Exhibit No. 3 – Search Warrant). Also handwritten next to the typed name of Ashley Simms on this portion of the affidavit was "AKA: Paulette Sims." R. 319 (Court's Exhibit No. 3 – Search Warrant).

Finally under the "reason for affiant's belief that the property sought is on the subject premises," Owen averred:

> On March 1, 2020, at approximately 1159 hours, Allendale Police Department (APD) received a 911 call of an active assault. Upon APD officers arrival they observed a black female subject actively stabbing a white female victim in the parking lot in front of apartment 826. The subject was detained and identified as Ashley Simms. The victim, identified as Carolyn Cook, was of apartment 826. At this time, no motivate [sic] has been determined. It is the affiant's belief that items of evidence may be recovered in the residence that will aid in this investigation. Any and all evidence recovered as a result of this search will be compared to other evidence obtained in the investigation.

R. 3 (Court's Exhibit No. 3 – Search Warrant).

After being signed by a magistrate, law enforcement executed the warrant around seven o'clock in the evening on the day of Appellant's arrest. R. 322 (Court's Exhibit No. 3 – Search Warrant). They collected a buccal swab from Appellant as well as swabs of suspected blood found on her person. R. 322 (Court's Exhibit No. 3 – Search Warrant). At the time, Appellant was being held at the local detention center.

Appellant moved midtrial to suppress any evidence obtained as a result of this warrant. Defense counsel explained that law enforcement obtained the warrant pursuant to S.C. Code Ann. § 17-13-140, which states a warrant may only be issued if the judge is satisfied that the grounds for the warrant exist or that there is probable cause to believe that they exist. R. 141, ll. 5-13. He also asserted that the statute specifically states it does not modify or limit any statute or other law regulating search, seizure, and the issuance and execution of search warrants, which counsel argued included "constitutional requirements." R. 141, ll. 14-18. In addition to S.C. Code Ann. § 17-13-140, counsel cited to both the United States Constitution and the South Carolina Constitution, which require a "finding of probable cause supported by oath or

affirmation" before a warrant may be issued, and Schmerber v. California, 384 U.S. 757 (1966), in support of his argument. R. 143, ll. 5-23.

Counsel presented the trial judge with a copy of the warrant in chambers. R. 141, ll. 19-21. The warrant was also marked as Court's Exhibit No. 3. R. 150, ll. 3-14. Counsel recited the contents of the affidavit for the benefit of the judge. R. 142, ll. 1-15. He argued the affidavit in support of the warrant "says absolutely nothing about . . . having evidence in her [Appellant's] DNA." R. 141, l. 24 – 142, l. 1. Rather, the application states "it is the affiant's belief that items of evidence may be recovered in the residence that will aid in this investigation. It says not a thing about my client's person which is at the jail." R. 142, ll. 15-19. Counsel further asserted, that the affidavit "utterly failed to show probable cause to believe that my client's DNA was necessary, because it was never, never addressed by the search warrant affidavit, which is required by the statute." R. 146, ll. 19-23. He concluded that the issuing judge could not have been satisfied that grounds for obtaining buccal swabs from Appellant and her known DNA sample existed since "it's completely unsupported by the affidavit." R. 142, ll. 19-24. He requested the trial judge suppress any evidence emanating from the illegal search and seizure of Appellant. R. 142, l. 25 – 143, l. 4.

The assistant solicitor argued the affidavit established probable cause to believe Appellant "committed a crime as officers actively observ[ed] her stab the victim to death." R. 145, ll. 1-14. She maintained law enforcement complied with the Fourth Amendment and S.C. Code Ann. § 17-13-140. R. 145, l. 24 – 146, l. 1. Lastly, the solicitor asserted that if the judge found the warrant was not supported by probable cause then she should find the officers acted in good faith reliance on what they believed was a valid warrant. R. 147, ll. 1-7.

The trial judge ultimately denied the motion. She merely stated, "Mr. Plexico [defense counsel], I'm going to deny your motion. I'm going to allow the testimony - - or the evidence from the buccal swab to come in at this time." R. 152, ll. 3-8.

Appellant contemporaneously renewed her objection to the admission of any evidence obtained as a result of the unlawful warrant. C.f. State v. Jones, 435 S.C. 138, 144-45, 866 S.E.2d 558, 561 (2021) (holding "where a court rules after a hearing on a constitutional issue . . . the ruling is final and, unless something changes during the trial that may reasonably cause the trial judge to alter the pretrial ruling, no further objection is required to preserve the issue for appellate review").

Standard of Review

"On appeals from a motion to suppress based on Fourth Amendment grounds, this Court applies a deferential standard of review and will reverse if there is clear error." State v. Tindall, 388 S.C. 518, 521, 698 S.E.2d 203, 205 (2010) (citing State v. Khingratsaiphon, 352 S.C. 62, 70, 572 S.E.2d 456, 459 (2002)); See State v. Brockman, 339 S.C. 57, 66, 528 S.E.2d 661, 666 (2000) (holding the appellate standard of review in Fourth Amendment search and seizure cases is limited to determining whether any evidence supports the trial court's finding and the appellate court may only reverse where there is clear error). "However, this deference does not bar this Court from conducting its own review of the record to determine whether the trial judge's decision is supported by the evidence." Id. (citing Khingratsaiphon, 352 S.C. at 70, 572 S.E.2d at 459).

Discussion

The trial judge erred by denying Appellant's motion to suppress as the affidavit in support of the search warrant to obtain a buccal swab from Appellant, and thereby her known

DNA standard, failed to provide the magistrate with a substantial basis for determining the existence of probable cause in violation of the Fourth Amendment, Article 1, § 10 of the South Carolina Constitution, and S.C. Code Ann. § 17-13-140.

The Fourth Amendment of the United States Constitution and Article I, Section 10 of the South Carolina Constitution require warrants be issued only "upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const. Amend. IV; S.C. Const. Art. 1, § 10. "This is a minimum standard, and state legislatures are free to enact stricter requirements for the issuance of search warrants." State v. McKnight, 291 S.C. 110, 113, 352 S.E.2d 471, 472 (1987) (citing State v. York, 250 S.C. 30, 156 S.E.2d 326 (1967)).

S.C. Code Ann. § 17-13-140 is the "general search warrant statute" in South Carolina. State v. Covert, 382 S.C. 205, 209, 675 S.E.2d 70, 743 (2009). This statute contains requirements different from those mandated by the Fourth Amendment and Article I, Section 10 of the South Carolina Constitution, and is in some ways stricter than the federal and state constitutions. Covert, 382 S.C. at 209, 675 S.E.2d at 743 (citing McKnight, 291 S.C. 110, 352 S.E.2d 471). Consequently, a search warrant that would survive constitutional scrutiny may still be defective under § 17-13-140. McKnight, 291 S.C. 110, 352 S.E.2d 471.

The statute states in relevant part:

> A warrant issued hereunder shall be issued only upon affidavit sworn to before the magistrate, municipal officer, or judge of a court of record establishing the grounds for the warrant. **If the magistrate, municipal judge, or other judicial officer abovementioned is satisfied that the grounds for the application exist or that there is probable cause to believe that they exist, he shall issue a warrant identifying the property and naming or describing the person or place to be searched**.

S.C. Code Ann. § 17-13-140 (emphasis added). Our Supreme Court has previously held search warrants were defective for failing to comply with this statute and suppressed the evidence obtained as a result of the invalid warrants.

In State v. McKnight, police officers appeared before a magistrate to obtain a warrant, but did not complete an affidavit in support thereof. Our Supreme Court held the warrant was defective because the officers failed to comply with the affidavit requirement of § 17-13-140. McKnight, 291 S.C. at 113, 352 S.E.2d at 473; See S.C. Code Ann. § 17-13-140 (requiring search warrants be issued "only upon affidavit sworn to before the magistrate . . . establishing the grounds for the warrant."). Even though the officers were sworn and gave oral testimony to the magistrate, the Court held a search warrant affidavit which is itself insufficient to establish probable cause may be supplemented before the magistrate by sworn oral testimony, but sworn oral testimony alone does not satisfy the statute. McKnight, 291 S.C. at 113, 352 S.E.2d at 473. The Court found the mandatory requirement of an affidavit lacking and held any evidence seized as a result of the defective warrant must be suppressed. Id. at 113-114, 352 S.E.2d at 473.

In State v. Covert, law enforcement officers obtained and served a search warrant on September 26, 2002. The warrant was signed by the magistrate and dated September 28, 2002. However, the accompanying two page affidavit was signed by the magistrate on both pages and both signatures were dated September 26, 2002. Covert, 382 S.C. at 207, 675 S.E.2d at 741. Our Supreme Court held the warrant was invalid due to the absence of the magistrate's signature at the time the warrant was served. Id. at 208, 675 S.E.2d at 742. The Court concluded that under South Carolina law an unsigned warrant is not a warrant, and is not capable of being issued within the meaning of § 17-13-140. Id. at 210, 675 S.E.2d at 743.

In State v. Herring, a SLED agent faxed a search warrant to a magistrate and the magistrate swore the agent over the telephone. State v. Herring, 387 S.C. 201, 692 S.E.2d 490 (2009). Based on the language of § 17-13-140 that commands a warrant "be issued only upon affidavit sworn to before the magistrate," Herring argued the warrant was invalid because the statute requires the affiant appear before the magistrate *in person*. Our Supreme Court disagreed. The Court held the language does not state an affidavit must be sworn in person. It only requires the affidavit be sworn. Emphasizing that the agent who prepared the warrant was sworn over the telephone by the magistrate, the Court held this procedure complied with the literal terms of the statute and there was no defect in the warrant. Id.

The search warrant in this case failed to comply with the Fourth Amendment, Article 1, § 10 of the South Carolina Constitution, and § 17-13-140 because the grounds for the warrant were not supported by probable cause. While the affidavit maintained the affiant sought "DNA Samples, via Buccal (saliva) swabs . . . from the subject Ashley Simms, a black female," it failed to establish probable cause to believe Appellant's DNA sample would aid in the investigation of the homicide. As defense counsel argued below, there were "no facts [alleged] to show why the buccal swab to get her DNA is necessary." R. 151, ll. 4-6. Rather the affidavit claims "it is the affiant's belief that items of evidence may be recovered *in the residence* that will aid in this investigation." R. 321 (Court's Exhibit No. 3 – Search Warrant) (emphasis added). Because the affidavit failed to provide the magistrate with a substantial basis for determining the existence of probable cause, the trial judge erred by denying Appellant's motion to suppress.

Moreover, unlike the assistant solicitor argued at trial, the good faith exception to the exclusionary rule does not apply. In United States v. Leon, 468 U.S. 897, 919-920 (1984), the United States Supreme Court established a good faith exception to the exclusionary rule, holding

"that when an officer acting in objective good faith has obtained a search warrant from a judge or magistrate and acted within its scope, a reviewing court should not order a suppression of the evidence based on a lack of probable cause." State v. Robinson, 408 S.C. 268, 275, 758 S.E.2d 725, 729 (Ct. App. 2014), *aff'd as modified*, 415 S.C. 600, 785 S.E.2d 355 (2016) (quoting State v. Weston, 329 S.C. 287, 292, 494 S.E.2d 801, 803-804 (1997) (summarizing Leon)). The Court in Leon "listed three situations in which the good faith exception cannot apply, one of which is reviewing courts will not defer to a warrant based on an affidavit 'that does not provide the magistrate with a substantial basis for determining the existence of probable cause.'" Id. at 275-276, 758 S.E.2d at 729) (quoting Leon, 468 U.S. at 914-915).

Here, law enforcement should have known the affidavit in support of the warrant did not satisfy the Fourth Amendment, Article 1, § 10 of the South Carolina Constitution, *or* § 17-13-140 as it failed to allege any grounds whatsoever to believe Appellant's DNA sample, through the collection of a buccal swab, would aid the investigation. Consequently, the affidavit did not provide the magistrate with a substantial basis for determining the existence of probable cause. Any belief by law enforcement that it did was unreasonable.

In McKnight, our Supreme Court emphasized that the good faith exception to the exclusionary rule adopted by the United States Supreme Court in Leon only applies when a search warrant is defective on Fourth Amendment grounds, not on the basis of a statutory violation. McKnight, 291 S.C. at 114, 352 S.E.2d at 473. However, the Court did not decide whether evidence seized pursuant to a search warrant that is defective under § 17-13-140 may be admitted when the officers who execute the search act with objectively reasonable reliance on a warrant ultimately found to be invalid. Id. The Court noted that even if it were to adopt a good faith exception akin to Leon for violations of § 17-13-140, the exception would not have applied

in McKnight because the officers were aware of the defect in the warrant (the lack of a sworn affidavit) when they executed the search, negating any argument of good faith. Id.

Over two decades later, our Supreme Court recognized that there is a good faith exception to § 17-13-140's requirements where the officers make a good faith attempt to comply with the statute's *affidavit procedures*." Herring, 387 S.C. at 215, 692 S.E.2d at 497 (quoting Covert, 382 S.C. 205, 675 S.E.2d 740) (emphasis added). In Herring, the Supreme Court held the officers made a good faith attempt to comply with the affidavit procedures due to the surrounding circumstances: "It was 4:00 in the morning, and SLED agents were attempting to obtain a warrant to investigate a shooting by Richland County Sheriff's deputies of a prominent Columbia attorney." Id. at 216, 692 S.E.2d at 497.

Assuming our Supreme Court would extend the good faith exception to the statutory requirement that the issuing magistrate is "satisfied that the grounds or the application exist or that there is probable cause to believe that they exist," the exception would not apply in this case for the reasons argued above. The officers who executed the warrant should have known the affidavit in support of the warrant did not provide the magistrate with a substantial basis for determining the existence of probable cause as there was no mention whatsoever as to why the collection of a buccal swab from Appellant was needed to further the investigation.

Respectfully, this Court should hold the trial judge abused her discretion by denying Appellant's motion to suppress, reverse Appellant's convictions, and remand for a new trial.

CONCLUSION

Based on the foregoing argument, Appellant respectfully requests this Court reverse her convictions and sentence and remand for a new trial.

Respectfully submitted,

s/ Lara M. Caudy
Lara M. Caudy
Appellate Defender

ATTORNEY FOR APPELLANT

This 22nd day of February, 2023.

RECEIVED
Feb 22 2023
SC Court of Appeals

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

February 22, 2023

s/ Lara M. Caudy
Lara M. Caudy
Appellate Defender

S.C. Commission on Indigent Defense
Division of Appellate Defense
1330 Lady Street, Suite 401
Post Office Box 11589
Columbia, South Carolina 29211-1589