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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Lexington County

Walton J. McLeod, IV, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

Jerome Smith,

APPELLANT.

APPELLATE CASE NO. 2021-000788

FINAL BRIEF OF APPELLANT

Jason T. Yonge (SC Bar No. 102869)
Benjamin A. Stitely (SC Bar No. 75339)
Williams, Stitely & Brink, PC
200 E. Main St.
Lexington, SC 29072
(803) 359-9000
jyonge@wsblegal.com
bstitely@wsblegal.com

Attorneys for Appellant

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STATEMENT OF ISSUE ON APPEAL

Did the Trial Court err by denying Smith's motion to suppress evidence seized by SLED pursuant to a search warrant that was not supported by probable cause?

STATEMENT OF THE CASE

This is an appeal from Appellant Jerome Smith's conviction for trafficking in heroin. (R. p. 226, lines 13-20; R. p. 256-261). Smith was arrested on October 23, 2019. (R. p. 41, lines 17-21). On July 12, 2021, the State called this case for trial. (R. p. 5, lines 10-16). At trial, Smith made a motion to suppress evidence seized from his home pursuant to a search warrant, which the trial court denied. (R. pp. 7-53).

Following a bench trial, (R. pp. 54-57), the Honorable Walton J. McLeod, IV, found Smith guilty of trafficking heroin, distribution of heroin, and possession with intent to distribute heroin (R. p. 226, lines 12-22), and sentenced him to twenty-five years and ten years respectively, to be served concurrently, (R. p. 230, lines 5-12). Thereafter, Smith timely served and filed a notice of appeal.

STATEMENT OF FACTS

On October 23, 2019, SLED Special Agent Jamie Shaw arrested Jerome Smith in a Walmart parking lot. (R. p. 41). That morning, Agent Shaw and a team of SLED agents followed Smith as he drove from his apartment—located at 100 Riverbend Drive—to a Walmart parking lot to execute two arrest warrants on Smith. (R. pp. 232-251). The arrest warrants were for distribution of heroin two years earlier, in August 2017. (R. pp. 252-255).

After Smith's arrest, Agent Shaw applied for a search warrant for Smith's Riverbend Drive apartment. (R. p. 49; R. p. 175). In support of her search warrant application, Agent Shaw submitted an affidavit to the Magistrate. (R. pp. 236-248).

Search Warrant Affidavit

Agent Shaw's search warrant affidavit is nine pages long. The first five pages describe her training, experience, and familiarity with "drug distribution networks" generally. Neither Jerome Smith nor the facts of this case are mentioned until the sixth page. (R. p. 241). The information regarding this case can be divided into two categories: (a) information regarding events that occurred in August 2017 and (b) information regarding events that occurred within 72 hours of October 23, 2019. (R. pp. 241-248).

(a) Information regarding events that occurred in August 2017

In the search warrant affidavit, Agent Shaw alleged that SLED conducted two video-recorded controlled purchases of heroin from Smith in August 2017. Both controlled purchases were performed by confidential informants. (R. p. 241).

The first controlled purchase took place on August 19, 2017, at Smith's apartment, which was located at 1810 Allen Benedict Court at the time. Smith allegedly sold the confidential informant 0.97 grams of heroin. (R. p. 241).

The second controlled purchase took place almost a week later, on August 25, 2017, in a vehicle that was registered to Smith. Smith allegedly sold the confidential informant 3.01 grams of heroin. (R. p. 241).

(b) Information regarding events that occurred within 72 hours of October 23, 2019

The search warrant affidavit also contains information from two years later, when Smith lived in a different apartment. (R. pp. 242-244). According to the affidavit, within 72 hours of October 23, 2019, Agent Shaw observed Smith walk from his new apartment—located at 100 Riverbend Drive—to his van. (R. p. 242). Agent Shaw and other SLED agents followed Smith from the Riverbend Drive apartment to Walmart. (R. p. 242). Smith did not stop along the way. Upon arrival at Walmart, SLED agents observed Smith park and wait approximately twenty minutes before a man named Roland Carver walked to the van and entered the passenger side. (R. p. 242). Smith drove himself and Carver from one side of Walmart to the other. (R. p. 242). Carver then exited the vehicle and entered Walmart. Agent Shaw and another SLED agent remained in the parking lot while two other SLED agents followed Carver inside Walmart. (R. p. 242).

In the parking lot, SLED agent Lewis Stoertz pulled Smith over. Agent Shaw then informed Smith that he had two warrants for his arrest for distribution of heroin. No drugs were found on him at that time. Smith was arrested and transported to the SLED Annex.

Inside Walmart, other SLED agents placed Carver in investigative detention. (R. p. 243). Prior to a pat down, Carver admitted to possessing a needle and heroin. (R. p. 243). Carver was taken outside and placed in a law enforcement vehicle. (R. p. 243). Carver then admitted that he purchased heroin from “Mr C” in a white van in the Walmart parking lot. (R. p. 243). Carver also

admitted to purchasing heroin from Mr. C “hundreds of times over the past three years, either a gram or a half gram of heroin each time.” (R. p. 243).

Execution of Search Warrant

Based on the search warrant affidavit, the Magistrate signed the search warrant for Smith’s Riverbend Drive apartment on October 23, 2019. (R. p. 244). The search warrant was executed the same day. (R. p. 235). After the search warrant had been signed, but before it was executed, Agent Shaw learned that a baggie of heroin was found underneath Smith in a SLED interview room. (R. p. 175).

Suppression Hearing

Smith made a pretrial motion to suppress all evidence seized from the execution of the search warrant for his apartment. (R. p. 7). Smith’s counsel argued that the search warrant was improperly issued based on the search warrant affidavit, which contained stale information and lacked specific information that heroin or contraband would be found in Smith’s apartment. (R. pp. 36-38).

Agent Shaw was the only witness that testified at the suppression hearing, (R. pp. 40-51), and the State conceded that she did “not provide any additional oral testimony” when she presented the search warrant affidavit to the magistrate. (R. p. 26). During her testimony, Agent Shaw stated that she did not witness Smith conduct any illegal, suspicious, or drug-related activity at the Riverbend Drive apartment on the day of his arrest. (R. p. 43, lines 13-19).

After reading the search warrant, (R. p. 28), listening to Agent Shaw’s testimony, (R. pp. 40-51), and hearing arguments from Smith’s Counsel and the State, (R. pp. 7-40; R. pp. 50-53), the trial court denied Smith’s motion to suppress, (R. p. 51, lines 10-14).

Trial

At trial, Agent Shaw testified that SLED agents seized baggies containing heroin, among other items, from three different locations in this case: (1) 0.44 grams of heroin from Carver at Walmart (R. pp. 167-168; R. pp. 184-185); (2) 0.45 grams of heroin from underneath Smith's feet in the SLED interview room (R. pp. 180-181; R. p. 185); and (3) 16.53 grams of heroin from Smith's home pursuant to the search warrant (R. pp. 177-180; R. pp. 185-186). The seized items were admitted into evidence at trial. (R. pp. 168-186).

ARGUMENT

The Trial Court erred by denying Smith's motion to suppress evidence seized by SLED pursuant to a search warrant that was not supported by probable cause.

Jerome Smith's conviction for trafficking in heroin was based on evidence seized pursuant to the search warrant for his Riverbend Drive apartment. Without this evidence, the combined quantity of the heroin admitted at trial would have been less than one gram, which is insufficient to convict Smith of trafficking. S.C. Code Ann. § 44-53-370(e)(3) (requiring four grams or more of heroin to find a person guilty of "trafficking in illegal drugs"). Therefore, if this Court determines that the trial court erred in denying Smith's motion to suppress evidence, his trafficking conviction should be reversed.

The Fourth Amendment provides that the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." U.S. Const. amend. IV. The essence of the Fourth Amendment is to protect a person's right to be free from unreasonable government intrusions in his or her own home. Kyllo v. United States, 533 U.S. 27, 31 (2001). The exclusionary rule prohibits the use of evidence obtained through an unlawful search and/or seizure. Wong Sun v. United States, 371 U.S. 471, 484-85 (1963).

A search warrant was required for SLED to search the Riverbend Drive apartment in this case. See State v. Rodriguez, 323 S.C. 484, 490, 476 S.E.2d 161, 165 (Ct. App. 1996) ("Generally, police seizures are per se unreasonable within the meaning of the Fourth Amendment unless such seizures are accomplished pursuant to judicial warrants issued upon probable cause."). Because Smith was arrested outside his apartment, the arrest warrants no longer provided SLED with the authority to enter the apartment. See Payton v. New York, 455 U.S. 573, 603 (1980) ("[A]n arrest warrant . . . implicitly carries with it the limited authority to

enter a dwelling in which the suspect lives *when there is reason to believe the suspect is within.*") (emphasis added). Furthermore, there is no indication in the record that exigent circumstances supported a warrantless search of the apartment.¹ See *id.* at 590 ("In terms that apply equally to seizures of property and [persons], the Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant.").

In South Carolina, a search warrant may be "issued only upon affidavit sworn to before the magistrate." S.C. Code Ann. § 17-13-140. The affidavit must establish probable cause to believe that "there is a fair probability that contraband or evidence of a crime will be found in a particular place." *State v. Kinloch*, 410 S.C. 612, 617, 767 S.E.2d 153, 155 (2014).

In this case, the magistrate issued the search warrant based only on the information provided in Agent Shaw's affidavit. The State conceded that Agent Shaw did not supplement her affidavit with oral testimony. (R. p. 26); See *State v. Weston*, 329 S.C. 287, 290, 494 S.E.2d 801, 802 (1997) ("A search warrant that is insufficient in itself to establish probable cause may be supplemented by sworn oral testimony."). Therefore, at the suppression hearing, the trial court could only consider the information contained in Agent Shaw's affidavit in determining whether the search warrant was supported by probable cause. *State v. Thompson*, 419 S.C. 250, 257, 797 S.E.2d 716, 719 (2017) ("If no supplemental oral testimony is taken, an issuing judge's probable cause determination is limited to the four corners of the search warrant affidavit."); *State v. Dupree*, 354 S.C. 676, 684, 583 S.E.2d 437, 442 (Ct. App. 2003) ("In determining the validity of

¹ At the suppression hearing, Agent Shaw admitted that she did not witness any suspicious behavior at the Riverbend Drive apartment on the morning of October 23, 2019. (R. p. 26).

the warrant, a reviewing court may consider only information brought to the magistrate's attention."").

The trial court erred in finding that the search warrant was supported by probable cause. As discussed below, there are two problems with the information provided in Agent Shaw's affidavit. First, the information from August 2017 was stale. Second, the October 2019 information did not provide a sufficient nexus between the contraband sought in the affidavit and the Riverbend Drive apartment.

Thus, Agent Shaw's affidavit did not provide a substantial basis for the magistrate to conclude there was "a fair probability that contraband or evidence of a crime" would be found at the Riverbend Drive apartment on October 23, 2019—the date the warrant was issued. Kinloch, 410 S.C. at 617, 767 S.E.2d at 155 ("In reviewing a magistrate's probable cause determination, circuit court judges must determine whether the issuing magistrate had a substantial basis upon which to conclude that probable cause existed.") ("A warrant is supported by probable cause if, given the totality of the circumstances set forth in the affidavit, there is a fair probability that contraband or evidence of a crime will be found in a particular place.) (internal citations omitted).

I. The search warrant affidavit contained stale information from August 2017, which did not establish probable cause to believe heroin would be found in Smith’s Riverbend Drive apartment on October 23, 2019—the date the search warrant was issued.

“There is no question that time is a crucial element of probable cause.” United States v. McCall, 740 F.2d 1331, 1335 (4th Cir. 1984). “In order for an affidavit in support of a search warrant to show probable cause, it must state ‘*facts so closely related to the time of the issuance of the warrant as to justify a finding of probable cause at that time.*’” State v. Winborne, 273 S.C. 62, 64, 254 S.E.2d 297, 298 (1979) (emphasis added). “The reason for this rule is that probable cause, with time, dissipates.” Id. Without this temporal analysis, “the conduct of the citizen throughout the entire period of his past life would furnish grounds for continuous and repeated searches of his premises.” Id. “Consequently, evidence seized pursuant to a warrant supported by ‘stale’ probable cause is not admissible in a criminal trial to establish the defendant’s guilt.” McCall, 740 F.2d at 1336.

According to Agent Shaw’s search warrant affidavit, SLED confidential informants performed two controlled purchases of heroin from Smith in August 2017. The first controlled purchase occurred on August 19, 2017, at Smith’s Allen Benedict Court apartment. The second controlled purchase occurred on August 25, 2017, in a vehicle registered to Smith at his Allen Benedict Court apartment. However, SLED inexplicably chose not to get a search warrant for Smith’s Allen Benedict Court apartment. Agent Shaw’s affidavit provides no explanation for SLED’s delay in seeking a search warrant for Smith’s home (e.g. that SLED was actively investigating Smith). In fact, the affidavit does not describe any actions taken by SLED in this case between August 2017 and October 2019.

After a two-year delay, SLED sought a search warrant for Smith’s Riverbend Drive apartment based in part on the events that occurred in August 2017. Although this lapse of time

alone may be controlling, when it is considered in conjunction with the type of criminal activity alleged and property sought in Agent Shaw's affidavit, it becomes clear that the August 2017 information is too stale to establish probable cause to search the Riverbend Drive apartment. State v. Corns, 310 S.C. 546, 550-51, 426 S.E.2d 324, 326 (Ct. App. 1992) ("While the lapse of time involved is an important consideration and may in some cases be controlling . . . [t]here are other factors to be considered, including the nature of the criminal activity involved, and the kind of property for which authority to search is sought.") (quoting United States v. Steeves, 525 F.2d 33 (8th Cir. 1975)).

Most of the items of property described in Agent Shaw's affidavit are items that law-abiding people tend to keep in their homes. The affidavit lists, among other things, the following property: "items relating to domestic and foreign travel"; "bank statements, motor vehicle titles, bills of sale . . . bank checks, safe deposit box keys"; "United States currency, precious metals, jewelry, and financial instruments, including . . . stocks and bonds"; and "[i]ndica of occupancy, residency, and/or ownership of real estate, including, but not limited to utility and telephone bills, titles, correspondence, property tax statements, canceled envelopes, and keys." The fact that these items may have been present in Smith's home at any point between August 2017 and October 2019 does not establish probable cause to search his home. See State v. Dill, 423 S.C. 534, 544-45, 816 S.E.2d 557, 563 (2018) (In holding that a search warrant was invalid, the court noted that many of the items sought in the search warrant were "common household items.")).

Furthermore, the incriminating property described in Agent Shaw's affidavit, heroin, is "a highly incriminating or consumable item of personal property [which] is less likely to remain in one place as long as an item of property which is not consumable or which is innocuous in itself or not particularly incriminating." Corns, 310 S.C. at 551, 426 S.E.2d at 326 (quoting United

States v. Steeves, 525 F.2d 33 (8th Cir. 1975)); see also McCall, 740 F.2d at 1337 (stating that although there was probable cause to believe a gun was still at defendant's home over two years after a robbery, "this would certainly not have been true if it were the kind of property that could have been easily exchanged or sold"). As such, the one-off sale of heroin at Smith's Allen Benedict Court apartment in August 2017 does not establish probable cause to believe heroin would be found in his Riverbend Drive apartment in October 2019. See State v. Winborne, 273 S.C. 62, 65, 254 S.E.2d 297, 298 (1979) ("[W]e think that evidence should be seen by an informant within a reasonable time before the issuance of a warrant. The time should be sufficiently short to justify the conclusion that evidence is likely still at the place where it was seen.").

Finally, the information in Agent Shaw's affidavit regarding the single sale of heroin from Smith's vehicle in August 2017, considered alone, would be insufficient to establish probable cause to search his home. The only information linking that transaction to Smith's Allen Benedict Court apartment is the assertion that the vehicle was registered to him there. The affidavit does not provide any other context for this transaction, such as information showing Smith came directly from his Allen Benedict Court apartment to the transaction. See e.g., State v. Keith, 356 S.C. 219, 225, 588 S.E.2d 145, 148 (Ct. App. 2003) (finding that information regarding investigative surveillance from defendant's home to a lawful traffic stop where marijuana was discovered in defendant's vehicle established a sufficient basis to determine probable cause existed to search defendant's home). However, even when it is considered in the context of the heroin sale at Smith's Allen Benedict Court apartment one week earlier, it merely supports the argument that SLED may have had probable cause to search his Allen Benedict

Court apartment in August 2017. It does not support Agent Shaw's conclusion that heroin would be found at Smith's Riverbend Drive apartment in October 2019.

II. The search warrant affidavit did not establish a timely and direct nexus between the heroin sought in the affidavit and Smith's Riverbend Drive apartment.

"In determining whether a search warrant is supported by probable cause, the crucial element is not whether the target of the search is suspected of a crime, *but whether it is reasonable to believe that the items to be seized will be found in the place to be searched.*" State v. Thompson, 419 S.C. 250, 256, 797 S.E.2d 716, 719 (2017) (quoting Zurcher v. Stanford Daily, 436 U.S. 547, 556 (1978)). The "courts of this state have routinely held that information contained in an affidavit providing a timely and direct nexus between the contraband sought and the location to be searched . . . is sufficient to support a search warrant." Thompson, 419 S.C. 250 at 257, 797 S.E.2d at 719-20.

There is not a timely and direct nexus between the heroin sought in Agent Shaw's affidavit and Smith's Riverbend Drive apartment. In South Carolina, courts have typically held that this nexus exists where the following factors are established by the search warrant affidavit or supplemental oral testimony to the issuing magistrate: (a) law enforcement had a home under surveillance; (b) law enforcement followed a person from that home to another location; and (c) that person was found to be in possession of drugs or law enforcement witnessed a drug transaction at the other location. See State v. Kinloch, 410 S.C. 612, 767 S.E.2d 153 (2014); State v. Gore, 408 S.C. 237, 758 S.E.2d 717 (Ct. App. 2014); State v. Keith, 356 S.C. 219, 588 S.E.2d 145 (Ct. App. 2003); State v. Scott, 303 S.C. 360, 400 S.E.2d 784 (Ct. App. 1991).

Those three factors are not present in this case. Although Agent Shaw's affidavit states that SLED maintained surveillance of Smith as he drove from the Riverbend Drive apartment to

Walmart, there is no indication in her affidavit that the Riverbend Drive apartment was under surveillance, that Smith was found in possession of drugs in the Walmart parking lot, or that SLED witnessed a drug transaction in the Walmart parking lot.

First, Agent Shaw's affidavit did not state that the Riverbend Drive apartment was under surveillance prior to Smith's arrest. Cf. Kinloch, 410 S.C. at 618, 767 S.E.2d at 156 (The search warrant affidavit stated that numerous tips indicated that "drug activity was probably present" at the home and that "drug-related behavior was observed" by law enforcement during subsequent surveillance of the home.); State v. Gore, 408 S.C. at 241-42, 758 S.E.2d at 719-20 (The search warrant affidavit stated that a confidential informant made a recorded and monitored cocaine buy out of the residence, and law enforcement provided supplemental oral testimony to the magistrate that the controlled buy occurred seven months before the affidavit was written as part of "a lengthy investigation."); Keith, 356 S.C. at 225, 588 S.E.2d at 148 (The search warrant affidavit "outlined the investigative surveillance of [the defendant's] home."); Scott, 303 S.C. at 362, 400 S.E.2d at 785 (The search warrant affidavit stated that law enforcement was "in a position of surveillance on the [home].").

Second, Agent Shaw's affidavit does not state that drugs were found on Smith's person or in Smith's vehicle after SLED followed him from his apartment to the Walmart parking lot. Cf. Keith, 356 S.C. at 221-22, 588 S.E.2d at 146 (Officers found a marijuana bud and pipe containing marijuana residue in defendant's vehicle when they performed a traffic stop after defendant left his residence.); Scott, 303 S.C. at 362, 400 S.E.2d at 785-86 (Defendant was found to be in possession of cocaine when he was stopped by law enforcement after leaving his apartment.).

Finally, Agent Shaw's affidavit does not state that SLED agents witnessed a drug transaction take place in the Walmart parking lot. Cf. Kinloch, 410 S.C. at 614-15, 767 S.E.2d at 154 (Law enforcement observed a person walk from the home to a gas station, where the person "handed an unknown black male . . . a clear plastic wrapping [containing heroin] in exchange for money." Law enforcement then observed the person return to the home.); Gore, 408 S.C. at 247, 758 S.E.2d at 722 (Defendant was followed from the home to another location where law enforcement monitored and recorded a cocaine sale.). According to the affidavit, SLED agents witnessed Carver enter Smith's vehicle, the vehicle drive from one side of Walmart to the other, and Carver exit the vehicle. They subsequently discovered heroin on Carver inside a Walmart bathroom.² SLED agents did not see what occurred inside Smith's vehicle.

Because Agent Shaw's affidavit does not state facts that establish a nexus between the heroin sought and the Riverbend Drive apartment, the trial court erred in finding that the search warrant was supported by probable cause.

² Carver was not searched before he entered Smith's vehicle, and there is no information in the affidavit about where he came from or what he was doing before this incident. See State v. Gentile, 373 S.C. 506, 516, 646 S.E.2d 171, 176 (Ct. App. 2007) (The court held that the search warrant for defendant's home was invalid where it was issued, based in part, on information that "officers discovered marijuana in the possession of [a] driver after he left [defendant's home].") The court noted that "[t]he officers . . . had no knowledge of whether the driver had purchased the marijuana from [defendant]"; "[n]either the driver nor his vehicle was searched prior to going to [defendant's home]"; and "without surveillance within [defendant's home], there was no verification that the driver in fact purchased marijuana from [defendant].").

III. The good-faith exception to the exclusionary rule does not apply because it was not objectively reasonable for SLED agents to rely on a search warrant supported only by stale information and information that failed to establish a nexus between the heroin sought and Smith's Riverbend Drive apartment.

The exclusionary rule prohibits the use of evidence obtained through an unlawful search and/or seizure. Wong Sun v. United States, 371 U.S. 471, 484-85 (1963). "The purpose of the exclusionary rule is to deter law enforcement officers from committing Fourth Amendment violations." State v. Moore, 429 S.C. 465, 479, 839 S.E.2d 882, 889 (2020). Although the Supreme Court of the United States has carved out a good-faith exception to the exclusionary rule where officers act "in reasonable reliance on a search warrant," the good-faith exception does not apply "when an affidavit fails to provide a magistrate with a substantial basis for finding probable cause." State v. Johnson, 302 S.C. 243, 248, 395 S.E.2d 167, 170 (1990) (quoting United States v. Leon, 468 U.S. 897 (1984)); State v. Weston, 329 S.C. 287, 293, 494 S.E.2d 801, 804 (1997); see also United States v. Wilhelm, 80 F.3d 116, 123 (4th Cir. 1996).

The good-faith exception does not validate the search of Smith's Riverbend Drive apartment in this case. Agent Shaw's affidavit did "not include sufficient information to allow a magistrate to determine probable cause." Johnson, 302 S.C. at 249, 395 S.E.2d at 170. However, the affidavit does not fail on a technicality. It fails because of SLED's unexplained delay in acting on two-year-old information regarding Smith's prior address. It also fails because without that stale information, Agent Shaw's affidavit merely provides "bare bones" information that does not establish a nexus between the heroin sought in the affidavit and Smith's Riverbend Drive apartment. See Wilhelm, 80 F.3d at

121 (“We find that the good-faith exception to the exclusionary rule should not apply in this case due to the ‘bare bones’ nature of the affidavit”).

Therefore, it was not objectively reasonable for SLED to rely on the magistrate’s probable-cause determination in issuing the search warrant, and the good-faith exception to the exclusionary rule does not apply. See Leon, 468 U.S. at 922-23 (“Nevertheless, the officer’s reliance on the magistrate’s probable-cause determination and on the technical sufficiency of the warrant he issues must be objectively reasonable.”) (internal quotations omitted).

CONCLUSION

For the reasons stated above, this Court should reverse Smith’s conviction for trafficking in heroin and remand this matter for a new trial with instructions that the trial court suppress all evidence seized from the execution of the search warrant for Smith’s apartment.

Respectfully Submitted:



Jason T. Yonge (SC Bar No. 102869)
Benjamin A. Stitely (SC Bar No. 75339)
Williams, Stitely & Brink, PC
200 E. Main St.
Lexington, SC 29072
(803) 359-9000
jyonge@wsblegal.com
bstitely@wsblegal.com
Attorneys for Appellant

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CERTIFICATE OF COUNSEL

The undersigned counsel certifies 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.”



Jason T. Yonge (SC Bar No. 102869)
Williams, Stitely & Brink, PC
200 E. Main St.
Lexington, SC 29072
(803) 359-9000
jyonge@wsblegal.com

Attorney for Appellant

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