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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court Of General Sessions

J. Derham Cole, Circuit Court Judge

Appellate Case No. 2013-000487

The State, Respondent,

v.

Shondre Lamond Williams, Appellant.

APPELLANT'S PETITION FOR REHEARING

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ATTORNEYS FOR APPELLANT

PETITION FOR REHEARING

Pursuant to Rule 221(a), SCACR, Appellant respectfully requests that the Court grant a rehearing in this matter. In making this petition, Appellant submits that the Court overlooked or misapprehended the following points:

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

STATEMENT OF THE CASE

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

This Court held oral arguments on September 9, 2014. On October 29, 2014, the Court filed an unpublished opinion affirming the result below. Appellant has now filed a timely petition for rehearing pursuant to Rule 221, SCACR.

STATEMENT OF THE FACTS

This case involves a reverse-buy operation. On March 1, 2012, Investigator Travis McJunkin of the Spartanburg County Sheriff's Office assisted Greenville County officers in executing a search warrant on an individual named Shondrell Williams.¹ [R. p. 12, lines 3–9; p. 152, line 24–p. 153, line 7.] The police found enough drugs in Mr. Williams' home to make him eligible for a 25-year prison sentence. [R. p. 153, lines 8–9; p. 166, lines 2–5.] However, they informed Mr. Williams that if he cooperated with them, he could avoid prison. [R. p. 153, lines 10–24.] Accordingly, he agreed to act as a confidential informant ("Informant")² in arranging to sell cocaine to Appellant. [R. p. 12, lines 11–18; p. 153, lines 4–7; p. 154, lines 2–3.]

With the police observing, Informant called Appellant to tell him that Informant had some drugs to sell him. [R. p. 155, lines 5–23.] Appellant declined the offer. [R. p. 166, line 25–p. 167, line 5.] Appellant later called Informant back, however, and agreed to purchase cocaine. [R. p. 167, line 5.]

Meanwhile, Sergeant Joe Pharis of the Spartanburg County Sheriff's Office contacted Lieutenant Ashley Harris, a chemist in the forensic lab, and asked him to prepare a package containing approximately 250 grams of cocaine. [R. p. 59, line 21–p. 60, line 2; p. 116, line 19–p. 117, line 3.] Investigator Matt Hutchins retrieved the package from Lieutenant Harris and delivered it to the narcotic office. [R. p. 85, line 17–p. 86, line 12.]

Once the operation was ready to proceed, Investigator McJunkin retrieved the drugs from the narcotic office and gave them to Informant. [R. p. 89, line 21–p. 90, line

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

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

15.] Investigator McJunkin and several other members of the sheriff's office then followed Informant to Appellant's residence. [R. p. 12, line 19–p. 13, line 1.] Informant entered Appellant's residence and subsequently exited, got in his car, and drove away. [R. p. 19, lines 18–20.] Investigator William Tillinghast followed Informant to another location, where Informant gave Investigator Tillinghast \$4,000 that Informant said he received from Appellant in exchange for the cocaine. [R. p. 19, line 25–p. 20, line 3.] A surveillance tape captured this verbal exchange between Investigator Tillinghast and Informant. [R. p. 15, lines 13–24; p. 20, line 19–p. 23, line 21; Court's Exhibit 1.] Investigator Tillinghast concluded the recording by stating, "End of debrief at 1:04 a.m., March 2." [R. p. 23, lines 18–21; Court's Exhibit 1.] Investigator Tillinghast then called Investigator Hutchins, who was at the sheriff's office, and told him that Appellant had purchased the cocaine from Informant. [R. p. 20, lines 4–9.]

While waiting on the call from Investigator Tillinghast, Investigator Hutchins had prepared certain background portions of a search warrant and affidavit for Appellant's home. [R. p. 27, lines 7–17.] After receiving the call from Investigator Tillinghast, Investigator Hutchins completed the affidavit by adding the following sentences: "The CI then left the residence and met back with Investigator Tillinghast. Investigator Tillinghast recovered the U.S. currency from the CI. Surveillance was maintained on the residence (premise described above) by members of the Spartanburg County Sheriff's Office Narcotics Unit after the transaction." [R. p. 226; p. 27, line 18–p. 28, line 1.] Investigator Hutchins then printed the warrant and affidavit, drove from the sheriff's office to the jail, handed the documents to the magistrate, and observed the magistrate read and sign them. [R. p. 27, line 7–p. 31, line 2.] The magistrate wrote "0105"

underneath his signature on the second page of the affidavit. [R. p. 227.] Investigator Hutchins testified that this process, from the time he finished the task of filling out the warrant until obtaining the magistrate's signature, would have taken "a few minutes" to complete. [R. p. 31, lines 8–15.]

Once the officers on the scene got word that the warrant was signed, they searched Appellant's home. [R. p. 38, lines 9–17.] After Appellant was handcuffed and given a *Miranda* warning, he revealed to Investigator McJunkin and Lieutenant Cooper that he had hidden the cocaine in the hot water heater. [R. p. 39, line 21–p. 40, line 20; p. 44, lines 1–23.] A search of the home also revealed crack cocaine hidden above a kitchen cabinet. [R. p. 94, lines 14–16.]

Investigator Dan Swad, who recovered the cocaine and crack cocaine at the scene, placed the drugs in a BEST bag. [R. p. 94, line 1–p. 95, line 11.] Investigator Swad also prepared Form B, on which he indicated that he delivered the drugs to the evidence drop box on March 3, 2012. [R. p. 95, line 24–p. 96, line 3; p. 231.] The form was notarized, and the date above the notary's signature is also March 3. [R. p. 97, line 9–p. 98, line 1; p. 231.] Investigator Swad's testimony corroborated his statement on Form B that he placed the drugs in the drop box on March 3. [R. p. 96, line 14–p. 98, line 9.]

Anita Mullinax, an evidence custodian at the sheriff's office, indicated on Form C that she retrieved the BEST bag from the drop box on March 2. [R. p. 99, lines 7–15; p. 232.] She then delivered the bag to the drug room, which is a sealed room in the evidence office. [R. p. 104, line 8–p. 105, line 18; p. 232.] Later that day, Lieutenant Harris retrieved the BEST bag; a test of the substances revealed 249.71 grams of cocaine and 4.91 grams of crack cocaine to be present. [R. p. 63, lines 8–9; p. 81, lines 5–11.]

Before trial, Appellant moved to suppress the search warrant and to suppress the drug evidence due to an incomplete chain of custody. [R. p. 9, line 8–p. 10, line 21; p. 52, lines 6–11; p. 56, lines 20–22.] The court denied the motions. [R. p. 47, line 5–p. 51, line 23; p. 127, line 12–p. 130, line 17.] After trial, the jury convicted Appellant of possession of cocaine base and trafficking cocaine. [R. p. 220, line 20–p. 221, line 1.] This Court affirmed Appellant’s convictions.

ARGUMENT

I.

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

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

South Carolina further mandates that a “warrant . . . shall be issued only upon affidavit sworn to before the magistrate, municipal judicial officer, or judge of a court of record.” S.C. Code Ann. § 17-13-140. “Generally, affidavits must be made on the affiant’s personal knowledge of the facts alleged in the petition. The affidavit must in

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

Here, no evidence exists to support the trial court’s determination that the search warrant was valid and supported by Investigator Hutchins’ personal knowledge at the time it was executed. After Investigator Tillinghast met with Informant following the sale of the cocaine to Appellant, he recorded Informant’s recounting of the events. [R. p. 23, lines 9–21; Court’s Exhibit 1.] At the conclusion of the recording, Investigator Tillinghast noted that the time was 1:04 a.m. [R. p. 23, lines 18–21; Court’s Exhibit 1.] When the magistrate signed the affidavit, he wrote “0105” under his signature. [R. p. 227.] Investigator Hutchins testified that he could not have completed the affidavit, printed it and the warrant, driven to the jail, and allowed the magistrate to read and sign the documents within sixty seconds. [R. p. 31, lines 8–13.] Investigator Hutchins acknowledged that it would take a few minutes for these events to occur. [R. p. 31, lines 14–15.] Furthermore, Investigator Hutchins acknowledged that 1:05 is an accurate reflection of what time the magistrate signed the documents. [R. p. 31, line 20–p. 32, line 5.]

It is true that Investigator Tillinghast testified that he could not remember at what point during these events he called Investigator Hutchins to inform him of precisely what

had transpired on the scene. [R. p. 20, line 4–p. 21, line 22.] However, Investigator Tillinghast acknowledged that he would not have called Investigator Hutchins until after meeting with Informant to hear his version of the events:

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

A: Yes, sir.

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

A: Yes, sir.

[R. p. 22, lines 9–17.] The recording does not include a phone call or any other communication between Investigators Tillinghast and Hutchins. Thus, the only conclusion to be reached from Investigator Tillinghast's testimony is that he called Investigator Hutchins after the video recording concluded at 1:04, and that it was not until then that Investigator Hutchins could complete the portion of the affidavit detailing what occurred after Informant entered Appellant's residence.

The State attempted to mitigate this evidence by eliciting testimony from Investigator Hutchins that the timestamps in the video cameras used by the sheriff's office sometimes may be inaccurate. [R. p. 33, lines 6–21.] However, neither Investigator Hutchins nor anyone else testified that the *specific video camera in question* had an inaccurate timestamp. Furthermore, Investigator Tillinghast *did not* testify that he relied on the video timestamp when giving the time at the conclusion of the recording. The State introduced no evidence indicating that the time of 1:04 given in the video was inaccurate.

The following is a summary of the relevant evidence, in chronological order of occurrence:

- Investigator Tillinghast completed his debriefing of Informant and ceased recording at 1:04;
- At some point after turning off the recording, Investigator Tillinghast called Investigator Hutchins to relay what occurred at Appellant's residence;
- Investigator Hutchins then finished typing the warrant and affidavit, printed them, and drove to the jail which, in his estimation, would have taken "a few minutes"; and
- The magistrate signed the documents at 1:05.

Given this evidence, it was error for the trial court not to find the warrant invalid and not to suppress the evidence discovered as a result. The trial court was constrained to conclude that these events could not possibly have occurred as the State presented them. Notably, Investigator Hutchins *did not* testify that he had prepared the entire affidavit in anticipation and waited for confirmation before executing it. Rather, he testified that he waited for Investigator Tillinghast's call before he finished typing the affidavit, and *then* printed it and drove to the magistrate's office. Investigator Hutchins testified that it would have taken "a few minutes" from the time he finished filling out the warrant and affidavit until obtaining the magistrate's signature. [R. p. 31, lines 8–15.] This testimony is not compatible with the evidence that the call from Investigator Tillinghast to Investigator Hutchins occurred at 1:04 or afterwards and that the magistrate signed the warrant at 1:05.

Thus, the evidence permits only one conclusion: that when Investigator Hutchins executed the affidavit, he lacked personal knowledge of all the facts he included in that

document. Again, Investigator Hutchins did not testify that he had prepared the entire affidavit in anticipation of Investigator Tillinghast's call, but that he rather waited until after the call to complete it. This testimony is not credible in light of the times given in the video recording and under the magistrate's signature. Dunbar is clear that affidavits must be based on personal knowledge. The State has the burden of demonstrating the validity of the warrant, but the evidence it presented was inconsistent and the events could not possibly have occurred during the timeline presented. The actual events that occurred were left to conjecture, and there was no evidence that permitted the trial court to conclude that Investigator Hutchins had personal knowledge of all the facts in the affidavit at the time he executed it. Absent the statements in the affidavit discussing what happened after Informant entered Appellant's residence, the affidavit lacks sufficient facts to constitute probable cause for the search warrant.

In light of the fact that the affidavit was defective, probable cause did not exist for the search warrant. The trial court erred in finding that the warrant was valid. Accordingly, this Court should grant a rehearing, reverse on this issue, and remand for a new trial.

II.

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

When offering drugs into evidence, the State must establish a complete chain of custody as far as practicable. State v. Sweet, 374 S.C. 1, 6, 647 S.E.2d 202, 205 (2007). "Proof of chain of custody need not negate all possibility of tampering so long as the chain of possession is complete." State v. Hatcher, 392 S.C. 86, 92, 708 S.E.2d 750, 753

(2011). “Where an analyzed substance . . . has passed through several hands, the identity of individuals who acquired the evidence and *what was done with the evidence between the taking and the analysis must not be left to conjecture.*” Sweet, 374 S.C. at 6, 647 S.E.2d at 205 (emphasis added).

Here, the trial court erred in ruling that the State had established a complete chain of custody. Investigator Swad, who recovered the drugs at the scene, indicated on Form B that he placed the BEST bag in the drop box on March 3. [R. p. 231.] Form B was also notarized, and the notary similarly indicated the date as March 3. [R. p. 231.] When Anita Mullinax completed Form C, however, she indicated that she retrieved the BEST bag from the drop box on March 2. [R. p. 232; p. 100, lines 14–19.] On the witness stand, Investigator Swad affirmed the accuracy of Form B:

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

A: Yes, sir, form B.

Q: Is that your form?

A: Yes, sir.

Q: Is your form accurate?

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

A: Yes, sir.

[R. p. 95, line 24–p. 96, line 6.] At no point during his testimony did Investigator Swad testify that he transcribed the date erroneously. Given the discrepancy between the date the BEST kit was supposedly deposited in the drop box and the date it was supposedly retrieved, “what was done with the evidence between the taking and the analysis [was] left to conjecture,” Sweet, 374 S.C. at 6, 647 S.E.2d at 205, in violation of well-settled law in this state.

This Court, in its opinion, concluded that the trial court did not err because the manner of handling was reasonably demonstrated and that while a date discrepancy

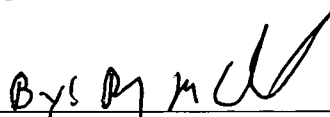
existed, nothing indicated that the drugs were not in the control of identifiable people at all times. However, too much time passed between when the drugs were seized at Appellant's home and when they were placed in the drug lab's drop box to permit the trial court to conclude that a sufficient chain was established. Specifically, Investigator Swad gathered the drugs in the early morning hours of March 2, but, according to Form B, he did not deposit the drugs in the lab until March 3. Importantly, the notary on Form B also listed the date as March 3. At trial, Investigator Swad did not testify that he incorrectly recorded the date on Form B; rather, he affirmed its accuracy. Thus, the drugs were unaccounted for during a period of 24-plus hours.

In sum, the trial court abused its discretion in finding that the State had established a complete chain of custody and allowing these drugs into evidence. Accordingly, this Court should grant a rehearing, reverse on this issue, and remand for a new trial.

CONCLUSION

For the reasons discussed above, as well as those contained in Appellant's Brief, this Court should grant the petition, conduct a rehearing in this matter, and reverse Appellant's convictions and sentences and remand this case for a new trial, with instructions that all evidence seized pursuant to the defective warrant be excluded.

Respectfully submitted,



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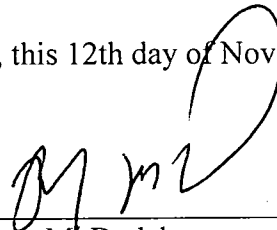
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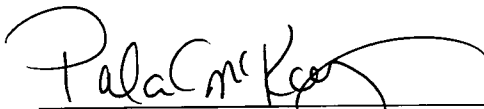
PROOF OF SERVICE

I certify that a true copy of the Appellant's Petition for Rehearing in the above-referenced case has been served upon Adam L. Whitsett, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 12th day of November, 2014.



Robert M. Dudek
Chief Appellate Defender

SUBSCRIBED AND SWORN TO before me
this 12th day of November, 2014

 (L.S.)

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