

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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APPEAL FROM HORRY COUNTY
Court of General Sessions

S.C. Supreme Court

The Honorable Edward B. Cottingham, Sr., Circuit Court Judge

Case No.: 2012-206368
Opinion No.: 5214 (S.C. Ct. App. filed April 2, 2014)

THE STATE.....Respondent

v.

ALTON WESLEY GORE JR.....Petitioner

APPENDIX
(Volume II of II)

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of General Sessions

Edward B. Cottingham, Sr., Circuit Court Judge

Case No. 2010-GS-26-2326

The State,

Respondent,

v.

Alton Wesley Gore, Jr.

Appellant.

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES

Alton Wesley Gore, Jr. submits his initial brief on the following issue(s):

1. Whether the trial court erred when it denied Gore's motion pursuant to *Franks v. Delaware* when the affidavit failed to indicate a specific time for the allegations and contained misleading information.
2. Whether the trial court erred in admitting photographs depicting Gore holding United States currency even though the pictures did not associate him with drug trafficking and did not establish a connection with the residence.
3. Whether the trial court erred when it failed to charge the jury on a lesser-included offense of simple possession when the jury could have held Gore responsible for a lesser weight of cocaine found in the residence.

STATEMENT OF THE CASE

Alton Wesley Gore, Jr. was the defendant in the Court of General Sessions for the Fifteenth Judicial Circuit in Horry County, South Carolina and will be referred to by name or as the appellant. The respondent, The State of South Carolina, will be referred to as the State.

Detective Jesse Ard of the Horry County Police Department drafted an affidavit on February 28, 2010 seeking a search warrant for the residence located at 309 Junco Circle, Longs, South Carolina 29568. (R. 24). A search warrant was issued on February 28, 2010. (R. 25). Officers searched the residence and retrieved evidence indicating drug activity. (R. 26). An indictment was returned on June 24, 2010, and charged that Gore did “knowingly, sell, deliver, purchase or _____ bring in to this State, or aid, abet, attempt, or conspire to sell, deliver, purchase or bring in to this State . . . a quantity of Cocaine in an amount of 200 grams or more, but less than 400 grams . . . in violation of Section 44-53-370(e)(2)(d) for the crime of trafficking.” (R. 4).

On February 23, 2011, Gore moved for an evidentiary hearing pursuant to *Franks v. Delaware*, 438 U.S. 154 (1978) alleging that the search warrant affidavit was insufficient. (R. 17). A hearing was held on March 15, 2011 and the trial court denied Gore’s motion finding that the affidavit was not false or misleading and was supported by probable cause. (R. 2). A jury trial was held on January 5, 2012 and

the jury found Gore guilty of the charge of trafficking cocaine 200 to 400 grams. (R. 234, lines 6-9). Gore was sentenced to a term of twenty-five years imprisonment and fined \$100,000. (R. 239, lines 2-4). Gore filed a timely Notice of Appeal on January 12, 2012. This appeal follows.

STATEMENT OF FACTS

Motion for *Franks* Hearing/Motion to Suppress

During the pre-trial hearing held on March 15, 2011, defense counsel challenged the affidavit dated February 28, 2010 that provided for the execution of the search warrant at a residence located at 309 Junco Circle, Longs, South Carolina 29568. (R. 24). He argued that the affidavit contained information that was either deliberately false or a reckless disregard for the truth requiring an evidentiary hearing pursuant to *Franks v. Delaware*. (R. 28, lines 16-25, 29, lines 1-25). The first challenged allegation in the affidavit stated the following: “A confidential and reliable informant made a buy for cocaine out of the residence while being recorded and monitored by agents in the area.” (R.29, lines 6-8). The activity actually occurred seven months prior to the issuance of the warrant on July 23, 2009. (R. 21). Defense counsel argued that the affidavit failed to specify the date and time the act occurred in violation of *State v. Winborne*. (R. 29, lines 20-23).

The second challenged allegation stated as follows: “Also within the last seventy-two hours agents followed the Defendant from the residence to another location, and were able to monitor and record another buy for cocaine.” (R. 30, lines 10-13). Defense counsel again argued that the affidavit failed to specify a date and time for the allegation. (R. 30, lines 22-23). He also stated that this sentence immediately followed the first allegation making it seem as if the buy occurred within seventy-two hours of the first buy. (R. 31, lines 2-11). However, the second buy actually occurred on February 25, 2010. (R. 21).

The State claimed that the officers informed the Magistrate of the dates and times. (R. 35, lines 7-12). He stated that the second buy was a “refresh buy” that would allow them to meet the close time and proximity requirements for the warrant. (R. 35, lines 12-16). Defense counsel explained that the second allegation was not sufficient to establish probable cause to search the residence. (R. 36, lines 1-5.) Rather, he argued that the first allegation was added to establish probable cause even though the officers were aware that the buy occurred seven months prior to the execution of the warrant. (R. 36, lines 3-5). This fact would not establish probable cause because there was no allegation in the affidavit that the drugs came from the residence. (R. 37, lines 11-13).

The Circuit Court heard testimony from the affiant of the affidavit, Officer Jessie Ard. (R. 38, lines 21-23). Officer Ard testified that the investigation was

lengthy and since the first buy had occurred seven months prior, he decided to do a “refresher buy” to obtain a search warrant for the residence. (R. 39, lines 5-16). He stated that he informed the judge about the lengthy investigation as well as the dates and times. (R. 39, lines 19-23). When asked why the dates and times were not included in the affidavit, Officer Ard said that it was customary in order to keep the informants’ identities confidential. (*Id.*) He stated that he told the Magistrate that they were unable to make another buy from inside the residence. (R. 40, lines 21-24). However, there were several occasions in which Officer Ard could not recollect what the Magistrate was told prior to the execution of the warrant when questioned by defense counsel. (R. 42, lines 9-12, 43, lines 3-25, 44, lines 1-16, 45, lines 1-24).

Q. All right. Do you recall telling the Judge whether or not he was carrying any kind of bag or anything with him? Do you know if you told the Judge that?

A. I do not recall that I seen him carrying a bag. I do not.

Q. All right. And you don’t remember whether or not you saw him enter the residence, only come out?

A. I do not remember that. I do remember that we did — we did identify him get in a vehicle. I don’t remember the specific vehicle that it was. We did follow it.

(R. 45, lines 10-19.)

The Circuit Court denied Gore's motion for a *Franks* hearing and his motion to suppress and found the statements contained in the affidavit to be true and that probable cause was established. (R.49, lines 24-25, 50, lines 1-14).

Photographs (States Exhibit 26 and 27):

During Gore's trial which commenced on January 5, 2012, the State sought to introduce two photographs of Gore in which he appeared to be holding up a large amount of United States currency. (R. 77, lines 10-18). Defense counsel argued that the photographs were irrelevant, but even if they were relevant, the prejudicial effect outweighed the probative value of the photographs. (R. 77, lines 7-9). Throughout the trial, defense counsel argued that Angela Deangelo, who was Gore's girlfriend at the time, actually lived in the residence. (R. 55, lines 9-16).

Defense counsel informed the trial court that "the issue is it's not relevant because Ms. Deangelo could've had a picture of him so how does that put him in the house — (R. 78, lines 11-13). Further, defense counsel argued that the photographs were prejudicial because "[h]e's not holding drugs but it makes him look as if he's holding a bunch of money. Nobody knows who took that photograph." (R. 77, lines 10-11). The State claimed that the photographs were "relevant because it goes to his identity. It puts him in the house." (R. 77, lines 21-22). The trial court admitted the photographs as evidence that the house was Gore's residence. (R. 78, lines 14-18).

Jury Charge:

Gore was indicted on June 24, 2010 for trafficking based on possession of a quantity of Cocaine in an amount of 200 grams or more, but less than 400 grams. (R. 4) Defense counsel requested a charge for simple possession as a lesser-included offense for trafficking. (R. 198, lines 1-3). He said that there was a trace amount of powder cocaine located in a separate bedroom underneath one of the mattresses. (R. 198, lines 8-9). Counsel stated that there was a factual question as to whom the bedroom and consequently, the drugs belonged. (R. 198, lines 1-3).

The trial court denied the request stating:

I'm going to charge the jury that they must find he possessed 200 or more or less than 400. And if they found some amount less than that, they can find him not guilty but they're gonna be charged — they must under this indictment find that he possessed actual or constructive 200 or more grams of cocaine. So, I respectfully deny your motion with reference to simple possession.

(R. 198, lines 11-17).

ARGUMENTS

- I. **The Circuit Court erred in failing to grant Gore's motion pursuant to *Franks v. Delaware* and motion to suppress because the affidavit contained false and misleading information and was not enough to establish probable cause to search the residence located at 309 Junco Circle, Longs, South Carolina 29568.**

A search warrant may be issued only upon an oath or affirmation and a finding of probable cause. U.S. Const. amend. IV; S.C. Const. art. I, § 10; *State v.*

Jones, 342 S.C. 121, 128, 536 S.E.2d 675, 678 (2000). The warrant must be supported by an “affidavit sworn to before the magistrate, municipal judicial officer, or judge of a court of record” S.C. Code. Ann. § 17-13-140. “In reviewing the validity of a warrant, an appellate court may consider only information brought to the magistrate’s attention.” *State v. Thompson*, 363 S.C. 192, 200, 609 S.E.2d 556, 560 (Ct. App. 2005).

A. The trial court erred in denying Gore’s request for a *Franks* hearing.

While great deference is ordinarily given to the probable cause determination of the Magistrate, that deference does not preclude an inquiry into the knowing or reckless falsity of the underlying affidavit or the knowing or reckless omission from the affidavit of exculpatory material. *United States v. Leon*, 468 U.S. 897, 914 (1984). “In *Franks v. Delaware*, the United States Supreme Court held that the Fourth and Fourteenth Amendments gave a defendant the right in certain circumstances to challenge the veracity of a warrant affidavit after the warrant had been issued and executed.” *State v. Missouri*, 337 S.C. 548, 553, 524 S.E.2d 394, 396 (1999). “[T]o mandate an evidentiary hearing, there must be allegations of deliberate falsehood or of reckless disregard for the truth [as to statements included in the warrant affidavit], and those allegations must be accompanied by an offer of proof.” *State v. Davis*, 354 S.C. 348, 359, 580 S.E.2d 778, 784 (Ct. App. 2003) (quoting *Franks v. Delaware*, 438 U.S. 154, 155-56

(1978)). This applies not only to false information included in the affidavit, but also when exculpatory material is left out of the warrant. *Missouri*, 337 S.C. at 554, 524 S.E.2d at 397.

To be entitled to a *Franks* hearing for an alleged omission, the challenger must make a preliminary showing that the information in question was omitted with the intent to make, or in reckless disregard of whether it made, the affidavit misleading to the issuing judge. There will be no *Franks* violation if the affidavit, including the omitted data, still contains sufficient information to establish probable cause.

Id. The defendant has the burden of proving these allegations by a preponderance of the evidence. *Id.* Oral testimony may be used to supplement search warrant affidavits, however, such testimony, standing alone, does not satisfy the statute. *State v. Weston*, 329 S.C. 287, 290, 494 S.E.2d 801, 802 (1997); *State v. McKnight*, 291 S.C. 110, 113, 352 S.E.2d 471, 473 (1987).

In this case, the trial court failed to analyze the probable cause issue by including the exculpatory information not revealed to the magistrate and excluding the false and misleading information contained in the affidavit, and assessing whether, after such information was extracted or supplied, probable cause had been shown to exist. *See Missouri*, 337 S.C. at 554, 524 S.E.2d at 397. The allegations contained in the affidavit were as follows:

A confidential and reliable informant made a buy for cocaine out of the residence while being recorded and monitored by agents in the area. Also within the last seventy-two hours agents followed the

Defendant from the residence to another location, and were able to monitor and record another buy for cocaine.

(R. 24). The affidavit was executed on February 28, 2010. (R. 24). Not only does the affidavit fail to specify a date and time for the allegations, it misleads the reader into believing that the first buy occurred within seventy-two hours of the date of the affidavit. In actuality, the first buy occurred on July 23, 2009, nearly seven months prior to the execution of the affidavit. (R. 21). The second buy occurred on February 25, 2010, clearly not within seventy-two hours of the first buy. (R. 33, lines 4-25). Police officers knew that the second buy would not be enough to establish probable cause because it did not occur at the residence. Rather, they chose to mislead the Magistrate by failing to include dates in the affidavit and making it seem as if the first and second buy occurred within close proximity to each other. In fact, Officer Ard stated that he was aware that the first buy had occurred seven months prior, and attempted to do a “refresher buy” to obtain a search warrant for the residence. (R. 39, lines 13-16). However, he was unable to detect a buy from the residence on the second occasion. As a result, he placed misleading information in the affidavit to establish probable cause even though the first buy was not in close proximity to the date of the affidavit and the second buy did not occur at the residence.

The State claimed that the officers informed the Magistrate of the dates and times. While oral information may be used to supplement the affidavit, such

information may only be used to “amend incorrect information in an affidavit which was not knowingly, intentionally, or recklessly supplied by the affiant.” *Jones*, 341 S.C. at 129, 536 S.E.2d at 679. In *Jones*, an officer submitted an affidavit that misled the Magistrate concerning the identity of the source of the information recited in the warrant affidavit. *Jones*, 341 S.C. at 125, 536 S.E.2d at 677. The affidavit described the source not as a confidential informant but as an “agent” of the Florence Combined Drug Unit. *Id.* The affiant, a police officer, verbally corrected this misrepresentation by advising the Magistrate that the so-called “agent” was in fact an informant and that he had used the term “agent” in the affidavit to protect the identity of the informant. *Id.* Notwithstanding his oral correction of the false information and notwithstanding the additional information in the affidavit indicating corroboration by police surveillance, the evidence was insufficient for a finding of probable cause. *Jones*, 342 S.C. at 127, 536 S.E.2d at 678. Here, similar to *Jones*, Officer Ard, the affiant, omitted key information regarding the dates and times of the allegations to allegedly protect the informant’s identity. However, the paragraph was written in such a way to imply that the first buy occurred in close proximity to the second buy, or within seventy-two hours of the execution of the affidavit. In doing so, he submitted an affidavit he knew to be false or at least misleading.

Additionally, even though Gore requested that the Magistrate be questioned in an evidentiary hearing, Gore was not given the opportunity to ask the Magistrate as to his understanding of the affidavit. (R. 36, lines 12-16). Furthermore, there were several occasions in which Officer Ard could not recollect what the Magistrate was told prior to the execution of the warrant when questioned by defense counsel. (R. 42, lines 9-12, 43, lines 3-25, 44, lines 1-16, 45, lines 1-24). Therefore, it is questionable whether the information regarding the lapse in time was communicated to the magistrate. While the admission of evidence is within the discretion of the trial court unless there is an abuse of discretion, *Hofer v. St. Clair*, 298 S.C. 503, 513, 381 S.E.2d 736, 742 (1989), the trial court erred in denying Gore the opportunity to question the Magistrate. There were material facts at issue as to whether the Magistrate was informed as to the specific dates and times of allegations in the affidavit. Nonetheless, Gore was at least entitled to an evidentiary hearing on the issue.

Notably, apart from the probable cause issue, the *Jones* decision also found a violation of the more stringent requirement of South Carolina law for issuance of a search warrant under S.C. Code Ann. § 17-13-140, which requires a sworn written affidavit, rather than the mere oath or affirmation required by constitutional standards. *Jones*, 342 S.C. at 128, 536 S.E.2d at 678-79. The Court held that the false affidavit was the equivalent of *not having an affidavit at all*, violating Section

17-13-150, “because if an affidavit is not truthful, then the magistrate must depend totally on information provided orally by the affiant in order to determine if probable cause exists.” *Jones*, 342 S.C. at 128, 536 S.E.2d at 679. In this case, the affidavit was not truthful, and it was the equivalent of having no affidavit at all. “[W]hen an omission is combined with an affirmative falsehood, it reveals that the affiant not only believed the omitted information was critical, but that a statement in the affidavit to the contrary was necessary for establishing probable cause.” *Missouri*, 337 S.C. at 557, 524 S.E.2d at 398. The affiant in this case omitted critical information, the date and time a controlled buy actually occurred at the residence sought to be searched. Instead, the affidavit indicated falsely that the buy occurred within seventy-two hours of the execution of the affidavit. (R. 24).

Considering the buy at the residence occurred nearly seven months prior to the execution of the warrant, the remaining allegation did not establish *any connection* between the residence and any alleged drug activity. The actions of the affiant show that he believed the omissions of this critical information was necessary to obtain a finding of probable cause for a warrant to search the residence. Therefore, the trial court erred in denying Gore’s motion pursuant to *Franks v. Delaware*.

B. Even if the allegations of the affidavit had been credible, they were insufficient to establish probable cause.

A magistrate may issue a search warrant only upon a finding of probable cause. *State v. Bellamy*, 336 S.C. 140, 143, 519 S.E.2d 347, 348 (1999). Probable

cause 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.” *Ornelas v. United States*, 517 U.S. 690, 696 (1996).

This determination requires the magistrate to make a practical, common-sense decision of whether, given the totality of the circumstances set forth in the affidavit, including the veracity and basis of knowledge of persons supplying the information, there is a fair probability that contraband or evidence of a crime will be found in a particular place.

State v. King, 349 S.C. 142, 150, 561 S.E.2d 640, 644 (Ct. App. 2002). Probable cause cannot be established by affidavits which are conclusory and do not provide factual detail. *Weston*, 329 S.C. at 290, 494 S.E.2d at 802; *State v. Smith*, 301 S.C. 371, 373, 392 S.E.2d 182, 183 (1990). Further, “probable cause to search a _____ person’s residence does not arise based solely upon probable cause that the person is guilty of a crime. Instead, there must be additional evidence linking the person’s home to the suspected criminal activity.” *United States v. Rowland*, 145 F.3d 1194, 1204 (10th Cir. 1998).

“In order for an affidavit in support of a search warrant to show cause, it must state facts so closely related to the time of the issuance of the warrant as to justify a finding of probable cause at that time.” *State v. Winborne*, 273 S.C. 62, 63, 254 S.E.2d 297, 298 (1979) (internal quotation marks omitted) (citations omitted). “An affidavit which fails altogether to state the time of the occurrence of

the facts alleged is insufficient.” *Id.* An “affidavit must state facts so closely related to the time of the issuance of the warrant [] to justify a finding of probable cause at that time.” *State v. Corns*, 310 S.C. 546, 550, 426 S.E.2d 324, 326 (Ct. App. 1992). However,

[w]hile the lapse of time involved is an important consideration and may in some cases be controlling, it is not necessarily so. There are other factors to be considered, including the nature of the criminal activity involved, and the kind of property for which authority to search is sought. Obviously, a highly incriminating or consumable item of personal property is less likely to remain in one place as long as an item of property which is not consumable or which is innocuous in itself or not particularly incriminating.

Corns, 310 S.C. at 550-51, 426 S.E.2d at 326 (quoting *United States v. Steeves*, 525 F.2d 33 (8th Cir. 1975)). In reviewing a magistrate’s decision, “[t]he duty of the reviewing court is to ensure the issuing magistrate had a substantial basis upon which to conclude that probable cause existed.” *State v. Baccus*, 367 S.C. 41, 50, 625 S.E.2d 216, 221 (2006).

Here, even if the information in the affidavit were credible, the affidavit and supplemental oral testimony were insufficient to provide the magistrate with a substantial basis for which to find probable cause to issue a search warrant for the residence. The affidavit in this case fails altogether to state the date and time of the occurrences. (R. 24). The first allegation was the only part of the affidavit that pertained to alleged drug-related activity at the residence. (*Id.*) Considering that activity occurred seven months prior to law enforcement obtaining a search

warrant, it was very unlikely that the alleged evidence would still be in the residence. (R. 21). “The time should be sufficiently short to justify the conclusion that the evidence is likely still at the place where it was seen.” *Winborne*, 273 S.C. at 65, 254 S.E.2d at 298. Further, the type of incriminating items that law enforcement was attempting to recover would be considered highly incriminating and consumable, making it less likely to remain in the residence during that lengthy period of time. *See Corns*, 310 S.C. at 550-51, 426 S.E.2d at 326. Notably, Officer Ard was unable to detect another buy from inside the residence despite the lengthy investigation into Gore’s alleged drug activity. (R. 40, lines 21-24). As such, this allegation should not have even been included in the affidavit as it had become stale and was far removed from the date the affidavit was executed.

Additionally, no information was provided regarding personal knowledge of either drug use or drug possession at the residence. Affidavits may not be “purely conclusory” but must detail the ““underlying circumstances”” in order to support a determination that probable cause exists. *United States v. Ventresca*, 380 U.S. 102, 108-09 (1965). Although the magistrate may draw reasonable inferences from the information given in the search warrant application, such inferences must be based on specific facts and cannot be the result of broad generalizations. *See Sowers v. Commonwealth*, 643 S.E.2d 506, 511 (Va. Ct. App. 2007); *State v. Graham*, 103

P.3d 1073, 1080 (Mont. 2004); *State v. Thein*, 977 P.2d 582, 589-90 (Wash. 1999).

The first allegation was not enough for the magistrate to make a reasonable inference that drugs would be found in the residence because the alleged activity occurred seven months prior to the execution of the warrant. The second allegation occurred at a location other than the residence and established no connection to drug activity and the residence. Rather, the issuance of the warrant was based on mere generalizations and was not enough to establish probable cause. However, during the *Franks* hearing, the controlled buy that the trial court relied on in finding a nexus to the residence occurred at a location other than the residence. (R. 37, lines 1-4).

The Court: So I'm clear about this, the second sentence is, "Also within the last seventy-two hours agents followed the Defendant from the residence to another location, were able to monitor and record another buy for a quantity of cocaine," and this may very well call for what was told to the Magistrate. What I'm understanding from that is, they followed the Defendant from his house to another location where he sold drugs to another individual.

Mr. O'Sullivan: Yes sir.

The Court: It would seem to me, even if there was some confusion about the first sentence — and I'll hear from the — hear from the Officer, but it seems to me that would be sufficient in and of itself. Where did the Defendant get the drugs from to sell to the person? If they observed him leaving the house, up to the time he comes to the location, and they see him sell the drugs to John Doe, where did he get the drugs from? He came from his house. The drugs had to be in his house, so that would be — you are tell me that's insufficient.

Mr. Truslow: Yes sir, and the reason is, because you have to have

probable cause that there was drugs in his house. Now, there's no allegation —

The Court: Where did the drugs come from, out of the air?

(R. 36, lines 17-25, 37, lines 1-15). However, probable cause to search a person's residence does not arise based solely upon probable cause that the person is guilty of a crime. *See Rowland*, 145 F.3d at 1204. Simply connecting a person to a home does not necessarily connect the home to the drugs. Contrary to the trial court's assumptions, the facts showed more of a connection to Gore's vehicle than the residence because Officer Ard admitted that he did not see Gore carrying anything when he came from the residence. (R. 45, lines 10-14). The trial court made improper inferences in its evaluation of the affidavit. The facts alleged in the affidavit did not provide the requisite connection between the items sought and the place to be searched in order to support a finding of probable cause. Therefore, a search warrant should not have been returned based on a lack of probable cause and the trial court erred in failing to suppress the evidence seized as a result of the invalid search warrant.

II. The trial court committed reversible error by allowing into evidence State's Exhibits 26 and 27, depicting Gore holding up United States currency, as these photographs were irrelevant under Rule 401, SCRE, and unfairly prejudicial under Rule 403.

Over defense counsel's objection that their prejudicial impact outweighed any probative value, the judge allowed the State to introduce two photographs of

Gore appearing to hold up a large amount of currency (R. 240-241). (R. 77, lines 1-25, 78, lines 1-25, 79, lines 1-25). It is unknown who took these pictures and when they were taken. Rule 401 of the South Carolina Rules of Evidence defines “relevant evidence” as “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.” “Evidence which is not relevant is not admissible.” Rule 402, SCRE. However, even if relevant, evidence should be excluded “if its probative value is substantially outweighed by the danger of unfair prejudice [or] confusion of the issues.” Rule 403, SCRE.

The admissibility of photographs is a matter generally entrusted to the discretion of the trial judge. *State v. Kornahrens*, 290 S.C. 281, 288, 350 S.E.2d 180, 185 (1986). “[T]here is no abuse of discretion if the offered photograph serves to corroborate testimony.” *State v. Johnson*, 338 S.C. 114, 122, 525 S.E.2d 519, 523 (2000). To be classified as unfairly prejudicial, photographs must have a “tendency to suggest a decision on an improper basis, commonly, though not necessarily, an emotional one.” *State v. Torres*, 390 S.C. 618, 623, 703 S.E.2d 226, 228-29 (2010) (quoting *State v. Franklin*, 318 S.C. 47, 55, 456 S.E.2d 357, 361 (1995)).

In this case, officers retrieved the photographs from a dresser in the master bedroom of the 309 Junco Circle residence. (R. 81, line 3). The State argued that

the photographs established Gore's identity and connection to the residence. (R. 77, lines 21-22). However, this evidence was not relevant because there was no indication as to when the pictures were taken and it is unknown who took the pictures. (R. 82, lines 10-11). The pictures appear to be old, taken well before the date of the criminal conduct alleged in the Indictment and they were also not taken from inside residence. (R. 82, lines 6-15, R. 240-241). Furthermore, it did not have any relation to Gore and any alleged illegal drug activity. (R. 82, lines 20-25). Nevertheless, the trial court still found that the photographs were admissible.

Photographs used to arouse the sympathy or prejudice of the jury should not be admitted if they are irrelevant and unnecessary to substantiate material facts or conditions. *See State v. Jackson*, 364 S.C. 329, 334, 613 S.E.2d 374, 376 (2005); *State v. Brazell*, 325 S.C. 65, 78, 480 S.E.2d 64, 72 (1997); *State v. Kelley*, 319 S.C. 173, 178, 460 S.E.2d 368, 370-71 (1995). The photographs the State introduced suggested that because the Defendant possessed United States currency at some point he must be involved in drug transactions even though there was no evidence the photographs occurred or were taken in conjunction with any alleged drug trafficking offense. The photographs are also irrelevant because there is no evidence that the photographs established a connection between Gore and the residence. The use of the photograph was also unnecessary because the State had another photograph found in the residence that depicted Gore and Angel Deangelo

together. (R. 65, lines 17-19). As such, the State could have simply used that photograph instead of the prejudicial photographs that were admitted. The photographs were admitted solely to lure the jury to decide the case on an improper basis. Additionally, since the State already had testimony from the investigating officers, Gore's girlfriend, Angel Deangelo, and Gore's bondsman stating that Gore appeared to be living at the residence, the photographs were unnecessary to substantiate material facts. (R. 53, lines 6-9, 65, lines 14-19, 85, lines 1-2, 86, lines 1-2, 121, lines 7-12, 191, lines 1-16). Such evidence was used simply to invite the jury to infer criminal disposition. Because the photographs had marginal if any probative value and a high potential to persuade the jury to decide the case on emotion rather than evidence, the failure to exclude the photographs was an abuse of discretion. Therefore, this Court should reverse Gore's convictions and remand for a new trial.

III. The jury should have been charged the lesser-included offense of possession with intent to distribute along with the trafficking charge.

An appellate court reviews a trial court's decision regarding jury instructions on an abuse of discretion standard. *Clark v. Cantrell*, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000). "An abuse of discretion occurs when the trial court's ruling is based on error of law or, when grounded in factual conclusions, is without evidentiary support." *Id.* However, in determining whether a lesser-offense charge is required, the court must view the evidence in the light most favorable to

the appellant, “mindful that the charge request is properly rejected only where ‘there is no evidence whatsoever’ of the lesser offense.” *State v. Cottrell*, 376 S.C. 260, 262, 657 S.E.2d 451, 452 (2008). The law to be charged is determined by the evidence presented at trial. *State v. White*, 361 S.C. 407, 412, 605 S.E.2d 540, 542 (2004). “[A] judge is required to charge a jury on a lesser-included offense ‘if there is any evidence from which it could be inferred the lesser, *rather than the greater*, offense was committed.’” *Dempsey v. State*, 363 S.C. 365, 371, 610 S.E.2d 812, 815 (2005) (quoting *State v. Gourdine*, 322 S.C. 396, 398, 472 S.E.2d 241, 242 (1996)) (emphasis in original). Where a requested instruction correctly states the law applicable to the issues in the case and is supported by the evidence, the court has a duty to give the instruction. *State v. Condrey*, 349 S.C. 184, 194, 562 S.E.2d 320, 325 (Ct. App. 2002); *State v. Harrison*, 343 S.C. 165, 172, 539 S.E.2d 71, 74 (Ct. App. 2000).

An indictment will sustain a conviction for a lesser offense if the lesser offense is included within the greater charged offense. *State v. Fennell*, 263 S.C. 216, 219, 209 S.E.2d 433, 434 (1974). It has also been held that “it is the amount of cocaine, rather than the criminal act, which triggers the trafficking statute, and distinguishes trafficking from distribution and simple possession.” *State v. Raffaldt*, 318 S.C. 110, 117, 456 S.E.2d 390, 394 (1995). “If the amount of cocaine, or any mixture containing cocaine, is ten grams or more, the trafficking

statute is applied.” *Id.*

In this case, Gore was entitled to a charge on the lesser-included offense of simple possession. During trial, he presented evidence that he was not a resident of the 309 Junco Circle residence. The testimony revealed that cocaine residue was found in the guest bedroom under the mattress. (R. 95, lines 6-15). The larger amount of cocaine was found in the master bedroom. (R. 67, lines 2-7). Since Gore’s primary argument was that the residence belonged to his girlfriend, Angela Deangelo, a jury could have determined that Gore had constructive possession over items in the guest bedroom. In that circumstance, the jury would have found that Gore possessed less than the minimum amount required for the trafficking charge. However, instead of deciding whether the evidence could support the lesser-included offense of simple possession, the trial court simply dismissed Gore’s request.

Mr. Truslow: Well, for the record, I — we talked about it the — up there but I would for the record request a charge of possession on this case. There was a trace amount of white powder located in a separate bedroom and there’s questions about whose bedroom was whose and I would think —

The Court: Well, he’s not being tried for that nor has been indicted for that. He’s been indicted as a document will disclose —

Mr. Truslow: I understand but possession is a lesser included offense. They could find that just that little baggie is his that was tucked under the mattress.

The Court: Then they would have to find him not guilty because I’m

going to charge the jury that they must find he possessed 200 or more or less than 400. And if they found some amount less than that, they can find him not guilty but they're gonna be charged — they must under this indictment find that he possessed actual or constructive 200 or more grams of cocaine. So, I respectfully deny your motion with reference to simple possession.

(R. 197, lines 2-16, lines 24-25, 198, lines 1-17). The record reveals that the trial court failed to consider that “[t]he absence of a lesser included offense instruction increase[s] the risk that the jury will convict . . . simply to avoid setting the defendant free. . . .” *Spaziano v. Florida*, 468 U.S. 447, 455 (1984). A lesser-included offense instruction minimizes this risk by giving jurors a “third option” when neither an acquittal nor a conviction on the charged offense fits the facts of the case. *See Schad v. Arizona*, 501 U.S. 624, 646 (1991). There is a reasonable likelihood that Gore could have been convicted of the lesser-included offense of simple possession based on the evidence. As a result, the trial court erred in inferring that the jury could simply find Gore not guilty of the charged offense if they believed he was guilty of some lesser amount. On the contrary, the jury could have felt that they had to convict Gore based on the trace amount of cocaine located in the guest bedroom because it indicates he was involved in drug activity. Under that circumstance, it is unlikely that the jury would have believed that the best option was a not guilty verdict. Therefore, the trial court erred in refusing to charge the jury as to the lesser-included offense entitling Gore to a reversal of his sentence and conviction.

CONCLUSION

Based upon the foregoing argument and citations of authority, the Appellant, Alton Wesley Gore, Jr. respectfully requests that this Court reverse his conviction.

Respectfully Submitted,

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THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM HORRY COUNTY

Court of General Sessions

Edward B. Cottingham, Sr., Circuit Court Judge

Case No. 2010-GS-26-2326

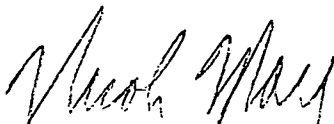
THE STATE.....RESPONDENT

V.

ALTON WESLEY GORE JR. APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant, Reply Brief of Appellant, and Record on Appeal in the above referenced case has been served upon Christine Catoe, Esq. at P.O. Box 11549, Columbia, SC 29211 on this 20th day of May, 2013.


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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
The Honorable Edward B Cottingham, Sr., Circuit Court Judge

Appellate Case No.: 2012-206368

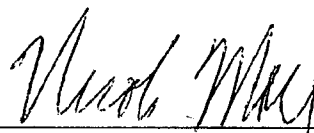
THE STATE.....Respondent

v.

ALTON WESLEY GORE JR.....Appellant

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR.



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SC Court of Appeals

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Horry County

The Honorable Edward B. Cottingham, Sr., Circuit Court Judge

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THE STATE OF SOUTH CAROLINA,

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v.

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APPELLANT.

FINAL BRIEF OF RESPONDENT

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SC Court of Appeals

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STATE OF SOUTH CAROLINA

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STATEMENT OF ISSUES ON APPEAL

- I. The trial judge properly denied Appellant's motion to suppress where the search warrant affidavit was not submitted with intent to deceive or with reckless disregard for the truth and where the affidavit provided probable cause for issuance of the search warrant. Further, even if the search warrant had been defective, the good-faith exception applied to preclude suppression of the fruits of the search.
- II. The trial judge properly allowed into evidence two photographs of Appellant which were relevant to proving he was a resident of the house, served to corroborate testimony, and which were not unfairly prejudicial. In any event, even assuming the judge erred, admission of the photographs was harmless in the context of the entire case.
- III. The trial judge properly denied Appellant's request for a lesser-included charge of simple possession where there was no evidence suggesting Appellant was guilty of only the lesser-included offense.

STATEMENT OF THE CASE

Appellant was indicted in Horry County in June 2010 for trafficking in cocaine in an amount between 200 and 400 grams. On March 15, 2011, a pre-trial hearing regarding the propriety of the search warrant was held before the Honorable Steven H. John. Judge John found the search warrant affidavit proper and denied Appellant's motion to suppress the fruits of the search. On January 3 and 5, 2011, Appellant was tried before the Honorable Edward B. Cottingham, Sr., and a jury. The jury found Appellant guilty, and Judge Cottingham imposed the mandatory sentence of twenty-five years and a fine of \$100,000. A timely notice of appeal was served and filed.

ARGUMENT

- I. **The trial judge properly denied Appellant's motion to suppress where the search warrant affidavit was not submitted with intent to deceive or with reckless disregard for the truth and where the affidavit provided probable cause for issuance of the search warrant. Further, even if the search warrant had been defective, the good-faith exception applied to preclude suppression of the fruits of the search.**

Alleged Franks Violation

In Franks v. Delaware, the United States Supreme Court held that a defendant had the right in certain circumstances to challenge the veracity of a warrant affidavit after the warrant had been issued and executed. State v. Missouri, 337 S.C. 548, 553, 524 S.E.2d 394, 396 (1999). Franks outlined a two-part test for challenging the warrant affidavit's veracity. See Franks v. Delaware, 438 U.S. 154, 155–56 (1978). First, to mandate an evidentiary hearing, there must be “allegations of deliberate falsehood or of reckless disregard for the truth [as to statements included in the warrant affidavit], and those allegations must be accompanied by an offer of proof.” Id. at 171. At the hearing, the defendant has the burden of proving the allegations of perjury or reckless disregard for the truth by a preponderance of the evidence. Id. at 155–56; see State v. Jones, 342 S.C. 121, 126–27, 536 S.E.2d 675, 678 (2000). Second, if deliberate falsehood or reckless disregard for the truth has been established, the court must consider the affidavit's remaining content, with the affidavit's false material set to one side, to determine if it is sufficient to establish probable cause. Id. If the court determines probable cause does not exist after the false material is omitted from the analysis, “the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit.” Franks, 438 U.S. at 155–56; see Missouri, 337 S.C. at 553–54, 524 S.E.2d at 396–97.

“[T]here is ‘a presumption of validity with respect to the affidavit supporting the search warrant.’” State v. 192 Coin-Operated Video Game Machines, 338 S.C. 176, 195, 525 S.E.2d 872, 882 (2000) (quoting Franks v. Delaware, 438 U.S. 154 (1978)). Therefore, a defendant’s attack on a search warrant affidavit must be more than conclusory; there must be allegations of deliberate falsehood or of reckless disregard for the truth, and those allegations must be accompanied by an offer of proof. State v. Missouri, 337 S.C. 548, 554, 524 S.E.2d 394, 397 (1999).

In Appellant’s case, the “probable cause” portion of the search warrant affidavit states as follows:

A confidential and reliable informant made a buy for cocaine out of the residence while being recorded and monitored by agents in the area. Also within the last seventy two hours agents followed the defendant from the residence to another location and were able to monitor and record another buy for a quantity of cocaine. It is the affiants belief that there are more illegal narcotics in the residence. (See R. p. 20).

The first sentence in the affidavit indicates that a controlled buy of cocaine occurred at the residence the police wished to search. The second sentence indicates that, within the past seventy-two hours of the date of the affidavit, but at some point after the controlled buy at the residence, police followed Appellant from the residence to another location where another controlled buy of cocaine occurred. These statements were both true. (See R. p. 39-40). Although the statements were not as specific as they could have been, Corporal Ard explained that it is common practice to keep the search warrant as general as possible in order to protect the identity of the confidential informant. (R. p. 40, lines 10-20). This practice is permissible since the affidavit, in its totality, still contained sufficient information to give rise to a probable cause finding. See U.S. v. Ventresca, 380 U.S. 102, 108 (1965) (“Technical requirements of elaborate specificity

once exacted under common law pleadings have no proper place in this area.”); U.S. v. Cioni, 649 F.3d 276, 286 (4th Cir. 2011) (defendant claiming reckless disregard for the truth in a search warrant affidavit must point to “specific evidence of recklessness” and must show that any omitted facts would have resulted in a failure of probable cause).

Appellant argues that Corporal Ard omitted “exculpatory” information regarding the date of the first controlled buy at Appellant’s residence. However, the fact that the buy at the residence occurred seven months earlier is not actually exculpatory considering that Appellant was still routinely selling the same kind of drugs, i.e., cocaine, seven months later and considering that the second buy listed in the affidavit, which occurred within seventy-two hours of the affidavit’s date, involved Appellant leaving *the same residence* and going immediately to conduct a drug transaction at another location.¹ (See R. p. 20-22; p. 39). See State v. Rutledge, 373 S.C. 312, 319, 644 S.E.2d 789, 792 (Ct. App. 2007) (although defendant alleged that the failure to include specific dates in the search warrant affidavit amounted to reckless disregard for the truth, any doubt as to whether illegal activities were currently ongoing at the residence was obviated by the recent information provided).

There is no evidence that Corporal Ard knowingly, intentionally, or recklessly provided incorrect or misleading information which was critical to probable cause in the affidavit. (See R. p. 39, lines 5-25). See State v. 192 Coin-Operated Video Game Machines, 338 S.C. at 195, 525 S.E.2d at 882 (noting that “there is ‘a presumption of validity with respect to the affidavit supporting the search warrant’”) (quoting Franks v. Delaware, 438 U.S. 154 (1978)); State v. Missouri, 337 S.C. 548, 555-56, 524 S.E.2d 394, 397-98 (1999) (indicating that officers may properly leave out facts they believe are

¹ As will be discussed in the next section regarding probable cause, the second controlled buy, on its own, supported probable cause to search the residence. See *infra* p. 11-14.

immaterial to the probable cause determination); State v. Rutledge, 373 S.C. at 319, 644 S.E.2d at 792 (where the exculpatory nature of information left out of a search warrant affidavit is dubious, and where exclusion of the information did not dilute probable cause, there was no Franks violation); U.S. v. Colkley, 899 F.2d 297, 303 (4th Cir. 1990) (officers are not required to include all potentially exculpatory evidence in a search warrant affidavit; unless the defendant shows that the affiant excluded information critical to the probable cause determination with the intent to mislead the magistrate, the Fourth Amendment provides no basis for an attack on the affidavit's integrity); State v. Thomas, 275 S.C. 274, 269 S.E.2d 768 (1980) (courts should consider a "common-sense reading of the entire affidavit" in determining whether probable cause exists).

However, even assuming the search warrant affidavit contained information that *might* be construed as misleading, the magistrate judge was privy to the oral testimony of Corporal Ard providing the specific dates of the controlled buys along with all the "facts and circumstances of the case." (See R. p. 40-41). See State v. Jones, 342 S.C. 121, 128, 536 S.E.2d 675, 678-79 (2000) (oral testimony may be used to supplement information in a search warrant affidavit which was not knowingly, intentionally, or recklessly supplied by the affiant). Corporal Ard's testimony at the pre-trial hearing made it clear that the magistrate judge was provided with information regarding the specific dates of each controlled buy; that there was a gap in time from the first buy to the second; and that in the second buy Appellant was observed leaving the house, getting into his vehicle, and then going to conduct a drug transaction. (See R. p. 40, lines 8-10 & lines 21-25; p. 43-44). See State v. Rutledge, 373 S.C. 312, 319, 644 S.E.2d 789, 792 (Ct. App. 2007) (there was no Franks violation where the affiant's oral testimony clarified any possible confusion about how and where the drugs were found). Considering that the affidavit

contained no false information, and considering that Corporal Ard provided oral testimony that clarified any possible ambiguities in the search warrant affidavit, Appellant failed to show that the magistrate was misled into issuing the search warrant.² See State v. Missouri, 337 S.C. 548, 524 S.E.2d 394 (1999) (a defendant's attack on a search warrant affidavit must be more than conclusory; there must be allegations of deliberate falsehood or of reckless disregard for the truth, and those allegations must be accompanied by an offer of proof). (See R. p. 1-2). Therefore, because there was no Franks violation, Appellant's argument that statements in the search warrant should be redacted must be rejected.

Probable Cause

When reviewing a decision to issue a search warrant, the reviewing court should decide whether the magistrate had a substantial basis for concluding probable cause existed. State v. Dupree, 354 S.C. 676, 683, 583 S.E.2d 437, 441 (Ct. App. 2003). Applying the same standard as the magistrate, the court should base its determination on the totality of circumstances. State v. Keith, 356 S.C. 219, 223, 588 S.E.2d 145, 147 (Ct. App. 2003). The magistrate's probable cause determination should be afforded great deference. State v. Rutledge, 373 S.C. 312, 316, 644 S.E.2d 789, 791 (Ct. App. 2007).

In order for a magistrate to issue a search warrant, an officer must present a sworn affidavit establishing the grounds for the warrant. State v. Bellamy, 336 S.C. 140, 143, 519 S.E.2d 347, 348 (1999). A search warrant affidavit must contain sufficient underlying facts upon which a magistrate can base a probable cause determination. State

² Appellant states in his Brief that he "was not given the opportunity to ask the Magistrate as to his understanding of the affidavit" and that the trial judge "erred in denying [Appellant] the opportunity to question the Magistrate." (Brief of Appellant, p. 12). However, at the hearing, Appellant failed to call the magistrate as a witness - despite being invited by the judge to call his own witnesses - and failed to even request a chance to question the magistrate. (See R. p. 27-50; see p. 46, lines 10-11). Therefore, Appellant cannot now complain about this on appeal. See State v. Meggett, 398 S.C. 516, 523, 728 S.E.2d 492, 496 (Ct. App. 2012) (a party cannot complain of an error which his own conduct has induced).

v. Smith, 301 S.C. 371, 373, 392 S.E.2d 182, 183 (1990). The facts contained in the affidavit must be so closely related to the time of the issuance of the warrant to justify a finding of probable cause at that time. State v. Winborne, 273 S.C. 62, 64, 254 S.E.2d 297, 298 (1979).

A search warrant may only be issued upon a finding of probable cause. Bellamy, 336 S.C. at 143, 519 S.E.2d at 348. In State v. Williams, 262 S.C. 186, 189, 203 S.E.2d 436, 437-438 (1974), the South Carolina Supreme Court explained probable cause as it relates to the issuance of a search warrant:

In order to justify the issuance of a search warrant, probable cause must be shown, but the term 'probable cause' does not import absolute certainty. In determining whether there is sufficient evidence to sustain a finding of probable cause, each case stands on its own facts. The evidence need not be sufficient to support a conviction, or a verdict of guilty, or to establish guilt beyond a reasonable doubt; nor need the proof be positive, it being enough if it is such as to induce in the mind of the issuing Corporal an honest belief that the facts set forth exist, or as would lead a man of prudence to believe that the offense has been committed.

(citing State v. Bennett, 256 S.C. 234, 182 S.E.2d 291 (1971)).

In deciding whether to issue a search warrant, the magistrate must "make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place." Illinois v. Gates, 462 U.S. 213, 238 (1983). In making a probable cause determination, "magistrates are concerned with probabilities and not certainties." State v. Sullivan, 267 S.C. 610, 617, 230 S.E.2d 621, 624 (1976); see Bennett, 256 S.C. at 240-241, 182 S.E.2d at 294. Consideration should be given to the fact search warrant affidavits are typically prepared by non-lawyers in the haste of criminal investigations, and they must be viewed in a common sense and realistic

fashion. State v. Arnold, 319 S.C. 256, 260, 460 S.E.2d 403, 405 (Ct. App. 1995). Searches based on warrants will be given judicial deference such that an otherwise marginal search may be justified as long as it meets a realistic standard of probable cause. Bennett, 256 S.C. at 241, 182 S.E.2d at 294; U.S. v. Ventresca, 380 U.S. 102, 109 (1965).

In Appellant's case, the search warrant affidavit clearly provided probable cause for a search of the residence in question. First, standing alone, the controlled buy that occurred within seventy-two hours of the swearing of the affidavit provided probable cause because it indicated that Appellant left the residence and immediately thereafter conducted a monitored drug transaction. See State v. Dupree, 354 S.C. 676, 687, 583 S.E.2d 437, 443 (Ct. App. 2003) ("An informant's controlled buy of drugs can constitute probable cause sufficient for a magistrate to issue a warrant."); U.S. v. Anderson, 851 F.2d 727, 729 (4th Cir. 1988) ("[T]he nexus between the place to be searched and the items to be seized may be established by the nature of the item and the normal inferences of where one would likely keep such evidence."); State v. Scott, 303 S.C. 360, 363, 400 S.E.2d 784, 786 (Ct. App. 1991) (citation omitted) ("In the case of drug dealers, evidence is likely to be found where the dealers live."); U.S. v. Grossman, 400 F.3d 212, 218 (4th Cir. 2005) (it is reasonable to suspect that a drug dealer stores drugs in a home to which he has a key); U.S. v. Williams, 974 F.2d 480, 481 (4th Cir. 1992) (search warrant for Appellant's motel room upheld where the affidavit supported that Appellant was a drug dealer and that his current residence was the motel room, even though there were no specific facts indicating that drugs would be located in the motel room); see also U.S. v. Feliz, 182 F.3d 82, 88 (1st Cir. 1999) (a likely place to seek to find a drug dealer's incriminating items would be in his residence, a safe and accessible place).

Therefore, regardless of where the drug transaction occurred, a nexus to the residence was established because Appellant conducted the drug transaction immediately after leaving the residence. (R. p. 39, lines 19-25). As the trial judge pointed out, Appellant had to get the drugs from somewhere, and – while it is certainly *possible* that Appellant kept his drugs in his car – there was nevertheless a substantial probability that the drug dealer, Appellant, would store his illegal drugs in the safety and privacy of his residence.³ (See R. p. 37, lines 1-15). See, e.g., Illinois v. Gates, 462 U.S. at 244, n. 13 (“[P]robable cause requires only a probability or substantial chance of criminal activity, not an actual showing of such activity.”); U.S. v. Williams, 974 F.2d at 481 (citing Texas v. Brown, 460 U.S. 730, 742, 103 S.Ct. 1535, 1543, 75 L.Ed.2d 502 (1983) (plurality opinion)) (“The probable cause standard ‘does not demand showing that such a belief be correct or more likely true than false.’”). Accordingly, there was probable cause for issuance of the search warrant based upon the controlled buy that occurred immediately after Appellant left the residence.

A nexus to the residence was further strengthened by the information in the search warrant affidavit indicating that a controlled buy was conducted out of Appellant’s residence at some time in the past. While this information could not have, on its own, provided probable cause for a search of the residence, this information *coupled with* the information about the controlled buy that occurred within the past seventy-two hours was more than sufficient to provide probable cause because it established a pattern of ongoing drug activity. See State v. Thompson, 363 S.C. 192, 207, 609 S.E.2d 556, 564 (Ct. App. 2005) (citations omitted) (“Given the continuous nature of the alleged drug activity, we

³ Appellant points out in his Brief that Corporal Ard did not recall seeing Appellant carrying anything when he left the residence to conduct the off-site drug transaction. (See Brief of Appellant, p. 18; see R. p. 45, lines 10-14). However, this particular drug transaction involved 29.2 grams of cocaine, an amount which could have easily been concealed in Appellant’s pocket. (See R. p. 21).

find the record supports the trial court's finding that it was reasonable for the magistrate to conclude that Thompson would be found in possession of illegal substances. Although isolated sales of narcotics unquestionably occur, it is generally recognized that 'narcotics conspiracies are the very paradigm of the continuing enterprises for which the courts have relaxed the temporal requirements of non-staleness.'"); State v. King, 349 S.C. 142, 150-51, 561 S.E.2d 640, 644 (Ct. App. 2002) (search warrant affidavit referencing an informant's observations of drugs "in the past" upheld where the affidavit also referenced current information regarding drugs); U.S. v. Cioni, 649 F.3d at 286 (defendant's claim that the search warrant affidavit was stale because it left out certain information regarding when various acts occurred was without merit, since the defendant's unlawful conduct extended over a substantial period of time and where much of the information was tied to specific and relatively recent dates); see also State v. Bultron, 318 S.C. 323, 333, 457 S.E.2d 616, 622 (Ct. App. 1995) ("Law enforcement officials are not constitutionally or otherwise legally compelled to halt a criminal investigation the moment they have minimal information to establish probable cause.").

Thus, Corporal Ard's failure to provide a specific time frame with respect to the previous controlled buy from the residence was not fatal, considering the totality of the circumstances and the entirety of the search warrant affidavit, including the information regarding the controlled buy within the past seventy-two hours. See State v. Thompson, 363 S.C. at 207; cf. State v. Winborne, 273 S.C. 62, 254 S.E.2d 297 (1979) (where search warrant affidavit failed to set forth *any time frame*, and there was no evidence from which a magistrate could determine how long ago the evidence was seen on the premises, the affidavit was defective) (emphasis added). In sum, the fact that Appellant was observed selling cocaine immediately after leaving his residence within seventy-two hours of the

search warrant affidavit, combined with the fact that cocaine was previously sold directly out of Appellant's residence, gave the magistrate a substantial basis to conclude that Appellant was engaged in ongoing drug activity and that drugs would be found at the residence at the time the search warrant was issued. Therefore, the affidavit was sufficient to provide probable cause for issuance of the search warrant.

The Good-Faith Exception

Even if the search warrant affidavit had been deficient, suppression of the fruits of the search was not required because the good-faith exception applied. Generally, under the good-faith exception, reliable physical evidence will not be suppressed where the evidence was obtained by an officer acting with objective good faith in reliance upon a search warrant issued by a detached and neutral magistrate, even though the search warrant is later determined to be defective. U.S. v. Leon, 468 U.S. 897, 926 (1984)); see also State v. Weston, 329 S.C. 287, 292-93, 494 S.E.2d 801, 803-804 (1997). There are three situations in which the good-faith exception will not apply: (1) where the affiant knowingly or recklessly included false information in the search warrant affidavit; (2) where the magistrate failed to perform his neutral and detached function and instead served as a rubber stamp for the police; and (3) where the affidavit is so lacking in indicia of probable cause that official belief in its existence would be entirely unreasonable. State v. Weston, 329 S.C. at 292-93, 494 S.E.2d at 803-804.

In this case, as discussed above, there is no evidence of deliberate dishonesty, reckless inclusion of false information, or bad faith on the part of Corporal Ard. See supra, p. 5-9. Further, there is no evidence that the magistrate was involved in the investigation or failed to perform his neutral or detached function. Finally, the affidavit was facially valid and was not so lacking in indicia of probable cause that the officer's

reliance upon it was unreasonable. See U.S. v. Leon, 468 U.S. at 926; U.S. v. Lalor, 996 F.2d 1578, 1583-84 (1993) (good faith exception applied even though search warrant affidavit may have been prepared without full disclosure of all the facts, and even though it may have contained misstatements of fact tending to increase the apparent strength of the evidence presented, as long as the affidavit was not prepared in bad faith); cf. State v. Adolphe, 314 S.C. 89, 93-94, 441 S.E.2d 832, 834 (Ct. App. 1994) (good faith exception did not apply where affidavit was defective on its face because it did not contain any information regarding the reliability of the informant nor was there any corroboration). Therefore, the good-faith exception applied and the fruits of the search needed not be suppressed.

II. The trial judge properly allowed into evidence two photographs of Appellant which were relevant to proving he was a resident of the house, served to corroborate testimony, and which were not unfairly prejudicial. In any event, even assuming the judge erred, admission of the photographs was harmless in the context of the entire case.

"The relevancy, materiality, and admissibility of photographs as evidence are matters left to the sound discretion of the trial court." State v. Holder, 382 S.C. 278, 290, 676 S.E.2d 690, 697 (2009) (quoting State v. Nance, 320 S.C. 501, 508, 466 S.E.2d 349, 353 (1996)). "A trial judge has considerable latitude in ruling on the admissibility of evidence and his rulings will not be disturbed absent a showing of probable prejudice." State v. Kelley, 319 S.C. 173, 177, 460 S.E.2d 368, 370 (1995). "It is well-settled in this state that '[i]f a photograph serves to corroborate testimony, it is not an abuse of discretion to admit it.'" State v. Torres, 390 S.C. 618, 623, 703 S.E.2d 226, 229 (2010) (citations omitted); see also State v. Todd, 290 S.C. 212, 214, 349 S.E.2d 339, 340 (1986) ("There is no abuse of discretion if the offered photograph serves to corroborate testimony."); State v. Holder, 382 S.C. 278, 290, 676 S.E.2d 690, 697 (2009). However,

photographs calculated to arouse the sympathy or prejudice of the jury should be excluded if they are irrelevant or not necessary to substantiate material facts or conditions. State v. Brazell, 325 S.C. 65, 78, 480 S.E.2d 64, 72 (1997). "To constitute unfair-prejudice, the photographs must create 'an undue tendency to suggest a decision on an improper basis, commonly, though not necessarily, an emotional one.'" State v. Jackson, 364 S.C. 329, 334, 613 S.E.2d 374, 376 (2005) (quoting State v. Alexander, 303 S.C. 377, 382, 401 S.E.2d 146, 149 (1991)).

In this case, State's Exhibits 26 and 27 were relevant because they served as circumstantial evidence regarding a contested issue, i.e., whether or not Appellant lived in the house. (See R. p. 77-78). The photographs, which depicted Appellant, were found in a dresser in the master bedroom of the residence, the same bedroom where cocaine was found. (R. p. 81-82; p. 85-86). As the trial judge noted, "ordinarily, people who live in [a] house may have pictures of them[selves] in the house particularly if they have a girlfriend living there." (R. p. 78, lines 14-16). The photographs also served to corroborate the testimony of Detective Cooper, Corporal Ard, and Appellant's former girlfriend regarding the photographs of Appellant being located in the dresser of the master bedroom. (See R. p. 65, lines 12-15; p. 106-107; p. 136-37). More specifically, the photographs served to corroborate Detective Cooper's un-objected-to testimony that there were two photos found in the bedroom depicting Appellant squatting down and holding money in his hands. (R. p. 76, lines 13-19). Finally, contrary to Appellant's argument, the photographs were not so prejudicial that the probative value was substantially outweighed by the danger of unfair prejudice. See Rule 403, SCRE. Indeed, considering that Appellant did not object to testimony about cash found in Appellant's bedroom and cash found on Appellant's person, it is difficult to understand

why a photograph of Appellant holding cash would be unduly prejudicial. (See R. p. 65, lines 23-25; p. 72, lines 8-13; p. 95, lines 17-21; p. 107, lines 11-16). Accordingly, the trial judge did not abuse his discretion by admitting the photographs. See State v. Quillien, 263 S.C. 87, 207 S.E.2d 814 (1974) (“It is a well-established rule of law that the trial judge has broad discretion concerning the admission of evidence. That discretion will not be overturned on appeal unless clearly abused.”); State v. Stephens, 398 S.C. 314, 319-20, 728 S.E.2d 68, 71 (Ct. App. 2012) (“A trial judge's decision regarding the comparative probative value and prejudicial effect of evidence should be reversed only in ‘exceptional circumstances.’ We review a trial court's decision regarding Rule 403 pursuant to the abuse of discretion standard and are obligated to give great deference to the trial court's judgment. A trial judge's balancing decision under Rule 403 should not be reversed simply because an appellate court believes it would have decided the matter otherwise because of a differing view of the highly subjective factors of the probative value or the prejudice presented by the evidence. If judicial self-restraint is ever desirable, it is when a Rule 403 analysis of a trial court is reviewed by an appellate tribunal.”) (citation omitted).

In any event, assuming the photographs were unnecessary, their admission does not warrant a new trial in this case. Even if photographs are not relevant and thus wrongly admitted by a trial judge, their admission may constitute harmless error if the photographs do not affect the outcome of trial. See State v. Langley, 334 S.C. 643, 647-48, 515 S.E.2d 98, 100 (1992). Here, as discussed previously, the photographs were not unduly prejudicial and could not have inflamed the jury; therefore, even if unnecessary, they were “harmless surplusage.” State v. Brazell at 79, 480 S.E.2d at 72; see also State v. Torres, 390 S.C. 618, 623, 703 S.E.2d 226, 229 (2010). In that vein, they were merely

cumulative to the un-objected-to testimony of Detective Cooper, Corporal Ard, and Appellant's former girlfriend regarding the photographs being found in the dresser of the master bedroom. (See R. p. 65, lines 12-15; p. 106-107; p. 136-37). More specifically, the photographs were merely cumulative to Detective-Cooper's un-objected-to testimony that there were two photos found in the bedroom depicting Appellant squatting down and holding money in his hands. (R. p. 76, lines 13-19). See State v. Johnson, 298 S.C. 496, 498-99, 381 S.E.2d 732, 733 (1989) ("The admission of improper evidence is harmless where it is merely cumulative to other evidence.").

Admission of the photographs could not reasonably have affected the outcome of Appellant's trial, particularly considering the overwhelming evidence of Appellant's guilt. (See R. p. 51-191). See State v. Elders, 386 S.C. 474, 486-87, 688 S.E.2d 857, 864 (Ct. App. 2010) (even though admitting certain evidence was error, the error was harmless in light of the overwhelming evidence of the defendant's guilt). Therefore, there was no reversible error with respect to admission of the photographs. See Brazell at 79, 480 S.E.2d at 72; State v. Robinson, 201 S.C. 230, 22 S.E.2d 587, 588-89 (1942); see also State v. Reeves, 301 S.C. 191, 194, 391 S.E.2d 241, 243 (1990) (an error is harmless if it could not reasonably have affected the result of the trial).

III. The trial judge properly denied Appellant's request for a lesser-included charge of simple possession where there was no evidence suggesting Appellant was guilty of only the lesser-included offense.

An appellate court will not reverse the trial court's decision regarding jury instructions unless it is shown that the trial court abused its discretion. State v. Franks, 376 S.C. 621, 624, 658 S.E.2d 104, 106 (2008). An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support. Id. "A trial judge is required to charge a jury on a lesser

included offense if there is evidence from which it could be inferred that a defendant committed the lesser offense rather than the greater.” State v. Drafts, 288 S.C. 30, 32, 340 S.E.2d 784, 785 (1986). “The trial court should refuse to charge on a lesser-included offense where there is no evidence that the defendant committed the lesser rather than the greater offense.” State v. Tucker, 324 S.C. 155, 170, 478 S.E.2d 260, 268 (1996) (citation omitted). “The mere contention that the jury might accept the State’s evidence in part and reject it in part is insufficient to satisfy the requirement that some evidence tend to show the defendant was guilty of only the lesser offense.” State v. Geiger, 370 S.C. 600, 608, 635 S.E.2d 669, 674 (Ct. App. 2006). In drug cases, where the undisputed evidence shows that the amount of drugs involved exceeds the minimum trafficking amount, only the trafficking charge should be submitted to the jury. State v. Grandy, 306 S.C. 224, 226, 411 S.E.2d 207, 208 (1991).

Appellant argues that the judge should have charged the jury regarding the lesser-included offense of simple possession because he presented evidence he was not a resident of the house and because a bag with cocaine residue was found in the so-called “guest bedroom” under the mattress. First, Appellant presented no “evidence” that he was not a resident of the house; at best, he presented cross-examination attempting to insinuate that he did not live there. (See R. p. 56-63; p. 73-76; p. 82-83; p. 109-112; p. 146-53; p. 160-63). Although Appellant tried to suggest that his girlfriend was the one who really lived there, the overwhelming evidence established that Appellant’s mother was the one who owned the house; that Appellant lived in the house; and that Appellant’s girlfriend, who kept her own residence in North Carolina, visited Appellant at the house three or four nights per week. (See R. p. 52-58; p. 85-87; p. 106-107; p. 112-13; p. 121-163; p. 166-67; p. 189-91).

Second, there was no evidence placing Appellant in the “guest bedroom” as opposed to any other rooms in the house. Appellant’s former girlfriend testified that this “guest bedroom” was Appellant’s daughter’s bedroom. (R. p. 137, lines 10-22). Detective Cooper referred to this bedroom as a “child’s bedroom or spare bedroom of some kind.” (R. p. 69, lines 17-23). At trial, Appellant never even *insinuated* that he slept in this particular bedroom or had any special connection with it. (See R. p. 168-69; p. 197-98). Significantly, all of the men’s clothing, and pictures of Appellant, were found in the master bedroom – the room where most of the cocaine was found hidden in a stack of men’s pants. (See R. p. 66-67; p. 93, lines 6-12; p. 185-87; see also p. 131-37). In short, there was no construction of the facts that would have reasonably permitted the jury to find that the cocaine residue found in the “guest bedroom” was Appellant’s but the other drugs were not. Therefore, since there was no evidence that Appellant was guilty of only the lesser-included offense, the trial judge did not err in refusing to charge the lesser-included offense of simple possession. (See R. p. 169, lines 12-14; p. 197, line 24 – p. 198, line 17). See Grandy, 306 S.C. at 226, 411 S.E.2d at 208.

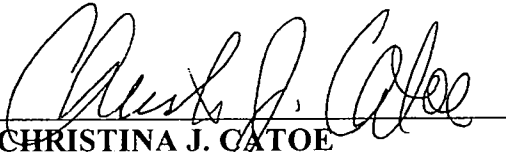
CONCLUSION

For the reasons discussed above, Respondent requests that this Court affirm Appellant's conviction and sentence.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT

June 7, 2013

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Horry County
The Honorable Edward B. Cottingham, Sr., Circuit Court Judge
Appellate Case No. 2012-206368

THE STATE OF SOUTH CAROLINA,

RESPONDENT,

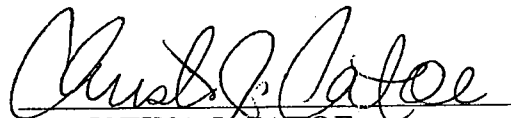
v.

ALTON WESLEY GORE, JR.,

APPELLANT.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the **Final Brief of Respondent** complies with Rule 211(b), SCACR, and also complies with the South Carolina Supreme Court's August 13, 2007 **Order on Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings**.


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ATTORNEYS FOR RESPONDENT

June 7, 2013

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED
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Appeal from Horry County
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THE STATE OF SOUTH CAROLINA,

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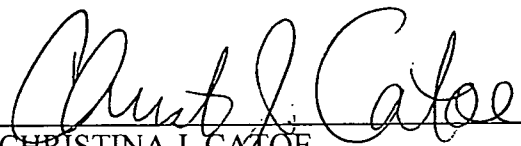
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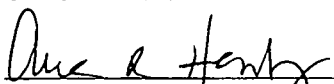
AFFIDAVIT OF SERVICE

The undersigned attorney hereby certifies that the **Final Brief of Respondent** in the above-referenced case has been served upon **Nicole N. Mace, Esquire**, The Mace Firm, 1341 44th Avenue North, Suite 205, Myrtle Beach, South Carolina, 29577, this 7th day of **June, 2013**.


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SWORN to before me this 7th day of June, 2013.


Notary Public for South Carolina.
My Commission Expires: 7/18/2017

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of General Sessions

Edward B. Cottingham, Sr., Circuit Court Judge

Case No. 2010-GS-26-2326

The State,

Respondent,

v.

Alton Wesley Gore, Jr.

Appellant.

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SC Court of Appeals

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ARGUMENTS

I. The good-faith exception is not applicable to Gore because the search warrant affidavit contained a deliberate falsehood by omission and also constitutes a reckless disregard to the truth.

The State argues in its answer brief that the good-faith exception applied to the facts of this case. In *United States v. Leon*, 468 U.S. 897, 926 (1984), the Supreme Court held that an exception to the exclusionary rule applied when an office acting in objective good faith obtains a search warrant from a magistrate and acted within the scope of that search warrant. A court should not suppress the evidence based on lack of probable cause if the good-faith exception applies. *Id.* *see also United States v. Weston*, 329 S.C. 287, 292-93, 494 S.E.2d 801, 803-804 (1997). The Court listed three situations in which the good-faith exception will not apply: first, where the officer knowing or with a reckless disregard included false information in an affidavit to support a search warrant, second, in situations where the magistrate did not perform a neutral and detached review of the affidavit and instead served as a “rubber stamp for the police” and third, in situations where the warrant does not “provide the magistrate with a substantial basis for determining the existence of probable cause.” *Weston*, 329 S.C. at 292, 93, 494 S.E.2d at 803-804 *quoting Leon*, 468 U.S. at 914–15, 104 S.Ct. at 3416, 82 L.Ed.2d at 693.

The first situation applies to the case at bar, making the good-faith exception inapplicable to Gore. Corporal Ard’s failure to disclose that the allegation of a buy

from the residence was just shy of seven months prior to the date of the affidavit is a deliberate falsehood by omission, and also constitutes a reckless disregard for the truth. The first buy occurred on July 23, 2009, nearly seven months prior to the execution of the affidavit. (R. 21). The second buy occurred on February 25, 2010, not within seventy-two hours of the first buy. (R. 33, lines 4-17). Corporal Ard knew that the second buy was insufficient to establish probable cause because it did not occur at the residence. As a result, he mislead the Magistrate by failing to include dates in the affidavit and making it seem as if the first and second buy occurred within close proximity to each other. In fact, Officer Ard stated that he was aware that the first buy had occurred seven months prior, and attempted to do a "refresher buy" to obtain a search warrant for the residence. (R. 39, lines 10-19). However, he was unable to detect a buy from the residence on the second occasion. As a result, he placed misleading information in the affidavit to establish probable cause even though the first buy was not in close proximity to the date of the affidavit and the second buy did not occur at the residence.

The allegations contained in the affidavit were as follows:

A confidential and reliable informant made a buy for cocaine out of the residence while being recorded and monitored by agents in the area. Also within the last seventy-two hours agents followed the Defendant from the residence to another location, and were able to monitor and record another buy for cocaine.

(R. 24). The affidavit was executed on February 28, 2010. (R. 24). It is important to note that there is no comma after “also.” Not only does the affidavit fail to specify a date and time for the allegations, it mislead the magistrate into believing that these two alleged events occurred within seventy-two hours of the date of the affidavit.

The affiant in this case omitted critical information which was a deliberate or reckless falsehood by omission. Instead, the affidavit indicated falsely that the buy occurred within seventy-two hours of the execution of the affidavit. (R. 24). Considering the buy at the residence occurred nearly seven months prior to the execution of the warrant, the remaining allegation did not establish *any* connection between the residence and any alleged drug activity. The actions of the affiant show that he believed the omissions of this critical information was necessary to obtain a finding of probable cause for a warrant to search the residence. Therefore, the trial court erred in denying Gore’s motion pursuant to *Franks v. Delaware*.

Additionally, the second situation may also apply to this case, where the magistrate did not perform a neutral and detached review of the affidavit and instead served as a “rubber stamp for the police.” *Leon*, 468 U.S. at 914–15, 104 S.Ct. at 3416, 82 L.Ed.2d at 693. The State argues that the appellant failed to call the magistrate at the hearing so any argument is waived on appeal. (see respondent’s brief footnote 2). Gore’s defense counsel stated, “the Magistrate

could testify and provide oral supplementation as to what he was told.” (R. 36, lines 12-14). The court responded, “or the officers can testify as to what they testified and what they told to the Magistrate...” (R. 36, lines 15-16) (emphasis added). The court, not defense counsel, first determined the Magistrate’s testimony was not necessary. However, there were several occasions in which Officer Ard could not recollect what the Magistrate was told prior to the execution of the warrant when questioned by defense counsel. (R. 42, lines 9-12, 43, lines 3-25, 44, lines 1-16, 45, lines 1-24). Therefore, it is questionable whether the information regarding the lapse in time was communicated to the magistrate or whether the magistrate simply “rubber stamped” the search warrants. There were material facts at issue as to whether the Magistrate was informed as to the specific dates and times of allegations in the affidavit. Gore was at least entitled to an evidentiary hearing at a later date on this issue so that the magistrate could be questioned. As a result, his case should be remanded.

II. The trial court committed reversible error by admitting State’s Exhibits 26 and 27 that depicted Gore holding up United States currency, as these photographs were irrelevant and unfairly prejudicial.

Over defense counsel's objection that their prejudicial impact outweighed any probative value, the judge allowed the State to introduce two photographs of Gore appearing to hold up a large amount of currency (R. 240-241). (R. 78, 2-25). It is unknown who took these pictures and when they were taken and it is clear that

they were several years old. The State argues in its brief that the photographs “served to corroborate Detective Cooper’s testimony that there were two photos found in the bedroom depicting the appellant squatting down and holding money in his hands.” (Respondent’s brief pg. 14); (R. 76, lines 13-19). Defense counsel immediately objected to this highly prejudicial testimony, which was overruled by the trial court. (R. 77, lines 4-12). Defense counsel explained that he believed the State was not going to use the photographs during the trial. (*Id.*) Defense counsel also argued that it was improper to introduce the photographs during redirect; however, the trial court explained that the photos were “coming in one way or the other.” (R. 79, lines 23-24).

The State argued that the photographs established Gore’s identity and connection to the residence. (R. 77, 21-24). However, the State was able to bring this issue before the jury in other ways, including the testimony of Angela Deangelo, Heather Lewis, and Thomas Johnson. These photos were not relevant because there was no indication as to when the pictures were taken and it is unknown who took the pictures. (R. 82, lines 6-13). The State argues that any error was harmless. It is important to note that these photographs appear to be old, taken well before the date of the criminal conduct alleged in the Indictment and they were also not taken from inside the residence. (R. 82, lines 23-24, 240-241). As a result, they did not have any relation to Gore and any alleged illegal drug

activity. (R. 82, lines 14-15). Nevertheless, the trial court still found that the photographs were admissible. The photographs the State introduced suggested that because the Defendant possessed United States currency at some point he must be involved in drug transactions even though there was no evidence the photographs occurred or were taken in conjunction with any alleged drug trafficking offense. The failure to exclude the photographs was an abuse of discretion.

III. The jury should have been charged the lesser-included offense of possession with intent to distribute along with the trafficking charge.

The State argues that there was overwhelming evidence that Gore lived in the house and that his girlfriend only visited the home three or four nights a week. (Respondent's brief pg. 18). However, the record supports the appellant's assertion that a jury could have easily concluded that his girlfriend, Angela Deangelo, was the primary resident. For example, Officer Kent Donald testified that Deangelo directly informed him she lived in the house and was not going to leave. (R. 54, 12-16). She also demanded to see the search warrant because she was a resident of the home. (R. 56, lines 6-16). Additionally, Gore's driving records indicated that he lived at a different address in Little River, South Carolina. (R. 58, lines 18-24).

The testimony revealed that cocaine residue was found in the guest bedroom under the mattress. (R. 95, lines 6-15). The larger amount of cocaine was found in the master bedroom. (R. 67, lines 2-7). Since Gore's primary argument was that

the residence belonged to his girlfriend, Angela Deangelo, a jury could have determined that Gore had constructive possession over items in the guest bedroom. Based on these facts, Gore was entitled to a charge on the lesser-included offense of simple possession because the jury could have found that Gore possessed less than the minimum amount required for the trafficking charge. However, instead of deciding whether the evidence could support the lesser-included offense of simple possession, the trial court simply dismissed Gore's request. (R. 169, lines 12-14).

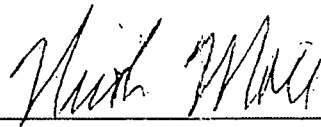
The court stated that Gore was not indicted for possession and that he was not going to allow the lesser included offense because that would result in a not guilty verdict. (R. 198, lines 4-17). Defense counsel explained that he did not have to be indicted for possession because it was a lesser included offense, the jury could find "that just that little baggie is his that was tucked under the mattress." (R. 198, lines 7-9). The record reveals that the trial court failed to consider that "[t]he absence of a lesser included offense instruction increase[s] the risk that the jury will convict . . . simply to avoid setting the defendant free. . . ." *Spaziano v. Florida*, 468 U.S. 447, 455 (1984). A lesser-included offense instruction minimizes this risk by giving jurors a "third option" when neither an acquittal nor a conviction on the charged offense fits the facts of the case. *See Schad v. Arizona*, 501 U.S. 624, 646 (1991). The trial court erred in refusing to charge the jury as to the lesser-included offense entitling Gore to a reversal of his sentence and

conviction.

CONCLUSION

Based upon the foregoing argument and citations of authority, the Appellant, Alton Wesley Gore, Jr. respectfully requests that this Court reverse his conviction.

Respectfully Submitted,

By: 
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**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

The State, Respondent,

v.

Alton Wesley Gore, Jr., Appellant.

Appellate Case No. 2012-206368

Appeal From Horry County
Edward B. Cottingham, Circuit Court Judge

Opinion No. 5214
Heard December 10, 2013 – Filed April 2, 2014

AFFIRMED

Nicole Nicolette Mace, of the Mace Law Firm, and Amy
Kristan Raffaldt, both of Myrtle Beach, for Appellant.

Attorney General Alan McCrory Wilson and Assistant
Attorney General Christina J. Catoe, of Columbia, for
Respondent.

WILLIAMS, J.: In this criminal appeal, Alton Gore appeals his conviction for trafficking cocaine, arguing the circuit court erred when it (1) denied Gore's motion to challenge the veracity of the search warrant affidavit pursuant to *Franks v. Delaware*, 438 U.S. 154 (1978); (2) improperly admitted certain photographs into evidence; and (3) failed to charge the jury on the lesser-included offense of simple possession. We affirm.

FACTS/PROCEDURAL HISTORY

On February 28, 2010, Detective Jesse Ard of the Horry County Police Department drafted a search warrant affidavit based on suspected criminal activity at 309 Junco Circle in Longs, South Carolina. Detective Ard supported the affidavit with the following probable cause allegations:

A confidential and reliable informant made a buy for cocaine out of the residence while being recorded and monitored by agents in the area. Also within the last seventy-two hours agents followed [Gore] from the residence to another location and were able to monitor and record another buy for a quantity of cocaine.

The magistrate issued a search warrant, and evidence suggesting drug activity was retrieved from the residence at Junco Circle. Gore was subsequently indicted for trafficking cocaine in an amount between two hundred and four hundred grams.¹

Prior to trial, Gore moved for an evidentiary hearing pursuant to *Franks v. Delaware*,² arguing the probable cause allegations used to support the search warrant were deliberately false or misleading. As a result, Gore contended the search warrant affidavit was insufficient to support probable cause. Gore claimed law enforcement improperly drafted the affidavit. He argued the affidavit suggested a controlled drug purchase had been executed at Gore's residence within seventy-two hours of seeking a search warrant when the purchase occurred seven months prior to the execution of the search warrant. He also contended the omission of the date and time of the alleged criminal activity was in violation of *State v. Winborne*.³

¹ S.C. Code Ann. § 44-53-370(e)(2)(d) (2002) (outlining the offense of trafficking in cocaine in an amount between two hundred and four hundred grams).

² 438 U.S. 154 (1978).

³ In *State v. Winborne*, the supreme court held that for a search warrant affidavit to show probable cause, it must state facts so closely related to the time of the issuance of the warrant that a probable cause finding can be justified. 273 S.C. 62, 64, 254 S.E.2d 297, 298 (1979). The supreme court concluded an affidavit that fails to state when the alleged facts transpired is insufficient. *Id.*

In response, the State claimed the officers told the magistrate the dates and times of the alleged drug transactions. The State also argued because it was a lengthy investigation, the second drug transaction was a "refresher buy" that would allow the officers to meet the close time and proximity requirements for the search warrant. Detective Ard testified at the hearing and corroborated the State's argument. In response to being asked about the omission of the date and time, Detective Ard stated it was common to omit this information to protect informants' identities and testified repeatedly that the magistrate was informed of all the facts, circumstances, and dates surrounding the procurement of the search warrant.

The circuit court denied Gore's motion for an evidentiary hearing pursuant to *Franks*, finding the affidavit was not false or misleading and was supported by probable cause. Based on the information in the affidavit and the officer's testimony, the circuit court held there was "a fair probability that evidence of a crime would be found on the particular place to be searched." Because Gore failed to make the requisite preliminary showing, the court determined the first prong of the *Franks* test was not met and there was no need to evaluate the sufficiency of the remaining portions of the affidavit.

A jury trial was held on January 5, 2012. At trial, the State sought to introduce two photographs of Gore found in the master bedroom. One of the investigating officers, Detective Mark Cooper, identified the photos and stated, "There was [sic] two photos of the defendant, I believe he had some money in his hand or something like that, he squatted down or something." Defense counsel immediately objected.

Outside the jury's presence, Gore argued the photos were irrelevant and highly prejudicial. In response, the State contended the photographs were relevant to prove Gore was a resident of the house. The circuit court agreed with the State and instructed the jury that the pictures were introduced "only for the purposes of the testimony alleging that they were found on the premises and for no other purposes." The pictures were introduced into evidence. Detective Cooper testified the pictures were found on the dresser in the master bedroom and the male in the photographs was Gore.

Detective Ard also testified at trial. On the day of Gore's arrest, Detective Ard observed Gore and his girlfriend leave in two separate vehicles from 309 Junco Circle. Detective Ard stated Gore and his girlfriend were unaccompanied when they left the residence and Gore was alone when he was subsequently arrested for an unrelated traffic incident. He stated they maintained visual contact with Gore from the time he departed the residence until he was stopped by police. Detective

Ard confirmed that two handguns and a large quantity of cocaine were seized from the residence later that day.

After hearing from other witnesses for the State and Gore, the circuit court charged the jury on trafficking in cocaine in the amount of two hundred to four hundred grams. The jury found Gore guilty as charged. The circuit court sentenced Gore to twenty-five years imprisonment and fined him \$100,000. This appeal followed.

ISSUES ON APPEAL

1. Did the circuit court err in denying Gore's motion to challenge the veracity of the search warrant affidavit pursuant to *Franks v. Delaware*?
2. Did the circuit court err in admitting two photographs of Gore holding large sums of United States currency?
3. Did the circuit court err in failing to charge the jury on the lesser-included offense of simple possession?

LAW/ANALYSIS

1. Search Warrant Affidavit

Gore first contends the circuit court erred in denying his motion to challenge the veracity of the search warrant pursuant to *Franks v. Delaware*. Alternatively, even if the circuit court properly denied his motion, Gore contends the search warrant was insufficient to establish probable cause. We disagree.

In *Franks v. Delaware*, the United States Supreme Court held that the Fourth and Fourteenth Amendments give an accused the right in certain circumstances to challenge the veracity of a search warrant affidavit after the warrant has been issued and executed. *State v. Missouri*, 337 S.C. 548, 553, 524 S.E.2d 394, 396 (1999). This challenge may be based on false information being included in the search warrant affidavit or exculpatory material being omitted from the affidavit. *Id.* at 554, 524 S.E.2d at 397.

Franks outlined a two-prong test for challenging the veracity of a search warrant affidavit. *Franks*, 438 U.S. at 155-56. First, to mandate an evidentiary hearing, there must be "allegations of deliberate falsehood or of reckless disregard for the truth [as to statements included in the warrant affidavit], and those allegations must be accompanied by an offer of proof." *Id.* at 171. At the hearing, the accused has

the burden of proving the allegations of perjury or reckless disregard for the truth by a preponderance of the evidence. *Id.* at 156; *see State v. Jones*, 342 S.C. 121, 127, 536 S.E.2d 675, 678 (2000) (holding a defendant is entitled to challenge misstatements in a warrant affidavit if the following criteria are met: "(1) the defendant's attack is more than conclusory and is supported by more than a mere desire to cross-examine; (2) the defendant makes allegations of deliberate falsehood or of reckless disregard for the truth which are accompanied by an offer of proof; and, (3) the affiant has made the allegedly false or reckless statement").

Second, if a deliberate falsehood or a reckless disregard for the truth has been established, the court must exclude the false material and consider the remainder of the affidavit to determine if it is sufficient to establish probable cause. *State v. Davis*, 354 S.C. 348, 360, 580 S.E.2d 778, 784 (Ct. App. 2003). If the court determines no probable cause exists after the false material is omitted from the analysis, "the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit." *Id.* (citing *Franks*, 438 U.S. at 155-56); *see Missouri*, 337 S.C. at 553-54, 524 S.E.2d at 396-97 (adopting the two-prong *Franks* test).

In the instant case, Gore challenges the sufficiency of the search warrant affidavit based on: (1) Detective Ard's failure to include a date and time for the first purchase of cocaine at the residence; and (2) Detective Ard's misrepresentation that the first purchase of cocaine occurred within seventy-two hours of the date of the search warrant affidavit.

We agree with Gore's argument that the first allegation in the affidavit improperly omitted the date and time of the drug transaction. The statement reads: "A confidential and reliable informant made a buy for cocaine out of the residence while being recorded and monitored by agents in the area." This phrase indicates only that a controlled buy was made at the residence on at least one occasion in the past. It gives no indication of how long ago the transaction occurred, which the supreme court in *Winborne* held is necessary to establish probable cause for a search warrant. *See Winborne*, 273 S.C. at 64, 254 S.E.2d at 298 ("An affidavit which fails altogether to state the time of the occurrence of the facts alleged is insufficient.").

This omission, however, does not *per se* invalidate the search warrant. Rather, Gore must make a preliminary showing that Detective Ard included a deliberate falsehood or recklessly disregarded the truth in an effort to make the affidavit misleading to the magistrate. *See Missouri*, 337 S.C. at 554, 524 S.E.2d at 398 ("To be entitled to a *Franks* hearing for an alleged omission, the challenger must

make a preliminary showing that the information in question was omitted with the intent to make, or in reckless disregard of whether it made, the affidavit misleading to the issuing judge."). Although Gore claims this omission is evidence of a reckless disregard for the truth, we find Detective Ard's sworn testimony is evidence to the contrary. See *Jones*, 342 S.C. at 129, 536 S.E.2d at 679 (holding oral information may be used by an affiant to supplement or to amend incorrect information in an affidavit which was not knowingly, intentionally, or recklessly supplied by the affiant).

Detective Ard testified under oath that he supplemented the affidavit with oral testimony and specifically stated the dates of the controlled buys when seeking the search warrant. See *id.* at 128, 536 S.E.2d at 678-79 ("Oral testimony may also be used in this state to supplement search warrant affidavits which are facially insufficient to establish probable cause."). When asked why he omitted this information, Detective Ard stated it was "common practice" to omit the specific date, time of the buy, or the amount of the drugs in the written affidavit portion of the warrant to protect the confidential informant's identity. Because of this omission, Detective Ard testified, "We made [the magistrate] painfully aware of the fact that there was a length of time from one buy from the house to our most recent buy . . . that we were unable to get inside the house, actually make a buy from inside the house, but we were able to observe [Gore] leave his residence, kept him under constant surveillance the entire trip to the empty . . . lot where the buy was made" We find Detective Ard's statements to the magistrate properly supplemented this portion of the affidavit.

We also address Gore's claim that the second probable cause allegation was intentionally misleading because the use of "also" indicated the first buy occurred within seventy-two hours of the affidavit's execution. This allegation states, "Also within the last seventy-two hours agents followed [Gore] from the residence to another location and were able to monitor and record another buy for a quantity of cocaine." While we agree that this sentence could have been more artfully drafted, we disagree with Gore's argument that it was deliberately misleading. It is uncontested that officers followed and observed Gore selling drugs within seventy-two hours of the affidavit's execution. Further, any confusion over the timing of these drug transactions was clarified by Detective Ard when he sought the search warrant. Because neither of these probable cause allegations were false, we find Gore failed to satisfy the first prong of the *Franks* test. As such, we affirm the circuit court's decision to deny Gore's motion pursuant to *Franks v. Delaware*.

Next, Gore contends that even if the allegations in the search warrant were credible, the magistrate did not have a substantial basis to conclude probable cause existed. We disagree.

An appellate court reviewing the decision to issue a search warrant should decide whether the magistrate had a substantial basis for concluding probable cause existed. *State v. King*, 349 S.C. 142, 149, 561 S.E.2d 640, 643 (Ct. App. 2002). This review, like the determination by the magistrate, is governed by the "totality of the circumstances" test. *Jones*, 342 S.C. at 126, 536 S.E.2d at 678. The appellate court should give great deference to a magistrate's determination of probable cause. *Id.*

We are mindful on review that affidavits are not meticulously drawn by lawyers, but are normally drafted by non-lawyers in the haste of a criminal investigation, and should therefore be viewed in "a common sense and realistic fashion." *State v. Sullivan*, 267 S.C. 610, 617, 230 S.E.2d 621, 624 (1976). Our task is to decide whether the magistrate had a substantial basis for concluding probable cause existed. *State v. Adolphe*, 314 S.C. 89, 92, 441 S.E.2d 832, 833 (Ct. App. 1994).

"The affidavit must contain sufficient underlying facts and information upon which the magistrate may make a determination of probable cause." *State v. Philpot*, 317 S.C. 458, 461, 454 S.E.2d 905, 907 (Ct. App. 1995). The magistrate should make a probable cause determination based on all of the information available to the magistrate when the warrant was issued. *State v. Driggers*, 322 S.C. 506, 510, 473 S.E.2d 57, 59 (Ct. App. 1996). In determining the validity of the warrant, a reviewing court may consider only information brought to the magistrate's attention. *State v. Gentile*, 373 S.C. 506, 513-14, 646 S.E.2d 171, 174 (Ct. App. 2007).

We find the search warrant affidavit contains sufficient facts to support the magistrate's probable cause determination. We acknowledge the second drug transaction did not occur inside the residence. However, we believe the circumstances surrounding the second drug transaction provided a sufficient nexus to the residence to justify a search warrant. Specifically, Detective Ard testified the officers observed only Gore and his girlfriend at the residence the morning of Gore's arrest. Further, he stated that Gore drove alone from the residence and went directly to the location where the drug transaction occurred. *See State v. Scott*, 303 S.C. 360, 362-63, 400 S.E.2d 784, 785-86 (Ct. App. 1991) (upholding subsequent search warrant of defendant's home when affidavit stated officers had visual contact with defendant from time he left his residence until the time of the traffic stop and drugs were uncovered on defendant at stop). In addition, the magistrate

was aware Gore had participated in a drug transaction inside the residence within the last seven months. *See id.* at 363, 400 S.E.2d 786 ("In the case of drug dealers, evidence is likely to be found where the dealers live." (citing *U.S. v. Angulo-Lopez*, 791 F.2d 1394, 1399 (9th Cir. 1986))). We find the earlier drug transaction at the residence coupled with this drug transaction demonstrate a pattern of ongoing illegal activity. *See King*, 349 S.C. at 151, 561 S.E.2d at 644 (finding confidential informant's previous reliability with law enforcement and first-hand knowledge of prior drug transactions at residence were sufficient to establish probable cause for search warrant). Accordingly, we hold the totality of circumstances provided a sufficient nexus to the residence to establish probable cause for the search warrant. *See State v. Dupree*, 354 S.C. 676, 685, 583 S.E.2d 437, 442 (Ct. App. 2003) ("The magistrate's task in determining whether to issue a search warrant is to make a practical, common sense decision concerning whether, under the totality of the circumstances set forth in the affidavit, including the veracity and basis of knowledge of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in the particular place to be searched." (citing *Illinois v. Gates*, 462 U.S. 213, 238 (1983))). Given the affidavit and the supporting oral testimony, we conclude there was a substantial basis for concluding probable cause existed to issue a search warrant.

2. Admission of Photographs

Next, Gore contends the circuit court erred in admitting two photographs, which depicted him holding large sums of United States currency. We agree with Gore but find this error to be harmless.

"The relevance, materiality and admissibility of photographs are matters within the sound discretion of the [circuit] court and a ruling will be disturbed only upon a showing of an abuse of discretion." *State v. Rosemond*, 335 S.C. 593, 596, 518 S.E.2d 588, 589-90 (1999). Even if evidence is improperly admitted, the admission must be prejudicial to warrant reversal. *See State v. Mitchell*, 286 S.C. 572, 573, 336 S.E.2d 150, 151 (1985) (holding the improper admission of evidence is reversible error only when the admission causes prejudice).

At trial, the State sought to introduce two photographs of Gore, which were found in the master bedroom when the officers searched the residence. In the photographs, Gore was squatting down and displaying large sums of United States currency in his hands and on-the ground in front of him. Gore objected at trial and

argued these photographs were irrelevant and unduly prejudicial.⁴ In support of that argument, Gore claims these photographs were not taken inside the residence, there were other seized photographs of Gore in the residence that were not prejudicial, and the photographs invited the jury to infer criminal disposition. We agree and find these photos were unnecessary to link Gore to the residence, particularly when other photographs in evidence accomplished this purpose and several other witnesses testified Gore lived at the residence. *See State v. Brazell*, 325 S.C. 65, 78, 480 S.E.2d 64, 72 (1997) ("Photographs calculated to arouse the sympathy or prejudice of the jury should be excluded if they are irrelevant or not necessary to substantiate material facts or conditions.").

However, we find the admission of these photographs to be harmless error in light of the overwhelming evidence of Gore's guilt. *See State v. Bailey*, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989) (holding an insubstantial error not affecting the result of the trial is harmless when "guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached"). Several police officers testified that based on their observations during the investigation, Gore lived at 309 Junco Circle. His former girlfriend testified he lived at 309 Junco Circle and only Gore possessed a key to the residence. An employee from the Horry County Clerk of Court's office stated Gore's address on his bond documents was listed as 309 Junco Circle. Further, the State established that the white-powder substance seized from 309 Junco Circle was cocaine. We find this evidence overwhelmingly established Gore's guilt. As a result, Gore's conviction should not be set aside based on the admission of these photographs. *See State v. Sherard*, 303 S.C. 172, 176, 399 S.E.2d 595, 597 (1991) (stating that appellate courts will not generally set aside convictions due to insubstantial errors not affecting the result).

3. Jury Charge on Simple Possession

Last, Gore claims the circuit court erred in denying his request to charge the jury on the lesser-included offense of simple possession. We disagree.

The circuit court must charge a jury on a lesser-included offense if evidence exists from which it could be inferred that a defendant committed the lesser offense rather than the greater offense. *State v. Drafts*, 288 S.C. 30, 32, 340 S.E.2d 784, 785 (1986). Nevertheless, due process requires that a lesser-included offense instruction be given only when the evidence warrants the instruction. *Hopper v.*

⁴ The State argues Gore failed to object when Detective Cooper described the two photographs. We disagree and find defense counsel timely objected.

Evans, 456 U.S. 605, 611 (1982). "The mere contention that the jury might accept the State's evidence in part and reject it in part is insufficient to satisfy the requirement that some evidence tend to show the defendant was guilty of only the lesser offense." *State v. Geiger*, 370 S.C. 600, 608, 635 S.E.2d 669, 674 (Ct. App. 2006).

Gore argues the circuit court erred in denying his request to charge the jury on simple possession because cocaine residue was found underneath a mattress in the guest bedroom of the residence. Because the larger amount of cocaine was discovered in the master bedroom, and Gore contended the residence belonged to his girlfriend, a jury could have determined Gore only had constructive possession over the items, including the cocaine residue, in the guest bedroom. As a result, Gore claims the jury could have concluded he did not possess the requisite amount of cocaine required for the trafficking charge.

We find the circuit court properly charged the jury. Although Gore claims the jury could have concluded he was not a resident of the house and only slept in the guest bedroom as a visitor, the overwhelming and undisputed evidence indicates otherwise. As noted above, several witnesses testified Gore lived at the residence. Although Gore argued his girlfriend lived there, evidence was submitted that she maintained her own residence in North Carolina at all pertinent times. Furthermore, no evidence placed Gore in the guest bedroom of the residence. Gore's girlfriend testified the guest bedroom was actually his daughter's bedroom, and one of the officers stated it appeared to be a "child's bedroom or a spare bedroom of some kind." Significantly, the master bedroom, where the larger amount of cocaine was hidden, contained all men's clothing as well as several framed pictures of Gore. Therefore, we find the evidence did not support a charge of simple possession and affirm the circuit court on this issue. *See State v. Grandy*, 306 S.C. 224, 226, 411 S.E.2d 207, 208 (1991) (finding the circuit court properly denied defendant's request to charge the lesser-included offense of possession with intent to distribute when the undisputed evidence showed the amount of cocaine in defendant's possession exceeded the quantity required to invoke the trafficking statute).

CONCLUSION

Based on the foregoing, Gore's conviction is

AFFIRMED.

SHORT and LOCKEMY, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of General Sessions

Edward B. Cottingham, Sr., Circuit Court Judge

Case No. 2010-GS-26-2326

The State,

Respondent,

v.

Alton Wesley Gore, Jr.

Appellant.

PETITION FOR REHEARING

The Appellant, Alton Wesley Gore, Jr., hereby makes a Petition for Rehearing pursuant to Rule 221 of the South Carolina Appellate Court Rules in the above-captioned matter from the decision of the panel of the South Carolina Court of Appeals on April 2, 2014 in *State v. Alton Wesley Gore, Jr.*, Appellate Case No. 2012-206368 (S.C. Ct. App. dated April 2, 2014). The decision affirmed Gore's conviction for trafficking cocaine holding that the trial court did not err in denying Gore's motion to challenge the validity of the search warrant affidavit pursuant to *Franks v. Delaware* or in failing to charge the jury on the lesser-included offense

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of simple possession. While the panel found that the trial court erred in admitting two photographs into evidence, it concluded that the error was harmless. Appellant respectfully submits that the panel decision overlooked and misapprehended certain facts and positions in affirming his conviction.

I. Search Warrant Affidavit

- A. The search warrant affidavit contained false and misleading information that was deliberately supplied or supplied in reckless disregard of the truth.**

The allegations contained in the affidavit were as follows:

A confidential and reliable informant made a buy for cocaine out of the residence while being recorded and monitored by agents in the area. Also within the last seventy-two hours agents followed the Defendant from the residence to another location, and were able to monitor and record another buy for cocaine.

(R. 24.) The affidavit was executed on February 28, 2010. (R. 24.) The first buy occurred on July 23, 2009, over seven months prior to the execution of the affidavit. (R. 17, 21.) The second buy occurred on February 25, 2010 at a location other than the residence and was not within seventy-two hours of the first buy as suggested in the affidavit. (R. p. 33, line 4-p. 34, line 4.) Gore argued that the date was wrongfully excluded making the affidavit insufficient pursuant to *State v. Winborne*, 273 S.C. 62, 254 S.E.2d 297 (1979). Additionally, Gore argued that the structure of the paragraph as well as the omission of the date of the first buy made

it seem as if the first buy occurred in close proximity to the second buy. This, Gore argued, was false or at the very least, a reckless disregard for the truth.

The panel agreed with Gore that the date and time of the first buy was improperly omitted:

We agree with Gore's argument that the first allegation in the affidavit improperly omitted the date and time of the drug transaction. The statement reads: "A confidential and reliable informant made a buy for cocaine out of the residence while being recorded and monitored by agents in the area." This phrase indicates only that a controlled buy was made at the residence on at least one occasion in the past. It gives no indication of how long ago the transaction occurred, which the supreme court in *Winborne* held is necessary to establish probable cause for a search warrant. *See Winborne*, 273 S.C. at 64, 254 S.E.2d at 298 ("An affidavit which fails altogether to state the time of the occurrence of the facts alleged is insufficient.").

(*State v. Gore*, pg. 5.) However, despite this reasoning, the panel found that Gore failed to show that Detective Ard "included a deliberate falsehood or recklessly disregarded the truth *in an effort* to make the affidavit misleading to the magistrate" based on Ard's sworn testimony that the dates and times were provided to the magistrate. (*State v. Gore*, pg. 6. (emphasis added)).

First, there are numerous facts indicating that Detective Ard deliberately omitted and included information that, taken together, was false. Detective Ard's excuse for the omission of the date was that it was "common practice to not put the specific date, time of the buy and/or the amount in the written affidavit portion of

the warrant, because given the fact that—through the process of deduction you can determine who the [confidential informant] is.” (R. 40, lines 16-20.) Even though both buys involved a confidential informant, Detective Ard omitted a date that occurred seven months prior to the execution of the affidavit, but included a date for the second buy which occurred three days prior to its execution. Surely, if Detective Ard’s intention was to protect the confidential informant in omitting the date of the first buy, he would have similarly omitted the date of the second buy. This directly refutes Detective Ard’s reasoning for the omission, and rather, shows an intent to omit and place language in the affidavit so that the first and second buy appear to have occurred within close proximity to each other in order establish probable cause to search the residence.

Second, contrary to the panel’s suggestion, Gore did not have to establish that Detective Ard *deliberately* intended for the affidavit to be misleading to the magistrate in order to meet the first prong under *Franks*. Rather, the Supreme Court stated in *State v. Missouri* that

[t]o be entitled to a *Franks* hearing for an alleged omission, the challenger must make a preliminary showing that the information in question was omitted with the intent to make, or *in reckless disregard of whether it made, the affidavit misleading to the issuing judge.*

337 S.C. 548, 554, 524 S.E.2d 394, 397 (1999) (emphasis added). Gore contends that the omission of the date and time of the first buy coupled with the “also”

language in the second sentence was at least a reckless disregard as to whether it made the affidavit misleading to the issuing judge. *Id.* In fact, the panel's decision indicates that the affidavit would have been misleading without the oral supplementation:

While we agree that this sentence could have been more artfully drafted, we disagree with Gore's argument that it was deliberately misleading. It is uncontested that officers followed and observed Gore selling drugs within seventy-two hours of the affidavit's execution. Further, any confusion over the timing of these drug transactions was clarified by Detective Ard when he sought the search warrant. Because neither of these probable cause allegations were false, we find Gore failed to satisfy the first prong of the *Franks* test.

(*State v. Gore*, pg. 6-7.) The Supreme Court has not expressly held that the timing of an occurrence set forth in an affidavit can be supplemented orally. Further, the panel's decision ignores the holding of *States v. Jones* which states that "oral information may *only* be used by an affiant to supplement or to amend incorrect information in an affidavit which was *not* knowingly, intentionally, or recklessly supplied by the affiant." 342 S.C. 121, 129, 536 S.E.2d 675, 679 (2000) (emphasis added). Detective Ard admitted that he intentionally omitted the date of the first buy. (R. 44, lines 17-21.) Additionally, the structure of the second sentence together with the intentional omission of the date was at least a reckless disregard for the truth because it indicated that both buys occurred within seventy-two hours of the execution of the affidavit. Under the holding of *Jones*, Detective Ard should

not have been able to orally supplement the affidavit because the omission of the date of the first buy was intentional and the inclusion of the “also within the last seventy-two hours” language in the second sentence was at the very least, recklessly supplied. Therefore, since the affidavit, as written, contained false and misleading information, it should have been found to be insufficient to establish probable cause.

On the other hand, the panel states that because the sentences in the affidavit were not false, Gore failed to satisfy the first prong of the *Franks* test. The panel is correct that the sentences in the affidavit, taken separately, are not false statements. However, taken together as they were intended, the paragraph is not only false, but also a reckless disregard for the truth as it indicates to a reader that these two events occurred within seventy-two hours of the date of the affidavit. *See State v. Davis*, 354 S.C. 348, 359, 580 S.E.2d 778, 784 (Ct. App. 2003) (“[T]o mandate an evidentiary hearing, there must be allegations of deliberate falsehood or reckless disregard for the truth. . . .”). This is clearly false and a reckless disregard for the truth. This case is very similar to *Jones* in which an officer submitted an affidavit that misled the Magistrate concerning the identity of a source. 342 S.C. at 125, 536 S.E.2d at 677. The affidavit described the source not as a confidential informant but as an “agent” of the Florence Combined Drug Unit. *Id.* The affiant, a police officer, verbally corrected this misrepresentation by advising the

Magistrate that the “agent” was actually an informant and that he had used the term “agent” in the affidavit to protect the identity of the informant. *Id.* Notwithstanding this oral correction and additional information in the affidavit indicating corroboration by police surveillance, the evidence was insufficient for a finding of probable cause. *Id.* at 127, 536 S.E.2d at 678.

Here, similar to *Jones*, Detective Ard, the affiant, omitted key information regarding the dates and times of the allegations to allegedly protect the informant’s identity. However, the paragraph was written in such a manner so as to indicate that the first buy occurred in close proximity to the second buy, or within seventy-two hours of the execution of the affidavit. In doing so, he submitted an affidavit that was false, misleading or in a reckless disregard for the truth. Additionally, *Jones* concluded that the false affidavit violated S.C. Code Ann. § 17-13-140 as it was the equivalent of having no affidavit at all, forcing the magistrate to depend on information provided orally by the affiant to make a probable cause determination. *Id.* at 128, 536 S.E.2d at 679. Likewise, the affidavit in this case contained false and misleading information that forced the magistrate to depend on information provided by Detective Ard to make a determination as to probable cause. Without the accurate dates, a probable cause determination would not have been possible.

Furthermore, considering the rationale of *Jones*, the panel’s decision raises substantial policy concerns. Officers should be required to at least provide the

time of the occurrence to ensure that the affidavit is not stale and that probable cause exists. If officers routinely rely on oral testimony to supplement an affidavit, reviewing courts will then be required to make probable cause determinations based on faded memories. This is exactly why the requirements of S.C. Code Ann. § 17-13-140 are in place, to prevent a magistrate from having to rely on oral information provided by the affiant. Therefore, based on the foregoing, the affidavit should have been found to be insufficient to establish probable cause. Alternatively, Gore was entitled to an evidentiary hearing at a later date on this issue.

B. Even if the search warrant were valid, it was insufficient to establish probable cause to search the residence.

The Fourth Amendment to the United States Constitution provides the government shall not violate “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures. . . .” U.S. Const. amend. IV. The Fourteenth Amendment extends this constitutional guarantee to searches and seizures by state officers. *Elkins v. United States*, 364 U.S. 206, 213 (1960). “[P]robable cause to search a person’s residence does not arise based solely upon probable cause that the person is guilty of a crime. Instead, there must be additional evidence linking the person’s home to the suspected criminal activity.” *United States v. Rowland*, 145 F.3d 1194, 1204 (10th Cir. 1998).

First, despite a lengthy investigation, officers never established that the residence in question was in fact Gore's residence. The Fourth and Fourteenth Amendments offer significant protections when it comes to a person's residence. The person living at this residence was Gore's girlfriend, Angel Deangelo. When officers searched her residence without sufficient probable cause, this greatly infringed on her constitutional rights.

Second, even if officers were able to conclude Gore lived at the residence, there was no probable cause to search it. There were two separate drug transactions referenced in the search warrant affidavit. The only transaction that occurred at the residence to be searched was the first transaction. That transaction had taken place seven months prior to the execution of the affidavit. The second drug transaction, which took place three days before execution of the affidavit, occurred in a lot away from the residence. Considering the buy at the residence occurred nearly seven months prior to the execution of the warrant, the remaining allegation did not establish *any* connection between the residence and any alleged drug activity. Despite these facts, the panel found that the second drug transaction provided a sufficient nexus to the residence to justify a search warrant. (*State v. Gore*, pg. 7.) However, the second drug transaction occurred at a location other than the residence and provided no direct link to the residence. Further, it is significant that Detective Ard was unable to detect another buy from inside the

residence despite the lengthy investigation into Gore's alleged drug activity. Rather, the facts showed more of a connection to Gore's vehicle than the residence. Therefore, a search warrant should not have been returned based on a lack of probable cause and the trial court erred in failing to suppress the evidence seized as a result of the invalid search warrant.

II. Admission of Photographs

Over defense counsel's objection that their prejudicial impact outweighed any probative value, the judge allowed the State to introduce two photographs of Gore appearing to hold up a large amount of United States currency. (R. 77-78, 240.) The panel agreed that these photographs were improperly admitted:

Gore contends the circuit court erred in admitting two photographs, which depicted him holding large sums of United States currency. We agree with Gore. . . .

. . .

Gore claims these photographs were not taken inside the residence, there were other seized photographs of Gore in the residence that were not prejudicial, and the photographs invited the jury to infer criminal disposition. We agree and find these photos were unnecessary to link Gore to the residence, particularly when other photographs in evidence accomplished this purpose and several other witnesses testified Gore lived at the residence.

(*State v. Gore*, pg. 8-9.) However, the panel found that this error was harmless given the overwhelming evidence of Gore's guilt. To the contrary, the evidence

against Gore was not overwhelming. In fact, there was substantial testimony and evidence establishing that Angel Deangelo, rather than Gore, was living in the residence and was involved in drug activity.

First, Detective Kent testified that Deangelo came to the residence while he was executing the warrant. Kent told her to leave. Deangelo adamantly stated that she lived at the residence and refused to leave. (R. 54, lines 12-19.) Notably, Angel admitted that she made such a statement. (R. 161, lines 23-25.) Second, Deangelo acknowledged that she had continued staying at the residence even after her arrest. (R. 143, lines 1-11.) Third, the pictures depicted Deangelo's personal effects at the residence. (R. 136, lines 9-11.) Fourth, at the time of Deangelo's arrest, she had a large amount of United States currency in her possession. (R. 107, lines 15-17.) Fifth, Deangelo had asked Gore's trial counsel to represent her child's father on drug charges, indicating her continued involvement in drug activity. (R. 153, lines 6-20.) Sixth, Gore's driving record indicated that he lived at a different address in Little River, South Carolina. (R. p. 58, line 22-p. 59, line 10.)

Given the evidence and testimony indicating that Gore's girlfriend was residing at the residence rather than Gore, the trial court's admission of the photographs was not harmless error and Gore's conviction should have been set aside.

III. Jury Charge on Simple Possession

The panel found that the trial court properly charged the jury, stating the “overwhelming and undisputed evidence” indicated that Gore, not Deangelo, lived at the residence. (*State v. Gore*, pg. 10.) To the contrary, the evidence against Gore was neither overwhelming nor undisputed. Furthermore, in reaching its decision, the panel disregarded well established case law in South Carolina. Specifically, the South Carolina Supreme Court has held that when determining whether a lesser-offense charge is required, the court must view the evidence in the light most favorable to the appellant, “mindful that the charge request is properly rejected only where ‘there is no evidence whatsoever’ of the lesser offense.” *State v. Cottrell*, 376 S.C. 260, 262, 657 S.E.2d 451, 452 (2008); *see also State v. Heyward*, 350 S.C. 153, 158, 564 S.E.2d 379, 382 (Ct. App. 2002) (“[T]o warrant eliminating a lesser included offense charge, it must ‘very clearly appear that there is *no evidence whatsoever*’ tending to reduce the crime from the greater offense to the lesser.”).

As previously set forth above, there was evidence tending to indicate that Deangelo, Gore’s girlfriend, not Gore, was residing at the residence. First, Detective Kent testified that during execution of the search warrant, Deangelo refused to leave the residence and adamantly stated that she lived there. (R. 54, lines 12-19.) Second, Deangelo acknowledged that she had continued staying at

the residence even after her arrest. (R. 143, lines 1-11.) Third, Deangelo's personal effects were located at the residence at the time the search warrant was executed. (R. 136, lines 9-11.) Fourth, Deangelo had a large amount of United States currency in her possession at the time of her arrest. (R. 107, lines 15-17.) Fifth, Deangelo had asked Gore's trial counsel to represent her child's father on drug charges, indicating her continued involvement in drug activity. (R. 153, lines 6-20.) Sixth, Gore's driving record indicated that he lived at a different address in Little River, South Carolina. (R. p. 58, line 22-p. 59, line 10.)

Based on these facts, the jury could have reasonably concluded that Deangelo lived at the residence and that Gore only came to the residence as a *guest*. The testimony revealed that cocaine residue was found in the guest bedroom under the mattress. (R. 95, lines 6-15.) The jury could have determined that Gore had constructive possession over the items in the guest bedroom and found him guilty of simple possession. Therefore, since there was evidence establishing the lesser-included offense of simple possession, Gore was entitled to a jury charge. *See Cottrell*, 376 S.C. at 262, 657 S.E.2d at 452.

CONCLUSION

Wherefore having made a petition for rehearing, the Appellant, Alton Wesley Gore, Jr., respectfully requests that the opinion be vacated and his conviction be reversed.

Respectfully Submitted,

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THE STATE OF SOUTH CAROLINA

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In The Court of Appeals

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SC Court of Appeals

APPEAL FROM HORRY COUNTY

Court of General Sessions

Edward B. Cottingham, Sr., Circuit Court Judge

Case No. 2010-GS-26-2326

THE STATE.....RESPONDENT

V.

ALTON WESLEY GORE JR. APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Petition for Rehearing of Appellant in the above referenced case has been served upon Christine Catoe, Esq. at P.O. Box 11549, Columbia, SC 29211 on this 15th day of April, 2014.



Nicole N. Mace, Esq.
Attorney for Appellant

The South Carolina Court of Appeals

The State, Respondent,

v.

Alton Wesley Gore, Jr., Appellant.

Appellate Case No. 2012-206368

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

Paul E. Short, Jr. J.

H. B. Wes J.

James E. ... J.

Columbia, South Carolina

cc:

Nicole Nicolette Mace, Esquire
Christina J. Catoe, Esquire
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FILED
June 19, 2014