

ORIGINAL

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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APR 17 2014

SC Court of Appeals

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Appeal from Pickens County  
Edward R. Miller, Circuit Court Judge  
\_\_\_\_\_

THE STATE,

RESPONDENT,

v.

LAROLD LEE MORRIS,

APPELLANT.

Appellate Case No. 2013-000682  
\_\_\_\_\_

FINAL REPLY BRIEF OF APPELLANT  
\_\_\_\_\_

CHRIS PATON  
Chris Paton LLC  
40 Calhoun Street, Suite 411  
Charleston, SC 29401  
(843) 968-0761

ROBERT M. DUDEK  
Chief Appellate Defender  
South Carolina Commission on Indigent Defense  
Division of Appellate Defense  
PO Box 11589  
Columbia, SC 29211-1589  
(803) 734-1343

ATTORNEYS FOR APPELLANT

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## ARGUMENT

I. The conclusory search warrant issue is available for review.

The State contends that, because Appellant challenged the search warrant of his sister's apartment in a motion *in limine* and failed to renew his objection during the trial, the issue is not preserved for review. The Court should reject this argument and address the search warrant issue on the merits.

The State correctly states that a motion before trial alone generally is insufficient to preserve an objection for review on appeal. As this Court explained in State v. Mueller:

Generally, a motion in limine seeks a pretrial ruling preventing the disclosure of potentially prejudicial matter to the jury. A ruling on the pretrial motion is preliminary, and is subject to change based on developments at trial. Because the evidence developed during trial may warrant a change in the ruling, the losing party must renew his objection at trial when the evidence is presented in order to preserve the issue for appeal.

In this case, Mueller's attorney sought a ruling on the admissibility of Mr. Mueller's prior convictions after the State rested its case, and immediately before calling Mr. Mueller, the first witness for the defense. Because no evidence was presented between the ruling and Mr. Mueller's testimony, there was no basis for the trial court to change its ruling. Thus, contrary to the State's argument, Mueller's motion was not a motion in limine. The trial court's ruling in this instance was in no way preliminary, but to the contrary, was a final ruling. Accordingly, Mueller was not required to renew her objection to the admission of the testimony in order to preserve the issue for appeal.

319 S.C. 266, 268-69, 460 S.E.2d 409, 410 (Ct.App.1995) (internal citations and footnote omitted). Thus, a defendant who loses a motion *in limine* must re-state his objection during the trial because there might have been evidence or testimony that would cause the court to rule differently than it did earlier. This reasoning is not applicable where there was no evidence or testimony between the motion and introduction of the evidence that could cause the court to change its ruling. The Supreme Court of South Carolina therefore held in State

v. Forrester that a pretrial objection to evidence introduced through the first witness at trial need not be re-stated when the evidence is introduced. 343 S.C. 637, 642-43, 541 S.E.2d 837, 840 (2001). And in Mueller, this Court ruled that a motion to suppress prior convictions ruled upon immediately before the defendant was called as a witness did not require further objection when the evidence was introduced. See 319 S.C. at 268-69, 460 S.E.2d at 410-11.

Here, because there was no evidence or testimony after the trial court denied the motion to suppress that could have changed the Court's ruling, there was no need for Defendant to re-state his objection during the trial. The reasons for requiring later objections do not exist here, and this Court should therefore address the issue whether the search warrant was invalid. To be clear, Defendant's argument is that the affidavit prepared by Officer Justice was insufficient to support the search warrant that led to the primary evidence against Defendant: the X-Box pictures and all testimony about the results of the search. The only evidence that logically can make a conclusory search warrant not conclusory is testimony about additional sworn testimony provided to the magistrate. See State v. Smith, 301 S.C. 371, 373, 392 S.E.2d 182, 183 (1990) (finding an affidavit "defective on its face," but remanding to determine whether sufficient additional information was orally conveyed to the magistrate such that the warrant should be upheld); State v. McKnight, 291 S.C. 110, 113, 352 S.E.2d 471, 472 (1987) ("A search warrant affidavit which itself is insufficient to establish probable cause may be *supplemented* before the magistrate by sworn oral testimony."). This is because the real question is whether the magistrate was provided with sufficient information to conclude that there was probable cause for the search warrant, not whether probable cause might have existed outside of what

was provided to the magistrate. Here, there was insufficient information provided to the magistrate in the affidavit. And there was no testimony or evidence presented about additional information provided to the magistrate. Thus there is no justification for requiring Defendant to re-state his objection to the evidence seized based on a conclusory search warrant.

It is telling that the State cites no cases requiring contemporaneous objections following denial of a pretrial motion to suppress evidence obtained based on a conclusory search warrant. (Initial Brief of Respondent, pp. 9-10). In State v. Bowman, suppression was sought based on an unlawful search and seizure. 366 S.C. 485, 500-01, 623 S.E.2d 378, 386 (2005), abrogated on other grounds, State v. Evans, 371 S.C. 27, 637 S.E.2d 313 (2006). In State v. King, suppression was sought based on an unreliable informant. 349 S.C. 142, 149-50, 561 S.E.2d 640, 643-44 (Ct.App.2002). In State v. Forrester, suppression was sought based on an illegal search and seizure. 343 S.C. 637, 642, 541 S.E.2d 837, 840 (2001). In State v. Mitchell, the Defendant challenged his conviction based on the court's failure to grant a recess because his attorney had a headache. 330 S.C. 189, 193 n. 3, 498 S.E.2d 642, 644 n. 3 (1998). In State v. Gagum, the Defendant sought to suppress evidence of prior bad acts. 328 S.C. 560, 564-65, 492 S.E.2d 822, 824 (Ct.App.1997). In State v. Burton, the Defendant sought to suppress evidence of prior bad acts and hearsay testimony. 326 S.C. 605, 486 S.E.2d 762 (Ct. App. 1997). In State v. Mueller, the Defendant sought to suppress evidence of prior convictions. 319 S.C. 266, 460 S.E.2d 409 (Ct. App.1995). It is worth noting that in two of these cases cited by the State (Mueller and Forrester), no contemporaneous objection was required to preserve the issue.

It is also noteworthy that case law from other jurisdictions does not impose the harsh rule of requiring a party to object again during trial after a pretrial motion was denied. In Lacy v. CSX Transportation, Inc., the court stated that “an objection to an adverse ruling on a motion *in limine* to bar evidence at trial will preserve the point, even though no objection was made at the time the evidence was offered, unless there has been a significant change in the basis for admitting the evidence.” 205 W. Va. 630, 639, 520 S.E.2d 418, 427 (1999) (quoting Wimer v. Hinkle, 180 W. Va. 660, 379 S.E.2d 383 (1989)). In United States v. Cone, the Fourth Circuit Court of Appeals cited Lacy approvingly, though it distinguished the facts before it in that the defendant had won her motion *in limine*, so “it ma[de] sense, therefore, that if the prosecutor’s closing remarks ran afoul of the district court’s prior ruling, [the defendant] should have timely objected to alert and afford the court an opportunity to correct any error.” 714 F.3d 197, 217 (4th Cir. 2013). Here, Appellant lost his pretrial motion to suppress.

In sum, only an unthinking application of the preservation rule would bar this Court from reaching the merits of this appeal. Based on the reasoning and facts of the cases cited by the State, Appellant’s objection to the conclusory search warrant is indeed preserved.

The State’s contention that Appellant failed to cite South Carolina’s search warrant statute to the trial court is the reddest of herrings. The statute, S.C. Code Ann. § 17-13-140, is one of many bases cited throughout the case law for the rule prohibiting conclusory search warrants, which Appellant did raise below. See, e.g., State v. Baccus, 367 S.C. 41, 50, 625 S.E.2d 216, 221 (2006). And the State correctly points out that under State v. McKnight, 291 S.C. 110, 113, 352 S.E.2d 471, 473 (1987), the statute “imposes stricter requirements than does either the State or federal Constitutions.” (Initial Brief of Respondent p. 11 n.6).

But it is not an independent legal argument, but rather one of many legal bases for Appellant's objection. Indeed, the State itself cites the statute as supporting authority on the same page it seeks to bar Morris from raising it. (Initial Brief of Respondent p. 12). An appellant must raise an issue to the trial court "with sufficient specificity" for it to be preserved, S.C. DOT v. First Carolina Corp., 372 S.C. 295, 302, 641 S.E.2d 903, 907 (2007) (quoting Jean Hoefler Toal et al., Appellate Practice in South Carolina 57 (2d ed. 2002)), but research failed to turn up any case law requiring a specific supporting case or statute to be cited below. The State asks this Court to extend the preservation rule well beyond its present limits. The Court should reject this request.

II. The State's arguments on the merits should be rejected.

The State argues that Officer Justice's affidavit provided sufficient facts as to why she believed evidence of criminal activity would be found at Appellant's residence. (Initial Brief of Respondent p. 14). But the affidavit fails to explain why she believed Appellant committed the crimes charged, and that is what is required. See, e.g., Jenkins, 398 S.C. at 222-24, 727 S.E.2d at 764-66. The facts conveyed in her affidavit are: (1) Morris is a robbery suspect; (2) certain electronic items were stolen; (3) the suspects used a handgun, gloves and a mask and drove a silver Impala; (4) a silver Impala was pulled over on March 8, 2011; and (5) and something the passengers told her made her believe stolen property was located in Morris's apartment. (R. p. 254). The only way the trial court could have concluded that the magistrate was presented with information sufficient to establish probable cause was for it to assume that the magistrate inferred that the passengers implicated Appellant in the crimes. Jenkins prohibits the trial court from making such assumptions. See 398 S.C. at 223, 727 S.E.2d at 765. Even though it denied the motion to

suppress, the trial court recognized the conclusory nature of the affidavit: “[T]here are some conclusory statement in there . . . It coulda been more specific, should be more specific but it’s not, uh, does not fall to a level that I feel is require[d] to be, uh, your motion to be granted, okay.” (R. p. 24, line 24-p. 25, line 7).

The State argues that the conclusory affidavit should be upheld because Officer Justice acted in good faith, but there is no support for applying this principle from United States v. Leon, 468 U.S. 897 (1984), in this case. Indeed, the Supreme Court of South Carolina in State v. Johnson, a case challenging a search warrant affidavit for failing to demonstrate probable cause, noted “Leon specifically precludes the application of the good faith exception in this situation.” 302 S.C. 243, 248, 395 S.E.2d 167, 170 (1990). Under Johnson, it is clear that an affidavit that “does not include sufficient information to allow a magistrate to determine probable cause” may not be validated through application of the Leon good faith exception. Id. at 248-49, 395 S.E.2d at 170. The State interprets the later decision in State v. Weston, 329 S.C. 287, 293, 494 S.E.2d 801, 804 (1997), as creating a possibility that Leon might apply here. But the State offers no reason why Johnson and Leon<sup>1</sup> should be sidestepped in this case, just that it is possible. And in any event, Johnson refers only to the “technical requirements of [United States v.] Gates,” and not the scenario, like here, where an affidavit is too conclusory to support a finding of probable cause.

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<sup>1</sup> Of course, this begs the question whether Leon, a decision of the United States Supreme Court, can be sidestepped consistent with the Supremacy Clause of the United States Constitution. The overwhelming authority holds that it cannot. See State v. Watts, 320 S.C. 377, 381 n.1, 465 S.E.2d 359, 362 (Ct.App.1995) (“We are cognizant of the fact that a rule stated in a decision by the United States Supreme Court and based on the United States Constitution is binding on state courts under the Supremacy Clause.”).

Furthermore, the Weston court did not apply the Leon good faith exception in Weston, so its pronouncement that Leon might be applicable in other cases is non-binding dicta.

In determining whether the lower court's error in admitting evidence stemming from the conclusory search warrant was harmless, the critical question is whether the error did not contribute to the verdict obtained, and the standard is "beyond a reasonable doubt." State v. Jenkins, 398 S.C. 215, 225, 727 S.E.2d 761, 766 (Ct.App.2012) (internal quotation marks omitted). The trial court noted the importance of the apartment search when he stated that the prosecution "pretty much ha[d] him nailed" when it recovered the Xbox at Appellant's apartment. (Tr. 42:4-19). Like the DNA evidence in Jenkins, the evidence from the apartment search and the testimony concerning it was the strongest evidence connecting Appellant to the crimes charged. Even when considered as a whole, the evidence cited by the State is nowhere near as strong: (1) the nickname "Junior" is a common one and is therefore of little weight in connecting Appellant to the crime; (2) the testimony about "gamer tags" was confusing (R. pp. 63-71); (3) the materials found in the car are circumstantial and in any event could have belonged to either of the other two passengers; (4) the DNA evidence was inconclusive as it showed that the mask could have been worn by Appellant's brother, also a passenger in the car (R. p. 222, lines 23-24; R. p. 225, lines 14-16); and (5) the State's witness Draper testified that the purported "smoking gun" text was not even sent on the night of the robbery (R. pp. 140-67; R. p. 163, lines 13-17; R. p. 165, lines 12-19). Absent solid evidence about the February 3 robbery, there was very little evidence of any crime on March 8. No witness testified that they observed criminal activity outside of the apartment on March 8. (R. p. 86, line 21-p. 87, line 3; R. p. 103, lines 5-13; R. p. 134, lines 12-17). And the silver gun with the obliterated serial number was

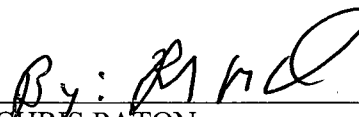
discovered in the back seat of the Impala, closer to the back seat passenger than to Appellant in the front seat. (R. p. 119, lines 3-24; R. p. 121, line 24-p. 122, line 10).

Based on this, the Court cannot conclude beyond a reasonable doubt that admission of the Xbox did not contribute to the guilty verdict. Therefore, the trial court's error was not harmless. See Jenkins, 398 S.C. at 225, 727 S.E.2d at 766.

#### CONCLUSION

For the reasons stated above, the Court should reject the State's arguments in its Brief, reverse Appellant's convictions and sentences and remand this matter for a new trial. In the alternative, the Court should remand for a hearing to determine whether Office Justice provided sworn testimony to the magistrate outside of the affidavit sufficient to uphold the warrant. If she did not, a new trial should be held.

Respectfully submitted,

By: 

CHRIS PATON  
Chris Paton LLC  
40 Calhoun Street, Suite 411  
Charleston, SC 29401  
(843) 968-0761

ROBERT M. DUDEK  
Chief Appellate Defender  
South Carolina Commission on Indigent Defense  
Division of Appellate Defense  
PO Box 11589  
Columbia, SC 29211-1589  
(803) 734-1343

ATTORNEYS FOR APPELLANT

This 17th day of April, 2014.

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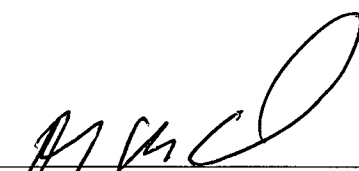
APPELLANT.

Appellate Case No. 2013-000682  
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CERTIFICATE OF COMPLIANCE WITH RULE 211(b), SCRAC  
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The undersigned hereby certifies that the Final Reply Brief of Appellant complies with Rule  
211(b), SCRAC.

April 17, 2014

  
\_\_\_\_\_  
Robert M. Dudek  
Chief Appellate Defender

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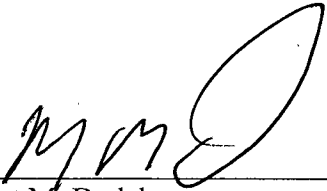
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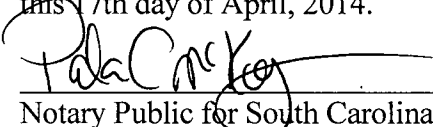
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CERTIFICATE OF SERVICE  
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The undersigned hereby certifies that a true copy of the Final Reply Brief of Appellant in the above referenced served on the date below upon Norman Mark Rapoport, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 17<sup>th</sup> day of April, 2014.

  
\_\_\_\_\_  
Robert M. Dudek  
Chief Appellate Defender

SUBSCRIBED AND SWORN TO before me  
this 17th day of April, 2014.

  
\_\_\_\_\_  
(L.S.)  
Notary Public for South Carolina  
My Commission Expires: July 24, 2022