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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court Of General Sessions

J. Derham Cole, Circuit Court Judge

Case No. 2012-GS-42-4097, -4098

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NOV 26 2013

SC Court of Appeals

The State, Respondent,

v.

Shondre Lamond Williams, Appellant.

INITIAL BRIEF OF APPELLANT

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ATTORNEYS FOR APPELLANT

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STATEMENT OF ISSUES ON APPEAL

- I. Did the circuit court err in refusing to suppress the search warrant for Appellant's home when the officer who completed the accompanying affidavit did so without personal knowledge of the facts giving rise to probable cause?
- II. Did the circuit court err in refusing to suppress the drug evidence when the State failed to demonstrate a complete chain of custody by failing to explain date discrepancies?

STATEMENT OF THE CASE

Appellant was indicted for trafficking cocaine and possession with intent to distribute cocaine base. Trial occurred on February 25 – 27, 2013 in Spartanburg County. Appellant was convicted on the trafficking charge and of possession of cocaine base. The trial court sentenced Appellant to 25 years' imprisonment on the trafficking charge and ordered him to pay a fine of \$50,000. On the possession charge, the trial court sentenced Appellant to 10 years' concurrent imprisonment and ordered him to pay a fine of \$12,500. Appellant filed a timely notice of appeal.

STATEMENT OF THE FACTS

This case involves a reverse-buy operation. On March 1, 2012, Investigator Travis McJunkin of the Spartanburg County Sheriff's Office assisted Greenville County officers in executing a search warrant on an individual named Shondrell Williams.¹ [Transcript pp. 25, 224-25.] The police found enough drugs in Mr. Williams' home to make him eligible for a 25-year prison sentence. [Transcript p. 225, 238.] However, they informed Mr. Williams that if he cooperated with them, he could avoid prison.

¹ This is a different individual than Appellant, who is named Shondre Williams.

[Transcript p. 225.] Accordingly, he agreed to act as a confidential informant (“Informant”)² in arranging to sell cocaine to Appellant. [Transcript pp. 25, 225-26.]

With the police observing, Informant called Appellant to tell him that Informant had some drugs to sell him. [Transcript p. 227.] Appellant declined the offer. [Transcript pp. 238-39.] Appellant later called Informant back, however, and agreed to purchase cocaine. [Transcript p. 239.]

Meanwhile, Sergeant Joe Pharis of the Spartanburg County Sheriff’s Office contacted Lieutenant Ashley Harris, a chemist in the forensic lab, and asked him to prepare a package containing approximately 250 grams of cocaine. [Transcript pp. 94-95, 151-52.] Investigator Matt Hutchins retrieved the package from Lieutenant Harris and delivered it to the narcotic office. [Transcript pp. 120-21.]

Once the operation was ready to proceed, Investigator McJunkin retrieved the drugs from the narcotic office and gave them to Informant. [Transcript pp. 124-25.] Investigator McJunkin and several other members of the sheriff’s office then followed Informant to Appellant’s residence. [Transcript pp. 25-26.] Informant entered Appellant’s residence and subsequently exited, got in his car, and drove away. [Transcript p. 32.] Investigator William Tillinghast followed Informant to another location, where Informant gave Investigator Tillinghast \$4,000 that Informant said he received from Appellant in exchange for the cocaine. [Transcript pp. 32-33.] A surveillance tape captured this verbal exchange between Investigator Tillinghast and Informant. [Transcript pp. 28, 33-36; Court’s Exhibit 1.] Investigator Tillinghast concluded the recording by stating, “End of debrief at 1:04 a.m., March 2.” [Transcript

² Shondrell Williams will hereinafter be referred to as “Informant” to reduce any confusion between him and Appellant.

p. 36; Court's Exhibit 1.] Investigator Tillinghast then called Investigator Hutchins, who was at the sheriff's office, and told him that Appellant had purchased the cocaine from Informant. [Transcript p. 33.]

While waiting on the call from Investigator Tillinghast, Investigator Hutchins had prepared certain background portions of a search warrant and affidavit for Appellant's home. [Transcript p. 40.] After receiving the call from Investigator Tillinghast, Investigator Hutchins completed the affidavit by adding the following sentences: "The CI then left the residence and met back with Investigator Tillinghast. Investigator Tillinghast recovered the U.S. currency from the CI. Surveillance was maintained on the residence (premise described above) by members of the Spartanburg County Sheriff's Office Narcotics Unit after the transaction." [State's Exhibit 1; Transcript p. 40-41.] Investigator Hutchins then printed the warrant and affidavit, drove from the sheriff's office to the jail, handed the documents to the magistrate, and observed the magistrate read and sign them. [Transcript pp. 40-44.] The magistrate wrote "0105" underneath his signature on the second page of the affidavit. [State's Exhibit 1.] Investigator Hutchins testified that this process, from the time he finished the task of filling out the warrant until obtaining the magistrate's signature, would have taken "a few minutes" to complete. [Transcript p. 44.]

Once the officers on the scene got word that the warrant was signed, they searched Appellant's home. [Transcript p. 51.] After Appellant was handcuffed and given a *Miranda* warning, he revealed to Investigator McJunkin and Lieutenant Cooper that he had hidden the cocaine in the hot water heater. [Transcript pp. 52-53, 57.] A

search of the home also revealed crack cocaine hidden above a kitchen cabinet. [Transcript p. 129.]

Investigator Dan Swad, who recovered the cocaine and crack cocaine at the scene, placed the drugs in a BEST bag. [Transcript pp. 129-30.] Investigator Swad also prepared Form B, on which he indicated that he delivered the drugs to the evidence drop box on March 3, 2012. [Transcript pp. 130-31; Defendant's Exhibit 1.] The form was notarized, and the date above the notary's signature is also March 3. [Transcript pp. 132-33; Defendant's Exhibit 1.] Investigator Swad's testimony corroborated his statement on Form B that he placed the drugs in the drop box on March 3. [Transcript pp. 131-33.]

Anita Mullinax, an evidence custodian at the sheriff's office, indicated on Form C that she retrieved the BEST bag from the drop box on March 2. [Transcript p. 134; Defendant's Exhibit 1.] She then delivered the bag to the drug room, which is a sealed room in the evidence office. [Transcript pp. 139-40; Defendant's Exhibit 1.] Later that day, Lieutenant Harris retrieved the BEST bag; a test of the substances revealed 249.71 grams of cocaine and 4.91 grams of crack cocaine to be present. [Transcript pp. 98, 116.]

Before trial, Appellant moved to suppress the search warrant and to suppress the drug evidence due to an incomplete chain of custody. [Transcript pp. 22-23, 65, 88.] The court denied the motions. [Transcript pp. 60-64, 162-65.] After trial, the jury convicted Appellant of possession of cocaine base and trafficking cocaine. [Transcript pp. 352-53.] This appeal followed.

STANDARD OF REVIEW

On appeals from a motion to suppress based on Fourth Amendment grounds, the appellate court applies a deferential standard of review and will reverse if there is clear

error. State v. Tindall, 388 S.C. 518, 521, 698 S.E.2d 203, 205 (2010). In spite of this deference, however, the Court may conduct its own review of the record to determine whether the trial court's decision is supported by the evidence. *Id.*

“The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion. An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law.” State v. Hatcher, 392 S.C. 86, 91, 708 S.E.2d 750, 753 (2011) (citation and internal quotation marks omitted).

ARGUMENT

I.

The circuit court erred in refusing to suppress the search warrant for Appellant's home when the officer who completed the accompanying affidavit did so without personal knowledge of the facts giving rise to probable cause.

“The Fourth Amendment to the United States Constitution and Article I, § 10 of the South Carolina Constitution protect citizens from unreasonable searches and seizures. Both state and federal constitutions provide that search warrants may not 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.” State v. Dunbar, 361 S.C. 240, 246, 603 S.E.2d 615, 618 (Ct. App. 2004). Both federal and state constitutions require an oath or affirmation before probable cause may be found. State v. Jones, 342 S.C. 121, 128, 536 S.E.2d 675, 678 (2000).

South Carolina further mandates that a “warrant . . . shall be issued only upon affidavit sworn to before the magistrate, municipal judicial officer, or judge of a court of

record.” S.C. Code Ann. § 17-13-140. “Generally, affidavits must be made on the affiant’s personal knowledge of the facts alleged in the petition. The affidavit must in some way show that the affiant is personally familiar with the facts so that he could personally testify as a witness.” Dunbar, 361 S.C. at 248 (citation and internal quotation marks omitted). Where an affidavit contains statements that are false or that were made with reckless disregard to the truth, the search warrant must be set aside if the affidavit’s remaining content is insufficient to establish probable cause. State v. Davis, 371 S.C. 412, 415-16, 639 S.E.2d 457, 459 (Ct. App. 2006) (citing Franks v. Delaware, 438 U.S. 154 (1978)).

Here, no evidence exists to support the trial court’s determination that the search warrant was valid and supported by Investigator Hutchins’ personal knowledge at the time it was executed. After Investigator Tillinghast met with Informant following the sale of the cocaine to Appellant, he recorded Informant’s recounting of the events. [Transcript p. 36; Court’s Exhibit 1.] At the conclusion of the recording, Investigator Tillinghast noted that the time was 1:04 a.m. [Transcript p. 36; Court’s Exhibit 1.] When the magistrate signed the affidavit, he wrote “0105” under his signature. [State’s Exhibit 1.] Investigator Hutchins testified that he could not have completed the affidavit, printed it and the warrant, driven to the jail, and allowed the magistrate to read and sign the documents within sixty seconds. [Transcript p. 44.] Investigator Hutchins acknowledged that it would take a few minutes for these events to occur. [Transcript p. 44.] Furthermore, Investigator Hutchins acknowledged that 1:05 is an accurate reflection of what time the magistrate signed the documents. [Transcript pp. 44-45.]

It is true that Investigator Tillinghast testified that he could not remember at what point during these events he called Investigator Hutchins to inform him of precisely what had transpired on the scene. [Transcript pp. 33-34.] However, Investigator Tillinghast acknowledged that he would not have called Investigator Hutchins until after meeting with Informant to hear his version of the events:

Q: Would you agree that you could not tell [Investigator Hutchins] what transpired until you met with the C.I. to find out? Does that make sense?

A: Yes, sir.

Q: Okay. So at that time when the C.I. tells you what has transpired for you to then relay to Hutchins, at that point you're with the C.I. And we can hear that on the tape.

A: Yes, sir.

[Transcript p. 35.] The recording does not include a phone call or any other communication between Investigators Tillinghast and Hutchins. Thus, the only conclusion to be reached from Investigator Tillinghast's testimony is that he called Investigator Hutchins after the video recording concluded at 1:04, and that it was not until then that Investigator Hutchins could complete the portion of the affidavit detailing what occurred after Informant entered Appellant's residence.

The State attempted to mitigate this evidence by eliciting testimony from Investigator Hutchins that the timestamps in the video cameras used by the sheriff's office sometimes may be inaccurate. [Transcript p. 46.] However, neither Investigator Hutchins nor anyone else testified that the specific video camera in question had an inaccurate timestamp. Furthermore, Investigator Tillinghast did not testify that he relied on the video timestamp when giving the time at the conclusion of the recording. The State introduced no evidence indicating that the time of 1:04 given in the video was inaccurate.

Given the evidence before the trial court—that Investigator Tillinghast completed his questioning of Informant at 1:04; that he then called Investigator Hutchins to relay what occurred at Appellant’s residence; that Investigator Hutchins then had to complete the warrant and affidavit, drive to the jail, and obtain the magistrate’s signature, which occurred at 1:05—it was error for the trial court not to find the warrant invalid and not to suppress the evidence discovered as a result. Dunbar is clear that affidavits must be based on personal knowledge. The only logical inference from the evidence is that Investigator Hutchins had already completed the affidavit in its entirety, executed it, and traveled to the jail with the documents before receiving confirmation of the events from Investigator Tillinghast. In other words, the evidence permits only one conclusion: that when Investigator Hutchins completed and executed his affidavit, he lacked personal knowledge of all the facts he included in that document. Thus, he acted, at a minimum, with reckless disregard of the truth when completing the portion of the affidavit detailing what occurred after Informant entered Appellant’s residence. Absent these statements, the affidavit lacks sufficient facts to constitute probable cause for the search warrant.

In light of the fact that the affidavit was defective, probable cause did not exist for the search warrant. The trial court erred in finding that the warrant was valid. Accordingly, this Court should reverse the trial court’s decision refusing to suppress the warrant and the evidence seized pursuant thereto.

II.

The circuit court erred in refusing to suppress the drug evidence when the State failed to demonstrate a complete chain of custody by failing to explain date discrepancies.

When offering drugs into evidence, the State must establish a complete chain of custody as far as practicable. *State v. Sweet*, 374 S.C. 1, 6, 647 S.E.2d 202, 205 (2007). “Proof of chain of custody need not negate all possibility of tampering so long as the chain of possession is complete.” *State v. Hatcher*, 392 S.C. 86, 92, 708 S.E.2d 750, 753 (2011). “Where an analyzed substance . . . has passed through several hands, the identity of individuals who acquired the evidence and *what was done with the evidence between the taking and the analysis must not be left to conjecture.*” *Sweet*, 374 S.C. at 6, 647 S.E.2d at 205 (emphasis added).

Here, the trial court erred in ruling that the State had established a complete chain of custody. Investigator Swad, who recovered the drugs at the scene, indicated on Form B that he placed the BEST bag in the drop box on March 3. [Defendant’s Exhibit 1.] Form B was also notarized, and the notary similarly indicated the date as March 3. [Defendant’s Exhibit 1.] When Anita Mullinax completed Form C, however, she indicated that she retrieved the BEST bag from the drop box on March 2. [Defendant’s Exhibit 1; Transcript p. 135.] On the witness stand, Investigator Swad affirmed the accuracy of Form B:

Q: If you’ll look at Defendant’s Exhibit 1, do you fill out any other documentation on that? Form B?

A: Yes, sir, form B.

Q: Is that your form?

A: Yes, sir.

Q: Is your form accurate?

THE STATE: Your Honor, I’m going to --

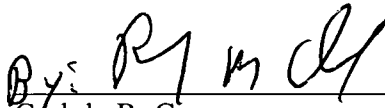
A: Yes, sir.

[Transcript pp. 130-31.] At no point during his testimony did Investigator Swad testify that he transcribed the date erroneously. Given the discrepancy between the date the BEST kit was supposedly deposited in the drop box and the date it was supposedly retrieved, “what was done with the evidence between the taking and the analysis [was] left to conjecture,” Sweet, 374 S.C. at 6, 647 S.E.2d at 205, in violation of well-settled law in this state. Thus, the trial court abused its discretion in finding that the State had established a complete chain of custody and allowing these drugs into evidence, and Appellant asks this Court to reverse that determination.

CONCLUSION

For the reasons discussed above, this Court should reverse Appellant’s convictions and sentences and remand this case for a new trial, with instructions that all evidence seized pursuant to the defective warrant be excluded.

Respectfully submitted,

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APPELLANT'S DESIGNATION OF MATTER TO BE
INCLUDED IN THE RECORD ON APPEAL

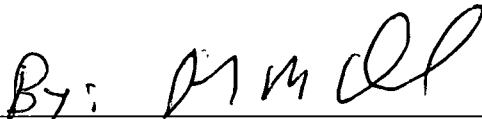
Appellant proposes the following materials be included in the Record on Appeal:

1. Transcript of Proceedings pp. 1-8; 22-65; 85-89; 93-165; 175-79; 223-39; 282; 293-94; 310-25; 352-53; and 357-58;
2. State's Exhibit 1;
3. Defendant's Exhibit 1;
4. Court's Exhibit 1;
5. Indictments and Sentence Sheets for 2012-GS-42-4097 & -4098.

Pursuant to Rule 209, SCACR, I certify that this designation contains no matter that is irrelevant to this appeal.

TURNER PADGET GRAHAM & LANEY P.A.

November 26, 2013

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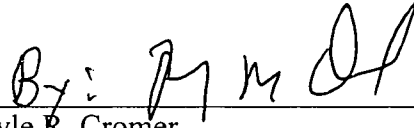
PROOF OF SERVICE OF APPELLANT'S INITIAL BRIEF AND
APPELLANT'S DESIGNATION OF MATTER TO BE INCLUDED
IN THE RECORD ON APPEAL

I certify that I have served the Initial Brief of Appellant and Appellant's Designation of Matter to be Included in the Record on Appeal on the Respondent by depositing a copy of it in the United States Mail, postage prepaid, on December 2, 2013, addressed to their attorneys of record at the addresses listed below.

[Signature page to follow.]

TURNER PADGET GRAHAM & LANEY P.A.

November 26, 2013

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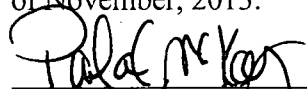
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SWORN TO BEFORE ME this 26th day
of November, 2013.

 (L.S.)

Notary Public for South Carolina
My Commission Expires: July 24, 2022