

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Horry County

Edward B. Cottingham, Circuit Court Judge

RECEIVED

JAN - 7 2015

S.C. Supreme Court

THE STATE,

PETITIONER,

V.

ALEX ROBINSON,

RESPONDENT

BRIEF OF RESPONDENT

LAURA R. BAER
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, S. C. 29211-1589
(803) 734-1343

ATTORNEY FOR RESPONDENT.

INDEX

INDEX..... 1

TABLE OF AUTHORITIES 2

ISSUES PRESENTED 4

STATEMENT OF THE CASE 5

STATEMENT OF FACTS 6

ARGUMENT

 I. The Court of Appeals properly reversed the trial judge’s denial of Respondent’s motion to suppress the evidence obtained pursuant to the search warrant where the affidavit in support of the search warrant contained no information regarding the informant’s reliability..... 9

 II. The Court of Appeals properly found that the good faith exception to the exclusionary rule was not applicable in the instant case because the search warrant was so lacking in indicia of probable cause that belief and reliance on its validity was objectively unreasonable, where the affidavit did not include any information upon which the issuing judge could find the informant reliable 16

 III. The Court of Appeals properly found that the affidavit in support of the search warrant contained a false statement where it omitted the fact that the confidential informant purchased cocaine through a purported agent and was not the direct purchaser at the residence 24

CONCLUSION 30

TABLE OF AUTHORITIES

South Carolina Cases:

State v. Adolphe, 314 S.C. 89, 441 S.E.2d 832 (Ct. App. 1994). 20

State v. Baccus, 367 S.C. 41, 625 S.E.2d 216 (2006). 10

State v. Bellamy, 336 S.C. 140, 519 S.E.2d 347 (1999). 10

State v. Davis, 354 S.C. 348, 580 S.E.2d 778 (Ct. App. 2003). 25

State v. Dupree, 354 S.C. 676, 583 S.E.2d 437 (Ct. App. 2003). 10, 13, 14

State v. Forrester, 343 S.C. 637, 541 S.E.2d 837 (2001). 10, 27

State v. Gentile, 373 S.C. 506, 646 S.E.2d 171 (Ct. App. 2007). 14

State v. Gore, 408 S.C. 237, 758 S.E.2d 717 (Ct. App. 2014). 24-26

State v. Johnson, 302 S.C. 243, 395 S.E.2d 167 (1990). 12, 19, 20

State v. Jones, 342 S.C. 121, 536 S.E.2d 675 (2000). 10, 28

State v. King, 349 S.C. 142, 561 S.E.2d 640 (Ct. App. 2002). 11

State v. Kinloch, 2014 WL 7273955 (S.C. Dec. 23, 2014). 10, 11

State v. Missouri, 337 S.C. 548, 524 S.E.2d 394 (1999). 25, 28, 29

State v. Philpot, 317 S.C. 458, 454 S.E.2d 905 (Ct. App. 1995). 10, 20

State v. Robinson, 408 S.C. 268, 758 S.E.2d 725 (Ct. App. 2014).5, 9, 12, 16, 19

State v. Sachs, 264 S.C. 541, 216 S.E.2d 501 (1975). 25

State v. Thompson, 363 S.C. 192, 609 S.E.2d 556 (Ct. App. 2005). 25

State v. Viard, 276 S.C. 147, 150, 276 S.E.2d 531, 532 (1981). 11

State v. Weston, 329 S.C. 287, 494 S.E.2d 801 (1997).16, 18, 25

United States Supreme Court Cases:

Aguilar v. Texas, 378 U.S. 108 (1964). 13

Franks v. Delaware, 438 U.S. 154 (1978). 24, 25, 27

Illinois v. Gates, 462 U.S. 213 (1983). 10, 11, 18

Johnson v. United States, 333 U.S. 10 (1948). 17

United States v. Chadwick, 433 U.S. 1 (1977). 17

United States v. Leon, 468 U.S. 897 (1984). 16-21, 27

Zurcher v. Stanford Daily, 436 U.S. 547 (1978). 11

Other Federal Cases:

United States v. Bynum, 293 F.3d 192 (4th Cir. 2002). 16, 17, 20-22

United States v. Reilly, 76 F.3d 1271 (2nd Cir. 1996). 27

United States v. Vigrant, 176 F.3d 565 (1st Cir. 1999). 27

United States v. Wilhelm, 80 F.3d 116 (4th Cir.1996). 21, 22

Statutes:

S.C. Code Ann. § 17-13-140 (1985). 10

S.C. Code Ann. § 44-53-370(e)(2)(c) (2008). 5

Constitutional Provisions:

U.S. Const. amend. IV. 9, 10

ISSUES PRESENTED

- I. The Court of Appeals properly reversed the trial judge's denial of Respondent's motion to suppress the evidence obtained pursuant to the search warrant where the affidavit in support of the search warrant contained no information regarding the informant's reliability.
- II. The Court of Appeals properly found that the good faith exception to the exclusionary rule was not applicable in the instant case because the search warrant was so lacking in indicia of probable cause that belief and reliance on its validity was objectively unreasonable, where the affidavit did not include any information upon which the issuing judge could find the informant reliable.
- III. The Court of Appeals properly found that the affidavit in support of the search warrant contained a false statement where it omitted the fact that the confidential informant purchased cocaine through a purported agent and was not the direct purchaser at the residence.

STATEMENT OF THE CASE

On August 27, 2009, Respondent was indicted by the Horry County Grand Jury for trafficking between one-hundred and two-hundred grams of cocaine and failing to stop for a blue light.

On November 7, 2011, Respondent proceeded to trial before the Honorable Edward B. Cottingham and a jury. App. 1. Respondent was represented by John Hilliard and Julia Bass, and the State was represented by Assistant Solicitor Brad Richardson. App. 1. Pre-trial, the trial court granted defense counsel's motion to sever the charges, and the State proceeded to trial on the trafficking cocaine charge. App. 3, 24 – 10, 21.

On November 9, 2011, the jury found Respondent guilty of trafficking between one-hundred and two-hundred grams of cocaine. App. 524, 20-25. The trial court sentenced Respondent to twenty-five years imprisonment pursuant to S.C. Code Ann. § 44-53-370(e)(2)(c) (2008). App. 534, 10 – 535, 7.

Appellate Defender Dayne C. Phillips filed Respondent's direct appeal on December 5, 2012. The State was represented on appeal by Assistant Attorney General Mark R. Farthing. The Court of Appeals heard oral argument on the case on January 8, 2014 and subsequently issued a published opinion reversing Respondent's conviction. State v. Robinson, 408 S.C. 268, 758 S.E.2d 725 (Ct. App. 2014). The Court of Appeals denied the petitions for rehearing of both the Respondent and the State. Petitioner filed a petition for writ of certiorari in the Supreme Court, and the petition was granted on December 3, 2014.

The State's Brief was filed December 8, 2014. This is Respondent's Brief.

STATEMENT OF FACTS

Pre-trial, defense counsel challenged the sufficiency of the search warrant that was previously issued by the trial court and moved to suppress the evidence found during the execution of the search warrant on September 25, 2008.¹ R. 11, 4-11; R. 30, ll. 6-10. The probable cause section of the search warrant affidavit provides:

A confidential and reliable informant working for the Horry County Police Department *purchased* a quantity of off white powder substance represented as being cocaine and field-testing positive for cocaine attributes *from the occupants of the house identified as [redacted] Stoneybrook Dr* in Conway, SC. That the informant has been able to make *recent continuous purchases of illegal drugs from this residence*

App. 545; State's Exhibit # 1 (Search Warrant). Defense counsel argued that, under the totality of the circumstances, the search warrant affidavit failed to establish sufficient information to support the trial court's finding of probable cause where: (1) the affiant knew information in the affidavit was false (e.g., the CI did not actually observe the alleged drug transaction); (2) there was no evidence presented to the trial court to verify the reliability of the confidential informant (CI); and (3) the prior alleged observations by the CI were made without listing a single date of when the alleged drug transactions occurred. App. 11, 24 – 57, 25.

Contrary to the information contained in the sworn search warrant affidavit, Officer Kent Donald of the Horry County Police Department admitted at the suppression hearing that the CI *never* directly purchased cocaine from the occupants of the residence at Stoneybrook Drive. App. 37, 18 – 39, 1. Specifically, Officer Donald stated that the CI gave Christopher Oliver the “police

¹ Defense counsel made a Motion for Recusal because the trial judge was also the judge who issued the warrant. The trial judge denied the motion despite his comment in response to finding out that he was the issuing judge: “That makes me think it’s correct... Where is it that you say this search warrant is insufficient. I would’ve read it in great detail at the time, though I don’t remember the exact factual situation.” App. 11, 15-23; 21, 1-13.

buy money” and that on three separate occasions the CI stayed in the car while Oliver allegedly purchased cocaine from individuals inside the Stoneybrook residence. App. 25, 3 – 27, 7. Officer Donald also revealed that the alleged drug transactions occurred on the following dates: August 15, 2008; August 22, 2008; and September 12, 2008. App. 25, 3-24.

On cross-examination, Officer Donald admitted that, although he prepared and signed the sworn search warrant affidavit, he did *not* inform Judge Cottingham that the CI *never* entered the Stoneybrook residence, or that the CI was *not* the person who allegedly purchased the cocaine from the Stoneybrook residence. App. 37, 11 – 40, 10. Officer Donald also admitted that he failed to provide Judge Cottingham with any information establishing the reliability of CI as well as the dates for when the alleged drug transactions occurred.² App. 40, 11-22; R. 44, 24 – 45, 2. Officer Donald further noted that he *never* “patted down” Oliver—as required—for drugs prior to the alleged drug transactions. App. 45, 1 – 46, 8.

After defense counsel listed numerous cases in support of the motion to quash the search warrant and suppression of the evidence,³ the trial court rejected defense counsel’s argument that the State failed to prove the reliability of the CI and stated: “I’ll be glad for you [defense counsel] to put your cases on the record but I’m not gonna [sic] sit here and have a review of all the cases that I’ve read for the last twenty-seven years.” App. 47, 2 – 50, 22. The trial court further stated:

I’m familiar generally with the cases that you [defense counsel] cited but I respectfully disagree with your position. This affidavit in my opinion then and now is complete and in accordance with the law regarding search warrants. This affiant to the best of his knowledge told the truth. Now, he [Officer Donald] may have told it not exactly as you would have it but he said I’m basing it on reliable information that I received that drugs have been sold from this place on several occasions.

² Officer Kent Donald testified during the Franks hearing that he did not orally supplement the affidavit for the search warrant. App. 34, 18-22.

³ Court’s Exhibit #1 (Case law submitted by the Defendant).

App. 52, 5-12. In response, defense counsel argued, “Your Honor, we would move on three grounds, number one, that there [was] patently on the face of this search warrant incorrect information provided to Your Honor.” App. 52, 21-23. The trial court responded, “Respectfully rejected. It’s not patently information wrong [sic]. *I dealt with that twice now and I’m not gonna [sic] go there again.*” App. 52, 24 – 53, 1 (emphasis added). The trial court later noted, “My concern, [defense counsel], is whether or not this affiant to the best of his knowledge was telling me the truth on that day. He says he got this from a reliable and confidential informant.” App. 55, 10-13.

At the conclusion of the argument, the trial court ruled, “I conclude that [the search warrant affidavit] contains sufficient information for me to issue a bench warrant, I mean, a search warrant, which I did. And I respectfully deny your motion to quash the indictment [search warrant].” App. 55, 16-19. To further support his ruling, the trial court stated, “I think it’s sufficient for me to conclude that the affidavit of this affiant was sufficient and the totality of the information provided is sufficient for the search warrant. *Now, I don’t need any more on this question.*” App. 57, 2-6 (emphasis added). The cases cited in support of defense counsel’s motion to suppress were later entered into evidence as Court’s Exhibit #1. App. 83, 1 – 84, 17.

After a trial, the jury found Appellant guilty of trafficking cocaine, defense counsel renewed the motion to quash the search warrant and suppression of the evidence found during the execution of that search warrant. App. 531, 2-8. The trial court denied the motion. App. 531, 9-23.

ARGUMENT

I.

The Court of Appeals properly reversed the trial judge’s denial of Respondent’s motion to suppress the evidence obtained pursuant to the search warrant where the affidavit in support of the search warrant contained no information regarding the informant’s reliability.

The Court of Appeals reversed Respondent’s conviction after concluding that the trial judge erred in failing to suppress the evidence discovered in the search of Respondent’s home because the affidavit underlying the search warrant did not include any evidence of the informant’s reliability as required to establish probable cause such that the search warrant was invalid. The Court of Appeals stated in its opinion:

The only information in the affidavit about the events and circumstances at Robinson’s residence, and thus the only information provided to the issuing judge regarding the existence of probable cause, came from the informant. As the issuing judge observed during the suppression hearing, “There were drugs there *if* the allegations [in the affidavit] are true.” Thus, the existence of probable cause in this case depended entirely on the informant’s hearsay statements to Sergeant Donald – whether the informant told the truth – particularly as to (1) whether there were any drugs *purchased* at all and (2) whether the drugs were purchased *from Robinson’s residence* (emphasis added). Concerning these key points, if the informant gave Sergeant Donald incorrect information, there would be no probable cause to search Robinson’s residence. Therefore, we find it necessary that Sergeant Donald demonstrate the informant’s reliability to the judge.

State v. Robinson, 408 S.C. 268, 274-75, 758 S.E.2d 725, 728 (Ct. App. 2014). The Court of Appeals correctly determined the essentiality of the information regarding reliability and correctly determined that the trial judge erred in finding that the statements contained in the affidavit provided any information as to the informant’s reliability. Accordingly, the decision of the Court of Appeals should be affirmed and Petitioner’s conviction reversed.

The Fourth Amendment of the United States Constitution guarantees “[t]he right of the

people to be secure . . . [from] unreasonable searches and seizures.” U.S. Const. amend. IV. Notably, the South Carolina General Assembly “has imposed stricter requirements than federal law for issuing a search warrant. Both the Fourth Amendment of the United States Constitution and Article I, § 10 of the South Carolina Constitution require an oath or affirmation before probable cause can be found by an officer of the court, and a search warrant issued.” State v. Jones, 342 S.C. 121, 128, 536 S.E.2d 675, 678 (2000); U.S. Const. amend. IV. The South Carolina Code mandates that a search 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 (1985).

“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, 454 S.E.2d 905 (Ct. App. 1995). 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). The magistrate should determine probable cause based on all of the information available to the magistrate at the time the warrant was issued.” State v. Dupree, 354 S.C. 676, 684, 583 S.E.2d 437, 441 (Ct. App. 2003). Evidence obtained in violation of the Fourth Amendment is inadmissible in both state and federal court. See State v. Forrester, 343 S.C. 637, 643, 541 S.E.2d 837, 840 (2001).

In terms of a circuit court’s review of a magistrate’s finding of probable cause, “[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); State v. Kinloch, 2014 WL 7273955 *3 (S.C. Dec. 23, 2014). “[T]he ‘substantial basis’ standard encourages law enforcement to seek a warrant, rather than conduct warrantless searches

with the hope of relying on some other exception to the warrant clause.” Kinloch, *3 (citing Illinois v. Gates, 462 U.S. 213 (1983)). In determining whether a substantial basis exists, the crucial element is not whether the target of the search is suspected of a crime, but whether it is reasonable to believe that the items to be seized will be found in the place to be searched. Zurcher v. Stanford Daily, 436 U.S. 547, 556 & n. 6 (1978). “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).

When a confidential informant is involved, it is necessary to examine the reliability and credibility of the informant in determining the existence of probable cause. See Illinois v. Gates, 462 U.S. 213, 230-235 (1983). In determining whether the information relied upon by law enforcement is reliable, no one factor is necessary or sufficient to establish probable cause. Id. Instead, probable cause arises from the totality of the circumstances, and “[a] deficiency in one [factor] may be compensated for, in determining the overall reliability of a tip, by a strong showing as to the other, or by some other indicia of reliability.” Id.

In this case, the trial court erroneously found the confidential informant reliable. The affidavit in support of the search warrant did not contain sufficient information upon which the issuing judge could make an independent determination as to the reliability of the informant in order to base a probable cause determination. Evidence of reliability could have taken the form of evidence of past credibility of the informant or independent corroboration of the informant’s present information. See State v. Viard, 276 S.C. 147, 150, 276 S.E.2d 531, 532 (1981). In the trial court’s explanation of his ruling, he stated:

I'm familiar generally with the cases that you [defense counsel] cited but I respectfully disagree with your position. This affidavit in my opinion then and now is complete and in accordance with the law regarding search warrants. *This affiant to the best of his knowledge told the truth.* Now, he [Officer Donald] may have told it not exactly as you would have it but he said *I'm basing it on reliable information that I received that drugs have been sold from this place on several occasions.*

App. 52, 5-12 (emphasis added). The trial court's own explanation illustrates its reliance upon the officer's bald averment that the informant is reliable rather than upon any details in the affidavit regarding the history of the informant's credibility or any independent verification of the information.

The Court of Appeals correctly noted the similarity in facts between the instant case and State v. Johnson, 302 S.C. 243, 395 S.E.2d 167 (1990). See Robinson, 408 S.C. 268 at 276, 758 S.E.2d at 729. In Johnson, the affidavit in support of the warrant stated that the confidential informant saw evidence in Johnson's home within 72 hours of the issuance of the warrant, but it did not contain any information regarding the reliability of the informant or corroboration of the information provided. Johnson, 302 S.C. at 247-48, 395 S.E.2d at 169. The officer testified at the suppression hearing that he worked with the informant in the past, but such information was not contained in the affidavit itself.⁴ Id. As a consequence of the lack of information regarding the reliability of the informant, this Court stated that "'the inferences from the facts which lead to the complaint' will be drawn not 'by a neutral and detached magistrate,' as the Constitution requires, but instead, by a police officer 'engaged in the often competitive enterprise of ferreting out crime,' or, as in this case, by an unidentified informant." Id. at 248, 395 S.E.2d at 169 (citing

⁴ Unlike the present case where the officer definitely testified that no supplemental testimony was made in support of the warrant, it was unclear from the record in Johnson whether the warrant was supplemented. 302 S.C. at 249, 395 S.E.2d at 170. Thus, the Johnson court remanded for a hearing to determine if the additional information regarding reliability was provided to the issuing judge by virtue of supplemental testimony. Id.

Aguilar v. Texas, 378 U.S. 108, 115, 84 S.Ct. 1509, 1514, 12 L.Ed.2d 723 (1964)). This Court then determined that, “applying the totality of the circumstances test . . . the affidavit by itself did not provide the magistrate with sufficient information concerning the informant’s reliability upon which he could base a probable cause determination.” Id.

Petitioner argues that the indicia of reliability contained within the affidavit for the search warrant was “information... in regard to the confidential informant’s purchases of narcotics from the residence on multiple occasions while working with law enforcement officers and the law enforcement officers’ corroboration of the information provided by informant by working with her and field testing the narcotics she purchased from the residence.” Petitioner’s Brief, p. 10.

Petitioner does not contend that there was any information included in the affidavit regarding any past history of working with the informant. Petitioner’s reference to “the confidential informant’s purchases of narcotics from the residence on multiple occasions while working with law enforcement officers” does not establish any history of the informant’s reliability because all three purchases⁵ related to the instant case. Thus, the informant had never made an allegation that was verified to lead to the discovery of contraband or evidence of a crime in the place alleged. The reference to continuous uncorroborated purchases of drugs by the informant does not boost the informant’s reliability.

The alternative method of establishing an informant’s reliability, when there is no history of past credibility, is to show “independent verification of the information, prior to the search.” State v. Dupree, 354 S.C. 676, 686, 583 S.E.2d 437, 442 (2003). Petitioner avers that the officers corroborated the information “by working with her and field testing the narcotics she purchased

⁵ The specific number of alleged drug purchases was not specified in the affidavit in support of the warrant. Rather, the warrant vaguely stated “that the informant has been able to make recent continuous purchases of illegal drugs from this residence.” App. 545.

from the residence.” However, the contention that law enforcement officers took any steps toward independent corroboration of the information provided by the informant is without basis in fact and is not expressed in the warrant affidavit.

Petitioner cites State v. Dupree in support of its contention that the information in the affidavit was sufficient to establish the informant’s reliability. 354 S.C. 676, 583 S.E.2d 437 (2003); Petitioner’s Brief p. 13. However, Dupree is distinguishable from the instant case because Dupree involved a controlled buy, meaning that the officers searched the informant prior to and after the drug purchase and the officers observed the informant enter and exit the location. Id. at 681, 583 S.E.2d at 439-40. Additionally, in Dupree the circumstances of the controlled buy were included both in the affidavit itself and in the supplemental testimony of the officer to the issuing magistrate. Id. at 681-682, 583 S.E.2d at 439-40. The present case did not involve a controlled buy. Rather, as the officer testified at the suppression hearing, he patted down and wired the informant but never the third party, Christopher Oliver. App. 36, 1-19; 37, 11 – 39, 3; 45, 22 – 46, 8. The informant then purported to drive to the Stoney Brook residence with Oliver and remained in the vehicle down the street while Oliver would allegedly go to the residence to purchase drugs and return with them to the car. App. 25, 3 – 27, 1. There was no legitimate effort on the part of the officers to confirm the informant’s story regarding whether the drugs were actually purchased or where they were purchased. See State v. Gentile, 373 S.C. 506, 515-16, 646 S.E.2d 171, 175-76 (Ct. App. 2007) (finding that the possession of drugs by a visitor of the home did not support a finding of probable cause to search the residence because neither the driver nor his vehicle was searched prior to going to Gentile's residence because without surveillance of the residence, there was no verification that the driver in fact purchased the marijuana from at the residence). Additionally, the field testing of the substance brought to the officers by the informant does nothing to verify the

source of the substance, but rather confirms only that the substance the informant gave them was cocaine.

The practical, common sense decision to be made by the issuing judge in light of the information set forth in the affidavit would necessarily be to find a lack of probable cause because there is no information regarding the informant's reliability and no effective means of corroboration attempted or described within the affidavit. If, as Petitioner contends, the issuing judge was left with the impression that the confidential informant participated in a controlled buy, that would be an inaccurate impression because no controlled buy occurred in the instant case. Therefore, the Court of Appeals was correct in determining that due to the absence of any information regarding the reliability of the informant in the affidavit, there was no probable cause to issue the search warrant.

II.

The Court of Appeals properly found that the good faith exception to the exclusionary rule was not applicable in the instant case because the search warrant was so lacking in indicia of probable cause that belief and reliance on its validity was objectively unreasonable, where the affidavit did not include any information upon which the issuing judge could find the informant reliable.

The Court of Appeals held that the good faith exception to the exclusionary rule did not apply to the Respondent's case. The Court found the good faith exception to the exclusionary rule inapplicable because the absence of any information regarding reliability made the affidavit "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable." Robinson, 408 S.C. at 277, 758 S.E.2d at 730 (quoting State v. Weston, 329 S.C. 287, 293, 494 S.E.2d 801, 804 (1997), (quoting United States v. Leon, 468 U.S. 897, 923, 104 S.Ct. 3405, 3421 (1984))). Specifically, the Court of Appeals reasoned:

As in Johnson, Sergeant Donald's affidavit gave the issuing judge no information as to assess the reliability of the information on which probable cause could exist. Without such information, the issuing judge was forced to guess whether the events described in the affidavit actually occurred. Under these circumstances, we cannot defer to the warrant because the affidavit "does not 'provide the magistrate with a substantial basis for *determining the existence of probable cause.*'" We find that given the lack of any basis on which the issuing judge could find the information in the affidavit reliable, the "affidavit is 'so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable.'" Consequently, Leon, Weston, and Johnson require us to find the good faith exception inapplicable to Robinson's case. We hold the evidence must be suppressed.

Id. at 277, 758 S.E.2d at 729-30 (internal citations omitted) (emphasis added).

In United States v. Leon, 468 U.S. 897, 104 S.Ct. 3405 (1984), the Court held that suppression of the fruits of a search conducted under the authority of a warrant, even if subsequently invalidated, is only appropriate if "a reasonably well trained officer would have

known that the search was illegal despite the magistrate's authorization." United States v. Bynum, 293 F.3d 192 (4th Cir. 2002) (citing Leon, 468 U.S. at 922 n.23, 104 S.C. at 3420). The good faith exception is not applicable in the following four circumstances, in which an officer cannot be found to have acted with "objective reasonableness":

- (1) the magistrate was misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard of the truth;
- (2) the magistrate acted as a rubber stamp for the officers and so "wholly abandoned" his detached and neutral role;
- (3) an affidavit is so lacking in indicia of probable cause as to render official belief in its existence unreasonable;
- (4) a warrant is so facially deficient in failing to particularize the place to be searched or the things to be seized that the executing officers cannot reasonably presume it to be valid.

Id.

In Leon, the Court explained the preference that searches be conducted with a warrant because it "provides the detached scrutiny of a neutral magistrate which is a more reliable safeguard against improper searches than the hurried judgment of a law enforcement officer 'engaged in the often competitive enterprise of ferreting out crime.'" 468 U.S. at 913-14, 104 S.Ct. at 3415-16 (1984) (citing United States v. Chadwick, 433 U.S. 1, 9, 97 S.Ct. 2476, 2482, 53 L.Ed.2d 538 (1977) (quoting Johnson v. United States, 333 U.S. 10, 14, 68 S.Ct. 367, 369, 92 L.Ed. 436 (1948)). However, the Court cautioned that "[d]eference to the magistrate... is not boundless." Id. at 914; 104 S.Ct. at 3416. The Leon Court stated:

It is clear, first, that the deference accorded to a magistrate's finding of probable cause does not preclude inquiry into the knowing or reckless falsity of the affidavit on which that determination was based. Second, the courts must also insist that the magistrate purport to perform his neutral and detached function and not serve merely as a rubber stamp for the police. A magistrate failing to manifest that neutrality and detachment

demanding of a judicial officer when presented with a warrant application and who acts instead as an adjunct law enforcement officer cannot provide valid authorization for an otherwise unconstitutional search.

Third, reviewing courts will not defer to a warrant based on an affidavit that does not provide the magistrate with a substantial basis for determining the existence of probable cause. Sufficient information must be presented to the magistrate to allow that official to determine probable cause; his action cannot be a mere ratification of the bare conclusions of others. Even if the warrant application was supported by more than a bare bones affidavit, a reviewing court may properly conclude that, notwithstanding the deference that magistrates deserve, the warrant was invalid because the magistrate's probable-cause determination reflected an improper analysis of the totality of the circumstances, or because the form of the warrant was improper in some respect.

Id. at 914; 104 S.Ct. at 3416-17 (internal quotations and citations omitted) (emphasis added).

Petitioner argues that the Court of Appeals erred in applying the “substantial basis test” rather than determining whether the affidavit is “so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable.” However, these tests are relevant to different steps in the court's analysis. As this Court explained in State v. Weston,

In State v. Johnson, we interpreted Leon as precluding application of the good-faith exception when an affidavit fails to provide a magistrate with a substantial basis for finding probable cause. However, Johnson should not be read as prohibiting application of the good-faith exception every time an affidavit fails to satisfy the technical requirements of Gates. Suppression is appropriate in only a few situations, including when an affidavit is “so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable.” Leon, 468 U.S. at 923, 104 S.Ct. at 3421, 82 L.Ed.2d at 699. We find the affidavit in this case lacked any indicia of probable cause. Therefore, the good-faith exception would not apply.

329 S.C. 287, 293, 494 S.E.2d 801, 804 (1987). Thus, the Court of Appeal's reference to the lack of “substantial basis” in the present case was merely to explain why they were not deferring to the magistrate, the first step of their analysis. The Court of Appeals explicitly stated that their

basis for declining to apply the good faith exception was “given the lack of any basis upon which the issuing judge could find the information in the affidavit reliable, the ‘affidavit is so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable.’” Robinson, 408 S.C. at 277, 758 S.E.2d at 730. Therefore, the Court of Appeals applied the proper standard and its findings are supported by the facts in the instant cases and relevant case law.

As discussed *supra*, the facts of the instant case are also analogous to those in State v. Johnson, 302 S.C. 243, 395 S.E.2d 167 (1990). In Johnson, the only information in the warrant affidavit was that a confidential informant saw evidence in Johnson’s home within 72 hours of the issuance of the warrant. 302 S.C. at 247-48, 395 S.E.2d at 169. No information regarding past credibility or independent corroboration of the allegations was alleged in the affidavit. Id. This Court determined that unless supplemental information was provided to the issuing judge such that there would be sufficient information to establish probable cause, the evidence seized pursuant to the warrant must be suppressed. Id. at 249; 395 S.E.2d at 170. The circumstance making the good faith exception to the exclusionary rule inapplicable was the failure of the magistrate to serve his “neutral and detached function.” due to the lack of information regarding the reliability of the informant. Id. at 248, 395 S.E.2d at 169.

Similarly in the present case, the issuing judge deferred to the officer’s bald assertion that the informant was reliable regardless of the lack of any other information in the warrant affidavit upon which the judge could independently determine reliability. Petitioner argues that the warrant affidavit is more than “bare bones” despite its lack of detail and failure to include any information regarding a past successful working history with the informant or any independent steps taken by law enforcement to corroborate her allegations. However, “[e]ven if the warrant application was supported by more than a bare bones affidavit, a reviewing court may properly

conclude that, notwithstanding the deference that magistrates deserve, the warrant was invalid because the magistrate's probable-cause determination reflected an improper analysis of the totality of the circumstances." Leon, 468 U.S. at 914; 104 S.Ct. at 3416-17; see also State v. Adolphe, 314 S.C. 89, 93, 441 S.E.2d 832, 834 (Ct. App. 1994) ("Considering the totality of the circumstances, we conclude the search warrant should not have been issued because the affidavit coupled with the Johnson hearing failed to supply facts creating probable cause. There was no showing of the confidential informant's reliability and the informant's allegations were never corroborated by any identifiable individuals. The evidence, therefore, obtained as a result of the search warrant was inadmissible at Adolphe's trial."); see also State v. Philpot, 317 S.C. 458, 454 S.E.2d 905 (1995) ("We have reviewed both the affidavit and written statement and find absolutely no showing of the confidential informant's reliability. Also, Officer Bryant testified at the pre-trial suppression hearing that the magistrate had no information regarding the reliability of the informant thus making a remand unnecessary for a hearing under State v. Johnson. We therefore find no substantial basis for the magistrate to conclude probable cause existed. Accordingly, the evidence obtained as a result of the search warrant was inadmissible.")

Petitioner cites United States v. Bynum, 293 F.3d 192 (4th Cir. 2002), which distinguishes between the "substantial basis" standard and the "so lacking" standard, the latter of which is less demanding. The present case is distinguishable from Bynum, in which the court found the good faith exception to the exclusionary rule applicable. 293 F.3d 192. In Bynum, the warrant affidavit included information that Bynum resided in the apartment to be searched, the apartment had been used in drug trafficking crimes, identified Bynum as a convicted felon with a criminal record, referred to a successful search of the same premises three months prior, specified that a reliable confidential informant indicated that Bynum was a "large quantity heroin

dealer” whom he observed to have heroin the apartment within the past 72 hours, and indicated that the information from the informant had been verified. 293 F.3d at 195. The lower court found there to be insufficient information regarding reliability due to the failure to explicitly state that the current informant was the same informant whose information lead to the prior successful search and found the other statements to be conclusory and stale. Id. However, the reviewing court found that based on the information contained the in the warrant, the issuing judge could reasonably infer that officers had verified prior information obtained from this same confidential source by a fruitful search of the same search site (Bynum’s residence) just three and a half months earlier. Id. The affidavit also included corroborating information of possible illegal drug activity at the search site and referred to Bynum’s prior criminal record. Id.

The Bynum Court distinguished United States v. Wilhelm, 80 F.3d 116 (4th Cir.1996), where it found that the good faith Leon exception did not apply. In Wilhelm, the officer applied for a warrant in response to an anonymous telephone tip that the defendant was seen selling marijuana in his home within the past 48 hours. 80 F.3d at 117-18. The officer never met the informant and had no past working relationship with the informant. Id. at 118. The officer’s only corroborating information was that she had confirmed directions to the residence and that the description of the marijuana and of the sale transactions was consistent with the officer’s knowledge of marijuana packaging and sales. Id. The Court held “that the Leon good faith exception did not apply because the officer ‘could not reasonably rely on an unknown, unavailable informant without significant corroboration,’ and the magistrate thus acted only as a ‘rubber stamp’ in approving a ‘bare bones’ affidavit. Bynum, 293 F.3d at 197 (citing Wilhelm, 80 F.3d at 121-23). The Bynum Court noted the increased credence given to a proven, reliable informant versus and anonymous tipster like the one in Wilhelm. Id. The Court also noted that

“the only corroboration offered by the affiant in Wilhelm to bolster the anonymous tipster’s information was accurate directions to the defendant’s house, which ... were available to almost anyone, and which did not reveal anything about the defendant’s criminal activities.” Id. at 198 (citing Wilhelm, 80 F.3d at 121.).

The present case is much more akin to Wilhelm than it is to Bynum. The informant in the present case, barely more than an anonymous tipster, was not a vetted informant who had provided any prior credible information. Thus, it was incumbent upon law enforcement to significantly corroborate the information supplied by her. As discussed *supra*, the so-called corroboration by the officer in the instant case was without substance. No real controlled buy ever occurred and the officer was not even honest in his brief warrant affidavit about how or when the alleged drug purchases did occur. Petitioner again points to the field-testing of the cocaine, despite the fact that it corroborates nothing about where the informant obtained the substance. Sergeant Donald knew that he had no successful working history with the informant and that he had not properly corroborated the informant’s information.

Petitioner argues that application of the exclusionary rule will improperly punish the officer rather than the issuing judge who made the error in issuing the warrant. However, the failure to substantiate the informant’s reliability was the task of Sergeant Donald and he is the one who failed that task. A reasonable officer would have known that the warrant was not properly issued with no basis of reliability proffered other than the mere use of the word “reliable.” Further, Sergeant Donald knew that the affidavit contained falsehoods and that the complete facts would likely not result in a finding of probable cause, which is presumably why he did not give the issuing judge all of the facts. Thus, it is the officer who erred.

Therefore, the Court Appeals was correct in determining that the good faith exception does not apply because the absence of any information regarding reliability resulted in the affidavit so lacking indicia of probable cause as to render official belief in its existence unreasonable.

Further, the good faith exception is not applicable where “the magistrate was misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard of the truth.” Sergeant Donald knew that the CI did *not* enter the Stoneybrook residence and that the CI was *not* the person who allegedly purchased the cocaine from the Stoneybrook residence. App. 37, 11 – 40, 10. He knew this information at the time that he executed the sworn warrant affidavit, yet he misrepresented it in the affidavit and failed to clarify with any oral supplement. App. 25, 3 – 26, 1; 37, 11 – 38, 5. Sergeant Donald’s knowledge that the information given to the issuing judge was misleading is such that the execution of the search warrant cannot be saved by the good faith exception. Thus, there was a separate, valid basis for the Court of Appeals to find that the good faith exception does not apply.

III.

The Court of Appeals properly found that the affidavit in support of the search warrant contained a false statement where it omitted the fact that the confidential informant purchased cocaine through a purported agent and was not the direct purchaser at the residence.

The Court of Appeals determined that the trial judge was clearly erroneous in finding that the search warrant affidavit did not contain any false statement where it failed to include that the informant was purportedly purchasing cocaine from the subject residence through a third party and rather stated, either impliedly or expressly, that the purchases from the residence were made by the informant herself. The Court of Appeals determined that even if the purchaser was an agent of the informant, that information should have been included in the affidavit so that the issuing judge could determine the tenuousness of the relationship. The failure to include any mention of the third party purchaser gave the issuing judge a false impression of the nature of the alleged purchases made from the Stoneybrook residence. The Court of Appeals found that the testimony at the suppression hearing negated the court's conclusion. Sergeant Donald presented no testimony that he in anyway misunderstood the circumstances surrounding the alleged drug purchases or learned their nature on a later date. Rather, he testified that he was told of the purported involvement of a third party, Chris Oliver, when debriefing the informant after each of the three alleged purchases. App. 25, 3 – 27, 7. Thus, the trial judge's statement that the "[t]his affiant to the best of his knowledge told the truth" was not accurate because the officer knew about the involvement of the third party at the time that he made the affidavit. App. 52, 8-9. However, the Court of Appeals erred in finding that suppression was not required based on the false information.

In reviewing a challenge to the veracity of a search warrant, South Carolina employs the two-prong test outlined in Franks v. Delaware, 438 U.S. 154, 98 S.Ct. 2674 (1978). State v.

Gore, 408 S.C. 237, 244, 758 S.E.2d 717, 721 (Ct. App. 2014) (citing Franks, 438 U.S. at 155–56, 98 S.Ct. 2674); see State v. Missouri, 337 S.C. 548, 553–54, 524 S.E.2d 394, 396–97 (1999) (applying the two-prong Franks test). First, 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. The burden is on the accused to prove the allegations of perjury or reckless disregard for the truth by a preponderance of the evidence. Id. “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.” Id. at 245, 758 S.E.2d at 721 (citing State v. Davis, 354 S.C. 348, 360, 580 S.E.2d 778, 784 (Ct. App. 2003)). If the court determines that in light of the false material no probable cause exists, then “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, 98 S.Ct. 2674).

Oral testimony may also be used in this state to supplement search warrant affidavits which are facially insufficient to establish probable cause. See State v. Weston, 329 S.C. 287, 494 S.E.2d 801 (1997); see also State v. Sachs, 264 S.C. 541, 216 S.E.2d 501 (1975). However, “[i]n 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). In the present case, Sergeant Donald testified that he did not orally supplement his application for the warrant. App. 34, 18-22. Therefore, only the written affidavit could be evaluated in contrast to Sergeant Donald’s testimony in determining falsity and the sufficiency of the remaining information.

Sergeant Donald admitted on cross-examination that, although he prepared and signed the sworn search warrant affidavit, he *never* told Judge Cottingham that the CI did *not* enter the Stoneybrook residence, or that the CI was *not* the person who allegedly purchased the cocaine from the Stoneybrook residence. App. 37, 11 – 40, 10. Yet, the probable cause section of the search warrant affidavit provides:

A confidential and reliable informant working for the Horry County Police Department purchased a quantity of off white powder substance represented as being cocaine and field-testing positive for cocaine attributes from the occupants of the house identified as [redacted] Stoneybrook Dr in Conway, SC. That the informant has been able to make recent continuous purchases of illegal drugs from this residence

App. 27, 19-25; App. 545, State's Exhibit # 1 (Search Warrant). There was no evidence presented that the officer misunderstood the nature of the drug purchases at the time that he executed the affidavit. Rather, he testified that he debriefed the confidential informant after each of the three alleged purchases and that she indicated that she remained in the vehicle and purportedly worked with a third party, Chris Oliver, on all three occasions. App. 25, 3 – 26, 1; 37, 11 – 38, 5. The Court of Appeals correctly found that the affidavit as it was written misrepresented that the informant was the purchaser and that she was present at or in the residence. The information regarding the role of Oliver should have been included in the warrant affidavit so that it could be evaluated by the magistrate in making his determination as to probable cause.

Having established the deliberate falsehood or a reckless disregard for the truth, the court must then evaluate the sufficiency of the probable cause if the false portions of the affidavit were excluded. State v. Gore, 408 S.C. 237, 245, 758 S.E.2d 721 (Ct. App. 2014). The trial judge did not reach this step of the analysis because he found that the officer “may not have been as full in his – as to what he said” but that he did not lie. App. 46, 24-25. However, it is evident from the

record that the trial court was misled by the information in the affidavit because the trial court had no understanding of the alleged involvement of the third party or who was actually alleged to have purchased the drugs. App. 27, 2-4; 37, 11 – 47, 5; 50, 11-22. The trial judge stated:

Well, he said he was – there's two things, Ms. Bass, the CI on these other occasions was obviously a part of the transaction sitting there in the car. The CI was not involved in this case. This affidavit says reliable informants have told me that there were buys on several occasions. Based on that, he—we exercised the search warrant and the reliable information was correct. There was drugs there if the allegations are true....

App. 50, 11-18. Despite the Court's reference to multiple informants, the warrant affidavit references only one informant. App. 545; State's Exhibit # 1 (Search Warrant). Sergeant Donald confirmed that Oliver was never a confidential informant and is not the individual being referenced in the affidavit. App. 24, 15-20; 25, 3-8; 26, 15-17; 27, 6-7.

The Leon good faith exception does not apply when officers fail to provide all potentially adverse information to the issuing judge. See United States v. Reilly, 76 F.3d 1271, 1280 (2nd Cir. 1996); United States v. Vigrant, 176 F.3d 565, 573 (1st Cir. 1999). By omitting the information, the magistrate unknowingly became a rubber stamp for the police. Accordingly, the trial court erred by not suppressing the evidence obtained during the execution of the search warrant. See Leon, 468 U.S. at 923 (citing Franks, 438 U.S. 154, 98 S.Ct. 2674 (1978) (noting that suppression remains an appropriate remedy if the magistrate issuing a warrant was misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard of the truth)); see also State v. Forrester, 343 S.C. 637, 643, 541 S.E.2d 837, 840 (2001).

The Court of Appeals did not reverse Respondent's conviction on this basis, however, finding that the false statements themselves did not require suppression. The Court of Appeals

concluded that the affidavit might have still provided probable cause for the issuance of the search warrant *if* the CI was telling the truth. Respondent disagrees with this analysis and asserts that when these false statements are set aside, there is no remaining content in the warrant affidavit to support a finding of probable cause. The entirety of the probable cause section of the affidavit is false and there is no residual sufficient content to support a finding of probable cause. See State v. Jones, 342 S.C. 121, 536 S.E.2d 675 (2000); State v. Missouri, 337 S.C. 548, 524 S.E.2d 394 (1999).

Similar to the present case, Missouri involved acts of commission and omission by the officer drafting the drafting the warrant affidavit. 337 S.C. at 554, 524 S.E.2d at 397. In Missouri, the affiant explicitly stated in the written affidavit that “‘Hot Sauce’ told CSI that he had the crack but he would call him when it was right” but then testified at the Franks hearing that this was false because “‘Hot Sauce’” never told the information the crack was in his possession at his apartment. Id. at 553, 524 S.E.2d at 396. The affiant also omitted exculpatory statements to the informant that specifically indicated that the drugs were not in the house. Id. This Court found that the officer “at least acted recklessly” and that under the totality of the circumstances probable cause did not exist when you exclude the false information and insert the exculpatory statement. The omitted information went “to the very heart of the affidavit's purpose, which is to establish probable cause to search [the] apartment for crack cocaine.” The ultimate conclusion in Missouri was that:

[T]he combination of the police officer’s deliberate falsehood and his omission of critical facts pollute the affidavit to the extent that a magistrate could not have found that probable cause existed to issue the search warrant. There is no doubt that the officer intended to mislead the magistrate in obtaining the search warrant. We realize that police officers routinely leave out facts they believe are immaterial to the probable cause determination. Yet, when 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. We recognize that under Franks our role is not to punish dishonest police officers but, rather, to ensure that a substantial basis exists to find probable cause. That said, the depth of the prevarication perpetrated by the officer in this case undermines any remaining legitimacy the affidavit might possess. Under these circumstances, this Court is required by the Constitution to invalidate the search warrant where the facts create such a close call on the probable cause determination.

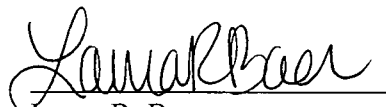
Id. at 556-57; 524 S.E.2d at 398. In the instant case, even if the officer had truthfully asserted all of the facts in the warrant affidavit, it would still contain a void as to the informant's reliability, discussed *supra*, and thus be insufficient to establish probable cause.

Therefore, the Court of Appeals was correct in determining that the trial court's finding that the affidavit contained no false statement is clearly erroneous. However, the Court of Appeals should have further found the false statements warranted suppression because probable cause would not have existed were the false allegations regarding the informant's purchases excluded from the warrant affidavit and the accurate information included.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the decision of the Court of Appeals be affirmed.

Respectfully submitted,

A handwritten signature in cursive script that reads "Laura R. Baer". The signature is written in black ink and is positioned above a horizontal line.

Laura R. Baer
Appellate Defender

ATTORNEY FOR RESPONDENT.

This 7th day of January, 2015.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Horry County

Edward B. Cottingham, Circuit Court Judge

THE STATE,

PETITIONER,

V.

ALEX ROBINSON,

RESPONDENT

CERTIFICATE OF SERVICE

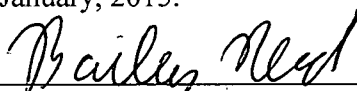
I certify that a true copy of the brief of respondent, in this case has been served on Mark R. Farthing, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Columbia, SC 29201, and Alex Robinson #348613, at Lee Correctional Institution this 7th day of January, 2015.



Laura R. Baer
Appellate Defender

ATTORNEY FOR RESPONDENT

SWORN TO BEFORE ME this 7th day
of January, 2015.

 (L.S.)

Notary Public for South Carolina
My Commission Expires: October 24, 2021