ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Dorchester County

Diane Schafer Goodstein, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

DON-SURVI CHISOLM,

APPELLANT

Appellate Case No. 2011-200186

INITIAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE

Appellant was indicted by the Dorchester County Grand Jury for the offense of murder. R. *. His case was called to trial on September 13, 2011 before the Honorable Diane S. Goodstein, and a jury. Appellant Don-Survi Chisolm represented himself. John Loy was stand-by counsel. Russell Hilton and Matt Austin were the assistant solicitors. Tr. 1.

On September 19, 2011, the jury found appellant guilty. Tr. 794, ll. 10-14. Judge Goodstein sentenced appellant to life imprisonment. Tr. 804, ll. 4-6.

This appeal follows.

ARGUMENT

1.

The court erred by ruling evidence of appellant's prior drug dealing was admissible since it was unduly prejudicial pursuant to Rule 403, SCRE, and the judge erred by ruling it was admissible to prove motive under Rule 404(b), SCRE.

Relevant Facts

Shaquanda White testified that she rode as a front passenger in appellant's gray Dodge Durango approximately one week before September 13, 2007, the date of the murder. Tr. 239, ll. 14-22. She claimed that at that time the front passenger seat was in "normal condition," did not have any major holes nor did it need to be replaced. Shaquanda further testified that she remembered seeing the front passenger seatbelt and that it was "fine." Tr. 239, l. 23 – 240, 1. 17.

Appellant's co-defendant, David White, testified that after the murder, the front passenger seat of appellant's Dodge Durango had "a big spot of blood on it." Tr. 286, l. 6 – 287, l. 10. He claimed that appellant told him several hours after the murder that he was trying to find a new front passenger seat for the Durango. Appellant allegedly showed White where he had cut out a big hole in the passenger seat where the blood spot used to be located. White explained that appellant had put a black and gray seat cover on the seat to hide the hole. Tr. 288, l. 3 – 289, l. 25. White noticed that the front passenger seatbelt was missing and that it had been cut off. Tr. 290, ll. 6-11.

Based on this testimony, the state wished to present evidence that appellant replaced the front passenger seat of his Dodge Durango within days of the murder. Specifically, the state sought to present the testimony of Thomas Simonelli regarding an agreement between

Simonelli and appellant in which Simonelli would purchase a new car seat from LKQ Automotive on a credit card if appellant would pay Simonelli twice the amount in cocaine. The state also planned to have Simonelli testify that he knew appellant because appellant was Simonelli's "cocaine supplier." Tr. 411, ll. 2-24.

The state argued Simonelli's testimony was admissible under Rule 404(b) to show motive. The state noted that Tamekka Williams previously testified that the decedent had started selling drugs about a month prior to the murder. The solicitor argued, "I need to establish at this point . . . [appellant] also sold drugs in that area to show motive as to why he would want to take out the victim . . ." Tr. 413, l. 23 – 414, l. 10; See Tr. 227, l. 20 – 228, l. 8. The solicitor stated, "It's the state's position that that would be quite a good reason for Mr. Chisolm to want to take out a fellow drug dealer that's cutting into his territory." Id.

The state also argued that the testimony was more probative than prejudicial because appellant told law enforcement that he replaced the seat because it had cigarette burns on it and because it is unusual that a person who wants to replace a car seat would do so when he could not afford to do it with cash and was forced to make a third-party purchase involving cocaine the day after a murder. Tr. 413, ll. 3-22; Tr. 415, l. 10 – 416, l. 13.

Appellant objected to the presentation of Simonelli's testimony regarding allegations that he sold Simonelli drugs and that there was an agreement to trade cocaine for the purchase of a car seat. Appellant also objected to the state's theory of motive. He argued, "That is pure speculation and is highly prejudicial. It's remote in time, it's not res gestae. It's not subject of conviction, it's purely unrelated and unsubstantiated conjecture." Tr. 414, ll. 11-14. Appellant noted that Tamekka Williams, who previously testified that the decedent sold drugs, never mentioned that appellant and the decedent had a conflict, nor was there

any previous testimony indicating appellant sold drugs. Instead, all the state had was testimony from Simonelli that a trade was going to take place, but never did because the credit card was declined. Tr. 414, ll. 15-23; See Tr. 227, l. 20 – 228, l. 8. Appellant also stated, "I just think it's highly prejudicial towards me. I've never been arrested for any drug charges. There's no evidence of ill will between me and [the decedent]. Other than this accusation there's nothing historically to show any problems between us. No one has testified that there was a war between us in drug competition. Nothing of that nature, Your Honor. It's just pure speculation . . ." Tr. 417, ll. 17-24.

The court held Simonelli's testimony was admissible. The court stated that the testimony regarding the purchase of the seat through payment by cocaine was relevant to show appellant replaced the seat in his vehicle and to show motive under SCRE 404(b). Additionally, the court held "the probative value far exceeds the prejudicial effect" to appellant because the testimony regarding cocaine is not similar to the alleged offense. Specifically, the testimony does not involve an act of physical violence which would be too similar to the allegations in the case. Tr. 417, l. 25 – 419, l. 20.

Thomas Simonelli ultimately testified that he "used to have a drug problem" and that appellant sold him drugs. Tr. 446, ll. 21-24. Appellant subsequently objected based on the same grounds as raised before and the court overruled his objection. Tr. 447, ll. 1-4. Simonelli also testified that on September 14, 2007, appellant called him in reference to a car seat. Appellant allegedly asked Simonelli if he would buy a seat from LKQ, a junk yard, on a credit card in exchange for cocaine. The credit card was ultimately declined and thus the purchase never took place. Tr. 447, l. 6 – 449, l. 4.

The state discussed its theory of appellant's motive for the murder during its closing argument. The solicitor suggested that appellant killed the decedent because the decedent started selling drugs in the area about a month before his death, and his actions were interfering with appellant's own drug dealing business. Tr. 769, l. 11 – 770, l. 1.

Discussion

The circuit court erred in admitting testimony regarding appellant's alleged prior drug dealing and an alleged trade involving the purchase of a car seat in exchange for cocaine since it was remote in time, irrelevant to the murder, failed to establish any logical motive based on the evidence presented, and its probative value was substantially outweighed by unfair prejudice to appellant.

"Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity. It may, however, be admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent." SCRE Rule 404(b); See State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923). To be admissible, alleged prior bad acts that are not the subject of conviction must be proved by clear and convincing evidence. State v. Cutro, 332 S.C. 100, 103, 504 S.E.2d 324, 325 (1998); State v. Smith, 300 S.C. 216, 218-219, 387 S.E.2d 245, 247 (1989). Additionally, the record must support a logical relevance between the prior bad act and the crime for which the defendant is accused. State v. Brooks, 341 S.C. 57, 61, 533 S.E.2d 325, 327 (2000).

"Further, even though the evidence falls within a Lyle exception, it must be excluded if its probative value is substantially outweighed by the danger of unfair prejudice to the defendant." SCRE Rule 403; See State v. Garner, 304 S.C. 220, 221-222,

403 S.E.2d 631, 632 (1991). "The determination of the prejudicial effect of prior bad act evidence must be based on the entire record and the result will generally turn on the facts of each case." Brooks, 341 S.C. at 62, 533 S.E.2d at 328.

Simonelli's testimony that appellant previously sold him drugs lacked any logical relevance to the murder for which appellant was accused. See State v. Brooks, 341 S.C. at 61, 533 S.E.2d at 327. The connection was simply not there. Besides Simonelli's testimony that appellant sold him drugs, the only other evidence produced at trial that contributed to the state's farfetched alleged motive was the testimony of Tamekka Williams that the decedent began selling drugs about a month before his death. See Tr. 227, l. 20 – 228, l. 8; See also Tr. 446, l. 21 – 449, l. 4. As appellant argued at trial, "it's purely unrelated and unsubstantiated conjecture." Tr. 414, ll. 11-14. There was no evidence of a conflict between appellant and the decedent over alleged drug dealing nor was there any evidence of a competition between the two. White, the only witness to the alleged murder, testified that there was no arguing between appellant and the decedent and that he did not know why appellant allegedly shot the decedent. Tr. 292, ll. 3-5.

There was nothing in the record to support the inference that the decedent and appellant were involved in competing drug dealing businesses. Therefore, Simonelli's testimony should not have been admitted under Rule 404(b) to support the state's farfetched theory of motive.

Not only was there no logical relevance between appellant's alleged prior drug dealing and the murder for which appellant was tried, but any probative value of the testimony regarding appellant's alleged prior drug dealing was substantially outweighed by the danger of unfair prejudice to appellant. Appellant was prejudiced because such

testimony was destructive to his character and hence his credibility. While appellant did not testify at trial, he made various statements to law enforcement that were presented to the jury, such as he purchased a new front passenger seat for his Durango because of burn holes from cigarettes and that the seatbelt was missing when he had purchased the vehicle from his brother and sister. See Tr. 467, l. 19 – 468, l. 4. Thus, appellant's credibility was an important issue in the case. The trial court's error in admitting evidence of appellant's prior drug dealing cannot be found harmless due to the overwhelming prejudice to appellant.

In State v. Coleman, 301 S.C. 57, 389 S.E.2d 659 (1990), the South Carolina Supreme Court held prejudice to Coleman from the admission of evidence that he was a social user of cocaine outweighed any probative value to show Coleman's motive or state of mind at the time of the murder. Despite evidence Coleman was "wired" on the morning of the murder, the court concluded there was no evidence that Coleman's condition was the result of cocaine use nor was there any evidence in the record to support the inference that the victim and Coleman were involved in a drug transaction. Instead, the court held the only function of this evidence was to demonstrate Coleman's bad character and thus it granted him a new trial. Id. at 60, 389 S.E.2d at 660.

In State v. Bolden, 303 S.C. 41, 398 S.E.2d 494 (1990), the South Carolina Supreme Court held evidence of Bolden's alleged crack cocaine use in a hotel shortly before the hotel was robbed was prejudicial error when its only function was to demonstrate the defendant's bad character. The court stated "there is nothing in the record to indicate a logical relevance between use of crack cocaine during the night before the robbery and the robbery which occurred at 6:10 am the following day." Id. at

43, 398 S.E.2d at 494-495. The court further held that even if the testimony was relevant, its probative value was clearly outweighed by its unfair prejudice and thus remanded Bolden's case for a new trial. Id. at 43-44, 398 S.E.2d at 495.

In State v. Smith, 309 S.C. 442, 424 S.E.2d 496 (1992), the South Carolina Supreme Court held evidence of Smith's prior drug use, unrelated to the murder and armed robbery, should have been excluded. Despite considerable evidence of cocaine use during the actual murder and armed robbery, the court held Smith's *prior* cocaine use was highly prejudicial and "so destructive to [Smith's] character, hence her credibility, that it cannot be held harmless error or cumulative." The Supreme Court ultimately overturned Smith's convictions and death sentence and remanded the case for a new trial.

The facts of appellant's case are similar to the facts of the above cited cases. Evidence of appellant's alleged *prior* drug dealing was highly prejudicial, failed to establish any logical motive based on the evidence presented, and was extremely destructive to appellant's character and credibility. This Court should thus find harmful error and remand the case for a new trial.

2.

The court erred by allowing a weapon into evidence since there was not a sufficient nexus to prove the weapon was involved in the murder, and it was therefore highly prejudicial.

Relevant Facts

David White, appellant's co-defendant, testified that he saw the gun appellant allegedly used to shoot the decedent. White testified, "It was a twenty-two, a twenty-two long. I know what a twenty-two long look like. It was a twenty-two long, long on the muzzle." Tr. 275, ll. 23-25. White provided no further details regarding the appearance or characteristics of the weapon. When presented with a gun identified as State's Exhibit No. 14, White stated, "That *looks like* the gun [appellant] shot [the decedent] with." Tr. 276, ll. 17-18.

Before appellant drove White home on the night of the murder, White testified appellant stopped at Bacon Bridge Road and "tossed the gun out over the bridge." Tr. 281, ll. 18-23; Tr. 285, ll. 1-9. White explained that the area where the alleged murder weapon was disposed of was a local fishing area where he had fished before. White admitted that it's the closest fishing hole to his home. Tr. 343, ll. 1-7; Tr. 344, ll. 5-12.

White confessed under cross-examination that after leading law enforcement to "the alleged but never proven murder weapon" his charge was reduced and he was immediately given a lower bond. Tr. 324, ll. 13-20.

Allison Greer of the Dorchester County Sheriff's Office testified that the sheriff's office learned of the location of the alleged murder weapon on November 16, 2007 when David White came forward. Tr. 468, ll. 16-21. Greer was a member of the "dive team" and was "requested to dive the area on Bacon's Bridge Road where the Ashley River crosses

over Bacon's Bridge." Tr. 468, l. 22 – 469, l. 7. On the first day of the search, the dive team recovered a long gun that they determined had no connection to this case. Two days later, however, the dive team located and recovered a twenty-two caliber Browning Buck Mark semi-automatic pistol. Tr. 469, l. 25 – 470, l. 4. When presented with a firearm identified as State's Exhibit No. 14, Greer testified, "That it *appears to be* the same weapon that we located." Tr. 472, ll. 14-18.

The state subsequently offered State's Exhibit No. 14 into evidence, but appellant objected on grounds of relevance, lack of foundation, and improper chain of custody. Tr. 472, l. 22 – 473, l. 4; Tr. 475, ll. 1-6. In response, the state argued that the gun was tied to the crime through the testimony of the co-defendant and that it was found in the water at the location where the co-defendant said the gun was located. The state also noted that Greer testified that the gun appeared to be the gun the dive team pulled out of the water. The state concluded that the gun was relevant and that the state laid proper foundation for the gun to be admitted into evidence. The state also argued that the gun was a non-fungible item and thus, under current case law, no chain of custody is required "as long as the witness says this is the gun that is in the same appearance and condition it was the date that it was recovered." Tr. 474, ll. 20-25.

Appellant argued that David White was "high on cocaine, freaked out, he was in a dark car," thus implying White was not reliable in his identification of the alleged murder weapon and thus that the gun was not relevant to the case. Appellant also pointed out that law enforcement found another gun submerged in water in the same area. Tr. 475, ll. 8-10. As far as chain of custody, appellant argued law enforcement did not follow "proper procedure" and noted they failed to record the weapon's serial number or identify a marked,

signed evidence bag indicating who had contact with and possession of the gun. Tr. 475, ll. 1-6.

The court ruled it needed more foundation and sustained appellant's objection. Tr. 475, l. 13 – 476, l. 2.

Greer then testified that she was present when the firearm was recovered from the river and placed in a cooler along with some of the water from the river. Greer explained that a serial number from the weapon could not be obtained at that time because the weapon could not be removed from the water. If removed from the water, Greer stated, the firearm would begin to oxidize and rust and interfere with SLED's examination. Greer concluded that the gun removed from the water and firearm identified as State's Exhibit No. 14 both had gold triggers and the handle grips appeared to be the same shape. Tr. 476, l. 23 – 478, l. 1. Greer also testified that the gun recovered from the water did not have a magazine and that the weapon identified as State's Exhibit No. 14 also did not have a magazine. Tr. 479, ll. 19-25.

The weapon was ultimately admitted into evidence during the testimony of Detective Zensen of the Dorchester County Sheriff's Office. Appellant renewed his objection at the proper time. Tr. 514, ll. 18-23. Zensen testified that she took possession of the weapon immediately after it was recovered from the water and placed in a Dorchester County cooler. Detective Greer handed Zensen the cooler and then Zensen transported the gun directly to SLED. Tr. 512, l. 10 – 513, l. 25. Zensen identified State's Exhibit No. 14 as the gun recovered from the river. Zensen explained that the weapon had a "very distinctive" green neon sight and a "very distinctive" gold trigger. Tr. 511, l. 25 – 512, l. 9; Tr. 513, ll. 23-25.

Ira Parnell, qualified as an expert in firearms and ballistics without objection, testified that he examined State's Exhibit No. 14, the alleged murder weapon recovered from the Bacon's Bridge area, and State's Exhibit No. 18, the bullet recovered from the decedent's body. Tr. 701, ll. 9-17. Parnell stated that the bullet was "badly damaged" and, as a result, he was unable to determine whether the bullet was or was not fired from the firearm labeled as State's Exhibit No. 14. Tr. 702, l. 21 – 703, l. 9. However, Parnell testified that State's Exhibit No. 14 was "a twenty-two caliber firearm specifically made to fire twenty-two long caliber rifle ammunition" and that the bullet recovered from the decedent's body had "all the physical characteristics and the weight consistent with being a twenty-two long rifle caliber bullet." Tr. 703, ll. 10-17. Parnell conceded under cross-examination that there are hundreds of twenty-two caliber firearms and that the bullet recovered from the decedent's body could have been fired from any one of them. Tr. 705, ll. 7-21.

Discussion

The circuit court erred in admitting the alleged murder weapon into evidence because there was insufficient evidence connecting the recovered weapon to the murder or to appellant and thus such evidence was not relevant to the case. Admitting the weapon was also unduly prejudicial to appellant.

"Evidence which is not relevant is not 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. Additionally, even relevant evidence should be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice." Rule 403, SCRE. "Unfair prejudice does not mean the damage to a defendant's

case that results from the legitimate probative force of evidence; rather it refers to evidence which tends to suggest decision on an improper basis." State v. Elders, 386 S.C. 474, 486, 688, S.E.2d 857, 863 (Ct. App. 2010) (quoting State v. Gilchrist, 329 S.C. 621. 630, 496 S.E.2d 424, 429 (Ct. App. 1998)).

David White, the ***only*** witness to the alleged murder, testified that the gun appellant allegedly used to shoot the decedent was a "twenty-two long." Tr. 275, ll. 23-25. White provided no further details. White did not testify about the "very distinctive" neon green sight nor did he mention the "very distinctive" gold trigger. See Tr. 512, ll. 7-9. As appellant noted at trial, White was high on cocaine and "freaked out" on the night of the alleged murder. See Tr. 475, ll. 8-10. White testified that he did not see any guns before the alleged shooting and that after the alleged shooting he "was in shock" and his "mind went blank." Tr. 272, ll. 14-17; Tr. 274, l. 11 – 275, l. 20. Additionally, the incident allegedly took place in the early morning hours when it was dark outside. See Tr. 273, ll. 14-20. The lack of description of the alleged murder weapon provided by White coupled with the circumstances surrounding the incident including the fact that it was dark and that White was high on cocaine and "freaked out" indicate that it was highly unlikely White could reliably identify the alleged weapon.

The only other information White provided to law enforcement was that appellant allegedly stopped at Bacon Bridge Road on the night of the murder and "tossed the gun out over the bridge." Tr. 281, ll. 18-23; Tr. 285, ll. 1-9. Even if White's testimony that appellant threw the gun over Bacon Bridge is to be believed, there is no reliable evidence that the weapon recovered by law enforcement and presented at trial as the alleged murder weapon was the actual weapon used to inflict the injury upon the decedent.

Parnell, the firearms and tool mark expert, was unable to determine whether the bullet recovered from the decedent's body was or was not fired from the weapon entered into evidence as the murder weapon because the bullet was so badly damaged. Tr. 702, l. 21 – 703, l. 9. All Parnell could conclude was that the bullet had "all the physical characteristics and the weight consistent with being a twenty-two long rifle caliber bullet." Tr. 703, ll. 10-17. Parnell conceded that the bullet could have been fired from any of hundreds of different types of twenty-two caliber firearms. Tr. 705, ll. 7-21.

Additionally, there was no testimony that appellant owned a similar gun or had been seen with a gun prior to the alleged murder. Tamekka Williams testified that she remembers telling detectives that she had never seen appellant with a gun. Tr. 223, ll. 18-20. Shaquanda White also testified that she told detectives that she had never seen appellant with a weapon. Tr. 251, ll. 9-11. There was no evidence that appellant owned the gun recovered by law enforcement in the Ashley River or that he had ever previously had the gun in his possession. In short, there is nothing tying appellant to that weapon besides David White's testimony that it "looks like" the gun appellant used to allegedly murder the decedent. See Tr. 276, ll. 17-18.

There is no reliable evidence connecting the twenty-two caliber Browning Buck Mark semi-automatic pistol to the murder of Craig Michael Canady or to appellant. Weapons with no connection to the crime are not admissible. See State v. Elders, 386 S.C. 474, 688 S.E.2d 857 (Ct. App. 2010). Therefore, the circuit court erred in finding the firearm relevant and admissible. Furthermore, because there was an insufficient nexus connecting the weapon to the crime, its admission was unduly prejudicial to appellant as it led the jury to believe that White's testimony was credible because law enforcement

discovered the alleged murder weapon where White said it would be located. Since White was the sole witness to the alleged murder, his credibility was crucial to the state's case. This Court should thus find harmful error and remand the case for a new trial.

3.

The court erred in failing to suppress the fruits of evidence derived from a search warrant issued on September 27, 2007 for appellant's 2007 Dodge Durango since the search warrant was based on defective information.

Relevant Facts

Appellant moved prior to the start of trial to suppress all evidence seized as a result of a search warrant issued on September 27, 2007 for his 2007 Dodge Durango on grounds that the warrant was issued in violation of S.C. Code Section 17-13-140 and the Fourth Amendment. Tr. 76, ll. 11-16. Appellant explained that law enforcement had executed a valid search warrant on his vehicle on September 17, 2007 and found no items of evidentiary value. Law enforcement subsequently obtained a second search warrant for his vehicle on September 27, 2007 citing the same grounds for probable cause along with adding new information to the affidavit that was allegedly false. Tr. 76, l. 17 – 77, l. 21. Appellant explained that the new information that was false was the sentence, "Officers obtained several verbal and written statements that Donsurvi Chisolm purchased a passenger side front seat for a Dodge Durango on September 14, 2007." Tr. 81, l. 3 – 82, l. 19. Appellant alleged that "it was never confirmed that a purchase took place on September 14, 2007." Tr. 82, ll. 4-5.

Appellant argued that the affiant, Detective Mike Giglio of the Dorchester County Sheriff's Office, "willfully and knowingly with reckless disregard for the truth submitted false information on an affidavit for a warrant, and the warrant should therefore be deemed invalid, and its fruits excluded from use in court under the exclusionary rule under the U.S. Constitution." Tr. 80, ll. 4-9.

Detective Giglio testified that, through verbal and written statements from various employees at LKQ Auto Parts and a parts invoice, the Sheriff's Office learned that a customer identified as appellant attempted to purchase a gray "right front seat" pulled from a 2006 Dodge Durango on September 14, 2007. Tr. 86, l. 19 – 87, l. 1; Tr. 88, l. 7 – 89, l. 4. One of the written statements obtained stated, "His dad called in with credit card to pay for seat. Credit card declined. So customer came back the next day and paid cash." Tr. 94, ll. 6-10. Detective Giglio testified that the business, however, could not produce a final sales receipt and thus it was unclear whether the front passenger seat was purchased by appellant legally with cash on September 15, 2007 or whether it was stolen on that day. Tr. 95, l. 16 – 98, l. 24; Tr. 107, ll. 1-17; Tr. 109, l. 17 – 110, l. 11. Regardless, it was undisputed that a seat was not purchased on September 14, 2007. Tr. 94, ll. 6-16.

Detective Giglio testified that he relied on this information when he obtained the second search warrant for appellant's Dodge Durango. Tr. 107, l. 22 -108, l. 12. Giglio further testified that the statement in the affidavit in support of the second search warrant that stated the seat was purchased on September 14, 2007 was a "clerical error" and that it should have stated September 15, 2007. Tr. 108, l. 17 – 109, l. 4. Giglio claimed that he did not know he made a mistake regarding the date until appellant pointed it out to him. Tr. 109, ll. 5-10.

After Detective Giglio testified, appellant cited State v. Sachs, 264 S.C. 541, 216 S.E.2d 501 (1975), and argued the officer "provided false information to a magistrate with absolutely no intention of showing good faith effort to correct it. This information was sworn to and taken by the magistrate as true. I'm sure if [the magistrate] knew it was a lie

the warrant would never have been issued, and since we know as much now, I ask for this warrant to be suppressed." Tr. 111, l. 1 – 112, l. 7.

The court found that the affidavit was not given in bad faith or recklessly and that it was supported by probable cause. The court therefore denied appellant's motion to suppress. Tr. 112, l. 14 – 113, l. 15.

Discussion

The Fourth Amendment to the United States Constitution, made applicable to the States by way of the Fourteenth Amendment, protects people from unreasonable searches and seizures and provides that no warrants shall be issued except 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. Additionally, under S.C. Code Section 17-13-140, a warrant should be issued "only upon affidavit sworn to before the magistrate . . . establishing the grounds for the warrant."

"The Fourth Amendment itself provides no remedy for a violation of the warrant requirement." State v. Brown, 401 S.C. 82, 88, 736 S.E.2d 263, 266 (2012) (internal citations omitted). "However, the United States Supreme Court has fashioned a judicially-created remedy, the exclusionary rule, which is a deterrent sanction by which the prosecution is barred from introducing evidence obtained in violation of the Fourth Amendment." Id.

Under South Carolina case law, the proper test for dealing with inaccuracies in an affidavit in support of a search warrant is as follows: "Did the officer . . . intentionally, recklessly, or in bad faith recite facts he knew or should have known to be erroneous,

without correcting the error by additional affidavit or affirmation, to obtain the issuance of a warrant?" Sachs, 264 S.C. at 556, 216 S.E.2d at 509.

Additionally, in State v. Missouri, 337 S.C. 548, 556, 524 S.E.2d 394, 398 (1999), the South Carolina Supreme Court invalidated a search warrant where it found "the combination of the police officer's deliberate falsehood and his omission of critical facts pollute the affidavit to the extent that a magistrate could not have found that probable cause existed to issue the search warrant."

Appellant established during the suppression hearing that Detective Giglio's statement in the affidavit in support of the second search warrant that "Donsurvi Chisolm purchased a passenger side front seat for a Dodge Durango on September 14, 2007" was false. The evidence produced at the suppression hearing indicated that the Dorchester County Sheriff's Office learned from employees at LKQ Auto Parts that a passenger seat was pulled from a 2006 Dodge Durango for a customer identified as appellant on September 14, 2007. However, there was no evidence that the seat was actually purchased on that date. Instead, there was ***questionable*** evidence regarding whether the seat was purchased by appellant on the following day, September 15, 2007. The Sheriff's Office had no evidence to confirm appellant or anyone else actually purchased a front passenger seat on September 15, 2007.

It is likely Detective Giglio either intentionally or recklessly made the statement that appellant purchased a new front passenger seat on September 14, 2007 when he knew or should have known through investigation that the information was false. Because without the false statement there would be no new additional probable cause to support a second search warrant, the evidence seized as a result of the warrant should have been suppressed

under the exclusionary rule. Because the trial court erred by denying appellant's motion to suppress, the case should be remanded and appellant granted a new trial.

4.

The court erred by refusing to allow the defense to question Detective Zensen about DNA testing performed on a seized firearm, specifically as it pertained to Craig Michael Canady, since the defense had the right to show that the detective's answers were inconsistent in this regard and because the evidence was relevant to the thoroughness and accuracy of the investigation.

Relevant Facts

Detective Zensen of the Dorchester County Sheriff's Office testified extensively regarding her involvement in the investigation of the death of Craig Michael Canady. She was the crime scene technician who processed the scene where the body was discovered on Clubhouse Road. Tr. 489, l. 17 – 490, l. 11. She also assisted in the execution of a search warrant on appellant's Dodge Durango and transported the alleged murder weapon to SLED after it was recovered from the water. Tr. 497, ll. 4-17; Tr. 511, l. 25 – 513, l. 25.

Throughout her testimony, Zensen testified about various items that were sent to SLED for testing, specifically for comparison against the DNA of the decedent, including swabs, hair, and fingernail clippings, among numerous other items. Towards the end of cross-examination, appellant asked Zensen whether she recalled anything else being sent to SLED for testing. Zensen responded, "No." Tr. 605, l. 12 – 606, l. 2. At this point, appellant attempted to impeach Zensen with evidence that on January 7, 2008 a request was sent to SLED to compare a twenty-five caliber automatic handgun against the DNA of Craig Michael Canady. The state objected on grounds of lack of relevance. Tr. 606, l. 1 – 607, l. 3.

The state argued that the firearm appellant wished to question Zensen about was recovered from an unrelated individual at some other time and has "no connection to the crime whatsoever." Tr. 607, ll. 10-13. Appellant argued that he should be able to impeach

Zensen with the SLED report "since the question was not answered correctly I would, at least, like to straighten out the mis-statement and the false representation . . ." Tr. 608, ll. 13-21. Appellant stated that the twenty-five caliber handgun was recovered two months after his arrest and was listed under the same SLED number. Tr. 610, ll. 20-24; Tr. 612, ll. 3-6.

After further discussion, the court held, "This is absolutely not impeachment. If you want to ask her directly was there another gun at some later time that there was DNA testing done with regards to the alleged victim, we'll talk about that, but this is not impeachment." Tr. 611, ll. 8-22. The court noted that the handgun appellant referred to was listed under a different SLED number than the evidence in the case and that the testing was completed five months later. Id.; Tr. 612, ll. 7-10. The court also stated that the line of questioning "up to that point had been items that this witness had removed from your car and had been involved in this investigation. And there's no question in my mind, but that was the focus of your questions. I do not believe that it is fair impeachment for you to now ask her about a DNA comparison that occurred some five, six months later . . . " Tr. 613, l. 21 – 614, l. 16.

The court concluded that appellant could question Zensen about DNA testing performed on the twenty-five caliber handgun if he could prove relevance, but not as impeachment. Tr. 609, ll. 16-22; Tr. 611, l. 24 – 612, l. 2; Tr. 614, l. 17 – 615, l. 2.

Appellant maintained the evidence was relevant because the weapon was recovered about two to three months after appellant was arrested from an individual acquainted with the decedent who lived in the very apartment complex where the murder allegedly occurred and was sent to SLED for DNA comparison testing to the decedent, Craig Michael Canady. Appellant reasoned the evidence was relevant because if the alleged murder weapon was

already found then law enforcement would have no reason to investigate another firearm. Tr. 615, l. 3 – 616, l. 6. Appellant argued:

> MR. CHISOLM: My co-defendant's daughter, Shaquanda White, who took the stand, who's testified already.
>
> THE COURT: Yes.
>
> MR. CHISOLM: Her boyfriend at the time was named Siquan Moody. That's who - -
>
> COURT REPORTER: Who?
>
> MR. CHISOLM: Siquan Moody. The person that Tamekka Williams got on the stand and said that Red was with the last time she saw him on Thursday, and after he left Siquan, Red came with me. I told detectives after Red left me he went back to Azalea Park. Azalea Park is where Siquan Moody stays at. The person that they recovered that gun from is Pierre Moody, that's Siquan Moody's younger brother. They're testing DNA from Craig Michael Canady against Pierre Moody's gun and they're all in the Haven Oaks - - I'm sorry - - they're all in the Azalea Park area, and this is after, like I said, Your Honor, we're already under arrest. But they're still investigating that Red went to Azalea Park and Siquan Moody and Pierre Moody, and they're testing his DNA exactly two to three months after David White said this happened, I did this, after David White gave them a weapon that has never been proven to be the murder weapon. If all that was true, why are they still investigating Siquan Moody's little brother against Craig Michael Canady's DNA on his gun. . ."

Tr. 615, l. 3 – 616, l. 2.

The court ruled the evidence was not relevant because according to the SLED report, the handgun recovered at the later time was a "semi-automatic pistol which could not fire the bullet that was removed from the body of this alleged victim." Tr. 617, l. 24 – 619, l. 4.

Discussion

"All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, the Constitution of the State of South Carolina, statutes, these rules, or by other rules promulgated by the Supreme Court of South Carolina." 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.

Appellant should have been permitted at trial to impeach Detective Zensen with the SLED report that a second firearm was sent to SLED for comparison testing against the DNA of the decedent. By failing to allow appellant to impeach Zensen, her inaccurate statement remained uncorrected in the minds of the jurors. The jury was led to believe that all the potential evidence that was sent to SLED had been named and discussed at trial when the truth was that law enforcement was investigating a second firearm as being involved in the murder.

Additionally, the fact that law enforcement was examining another firearm in connection with the case was relevant to the thoroughness and accuracy of the investigation into the death of Craig Michael Canady. The fact that law enforcement was investigating a second weapon indicated that officers from the Dorchester County Sheriff's Office were not firmly convinced that the gun recovered from the Ashley River was the murder weapon and that the officers considered that someone else may have been involved in the murder. This is relevant evidence weakening the case against appellant and appellant should have been permitted to question the detective about this relevant evidence to properly defend himself.

5.

The court erred by allowing appellant to represent himself where the court did not inquire about the nature of the conflicts appellant was having with his attorney, did not warn appellant that a murder conviction here would constitute an aggravating circumstance for the state to seek the death penalty in his other Berkeley county murder case, and was very vague, and not specific about the dangers and disadvantages of self-representation.

Relevant Facts

An in camera ex-parte hearing was held on appellant's request to represent himself. Appellant was represented by John Loy at the time. Supp. Tr. 1; Supp. Tr. 4, ll. 1-7. Loy, appellant, three deputies, the judge, and the court reporter were the only people allowed in the courtroom. Supp. Tr. 4, l. 1 – 5, l. 24. The judge also sealed the transcript. [1]

It was apparent there were conflicts between appellant and defense counsel Loy. Appellant offered: "I don't want to waste the court's time arguing the conflicts and issues that me and Mr. Loy have together. I would like to proceed pro se as of this day February 11, 2011." Supp. Tr. 7, ll. 16-19.

The judge noted that she learned appellant was in Berkeley County, and that he had to be transported to Dorchester County for this hearing. The judge offered she needed to know if appellant was using his motion for purposes of delaying the trials. Appellant told the judge, in response to her question, that his Berkeley County trial had not yet been scheduled. Supp. Tr. 9, ll. 14-24.

Significantly, the subsequent Berkeley County case was going to be a murder trial also. However, that important fact was never raised during this waiver hearing. Neither was

[1] Appellant later petitioned this Court to unseal the transcript which was granted.

the fact that if appellant was convicted of murder in Dorchester County that that conviction would constitute a "prior murder conviction" which would allow the state to seek -- or legitimately threaten to seek -- the death penalty in Berkeley County.[2] Supp. Tr. 9, l. 10 – 10, l. 9.

During the colloquy, appellant told the judge he was married with four children and that he had one year of college. Appellant was never asked where he went to college and later told the judge he either graduated from high school or "got your GED" in response to a very open-ended question. Supp. Tr. 11, l. 19 – 13, l. 5.

Appellant had been in the service and he spent ten months in Afghanistan. Appellant also told the judge he was in "Special Forces," and the judge interjected that she understood appellant could not talk about what occurred in Special Forces. Supp. Tr. 13, l. 7 – 15, l. 2.

Appellant had also worked with heavy machinery and most recently worked at a Sonic restaurant and then a McDonald's. However, his murder charge had hindered his ability to become employed. Supp. Tr. 12, l. 2 – 21, l. 10. Appellant denied he had been treated for post-traumatic stress syndrome or had received any mental health treatment. Supp. Tr. 21, ll. 14-16.

The judge told appellant that his attorney, John Loy, was her friend "and he is as fine a lawyer as there is for sure in this state, probably this country, you understand that?" Appellant said that he did understand. Supp. Tr. 23, l. 16 – 24, l. 4.

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[2] State v. Sims, 304 S.C. 409, 405 S.E.2d 377 (1991)(in context of statutory mitigating circumstance of absence of significant history of prior criminal conviction involving use of violence against another person, word "prior" would be construed to mean prior to trial, rather than prior to time of crime for which defendant was on trial).

The judge said that one of her prepared questions dealt with possible defenses to the charge. She mentioned self-defense but then said: "We're not going to talk about your defenses. We're just not going to do that. I'm not going to let you go into your factual basis. We're not going to do that. I'm not going to let you do that." Appellant did not make any "audible response." Supp. Tr. 27, l. 22 – 28, l. 5.

The judge only mentioned appellant's Berkeley County charges in passing stating they were "not helpful." Supp. Tr. 28, l. 25 – 29, l. 10. The judge said that she did not need to know any more about the Berkeley charge although it was potentially "problematic." Supp. Tr. 29, ll. 11-21.

The judge very briefly told appellant he would have to "comply with the rules . . . rules of evidence, the court rules." Supp. Tr. 32, ll. 10-18. The judge stated that she thought appellant was proceeding with his eyes open but then stated:

> I don't think I understand the "why" [you want to represent yourself] part of it. I think I don't like it. But that - - the judge's pleasure with it is - - doesn't get to be factored in. I don't get a vote. You do. I don't.

Supp. Tr. 35, ll. 10-13.

The judge told appellant he was very bright and that he probably could have gone to law school. She told appellant that he was capable and aware of what he was doing. Supp. Tr. 36, ll. 2-9.

Discussion

The defendant may waive his right to counsel and proceed pro-se, but only if it is clear on the record that he understands the dangers and disadvantages of self-representation. See Faretta v. California, 422 U.S. 806 (1975). Here, appellant was only told in a vague manner the dangers and disadvantages of self-representation. Appellant was advised in a

very brief fashion that he would have to comply with the rules of evidence, and the rules of court. There is nothing in this waiver record to show appellant understood the rules of evidence or what court rules the judge was referring to.

The judge did not make any effort to find out the source of the friction between defense counsel Loy and appellant. Many defendants before trial express problems with their defense attorneys which are solved by the trial judge engaging the defendant in a *specific colloquy about the nature of the problem.*

Appellant had a pending murder charge against him in Berkeley County at the time of this waiver of counsel hearing. A murder conviction in Dorchester County could and was used as an aggravating circumstance that would justify the state seeking -- or threatening to seek – the death penalty against him in a future trial in Berkeley County. See S.C. Code §16-3-20 (C)(a)(2) the aggravating circumstances that "the murder was committed by a person with a prior conviction for murder." Yet, the Berkeley County murder case was hardly even mentioned in passing during the waiver hearing to impress upon appellant the seriousness of what he was doing.

Conversely, in a case decided on the day of the filing of this initial brief, State v. Barnes, Op. No. 27322 (filed October 16, 2013), our Supreme Court ruled the defendant would have been allowed to represent himself where he demonstrated "an understanding of the process of capital *voir dire*, [he] stated his intention to pursue a third-party guilt defense at trial and discussed relevant case law, the burden of proof, and his right to testify." The defendant in State v. Barnes also answered the judge's detailed inquiries about the problems with his defense attorneys and the "trust issues" about why he felt betrayed. The defendant

in State v. Barnes was also had read relevant case law, and he showed some understanding of the rules of evidence when questioned by the trial judge.

None of the factors in Barnes which evidenced an intelligent waiver of the right to counsel, and that the defendant was proceeding with the full understanding of the dangers and disadvantages of self-representation exist in the record before this court.

Appellant Chisolm is similarly situated to the defendant in State v. Winkler, 388 S.C. 574, 698 S.E.2d 596 (2010) where our Supreme Court held the record did not demonstrate a knowing and intelligent waiver of the right to counsel with a full understanding of the dangers and disadvantages of self-representation. See Wroten v. State, 301 S.C. 293, 391 S.E.2d 575 (1990). Cf. State v. Brewer, 328 S.C. 117, 492 S.E.2d 97 (1997); State v. Starnes, 388 S.C. 590, 698 S.E.2d 604 (2010).

Appellant should be granted a new trial.

CONCLUSION

By reason of the foregoing arguments, appellant's convictions should be reversed and this case remanded to the Dorchester County Court of General Sessions for a new trial.

Respectfully submitted,

By: _____
Robert M. Dudek
Chief Appellate Defender

Lara M. Caudy
Appellate Defender

ATTORNEYS FOR APPELLANT

This 16th day of October, 2013.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Dorchester County

Diane Schafer Goodstein, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

DON-SURVI CHISOLM,

APPELLANT

DESIGNATION OF MATTER TO BE INCLUDED IN RECORD ON APPEAL

Appellant proposes the following be included in the Record on Appeal:

(1) True–billed indictment;
(2) Entire pre-trial transcript dated February 11, 2011
(3) Cover page of the trial transcript;
(4) Tr. 76-100;
(5) Tr. 104-117;
(6) Tr. 122-123;
(7) Tr. 134-168;
(8) Tr. 170-173;
(9) Tr. 176-188;
(10) Tr. 193-194;
(11) Tr. 221-252;
(12) Tr. 259-310;
(13) Tr. 322-325;
(14) Tr. 328-356;
(15) Tr. 371-400;
(16) Tr. 411-419;
(17) Tr. 422-437;
(18) Tr. 442-450;
(19) Tr. 455-516;

(20) Tr. 568-705;
(21) Tr. 710-711;
(22) Tr. 719-729;
(23) Tr. 735-789;
(24) Tr. 792-794;
(25) Tr. 798;
(26) Tr. 802-804

I certify that this designation contains no matter which is irrelevant to this appeal.

October 16th, 2013

By: _____

Robert M. Dudek
Chief Appellate Defender

Lara M. Caudy
Appellate Defender

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STATE OF SOUTH CAROLINA
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THE STATE,

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APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Initial Brief of Appellant and Designation of Matter in the above referenced case has been served upon Donald J. Zelenka, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 16th day of October, 2013.

Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 16th day of October, 2013.

(L.S.)
Notary Public for South Carolina

My Commission Expires: August 21, 2023.