THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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SC Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of General Sessions

THE HONORABLE J. DERHAM COLE, Circuit Court Judge

Appellate Case No. 2012-213141

The State, Respondent

v.

Alphonso Chaves Thompson, Petitioner

PETITION FOR REHEARING

By Opinion filed August 12, 2015, this Court affirmed the trial court's denial of Thompson's motion to suppress all evidence seized as a result of an illegal search, holding that:

> under the totality of the circumstances set forth in the affidavit, the issuing judge had before him information supporting a fair probability that contraband or evidence of a crime would be found at 120 River Street, and the judge therefore had a substantial basis upon which to conclude that probable cause existed for issuance of the search warrant

Chief Judge Few dissented from this portion of the Court's holding, would have found the trial court's error in denying Thompson's motion to suppress prejudiced Thompson and, as a result, would have reversed Thompson's convictions in their entirety.

Pursuant to Rules 221(a) and 240(c), SCACR, Thompson respectfully petitions the Court for a Rehearing on Issue Number ~~1 the~~ search warrant and all issues related to the search warrant ~~and~~ submits the following in support of that Petition.

A. The Court overlooked the *Tindall* standard of review and misapprehended the significance of several statements in the search warrant affidavit.

Respectfully, this Court may have overlooked our Supreme Court's holding in *State v. Tindall* which held that although appellate courts generally defer to the trial court on suppression issues, "this deference does not bar [an appellate court] from conducting its own review of the record to determine whether the trial judge's decision is supported by the evidence." 388 S.C. 518, 521, 698 S.E.2d 203, 205 (2010). Thus, this Court may have given too much deference to the trial court's decision. Regardless, this Court may have misapprehended the significance of certain statements in the affidavit in support of the search warrant for the River Street home.

In affirming the trial court's denial of Thompson's suppression motion, the panel majority found that, from the affidavit in support of the search warrant ~~which~~ was not supplemented by sworn testimony ~~four~~ pieces of information established probable cause that cocaine would be found in the River Street home.

PIECE 1

In 2007 and 2008, Thompson was supplying cocaine and delivering cocaine to the homes of his buyers.

Piece 1 comes from June 2007 when "two unnamed informants indicated Thompson had been supplying them with large amounts of cocaine" and from August 2007 and September 2008 when "two named individuals, Keith Jeter and Fred Meadows, stated Thompson was supplying them with cocaine, noting Thompson would deliver the cocaine to their homes." Contrary to the panel majority's opinion, these statements do not support the conclusion that cocaine would be found in the River Street home in May of 2010.

First, although Jeter and Meadows are named—a fact the majority found particularly significant—neither of those individuals were true eyewitnesses in the sense that "evidence of past reliability" was not required. *State v. Jones*, 342 S.C. 121, 128, 536 S.E.2d 675, 679 (2000). Here, both Jeter and Meadows were—undoubtedly—drug dealers themselves—not citizen eyewitnesses—and therefore, were highly motivated by self-serving ulterior motives—the expectation of lighter (or no) criminal charges. *See State v. Bellamy*, 323 S.C. 199, 205, 473 S.E.2d 838, 842 (Ct. App. 1996) ("Like the informant in *Sullivan*, Stanley was not a paid informant and, from all appearances, lacked any ulterior motives for giving information to the police."); *State v. Sullivan*, 267 S.C. 610, 616, 230 S.E.2d 621, 616 (1976) (absence of ulterior motives sufficient to constitute reliability); *State v. Driggers*, 322 S.C. 506, 510-11, 473 S.E.2d 57, 59 (Ct. App. 1996) (deference due to a citizen roommate of robber who had no involvement in crime). Thus, with no evidence as to whom Jeter and Meadows were and why they were supposedly reliable, the fact that their names were included in the affidavit should have been given little, if any, weight. *See Bellamy*, 323 S.C. at 206, 473 S.E.2d at 842 (Cureton, J., dissenting) ("Here, there is no indication [the informant] was known to either Agent Vaught or the magistrate. Thus, from the standpoint of the issuing magistrate, the name John Doe would have been just as meaningful.").

Second, as the panel majority recognized, the information from Jeter and Meadows was extremely stale. *See State v. Corns*, 310 S.C. 546, 550, 426 S.E.2d 324, 326 (Ct. App. 1992) ("It is true that a probable cause affidavit must state facts so closely related to the time of the issuance of the warrant as to justify a finding of probable cause ***at that time***." (emphasis added)).

Finally, and perhaps most importantly, even if Jeter and Meadows are due the typical "citizen deference," nothing in Piece 1 references in any way the River Street home. *See United States v. Lalor*, 996 F.2d 1578, 1582 (4th Cir. 1993) ("In determining whether a search warrant is supported by probable cause, 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."). Indeed, although "[a] sufficient nexus can exist between a defendant's criminal conduct and ***his residence*** even when the affidavit supporting the warrant contains ***no factual assertions*** linking the items sought to the defendant's residence," *United States v. Grossman*, 400 F.3d 212, 217 (4th Cir. 2005), the River Street home, as Chief Judge Few recognized, was ***not*** Thompson's ***residence***. Consequently, the significance of the Jeter and Meadows statements as to the River Street home were, at best, minimal.

PIECE 2

> **In February 2009, authorities were informed that Thompson was being supplied multiple kilos of cocaine, and the cocaine was delivered to Thompson at the River Street address.**

"Generally, affidavits must be made on the affiant's personal knowledge of the facts alleged in the petition. The affidavit must in some way show that the affiant is personally familiar with the facts so that he could personally testify as a witness." *State v. Dunbar*, 361 S.C. 240, 248, 603 S.E.2d 615, 619 (Ct. App. 2004). Piece 2 comes from the double-hearsay Diaz-Arroyo statement in the affidavit that his brother-in-law was supplying Thompson with cocaine and that his brother-in-law had multiple kilos of cocaine delivered to Thompson at the River Street address.

As an initial matter, respectfully, the panel majority misapprehended the significance of Diaz-Arroyo being named in the affidavit for the same reasons it misapprehended the significance of naming Jeter and Meadows ~~he~~ was cooperating after an arrest and was not a typical citizen informant.

Moreover, Diaz-Arroyo's statement is even more unreliable because it is a statement about what someone else, his brother-in-law, told him, i.e., the source "heard it from a friend, who heard it from a friend, who heard it from another." *State v. Robinson*, 454 S.W. 3d 428, 439 (Mo. Ct. App. 2015) (quoting REO SPEEDWAGON, Take It On The Run, on HI INFIDELITY (Epic Records 1980)). The fact that information provided in an affidavit is double hearsay is relevant to its value in determining probable cause. *Dunbar*, 361 S.C. at 255, 603 S.E.2d at 623. Although double-hearsay does not "per se, invalidate the resulting search warrant," the hearsay upon hearsay statement will support the warrant only so long as the "underlying circumstances indicate there is a substantial basis for crediting hearsay ***at each level***." *Id.* (emphasis added).

Here, there is absolutely no indication Diaz Arroyo's brother-in-law ~~the~~ purported deliverer to the River Street address ~~was~~ reliable or even any indication as to who he is. The The brother-in-law is unnamed and, unlike the rest of the unnamed informants in the affidavit, is not even credited as a "Confidential Reliable Informant." Indeed, he is not mentioned anywhere else in the affidavit. As the panel majority recognized, information from unnamed informants, without some indication as to their background, should be given no weight. *See State v. Thompson*, Op. No. 5341 (S.C. Ct. App. filed Aug. 12, 2015) (Shearhouse Adv. Sh. No. 31, p. 125 ("[E]ven disregarding all of the information supplied by the unnamed informants . . . "). However, the panel majority did ***not*** disregard the

information from Diaz-Arroyo's brother-in-law ~~a~~n unnamed informant. Indeed, the brother-brother-in-law's statement was likely the most important piece of information relevant to the majority's holding because it was the ***only*** statement in the affidavit in which a specific individual placed cocaine at the River Street address. If the majority overlooked the fact that the Diaz-Arroyo statement is actually double-hearsay from an unnamed and unreliable witness, the affidavit provides ***zero*** specific reliable information linking cocaine to the River Street address. *Accord. Robinson*, 454 S.W. 3d at 439 (rejecting supposed reliability of double hearsay statement because "[w]hile it may be the case that more specific details were provided to [the officer] or that particular source indeed had proven reliable in the past, [the officer] failed to communicate any basis of past reliability or how, if at all, the first source learned of drug sales at Robinson's home so as to provide a substantial basis ~~the~~ constitutional constitutional minimum ~~f~~or probable cause.").

PIECE 3

> **In the six-month time period prior to issuance of the search warrant, investigators observed Thompson driving different vehicles to and from the River Street address, and also observed him visiting the River Street address right before making cocaine deliveries.**

Piece 3 is the only piece of information after January 2009 relied on by the panel majority that actually refers to the River Street home. However, this conclusory statement gives no specific examples of any drug deliveries and does not otherwise provide a ***substantial*** basis for concluding that drugs would be found in the River Street home in May of 2010. *See State v. Philpot*, 317 S.C. 458, 461, 454 S.E.2d 905, 907 (Ct. App. 1995) ("Mere ("Mere conclusory statements which give the magistrate no basis to make a judgment regarding probable cause are insufficient."). And, as Chief Judge Few noted, these non-

specific references compared to specific statements pre-July 2009 and during May 2010, have the opposite effect of supporting probable cause.

PIECE 4

> **Two days before the issuance of the search warrant, an individual informed investigators he was buying nine ounces of cocaine a month from Thompson, on that date the individual spoke to Thompson on the phone indicating he was ready from more drugs, and the day before issuance of the warrant Thompson arrived at the individual's home where he received $9,000 from the individual after which Thompson agreed to bring the individual "the package" in the morning, with this monetary transaction being observed, as well as audio and video recorded, by investigators.**

As to the Arthur Jones transaction, the panel majority may have overlooked its reliance on Piece ~~3~~ generic statements that the officers saw Thompson "visiting the River Street address right before making cocaine deliveries." When an actual specific event was witnessed ~~–~~ Thompson visiting Arthur Jones for a purported controlled buy ~~–~~ he officers did not (or at least did not say in the affidavit) that they witnessed Thompson going to Jones' house ***after visiting the River Street address***. Certainly, if the officers had seen any link between the Jones buy and River Street, they would have included that reference in the affidavit.

Respectfully, as to Piece Four, the panel majorities' reliance on *Grossman*, 400 F.3d at at 217-18, was misplaced. The *Grossman* Court did uphold a residential search of a home that was not the defendant's and explained that "the searches [were] not invalid merely because because he splits his time among several different homes. *Id.* at 218. However, the first home searched in the *Grossman* case was searched after a detective relayed specific observations from himself and a "reliable" informant about that house. *Id.* at 217. Not so here.

here. The remaining homes were searched (via two additional affidavits) only ***after*** drugs were found in the ***first home*** because "each [search] built upon the prior ones." *Id.* at 218. Again, not so here; in this case, all three searches were executed simultaneously. Consequently, Investigator Raymond's affidavit should have but did not contain specific and and direct links establishing that cocaine would be in the River Drive home in May of 2010.

Thompson respectfully requests rehearing.[1]

[1] Although not discussed by either the panel majority or the dissent, Thompson notes again, to the extent necessary for preservation purposes, that the trial court's error means all evidence—including Thompson's confession—should have been suppressed as the fruit of the poisonous tree because the officers did not act in good faith and, accordingly, all of Thompson's convictions should be reversed because the trial court's error was not harmless. *See United States v. Leon*, 468 U.S. 897, 922 n. 23 (1984) ("In making [the good faith] determination, all of the circumstances—***including whether the warrant application had previously been rejected by a different magistrate***—may be considered." (emphasis added)); *State v. Robinson*, 335 S.C. 620, 632 n. 3, 518 S.E.2d 269, 276 n. 3 (Ct. App. 1999) (stating "the good faith exception is inapplicable in cases where the affidavit fails to provide the magistrate with a substantial basis for probable cause"); *Hutto v. State*, 376 S.C. 77, 81, 654 S.E.2d 846, 848 (Ct. App. 2007) (the fruit of the poisonous tree doctrine provides that evidence must be excluded if it would not have come to light but for the illegal actions of the police and the evidence that has been obtained by the exploitation of that illegality); *State v. Covert*, 368 S.C. 188, 196-97, 628 S.E.2d 482, 487 (Ct. App. 2006) (error harmless only if "insubstantial error not affecting the result").

Respectfully submitted,

(SC Bar # 79055)
(for MPS w/express permission)

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September 14, 2015

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PROOF OF SERVICE FOR PETITION FOR REHEARING

I, Michael P. Scott, hereby certify that on this 14th day of September, 2015, I have served a copy of the PETITION FOR REHEARING in the above entitled case upon counsel for the State of South Carolina by mailing a copy to the address below via the United States Mail with proper postage affixed.

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September 14, 2015

The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
1220 Senate Street
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Re: ***The State v. Alphonso Thompson***
Case Tracking No.: 2012-213141

Dear Ms. Kitchings:

Enclosed please find the original and seven (7) copies of the Appellant's Petition for Rehearing, along with the Proof of Service, in the above-referenced matter. I would appreciate your filing the original and returning a filed stamped copy to me in the enclosed self-addressed stamped envelope.

By copy of this letter and as evidenced by the attached Proof of Service, we are serving Appellant and counsel of record with a copy of the same.

Very truly yours,

(for MPS w/express permission)

Michael P. Scott

MPS/ksh
Enclosures
cc: Robert M. Dudek, Esquire
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