STATE OF SOUTH CAROLINA
In the Supreme Court

Appeal from Horry County
The Honorable Edward B. Cottingham, Sr., Circuit Court Judge

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S.C. Supreme Court

Opinion No. 5214 (S.C. Ct. App. filed 4/2/14)
Appellate Case No. 2014-001496

THE STATE OF SOUTH CAROLINA, RESPONDENT,

v.

ALTON WESLEY GORE, PETITIONER.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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ISSUES PRESENTED

I. **The trial judge properly allowed into evidence two photographs of Petitioner 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 trial judge erred by admitting the photographs, the error was harmless in the context of the entire case.**

II. **The trial judge properly denied Petitioner'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.**

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

STATEMENT OF THE CASE

Petitioner 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 Petitioner's motion to suppress the fruits of the search. On January 3 and 5, 2011, Petitioner was tried before the Honorable Edward B. Cottingham, Sr., and a jury. The jury found Petitioner 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.

On April 2, 2014, the South Carolina Court of Appeals affirmed Petitioner's conviction. See State v. Gore, 408 S.C. 237, 758 S.E.2d 717 (Ct. App. 2014). Petitioner's request for rehearing was denied on June 19, 2014. Petitioner timely submitted a Petition for Writ of Certiorari, and this Return follows.

ARGUMENT

I. The trial judge properly allowed into evidence two photographs of Petitioner 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 trial judge erred by admitting the photographs, the error was harmless in the context of the entire case.

In this case, despite the fact that the Court of Appeals concluded it was error to admit the photographs in question, the State maintains its position that the trial judge did not abuse his discretion by admitting the photographs. "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)).

Here, State's Exhibits 26 and 27 were relevant because they served as circumstantial evidence regarding a contested issue, i.e., whether or not Petitioner lived in the house. (See R. p. 77-78). The photographs, which depicted Petitioner, 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 Petitioner's former girlfriend regarding the photographs of Petitioner 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 Petitioner squatting down and holding money in his hands. (R. p. 76, lines 13-19). Finally, contrary to Petitioner'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 Petitioner did not object to testimony about cash found in Petitioner's bedroom and cash found on Petitioner's person, it is difficult to understand why a photograph of Petitioner 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, the Court of Appeals properly concluded that their admission did 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 Petitioner'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 Petitioner 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.").

Moreover, any error was harmless due to the overwhelming evidence of Appellant's guilt. Although Petitioner tried to suggest via cross-examination that his girlfriend was the one who really lived in the residence, the overwhelming evidence established that Petitioner's mother owned the house; that Petitioner lived in the house; and that Petitioner's girlfriend, who kept her own residence in North Carolina, visited Petitioner 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). Police obtained a key to the house from Petitioner, and Petitioner's vehicles were parked at the house. (R. p. 55, lines 8-9; p. 88, lines 1-15; p. 107, line 19 – p. 108, line 3; p. 129, line 24 – p. 130, line 9). Several police officers testified that based on their observations during the investigation, Petitioner lived at the residence, and a clerk's office employee testified that the address listed on Appellant's bond documents was the address where the cocaine was found. See State v. Gore, 408 S.C. 237, 250, 758 S.E.2d 717, 723-24 (Ct. App. 2014). Men's clothing was found in the master bedroom, and the master bedroom was 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 light of the overwhelming evidence of guilt, admission of State's Exhibits # 26 and # 27 could not reasonably have affected the outcome of Petitioner's trial. 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).

II. The trial judge properly denied Petitioner'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 Petitioner'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 Petitioner 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).

Petitioner argues that Corporal Ard omitted "exculpatory" information regarding the date of the first controlled buy at Petitioner's residence. However, the fact that the buy at the residence occurred seven months earlier is not actually exculpatory considering that Petitioner 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 Petitioner 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

[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.

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 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 Petitioner 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, Petitioner 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, Petitioner's argument that statements in the search warrant should be redacted must be rejected.

[2] Petitioner argues in his Petition for a Writ of Certiorari 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 [Petitioner] the opportunity to question the Magistrate." (Petition for a Writ of Certiorari, p. 16). However, at the suppression hearing, Petitioner 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, Petitioner 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).

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 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 Petitioner'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 Petitioner 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 Petitioner's motel room upheld where the affidavit supported that Petitioner 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).

Regardless of where the drug transaction occurred, a nexus to the residence was established because Petitioner conducted the drug transaction **immediately after** leaving the residence. (R. p. 39, lines 19-25). As the trial judge pointed out, Petitioner had to get the drugs from somewhere, and – while it is certainly *possible* that Petitioner kept his drugs in his car – there was nevertheless a substantial probability that the drug dealer, Petitioner, 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

[3] Petitioner points out in his Petition for a Writ of Certiorari that Corporal Ard did not recall seeing Petitioner carrying anything when he left the residence to conduct the off-site drug transaction. However, this particular drug transaction involved 29.2 grams of cocaine, an amount which could have easily been concealed in Petitioner's pocket. (See R. p. 21).

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 Petitioner left the residence.

Further, the nexus to the residence was strengthened by the information in the search warrant affidavit indicating that a controlled buy was conducted out of Petitioner's residence 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 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 Petitioner 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 Petitioner's residence, gave the magistrate a substantial basis to conclude that Petitioner 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. 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.

III. The trial judge properly denied Petitioner's request for a jury charge on the lesser-included offense of simple possession where there was no evidence suggesting Petitioner 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).

Petitioner 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, Petitioner 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 Petitioner tried to suggest via cross-examination that his girlfriend was the one who really lived in the residence, the overwhelming evidence established that Petitioner's mother owned the house; that Petitioner lived in the house; and that Petitioner's girlfriend, who kept her own residence in North Carolina, visited Petitioner 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). Police obtained a key to the house from Petitioner, and Petitioner's vehicles were parked at the house. (R. p. 55, lines 8-9; p. 88, lines 1-15; p. 107, line 19 – p. 108, line 3; p. 129, line 24 – p. 130, line 9). Several police officers testified that based on their observations during the investigation, Petitioner lived at the residence, and a clerk's office employee testified that the address listed on Appellant's bond documents was the address where the cocaine was found. See State v. Gore, 408 S.C. 237, 250, 758 S.E.2d 717, 723-24 (Ct. App. 2014). Men's clothing was found in the master bedroom, and the master bedroom was 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).

Second, there was no evidence placing Petitioner in the "guest bedroom" as opposed to any other rooms in the house. Petitioner's former girlfriend testified that this "guest bedroom" was Petitioner'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, Petitioner 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 Petitioner, 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 Petitioner's but the other drugs were not. Therefore, since there was no evidence that Petitioner 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, the State requests that this Court deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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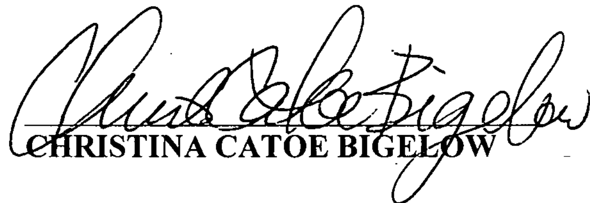

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ATTORNEYS FOR RESPONDENT

September 17, 2014

STATE OF SOUTH CAROLINA
In the Supreme Court

Appeal from Horry County
The Honorable Edward B. Cottingham, Sr., Circuit Court Judge

Opinion No. 5214 (S.C. Ct. App. filed 4/2/14)
Appellate Case No. 2014-001496

RECEIVED
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S.C. Supreme Court

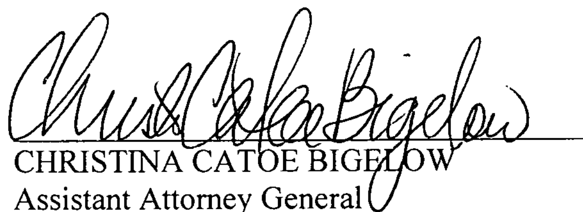
THE STATE OF SOUTH CAROLINA, RESPONDENT,

v.

ALTON WESLEY GORE, PETITIONER.

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that the **Return to Petition for Writ of Certiorari** in the above-referenced case has been served upon Nicole N. Mace and Amy K. Raffaldt, The Mace Firm, 1341 44th Avenue North, Suite 205, Myrtle Beach, SC 29577, this **17th day of September, 2014.**



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