STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY

Court of General Sessions
The Honorable J. Derham Cole, Circuit Court Judge

Appellate Case No. 2024-000320

THE STATE,

Respondent,

v.

PHILLIP RONALD MILLER,

Appellant.

FINAL BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

JOSHUA A. EDWARDS
Assistant Attorney General

Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

BARRY BARNETTE
Solicitor, Seventh Judicial Circuit

180 Magnolia St.
Spartanburg, SC 29306
(864) 596-2575

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

STATEMENT OF THE ISSUE ON APPEAL

The right to confrontation is a trial right. In order to show probable cause at a pretrial suppression hearing, the State presented testimony from police officers who observed a drug transaction between Miller and a confidential informant via audio and video surveillance and interviewed the informant afterwards. Was Miller's right to confrontation violated where the State did not call the informant as a witness at the suppression hearing?

STATEMENT OF THE CASE

A Spartanburg County grand jury indicted Appellant Phillip Miller for trafficking heroin. Miller proceeded to jury trial before the Honorable J. Derham Cole, Circuit Court Judge, on February 27–28, 2024. Miller was convicted and sentenced to life imprisonment based on prior convictions. This direct appeal follows.

STATEMENT OF FACTS

Investigator Zachary Brunson conducted a controlled buy of heroin from Appellant Phillip Miller to a confidential informant in West Columbia in March of 2021. R.p.36. Brunson listened to a telephone conversation between the informant and Miller wherein Miller directed the informant to come to his aunt's residence in West Columbia. R.p.38–39. Brunson outfitted the informant with audio and video recording equipment and $1,900 with which to buy drugs. R.p.38. Police searched the informant for drugs beforehand. R.p.37. Police were able to watch and listen to the transaction in real time. R.p.40–42. Officers were also surveilling the house. R.p.50. Brunson described the conversation between Miller and the informant. R.p.41–43. Afterwards, Brunson recovered a powder later identified as heroin and fentanyl from the informant along with $100, as Miller agreed to sell the drugs for less than the original price. R.p.44. Officers observed Miller leave the location in a black Chevy Tahoe driven by a female. R.p.45. Officers ran the tag and discovered the car was registered to a Laura Miller. R.p.46.

Officers believed Miller had a firearm and additional narcotics with him. R.p.47. When asked whether that belief was based on "the confidential source but also your viewing and listening to the device in real time," Bruson responded: "Yes. Mostly from listening. And I did not observe a firearm or narcotics in the bookbag on the video but from the audio talking about the 20 rounds and the firearm, as well as the debriefing after that controlled purchase from the . . . confidential source." R.p.47. On cross-examination during the suppression hearing, Brunson clarified

that the information about additional drugs in the bookbag came from the informant in his debriefing. R.p.51. Brunson was aware Miller was prohibited from possessing a firearm. R.p.45.

Officers followed the vehicle to Spartanburg, where a traffic stop was conducted in coordination with the Spartanburg County Sheriff's Office. R.p.46. Spartanburg County Deputy Cody Russell was on patrol when he received a request from an investigator to pull over the vehicle in which Miller was riding. Spartanburg police knew Miller had an outstanding arrest warrant. R.p.16. Russell also observed the vehicle cross the yellow line, failing to maintain its lane. R.p.18. Russell pulled the vehicle over and arrested Miller. R.p.20–21. At the investigator's instruction, Russell called a canine unit to the scene. R.p.26–27.

Spartanburg County investigator Derek Vassar testified police did not have time to arrange for a canine to be present at the initiation of the stop, but that a canine unit was requested and responded approximately 22 minutes later. R.p.64, 59. The canine alerted to the presence of drugs. R.p.59–60. Vassar wrote in his report that he requested the canine because of his knowledge of Miller's history of drug-related crimes and his behavior during the stop, including nervousness and his unprompted statement that officers were not allowed to search the car. R.p.67. He clarified during trial that he omitted his knowledge about the controlled buy in West Columbia in order to protect the integrity of ongoing investigations. R.p.144. Police searched the car and recovered heroin, marijuana, scales, baggies, and a gun in a bookbag in the trunk. R.p.60, 222–23. While Miller was in the back of a patrol

car, he requested to speak to Investigator Vassar. R.p.62. Miller acknowledged there was heroin in the car. R.p.62. Miller later gave a written statement regarding his supplier. R.p.62.

STANDARD OF REVIEW

When reviewing the denial of motion to suppress based on the Fourth Amendment, the appellate court reviews the trial court's factual findings for any evidentiary support, but the ultimate legal conclusion is a question of law subject to de novo review. State v. Frasier, 437 S.C. 625, 633–34, 879 S.E.2d 762, 766 (2022).

ARGUMENT

Miller had no constitutional right to confront a non-witness confidential informant at the pretrial suppression hearing, and probable cause existed with or without the informant's hearsay statement.

Miller argues this Court should reverse his conviction because he was denied the right to confrontation because the trial court refused to compel the State to call a confidential informant to testify at a pretrial suppression hearing. This argument fails for several reasons. First, the right to confrontation is a trial right which did not attach at this pretrial probable cause hearing. Even if it did, Miller was able to cross-examine every witness at the hearing. The State easily established probable cause even without the informant's testimony and there was no reason to doubt the informant's reliability. Finally, the State did not introduce any of the informant's hearsay statements at trial. Miller has not shown error or prejudice. This Court should affirm.

A. The Confrontation Clause did not attach at this in camera hearing.

Miller argues it would be "counterintuitive to find that statements which would be subject to Confrontation Clause before a jury are not subject to the Confrontation Clause simply because the testimony is heard in a suppression hearing." Brief of Appellant at 13. This argument has already been rejected by the United States Supreme Court.

In McCray v. Illinois, 386 U.S. 300 (1967), the Supreme Court rejected an argument that the right to confrontation was violated where the police refused to reveal the identity of a confidential informant for purposes of a probable cause

hearing. The informant's hearsay statements were introduced at the hearing to establish probable cause. The informant was not called to testify, but officers testified as to his reliability. In response to the argument "that the State violated the Sixth Amendment by not producing the informer to testify," the Court held the argument was "absolutely devoid of merit." Id. at 314. The Court affirmed the validity of the informer's privilege as a matter of evidentiary law, explaining it had never "approached the formulation of a federal evidentiary rule of compulsory disclosure where the issue is the preliminary one of probable cause, and guilt or innocence is not at stake." Id. at 311. The Court refused to extend the Confrontation Clause to require the State to waive the privilege for the purposes of a suppression hearing.

McCray was cited in United States v. Matlock, where the Court rejected a suppression claim based on hearsay admitted at a pretrial hearing. The Court explained, "[t]here is, therefore, much to be said for the proposition that in proceedings where the judge himself is considering the admissibility of evidence, the exclusionary rules, aside from rules of privilege, should not be applicable; and the judge should receive the evidence and give it such weight as his judgment and experience counsel. . . . certainly there should be no automatic rule against the reception of hearsay evidence in such proceedings . . . ." United States v. Matlock, 415 U.S. 164 (1974). Discussing McCray, the Court explained: "In the course of the [McCray] opinion, we specifically rejected the claim that defendant's right to confrontation under the Sixth Amendment and Due Process Clause of the

Fourteenth Amendment had in any way been violated." Matlock, 415 U.S. at 174–75.

The Court has on other occasions explained that the right of confrontation is a trial right intended to secure in-person cross-examination of trial witnesses before the trier of fact. In Barber v. Page, the Court explained:

> The right to confrontation is basically a trial right. It includes both the opportunity to cross-examine and the occasion **for the jury** to weigh the demeanor of the witness. A preliminary hearing is ordinarily a much less searching exploration into the merits of a case than a trial, simply because its function is the more limited one of determining whether probable cause exists to hold the accused for trial.

Barber v. Page, 390 U.S. 719, 725 (1968) (emphasis added). See also Pennsylvania v. Ritchie, 480 U.S. 39, 52 (1987) (explaining "the right to confrontation is a trial right, designed to prevent improper restrictions on the types of questions that defense counsel may ask during cross-examination"); Coy v. Iowa, 487 U.S. 1012, 1016 (1988) (explaining "the Confrontation Clause guarantees the defendant a face-to-face meeting with witnesses appearing **before the trier of fact**") (emphasis added); Mattox v. United States, 156 U.S. 237, 242–43 (1895) (explaining purpose of Confrontation Clause is to compel a witness "to stand **face to face with the jury** in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief") (emphasis added); see also United States v. Raddatz, 447 U.S. 667, 679 (1980) (explaining "the process due at a suppression hearing may be less demanding and elaborate than the protections accorded the defendant at the trial itself").

Numerous state high courts and federal circuit courts have likewise concluded there is no right to confront non-witnesses at suppression hearings, and many have held the right to confrontation does not apply at all in a pretrial setting. See State v. Zamzow, 892 N.W.2d 637, 643 (Wis. 2017) (collecting cases). The Supreme Court of New Mexico explained this is because a "trial focuses on the ultimate issue of an accused's guilt or innocence, whereas in a pretrial hearing the focus is generally on the admissibility of evidence." State v. Rivera, 192 P.3d 1213, 1216 (N.M. 2008). This is the same rationale behind Rule 104(a), SCRE, which provides that the rules of evidence do not apply to preliminary questions of admissibility.

Miller ignores the above authority. Instead, he cites inapposite cases from inferior courts (including a municipal court in Ohio) that do not support his argument. Brief of Appellant at 11, n.5. Miller relies chiefly on Curry v. State, a case from the Texas Court of Appeals at Waco, which stated "the protections of the Confrontation Clause extend to a pretrial suppression hearing" and held Curry had a right to cross-examine a confidential informant about his statements to a defendant during a recorded drug transaction.[1] Curry v. State, 228 S.W.3d 292, 298 (Tex. App. 2007). The Curry court acknowledged that its holding conflicted with that of one of its sister courts. Vanmeter v. State, 165 S.W.3d 68, 74–75 (Tex. App. 2005) (explaining "the constitutional right of confrontation is a trial right, not a

[1] The Curry court nonetheless affirmed because it held the statements were not testimonial.

pretrial right"). The court failed to discuss the above-cited United States Supreme Court authority.

Curry is wrong, and the cases it relies on (the same ones cited in the Brief of Appellant at 11, n.5) do not support its holding. United States v. Clark addressed a defendant's right to presence at a suppression hearing, not the right to cross-examine a non-witness confidential informant. The opinion noted the State interest in keeping secret government airplane "hijacker profile," but explained no secrets were revealed by the testimony at the suppression hearing, which focused on straightforward facts relevant to Clark's Fourth Amendment claim, and Clark was unable to assist counsel because he was excluded from the hearing. United States v. Clark, 475 F.2d 240, 246 (2d Cir. 1973). United States v. Lopez, 328 F. Supp. 1077 (E.D.N.Y. 1971), addressed the same issue, but explicitly distinguishes it from the confidential informant line of cases, citing McCray. Id. at 1090 (explaining the "cases draw a distinction between informer evidence respecting material facts in issue and that concerning a preliminary question of the admissibility of relevant evidence"). Sigerson also concerns the "hijacker profile" where the defendant and his attorney were excluded from the suppression hearing. It does not establish any right to confront non-witness informants at pretrial suppression hearings. State v. Sigerson, 282 So. 2d 649, 651 (Fla. Dist. Ct. App. 1973). United States v. Mejia, 69 F.3d 309 (9th Cir. 1995), concerned the denial of a continuance and does not establish a right to confrontation at suppression hearings.

Even assuming the Confrontation Clause does apply to some degree at suppression hearings, the right to confrontation was not violated in this case. Miller was able to fully cross-examine the witnesses who testified at the hearing. Cf. United States v. Stewart, 93 F.3d 189, 193 (5th Cir. 1996) (examining unreasonable restriction of cross-examination of State witnesses during suppression hearing, but finding the error harmless). Thus he was not denied the opportunity to cross-examination; rather, he was simply not allowed to compel the State to call a privileged witness whose testimony was not necessary to establish probable cause. This Court should affirm.

B. There was probable cause to search the vehicle in which Miller was a passenger.

Miller's arrest and the search of the car in which he was a passenger did not violate the Fourth Amendment. The police had reasonable suspicion and probable cause to stop the vehicle for a traffic violation, suspected drug and gun possession, and Miller's outstanding arrest warrant. Regarding the additional search of the car, the testimony at the hearing supported a probable cause finding, with or without the confidential informant's statement to police that Miller had more drugs in his bookbag.

With the informer's statement, police had direct evidence from a proven source that Miller had drugs in his possession. The informant had been proven reliable and his information was corroborated by the police's real-time audio and video monitoring of the drug transaction, and by the drugs recovered from the informant. See Illinois v. Gates, 462 U.S. 213, 241 (1983) ("Our decisions applying

the totality-of-the-circumstances analysis outlined above have consistently recognized the value of corroboration of details of an informant's tip by independent police work."). Miller fails to even argue that the informant's statements were not reliable. His reliability was borne out by the officers' recovery of heroin from his possession immediately after the drug deal, and by their corroboration of the statement via real-time surveillance of the obvious drug transaction.

Even without the informer's statement about the additional drugs, the police had probable cause to arrest Miller for a gun crime. Police knew Miller was prohibited from possessing a firearm and listened first-hand to his discussion about the gun during the course of the drug transaction. R.p.47. Contrary to Miller's assertions, police did not rely exclusively on the informant's statements; they reasonably believed Miller was armed based on their direct observation of his statements through audio and video surveillance. R.p.47. Also contrary to Miller's assertions, the stop was not attenuated from the drug deal; police surveilled Miller leaving the location of the drug deal in a black Tahoe, ran the license plates, and tracked the Tahoe from West Columbia to Spartanburg. R.p.45–46. Further, police could have reasonably concluded Miller had additional drugs besides those he sold to the informant based on the totality of the circumstances. The trial court correctly found police conducted a valid traffic stop for a traffic violation and to arrest Miller for the gun crime and for an outstanding arrest warrant. R.p.108–11.

The trial court correctly ruled police had cause to extend the stop to for 22 minutes while the canine arrived, based on the above facts and the $2,080.00 cash

police recovered during the search incident to arrest of Miller's person. R.p.110. See State v. Morris, 411 S.C. 571, 578, 769 S.E.2d 854, 858 (2015) (explaining police may extend a routine traffic stop based on reasonable suspicion). Police searched the car only after the canine alerted to the presence of drugs, but they would have been justified in searching even without the canine alert based on the above facts. There was "fair probability" that evidence of multiple crimes would be recovered in the search. Gates, 462 U.S. at 238. See also Morris at 580, 769 S.E.2d at 859 ("Probable cause to conduct a search exists where "the known facts and circumstances are sufficient to warrant a man of reasonable prudence in the belief that contraband or evidence of a crime will be found." (citing Ornelas v. United States, 517 U.S. 690, 695 (1996))). Further, Miller was already under arrest while the drug dog was en route. He suffered no additional "restrictions on [his] freedom of movement" during those 22 minutes. See Pennsylvania v. Mimms, 434 U.S. 106, 109 (1977).

At trial, the State did not introduce any hearsay statements by the informant. Rather, it relied on the officer's direct observations of the drug transaction via the real-time audio and video surveillance. R.p.117–19. Therefore, there was nothing for Miller to object to and no confrontation clause violation. Unable to show prejudice, Miller is left to argue he was denied the right to confront a non-witness at a pretrial hearing where probable cause was easily established. Miller has not shown error or prejudice. This Court should affirm.

CONCLUSION

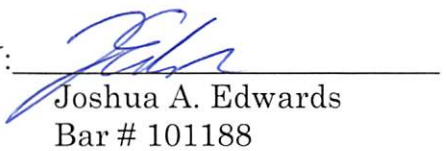
For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

ALAN WILSON
Attorney General

JOSHUA A. EDWARDS
Assistant Attorney General

BARRY BARNETTE
Solicitor, Seventh Judicial Circuit

BY: 
Joshua A. Edwards
Bar # 101188

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

May 2, 2025

RECEIVED
May 05 2025
SC Court of Appeals

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY

Court of General Sessions
The Honorable J. Derham Cole, Circuit Court Judge

Appellate Case No. 2024-000320

THE STATE, Respondent,

v.

PHILLIP RONALD MILLER, Appellant.

PROOF OF SERVICE

I, Susan Spencer, certify that I have served the within Final Brief of Respondent on Jessica Saxon, Esquire, counsel of record for the Appellant, by electronic mail to the address listed for counsel in AIS.

I further certify that all parties required by Rule to be served have been served.

This 2nd day of May, 2025.

Susan Spencer

Susan Spencer
Legal Assistant

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

Susan Spencer

From: Susan Spencer
Sent: Friday, May 2, 2025 9:34 AM
To: Saxon, Jessica
Cc: Josh Edwards; Leverett, Scott
Subject: The State v. Phillip Ronald Miller (2024-000320)
Attachments: MILLER Phillip - Final Brief of Respondent.pdf

Good Morning Ms. Saxon,

Attached please find the Final Brief of Respondent in The State v. Phillip Ronald Miller (2024-000320). This brief will be filed today with the Court of Appeals via the AIS OneDrive system. If you will, please confirm receipt.

Thank you.

SUSAN SPENCER, Legal Assistant
South Carolina Attorney General's Office
Criminal Appeals | Office 803-734-3219 | susanspencer@scag.gov
P.O. Box 11549 | Columbia, SC 29211
scag.gov