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S.C. Supreme Court

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

THE STATE OF SOUTH CAROLINA,

RESPONDENT,

v.

ALTON WESLEY GORE, JR.,

PETITIONER.

BRIEF OF RESPONDENT

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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.**

STATEMENT OF THE CASE

Petitioner was indicted in Horry County in June 2010 for trafficking 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. On January 16, 2015, this Court denied the Petition as to Question III but granted the Petition as to Questions I and II. Petitioner's Brief was served on February 13, 2015, and this Brief of Respondent 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 and that the bedroom in which the photographs were found was Petitioner's. However, even assuming the trial judge erred by admitting the photographs, the error was harmless in the context of the entire case and considering the overwhelming evidence of Petitioner's guilt.

It was Within the Trial Judge's Discretion to Admit the Photographs

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: whether or not Petitioner lived in the house and whether or not the bedroom where the cocaine was found was Petitioner's. (See App'x p. 80-81). The photographs, which depicted Petitioner, were found inside a dresser in the master bedroom of the residence, the same bedroom where the cocaine was found. (App'x p. 84-85; p. 88-89). 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." (App'x p. 81, lines 14-16). The photographs also served to corroborate the testimony of Detective Cooper, Corporal Ard, and Petitioner's former girlfriend regarding photographs of Petitioner being located in the dresser of the master bedroom. (See App'x p. 68, lines 12-15; p. 109-110; p. 139-40). More specifically, the photographs corroborated Detective Cooper's **un-objected-to** testimony regarding the particular content of the photographs – i.e., his testimony that there were two photos found in the bedroom depicting Petitioner squatting down and holding money in his hands. (App'x p. 79, 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.[1] See Rule 403, SCRE. Indeed, considering that Petitioner did not object to testimony about

[1] Petitioner's argument that "the State had other photographs of Gore that were found in the residence that could have been introduced in lieu of these prejudicial photographs" (Brief of Petitioner, p. 9) is not preserved because it was not made to the trial judge below, and in any event, this argument is speculative because there is nothing in the record showing the particular content of these other photographs and thus nothing to indicate these other photographs were in fact any less "prejudicial" than State's Exhibits 26 and 27. (See App'x p. 79-84; p. 68, lines 12-19; p. 71, lines 15-20; p. 74, lines 18-20; p. 109, line 14 – p. 110, line 4; see also p. 138, line 9 – p. 140, line 9).

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 App'x p. 68, lines 23-25; p. 75, lines 8-13; p. 98, lines 17-21; p. 110, lines 11-16). Moreover, any possible prejudice from the photographs was removed when the trial judge provided a contemporaneous limiting instruction informing the jurors that they could consider the photographs "only for the purpose of the testimony alleging that they were found on the premises and for **no other purpose**." (App'x p. 84, lines 20-22) (emphasis added). See State v. Grovenstein, 335 S.C. 347, 353, 517 S.E.2d 216, 219 (1999) (jurors are presumed to follow the law as instructed to them); see also State v. Trotter, 317 S.C. 411, 414, 453 S.E.2d 905, 907 (Ct. App. 1995) ("The trial judge's limiting instruction regarding the nature of Busterna's testimony assured no prejudice would occur."); Judy v. Judy, 384 S.C. 634, 643-44, 682 S.E.2d 836, 841 (Ct. App. 2009) ("Furthermore, to the extent the admission of the prior judgment may have prejudiced Ronnie, we find any prejudice was alleviated when the trial court gave a limiting instruction to the jury as to the proper purpose for which the evidence of the prior judgment was to be used.").

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).

Any Error was Harmless Beyond a Reasonable Doubt

However, 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." Brazell, 325 S.C. 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 App'x p. 68, lines 12-15; p. 109-110; p. 139-140). Again, more specifically, the photographs were merely cumulative to Detective Cooper's testimony regarding the particular content of the photographs, which was properly in the record because there was no objection and motion to strike regarding that testimony. (App'x p. 79, 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."). Finally, as mentioned previously, the trial judge provided a contemporaneous limiting instruction informing the

jurors that they could consider the photographs "only for the purpose of the testimony alleging that they were found on the premises and for no other purpose." (App'x p. 84, lines 20-22). This instruction removed any possible harm from admission of the photographs because jurors are presumed to follow the instructions of the trial judge. Trotter, 317 S.C. at 414, 453 S.E.2d at 907; Judy, 384 S.C. at 643-44, 682 S.E.2d at 841.

Moreover, any error was harmless due to the overwhelming evidence of Petitioner's guilt. Although Petitioner's counsel attempted to suggest through cross-examination that his girlfriend was the one who lived in the residence, the overwhelming evidence established that the residence was Petitioner's. It was undisputed at trial that Petitioner's mother was the owner of the house and that she permitted Petitioner to live there. (App'x p. 142, lines 13-21; p. 143, line 14 – p. 144, line 2; see p. 149-67 & p. 224-33). It was also undisputed that Petitioner's girlfriend had a separate residence in North Carolina and she presented her lease agreement regarding her North Carolina residence at trial. (See App'x p. 126-27; p. 155, lines 10-13). Petitioner's girlfriend testified that around the time of Petitioner's arrest, she was going to school and working in North Carolina during the day and driving down to spend three or four nights per week with Petitioner at his house. (App'x p. 129-30). This testimony was also undisputed. (See App'x p. 155, lines 10-13; p. 163, line 10 – p. 164, line 5).

Prior to executing the search warrant, police obtained a key to the house from Petitioner. (App'x p. 58, lines 8-9; p. 91, lines 1-15). Petitioner's vehicles were parked at the house. (App'x p. 110, line 19 – p. 111, line 3; p. 132, line 24 – p. 133, line 9). Police officers testified that based on their observations during the narcotics investigation, Petitioner lived at the residence. (App'x p. 55-56; p. 87-89). A clerk's office employee testified that the address listed on Appellant's bond document - which was signed by

Petitioner - was the address where the cocaine was found. (App'x p. 165-67). A home detention officer testified that he monitored Petitioner on bond from March 2010 through 2011; that Petitioner's address was the same address where the cocaine was found; and that he visited Petitioner at that address while monitoring him. (App'x p. 193-94). Finally, 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 App'x p. 66-67; p. 93, lines 6-12; p. 185-87; see also p. 131-37). Significantly, although at trial Petitioner tried to insinuate that his girlfriend lived in the house, he never suggested that another *male* lived there. (See App'x. p. 224-33). Note also that after trial, in denying Petitioner's new trial motion, the trial judge stated that "the evidence is frankly overwhelming." (App'x p. 240, line 16).

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).

The *Barnes* Case from Louisiana is Distinguishable

In his Brief, Petitioner likens his case to the Louisiana case of State v. Barnes, 790 So.2d 651 (La. Ct. App. 2001).[2] In Barnes, law enforcement officers testified that while they were out investigating a complaint regarding narcotics activity on a particular block, they observed the defendant, upon spotting the officers, discard an object and run into a nearby residence. Barnes at 653. When officers picked up the discarded object and discovered it was a tin foil packet of heroin, they attempted to intercept the defendant. Id. One officer knocked on the front door of the residence while the other ran around to the back. Id. The person who answered the front door identified himself as the defendant's father and allowed the officers to search what the defendant's father said was the defendant's bedroom. Id. The officers found no drugs in the bedroom but found photographs of the defendant. Id. One of the photographs depicted the defendant standing alone holding a rifle, and another showed the defendant - posed with three other men in front of a painted backdrop of cars and night clubs - holding money spread into a fan shape in one hand while holding the middle finger of his other hand up to the camera, a gesture commonly known as "giving someone the finger." Id. at 655. At trial, the defendant presented testimony from several witnesses, including testimony that he did not in fact throw anything down when the officers approached and that the officers instead conducted a warrantless search of a truck parked in front of the residence. Id. at 653.

On appeal, the defendant contended that admission of the two photographs described above was reversible error, arguing that the photographs were not relevant since his identity was not at issue and, even if they were relevant, they should have been

[2] There is a typographical error on page 9 of Petitioner's Brief listing the citation as 790 So.2d 641 rather than 790 So.2d 651.

excluded because their probative value was clearly outweighed by their highly prejudicial nature. Id. at 654. The Louisiana Court of Appeals agreed with the defendant and reversed his conviction. The court held that because identity was not an issue and it was undisputed that the bedroom in question was the defendant's, the photographs were irrelevant. Id. at 654-55. The court also held that even if the photographs were relevant, their probative value was substantially outweighed by their prejudicial effect where the photographs were not benign as the state suggested but instead "clearly ha[d] a negative connotation" and could have easily been cropped (as requested by the defendant at trial) to accomplish the state's "ostensible purpose" of merely showing identity. Id. at 655. Finally, the court held that admission of the two photographs was not harmless error where the defendant's first trial resulted in a hung jury; where the defendant's second trial resulted in his conviction for the lesser-included offense of attempted possession rather than possession; and where the photographs showed the defendant "in a negative light, indicating an association with guns and money ... both of which might be considered as attributes of a drug user." Id. at 656.

Petitioner's case is completely distinguishable from Barnes for several reasons. First, unlike in Barnes, the photographs were found in the same bedroom in which the drugs were found. Second, Petitioner did not admit that the bedroom was his bedroom and did not admit that he lived in the residence. Third, the photographs in Petitioner's case did not have the same "negative connotation" present in the Barnes case. The two photographs in this case (which were essentially the same photo from two different angles) did show Petitioner holding money, but did not show Petitioner with any firearms and did not show Petitioner "giving the finger" to the camera. (See App'x p. 243). Furthermore, unlike in Barnes, there was unobjected-to testimony already in the record regarding the particular

content of the photos, and in addition, Petitioner did not object to other testimony about cash found in his bedroom and on his person. Finally, the Barnes case did not involve overwhelming evidence of guilt because the case was essentially a credibility contest between the two officers who claimed the defendant threw down drugs and the defense witnesses who claimed the defendant did not throw down drugs. Here, as discussed above, the evidence was overwhelming that the residence was Petitioner's and that the drugs were Petitioner's. For all of these reasons, the Barnes case is distinguishable from Petitioner's case and does not serve as persuasive authority supporting an entitlement to relief. The trial judge committed no reversible error with respect to admission of the photographs in this case and any error with respect to admission of the photographs was harmless. Petitioner is not entitled to a new trial on this ground.

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. (App'x p. 27).

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 App'x p. 42-43). 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. (App'x p. 43, 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.[3] (See App'x p.

[3] 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.

23-25; p. 42). See State v. Rutledge, 373 S.C. 312, 319, 644 S.E.2d 789, 792 (Ct. App. 2007) (although defendant alleged that the failure to include specific dates in the search warrant affidavit amounted to reckless disregard for the truth, any doubt as to whether illegal activities were currently ongoing at the residence was obviated by the recent information provided).

There is no evidence that Corporal Ard knowingly, intentionally, or recklessly provided incorrect or misleading information which was critical to probable cause in the affidavit. (See App'x p. 42-43). 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 App'x p. 43-44). 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 App'x p. 42-47). 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. 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 App'x p. 4-5). Therefore, because there was no Franks violation, Petitioner's argument must be rejected.

Probable Cause

When reviewing a decision to issue a search warrant, the reviewing court should decide whether the magistrate had a substantial basis for concluding probable cause existed. State v. Dupree, 354 S.C. 676, 683, 583 S.E.2d 437, 441 (Ct. App. 2003).

Applying the same standard as the magistrate, the court should base its determination on the totality of circumstances. State v. Keith, 356 S.C. 219, 223, 588 S.E.2d 145, 147 (Ct. App. 2003). The magistrate's probable cause determination should be afforded great deference. State v. Rutledge, 373 S.C. 312, 316, 644 S.E.2d 789, 791 (Ct. App. 2007).

In order for a magistrate to issue a search warrant, an officer must present a sworn affidavit establishing the grounds for the warrant. State v. Bellamy, 336 S.C. 140, 143, 519 S.E.2d 347, 348 (1999). A search warrant affidavit must contain sufficient underlying facts upon which a magistrate can base a probable cause determination. State 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); 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. (App'x p. 42, 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. (See App'x p. 40, lines 1-15). See, e.g., Illinois v. Gates, 462 U.S. at 244, n. 13 ("[P]robable cause requires only a probability or substantial chance of criminal activity, not an actual showing of such activity."); U.S. v. Williams, 974 F.2d at 481 (citing Texas v. Brown, 460 U.S. 730, 742, 103 S.Ct. 1535, 1543, 75 L.Ed.2d 502 (1983) (plurality opinion)) ("The probable cause standard 'does not demand showing that such a belief be correct or more likely true than false.'"). Accordingly, there was probable cause for issuance of the search warrant based upon the controlled buy that occurred immediately after Petitioner left the residence. Cf. State v. Kinloch, 410 S.C. 612, 617-18, 767 S.E.2d 153, 156 (2014) (finding that a search warrant affidavit provided probable cause for a search and that a sufficient nexus to the particular residence was established where the police received numerous tips about drug activity at the residence, where the police observed activity

consistent with drug activity outside the house, and where the defendant's associate conducted a drug transaction at a nearby gas station after leaving 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.").

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

However, 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 (4th Cir. 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.

Petitioner was not Entitled to a Second Evidentiary Hearing

Petitioner argues in his Brief that he was entitled to an evidentiary hearing "at a later date" because he "was not given the opportunity to ask the Magistrate as to his understanding of the affidavit" and the trial judge "erred in denying [Petitioner] the

opportunity to question the Magistrate." (Brief of Petitioner, p. 17-19). This argument is totally unpreserved and without merit. 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 App'x p. 30-53; see p. 49, lines 10-11). Petitioner cannot now complain about not having an opportunity to question the magistrate. See, e.g., State v. Babb, 299 S.C. 451, 455, 385 S.E.2d 827, 829 (1989) (a party cannot complain of an error which his own conduct has induced). Petitioner had a full Franks hearing prior to trial and was entitled to nothing more.

CONCLUSION

For the reasons discussed above, the State submits that this Court should affirm Petitioner's conviction and sentence.

Respectfully submitted,

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March 16, 2015

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

THE STATE OF SOUTH CAROLINA,

RESPONDENT,

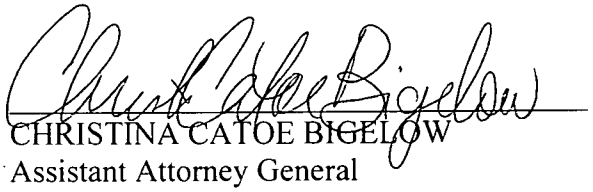
v.

ALTON WESLEY GORE, JR.,

PETITIONER.

PROOF OF SERVICE

The undersigned hereby certifies that a copy of the State's **Brief of Petitioner** in the above-referenced matter 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 **16th day of March, 2015.**



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March 16, 2015

The Honorable Daniel E. Shearouse
Clerk of Court, S.C. Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

RE: State of South Carolina v. Alton Wesley Gore, Jr.
Appellate Case No. 2014-001496

Dear Mr. Shearouse:

Enclosed please find the original and fourteen copies of the State's **Brief of Respondent** along with **Proof of Service** in the above-referenced appeal.

Thank you for your attention to this matter, and please do not hesitate to contact me at (803) 734-3713 should there be any questions or concerns.

Sincerely,

Christina Catoe Bigelow
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cc: Nicole N. Mace, Esquire
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