STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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Appeal from Laurens County

Eugene C. Griffith, Jr., Circuit Court Judge

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THE STATE,

RESPONDENT,

V.

JAMES CLYDE DILL, JR.,

APPELLANT

APPELLATE CASE NO. 2013-000724

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# INITIAL REPLY BRIEF OF APPELLANT

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## ARGUMENT IN REPLY

### Introduction

At trial, the State presented a moving target as to whether the informant was a "mere tipster" or a confidential undercover informant working with law enforcement. Conveniently, when law enforcement needed probable cause for a search warrant, the informant was a "confidential informant working in an undercover capacity with the Laurens County Sheriff's Department" who had been reliable in two other cases. Tr. 18, ll. 7-25. When the solicitor did not want to reveal informant's identity, the informant conveniently morphed into a mere tipster who "was not sent under the authority of the sheriff's office [but] merely observed." Tr. 20, ll. 8-9. The State's argument is equivalent of "heads I win, tails you lose."

If the informant was a mere tipster, as the State claimed, then the search warrant was issued without probable cause and the search warrant affidavit was drafted with a reckless or intentional disregard for the truth in a disingenuous effort to reinforce the credibility of the informant. *Franks v. Delaware*, 438 U.S. 154 (1978); *State v. Green*, 341 S.C. 214, 532 S.E.2d 896 (Ct. App. 2000). If, somehow, the warrant affidavit and supplemental testimony were true, law enforcement still lacked sufficient information supporting the credibility of the informant and the basis of the informant's knowledge for the magistrate to conclude probable cause existed. *State v. Hammond*, 270 S.C. 347, 242 S.E2d 411 (1978).

Whether the informant was a "mere tipster" or an undercover informant working with law enforcement, the evidence found during the execution of the search warrant should be suppressed.

## I.

**The trial court erred in failing to suppress evidence seized from the execution of the search warrant where the search warrant affidavit, supplemented by law enforcement's oral testimony, concerning the credibility of the informant and the basis of the informant's knowledge, was insufficient to establish probable cause.**

In evaluating whether probable cause exists to issue a warrant, magistrates must make a practical, common-sense decision 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). A warrant based exclusively on information provided by a confidential informant must contain information supporting the credibility of the informant and the basis of his knowledge. *192 Coin-Operated Video Game Machines*, 338 S.C. 176, 525 S.E.2d 872 (informant's information corroborated by undercover SLED agents established probable cause under the totality of the circumstances).

In its brief, Respondent primarily relies on *State v. Hammond* to argue that the search warrant affidavit and supplemental oral testimony provided a sufficient basis for the magistrate to evaluate the informant's credibility and basis of knowledge. 270 S.C. 347, 242 S.E.2d 411; Resp't Br. p. 9. As Respondent's own recitation of *Hammond's* facts make clear, it is easily distinguishable from the present case. In *Hammond* the informant had "seen the use and sale of drugs . . . within the last 48 hours." 270 S.C. at 351, 242 S.E.2d at 413. Further, the *Hammond* informant had been used by law enforcement for ***three years*** and his/her information had resulted in the ***arrest and conviction*** of known drug dealers in a court of law. *Id.* ***(emphasis added)***

The Court in *Hammond* relied on its earlier opinion in *State v. Williams.*[1] 262 S.C. 186, 203 S.E.2d 436 (1974). In *Williams*, the Court held that probable cause existed to issue the search warrant because the affiant officer knew the informant well, had past dealings with him and that his past experience showed informant to be reliable. *Id.* at 191-192, 203 S.E.2d at 438-439. *Williams* is also distinguishable from Appellant's case because the factual circumstances of the *Williams* informant's knowledge and his reliability were set out in detail in the search warrant affidavit. *Id.*

The *Williams* informant identified the defendant by name as having possession of a large quantity of marijuana and stated to law enforcement that he had spoken with the defendant about a marijuana shipment. *Id.* Second, the affiant officer independently recognized defendant was a person suspected of being involved in the drug trade. *Id.* Third, the informant also knew the name of defendant's neighbors and knew defendant's post-office box mailing address. *Id.*

In contrast, the affidavit and supplemental testimony in Appellant's case is vague and conclusory. Tr. 31, ll. 9-14; *Cf: State v. Sullivan*, 267 S.C. 610, 613, 230 S.E.2d 621, 624 (1976) (specificity of informant's statements coupled with absence of ulterior motives showed sufficient reliability). The affidavit does not name Appellant, his co-defendant, or any other individuals the

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[1] *Hammond* relies on several out-of-state cases. Of the out-of-state cases that address in detail the sufficiency of a warrant based exclusively on information provided by a confidential informant, all provided more information on the reliability/credibility of the informant and on the factual circumstances of the informant's knowledge than in Appellant's case. *State v. Singleton*, 235 S.E.2d 77 (N.C. Ct. 1977) (informant used by police for ten years, has never lied to police in past cases, identified defendant by name and the specific drugs involved); *Torres v. State*, 552 S.W.2d 821 (Tex. Cr. App. 1977) (informant identified defendant by name, specified that informant had seen heroin in defendant's possession in the last 24 hours, had provided correct information in the past; *State v. Albert*, 565 P.2d 534 (Az. Ct. App.1977) (informant identified defendant by name, informant's past information led to arrests on three prior occasions, informant provided information in the past which police confirmed was accurate through independent sources, informant was familiar with heroin).

police expected to find at the residence.[2] Tr. 40, ll. 2-11. The affidavit does not even provide a physical description of individuals seen in the house.

The affidavit does not to describe the factual circumstances surrounding how the informant came to be in the residence or what materials the informant saw that he believed were a methamphetamine lab or methamphetamine ingredients. Finally, there is no indication that the residence was known by law enforcement to be associated with methamphetamine production. The State offered no testimony that police attempted to independently corroborate any of the information provided.

The affidavit and supplemental testimony in support of the search warrant in Appellant's case, which were based entirely on the hearsay information of a confidential informant, failed to set forth facts which show the informant was sufficiently reliable and failed to set forth the underlying factual circumstances supporting the substance of the informant's information. *Cf.: Hammond*, 270 S.C. at 352-353, 242 S.E2d at 414-415. Accordingly, the trial court erred by refusing to suppress the evidence found during the execution of a search warrant because the search warrant affidavit and supplemental testimony was insufficient to establish a substantial basis for probable cause. *See* U.S. Const. amend. IV; *see also* S.C. Code Ann. § 17-13-140 (1985); *United States v. Leon*, 468 U.S. 897, 923 (1984).

[2] The search warrant affidavit and testimony in this case were exactly the kind of conclusory statements the Supreme Court warned against in *Illinois v. Gates.* 462 U.S. 213, 238, 103 S.Ct. 2317, 2333-2334 (1983) (officer's statement that "affiants have received reliable information from a credible person and believe" that heroin is stored in a home, is an inadequate, conclusory statement that gives the magistrate no basis at all for making a judgment regarding probable cause).

## II.

**The trial court erred in denying the motion to suppress the fruits of the search warrant because the magistrate was misled by knowingly or recklessly false statements by law enforcement which were material to the determination of probable cause. This issue is preserved for review.**

**Error Preservation**

This error is preserved for appellate review. A party need not use the exact name of a legal doctrine in order to preserve it, however it must be clear that the argument has been presented on that ground. *See State v. Russell*, 345 S.C. 128, 546 S.E.2d 202 (Ct. App. 2001); *see also Chastain v. Hiltabidle*, 381 S.C. 508, 673 S.E.2d 826 (Ct. App. 2009) (rules of error preservation will not be applied so rigidly as to bar an otherwise properly presented issue).

Whether the difference between a "confidential informant working in an undercover capacity with the Laurens County Sheriff's Department" and a mere tipster represented a knowing or reckless disregard for the truth and whether such a substantial variance was material to the probable cause determination was argued at length before the trial court. Tr. 18, ll. 1 – Tr. 37, ll. 24. *See State v. Torrence,* 305 S.C. 45, 67, 406 S.E.2d 315, 327 (1991)(requirement of a contemporaneous objection enables trial judges to make reasoned decisions by appropriately developing issues during arguments, both for or against a particular legal proposition).

For example, the State argued that the terms tipster and "confidential informant" were not terms of art and that the use of the "confidential informant" label was irrelevant. Tr. 36, ll. 9 – Tr. 37, ll. 2. Defense counsel strongly disagreed and contended that each term had a distinct meaning. Counsel asked rhetorically if the search warrant would have been issued had the law enforcement not sworn that the informant was working "in an undercover capacity" with law enforcement. Tr. 37, ll. 5-16. Counsel noted that "undercover capacity" implies that law

enforcement has direct knowledge of the informant's activities and that they have been "working on this case." *Id.*

The trial court sided with the State, ruling that the informant was a mere tipster and that describing the now-designated mere tipster as a confidential informant was not a knowingly or recklessly false statement. Tr. 38, ll. 2 – Tr. 39, ll. 6. The trial court further concluded that the warrant was valid "based upon the inference that the informant was nothing more than a mere tipster." *Id.*

This ruling constituted a final ruling by the trial court as it was made immediately prior to the introduction of the evidence found during the execution of the search warrant, so a contemporaneous objection by defense counsel was unnecessary as there was no basis for the trial court to change its ruling. *State v. Forrester*, 343 S.C. 637, 541 S.E.2d 837 (2001)

Therefore, this issue preserved for appeal. *See State v. Brannon*, 388 S.C. 498, 502, 697 S.E.2d 593, 595-96 (2010) (litigant only required to fairly raise the issue to the trial court, thereby giving the trial court an opportunity to rule on the issue).

**Discussion**

Turning to the substance of Respondent's argument, Respondent avers that describing the informant as a "confidential informant working in an undercover capacity with Laurens County Sheriff's Department" when in actuality the informant was a mere tipster did not rise to the level of a *Franks* violation and, if it did, removing the untruthful portions of the affidavit would not impact the finding of probable cause. Resp't Br. p. 11-15.

Respondent cites to *State v. Jones* to support its argument. 342 S.C. 121, 536 S.E.2d 675 (20). *Jones* is instructive, but distinguishable. Crucially, unlike in Appellant's case, the affiant officer in *Jones* actually attempted to correct his knowing misstatement on the status of the

informant with oral testimony. *Id.* at 125, 536 S.E.2d at 677-678. In Appellant's case, law enforcement made no such effort to correct their error; instead the oral testimony reinforced the deceitful impression created by the warrant. Tr. 23, ll. 11 – Tr. 27, ll. 24.

Respondent also relies on *State v. Missouri*, where the affiant detective knowingly included false information indicating that drugs would be found at a conspirator's residence when the informant had told the detective that the conspirator denied the drugs were in his residence. 337 S.C. 548, 524 S.E.2d 394 (1999). Unlike in Appellant's case, the search warrant in *Missouri* was the culmination of months of investigative work. Moreover, the informant provided substantially more information that the informant in Appellant's case, such as: the names of the defendants, the amount of crack cocaine being trafficked, and where and when the drugs were being transported. *Id.* at 551-552, 524 S.E.2d at 395-396.

Law enforcement in *Missouri* also corroborated the informant's information by observing another conspirator purchase a large quantity of baking soda and by conducting video and audio surveillance. *Id.* Nevertheless, the Supreme Court held that by intentionally including an untruthful statement of a conspirator in the warrant affidavit stating drugs would be at his residence; when in reality the conspirator stated the drugs would not be there, police had demonstrated –at a minimum– a reckless disregard for the truth. *Id.* The detective's "information" went "to the very heart of the affidavit's purpose, which is to establish probable cause to search [the] apartment for crack cocaine." *Id.*

The inaccuracy of the warrant affidavit in Appellant's case represents, at the very least, a reckless disregard for the truth about the informant's role in the case. Tr. 18, ll. 7-13. The clear impression from the warrant affidavit is that the "confidential informant" was sent to Appellant's residence at the direction of law enforcement in the course of an ongoing investigation.

Undercover informants are vested with a greater degree of reliability that confidential informants or mere tipsters because closely supervised and controlled by law enforcement. *See State v. Dupree*, 354 S.C. 676, 685-686, 583 S.E.2d 437, 442-443 (Ct. App. 2003); *see also Green*, 341 S.C. at 218, 532 S.E.2d at 897; *see also State v. Driggers*, 322 S.C. 506, 512, 473 S.E.2d 57, 60 (1996) (non-confidential informant afforded more credibility than confidential informant).

The untruthful classification of the informant in Appellant's case is all the more damaging since police conducted no independent investigation and were totally reliant on the informant. See *Gates*, 462 U.S. at 241, 103 S.Ct. 2317; *see also Dupree*, 354 S.C. at 685-686, 583 S.E.2d at 442-443. The State's argument that the lead investigator's affidavit describing the informant as a "confidential informant working in an undercover capacity with [law enforcement]" was nothing more than an unintended misstatement is convenient, but unavailing. By all accounts the investigator is an experienced drug enforcement officer, who testified that he had spoken directly with the informant. Apparently the officer made a deliberate decision to give the false impression that the informant was part of an active undercover operation. Tr. 24, ll. 20 – Tr. 26, ll. 4.

Law enforcement intentionally –or recklessly– disregarded the informant's actual status. Their decision to do so erodes the basis upon which the magistrate found probable cause to search Appellant's residence. *Jones*, 342 S.C. 121, 536 S.E.2d 675. Once the untruthful characterization is removed, and the informant is correctly identified as a mere tipster, the affidavit fails to establish probable cause. *Green*, 341 S.C. 214, 532 S.E.2d 896. Thus the trial judge erred in not suppressing the evidence obtained during the execution of the search warrant.

## III.

**The trial court erred in declining to require the State to disclose the identity of its confidential informant because the individual acted beyond the scope of a mere tipster.**

Respondent argues that the confidential informant relied upon by the State was "merely a tipster and did not participate in the investigation." Resp't Br. p. 16-17. In actuality, the informant was the entirety of law enforcement's pre-search warrant investigation. Tr. 31, ll. 9-14. The informant was also the only individual who allegedly saw "an active methamphetamine lab" at Appellant's residence. Tr. 28, ll. 10-15; *State v. Burns*, 294 S.C. 338, 340, 364 S.E.2d 465, 466 (1988) (informant, the sole witness corroborating allegation of accused drug's use, was a material witness because he was relied upon by law enforcement when seeking a warrant).

Respondent correctly states that *State v. Humphries* holds that the identity of an informant with only peripheral knowledge of a crime does not need to be disclosed. Resp't Br. p. 17; 354 S.C. 875, 79 S.E.2d 613 (2003). Respondent then argues that Appellant cannot distinguish this case and "other cases where a member of the public provides information to law enforcement." *Id.*

Appellant's case is distinguishable from those where a member of the public provides information and leads for law enforcement to investigate. In *Humphries*, law enforcement received an anonymous tip that a package containing cocaine would be shipped to an auto repair shop. *Id.* Police intercepted the package in transit and a drug dog identified the package as containing drugs. The package then continued on to the defendant's auto shop and he was arrested. *Id.* The *Humphries* court ruled that the confidential informant was a mere tipster

because he had simply notified law enforcement of the shipment. *Id.* The intervening act of the drug dog generated probable cause to justify the arrest.[3]

In Appellant's case, the informant is the only individual who can testify about the active methamphetamine lab that he allegedly observed and what unspecified meth-making materials were present. *See State v. Blyther*, 287 S.C. 31, 33, 336 S.E.2d 151, 152-53 (Ct. App. 1985) (disclosure of informant's identity may be required where he is the only witness to the transaction other than the buyer and the defendant) The informant did more than simply provide a lead for law enforcement to investigate; he was law enforcement's entire investigation as the police sought a warrant immediately after receiving the information.

The informant's role is analogous to that of the informant in *State v. Diamond*, 280 S.C. 296, 312 S.E.2d 550 (1984). In *Diamond*, the informant arranged and witnessed a drug transaction between an undercover agent and the defendant. *Id.* at 297-299, 312 S.E.2d at 550-552. Due to contradictions in the accounts given by the undercover agent and another police officer listening in via a "bugging device," the Supreme Court held that the identity of the informant was necessary so that the defense could develop evidence of misidentification. *Id.*

The informant in Appellant's case claimed to have seen the manufacturing of methamphetamine. Tr. 18, ll. 7-13. Although the State is generally privileged from revealing the name of a confidential informant, disclosure may be required when the informant's identity is relevant and helpful to the defense or is essential for a fair determination of the State's case against the accused. *State v. Shupper,* 263 S.C. 53, 207 S.E.2d 799 (1974).

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[3] Investigation of package in a public place by a narcotics dog does not constitute a search. *United States v. Place*, 462 U.S. 696 (1983). *Cf: Florida v. Jardines*, 133 S.Ct. 1409 (2013) (use of drug-sniffing dog on front porch of home to investigate an unverified lead by anonymous tipster was an invasion of the curtilage constituting a "search" for Fourth Amendment purposes)

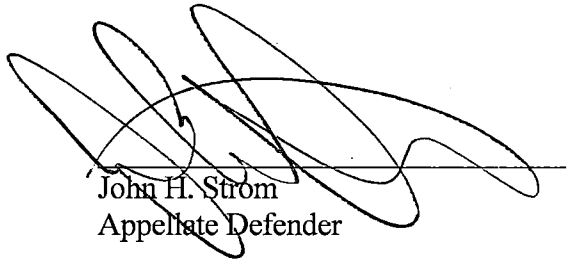
The identity of the informant was not only helpful and relevant to Appellant' defense but essential to a fair determination of Appellant' case as the informant was the only one who could testify as to what methamphetamine ingredients he allegedly observed in the residence and as to what method of methamphetamine manufacture was used. By categorizing the informant as a "mere tipster," the State was able to shield the informant's motives and basis of knowledge from adversarial testing. *State v. Driggers*, 322 S.C. 506, 473 S.E.2d 57 (1996). The State was also able to avoid having to explain why so many of the "ingredients for making methamphetamine" listed on the search warrant return were not found in the residence. *Diamond*, 280 S.C. 296, 312 S.E.2d 550 (1984).

Simply put without the identity of the informant, Appellant was unable to put up a defense or attack the State's case while the State was able to hide the weaknesses in their case from scrutiny and the jury by keeping the informant's identity a secret. Therefore, the trial court erred in refusing to reveal the identity of the confidential informant because confidential informant acted beyond the scope of a mere tipster and his/her identity was essential to a fair determination of Appellant' case.

## CONCLUSION

For these additional reasons, Appellant, James C. Dill, respectfully requests that this Court reverse his conviction and sentence and remand this case to the Laurens County Court of General Sessions for a new trial.

Respectfully submitted,



John H. Strom
Appellate Defender

ATTORNEY FOR APPELLANT.

This 18th day of June, 2015.

STATE OF SOUTH CAROLINA

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CERTIFICATE OF SERVICE

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The undersigned attorney hereby certifies that a true copy of the Initial Reply Brief of Appellant in the above referenced case has been served upon David Spencer, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 18th day of June, 2015.

John H. Strom
Appellate Defender

ATTORNEY FOR APPELLANT.

SUBSCRIBED AND SWORN TO before me
this 18th day of June, 2015.

_____(L.S.)
Notary Public for South Carolina

My Commission Expires: May 12, 2025 .