

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Laurens County

Eugene C. Griffith, Jr., Circuit Court Judge

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SEP 28 2015

SC Court of Appeals

THE STATE,

RESPONDENT,

V.

MOLINA ARMSTRONG,

APPELLANT

APPELLATE CASE NO. 2013-000932

FINAL BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF CONTENTS1

TABLE OF AUTHORITIES.....2

STATEMENT OF ISSUES ON APPEAL.....3

STATEMENT OF THE CASE4

ARGUMENT7

CONCLUSION.....12

TABLE OF AUTHORITIES

Cases

Anders v. California, 386 U.S. 738 (1967)..... 4

California v. Trombetta, 467 U.S., at 485, 104 S.Ct., at 2532; cf..... 9

Chambers v. Mississippi, 410 U.S., 284 93 S. Ct. 1038 (1973)..... 9

Crane v. Kentucky, 476 U.S. 683, 106 S.Ct. 2142 (1986)..... 9

Davis v. Alaska, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974)..... 9

Grannis v. Ordean, 234 U.S. 385, 394, 34 S.Ct 779, 783, 58 L.Ed. 1363 (1914). 10

Illinois v. Gates, 462 U.S. 213, 238, 103 S. Ct. 2317, 2333-2334 (1983)..... 7

In re Oliver, 333 U.S. 257, 273, 68 S.Ct. 499, 507-508, 92 L.Ed. 682 (1948);..... 9,10

State v. Humphries, 354 S.C. 87, 579 S.E.2d 613 (2003)..... 11

State v. Sachs, 264 S.C. 541, 216 S.E. 2d 501, (1975)..... 10

State v. Shupper, 263 S.C. 53, 207 S.E.2d 799 (1974)..... 11

Strickland v. Washington, 466 U.S. 668, 684-685, 104 S.Ct. 2052, 2063, 80 L.Ed.2d 674
(1984)..... 9

United States v. Cronic, 466 U.S. 648, 656, 104 S.Ct. 2039, 2045, 80 L.Ed.2d 657 (1984)10

Washington v. Texas, 388 U.S. 14, 23, 87 S.Ct. 1920, 1925, 18 L.Ed.2d 1019 (1967)... 9, 10

Constitutional Provisions

Article I, § 10..... 7

U.S. Const. amend. VI..... 9

U.S. Const. amend. XIV..... 9

STATEMENT OF ISSUE ON APPEAL

1. Did the trial court err in finding Officer Moody's affidavit and testimony provided a substantial basis for the magistrate to determine probable cause existed to issue a search warrant for Armstrong's residence?

2. Did the trial court err in refusing to require the State to reveal the identity of the confidential informant when Officer Moody used the phrase "confidential informant" in his affidavit and the magistrate relied upon the affidavit and Officer Moody's testimony to find probable cause existed to issue the search warrant?

STATEMENT OF THE CASE

Appellant was convicted of manufacturing methamphetamine along with co-defendant after a jury trial held before the Honorable Eugene C. Griffith, Jr., on April 9, 2012, in Laurens County. Both appellant and the co-defendant were sentenced to 10 years imprisonment. William Mayer, Esquire, represented both of them. Ashley Agnew, Esquire was the assistant solicitor.

On February 11, 2015, a brief was submitted pursuant to Anders v. California, 386 U.S. 738 (1967). On September 8, 2015, this Court issued an order directing the parties to brief the issues contained herein.

This final brief of appellant follows.

STATEMENT OF FACTS

Defense counsel questioned the accuracy and legality of the search warrant in this case. He noted that page 3 of the warrant provided a reason for belief that the property sought is on subject premises. It read that the Laurens County Sheriff's Office has received information in the last 72 hours that the location is an active methamphetamine lab is in operation. The confidential informant working in an undercover capacity with Lauren's County Sheriffs Office was at that location and did see numerous items that are used in the manufacturing of methamphetamine. Counsel said the 2 statements are inconsistent. One is that there is a lab in operation and the other is just the existence of materials that could be used to make a lab. He said the issue could be resolved if they could find out what the CI said and the credibility of the CI. (Trans. p. 18, lines 1-20)

The solicitor said that the informant in this case just gave information and was not an active participant. In such instances the informant is considered a mere tipster. His identity then does not have to be revealed. The affiant is available to testify as to what he orally told the magistrate and he can testify as to the reliability of the tipster. (Tr. p. 19, line 24- p. 20, line 18)

The affiant, Officer Moody, took the stand. While no longer with the Sheriffs Office, he did testify that he was at the property to be searched on February 15, 2011. He said he got involved in this case because he received information from an individual of a possible manufacturing of methamphetamine at the subject property. He had received information from that individual in the past that panned out where arrests were made. He found the individual reliable. He supplemented the affidavit with oral testimony to the magistrate. He said he told the magistrate that "an individual had been used prior in

reference to two cases where other arrests had been made and was reliable.” (Tr. p. 23, line 15- p. 25, line 25) As a result of this present warrant, he did find items used in the manufacturing of methamphetamine. (Tr. p. 26, lines 5-10)

On cross-examination, Officer Moody testified that to his knowledge none of the oral testimony was recorded or put in a supplemental affidavit. So there was no record of anything he said to the magistrate. (Tr. p. 27, lines 9-17)

The trial court accepted the search warrant because the informant was a tipster. (Tr. p. 38, lines 2-5)

ARGUMENT I

The trial court erred in finding Officer Moody's affidavit and testimony provided a substantial basis for the magistrate to determine probable cause existed to issue a search warrant for Armstrong's residence.

The Fourth Amendment to the United States Constitution provides:

The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Article I, § 10 of the South Carolina Constitution similarly provides:

The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures and unreasonable invasions of privacy shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, the person or thing to be seized, and the information to be obtained. (1970 (56) 2684; 1971 (57) 315).

In Illinois v. Gates, 462 U.S. 213, 238, 103 S. Ct. 2317, 2333-2334 (1983) the United States Supreme Court held:

An affidavit must provide the magistrate with a substantial basis for determining the existence of probable cause, and [a] wholly conclusory statement...[fails] to meet this requirement. An officer's statement that "affiant's" have received reliable information from a credible person and

believe” that heroin is stored in a home, is likewise inadequate. This is a mere conclusory statement that gives the magistrate virtually no basis at all for making a judgment regarding 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.

The search warrant affidavit and the oral testimony had the following deficiencies:

1. They lacked a sufficient indication of the informant’s reliability. Deputy Moody only relied on prior unrelated information from the informant. (Tr. p. 34, lines 1-8)
2. The police did not independently corroborate the informant’s tip.
3. The informant’s information was vague. He did not say who would be found at the residence or how he came to be at the residence. The return to the warrant only listed two items which were found at the residence out of a possible fifteen items the police thought they could find.
4. The informant was confidential and his or her identity was never disclosed so he could not be questioned.
5. There was no good faith exception as Deputy Moody should have known that he gave insufficient information concerning the informant’s reliability.

Under the totality of the circumstances which the law mandates in circumstances like this, the magistrate did not have sufficient probable cause to “stamp” a search warrant with his approval.

ARGUMENT II

The trial court erred in refusing to require the State to reveal the identity of the confidential informant when Officer Moody used the phrase “confidential informant” in his affidavit and the magistrate relied upon the affidavit and Officer Moody’s testimony to find probable cause existed to issue the warrant.

The informant was the only person who supplied the information to the police in this case. As such, he/she was a material witness to the alleged meth lab on the property to be searched. Identity should have been allowed along with cross-examination. This was essential to the right to present a defense. (Tr. p. 31, lines 3-14) In Crane v. Kentucky, 476 U.S. 683, 106 S.Ct. 2142 (1986) the Supreme Court of the United States wrote:

Whether rooted directly in the Due Process Clause of the Fourteenth Amendment, *Chambers v. Mississippi*, *supra*, or in the Compulsory Process of Confrontation clauses of the Sixth Amendment, *Washington v. Texas*, 388 U.S. 14, 23, 87 S.Ct. 1920, 1925, 18 L.Ed.2d 1019 (1967), *Davis v. Alaska*, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974), the Constitution guarantees criminal defendant’s “a meaningful opportunity to present a complete defense.” *California v. Trombetta*, 467 U.S., at 485, 104 S.Ct., at 2532; cf. *Strickland v. Washington*, 466 U.S. 668, 684-685, 104 S.Ct. 2052, 2063, 80 L.Ed.2d 674 (1984) (“The Constitution guarantees a fair trial through the Due Process Clauses, but it defines the basic elements of a fair trial largely through the several provisions of the Sixth Amendment”). We break no new ground in observing that an essential component of procedural fairness is an opportunity to be heard. *In re Oliver*, 333 U.S. 257, 273, 68

S.Ct. 499, 507-508, 92 L.Ed. 682 (1948); *Grannis v. Ordean*, 234 U.S. 385, 394, 34 S.Ct 779, 783, 58 L.Ed. 1363 (1914). That opportunity would be an empty one if the State were permitted to exclude competent, reliable evidence bearing on the credibility of a confession when such evidence is central to the defendant's claim of innocence. In the absence of any valid state justification, exclusion of this kind of exculpatory evidence deprives a defendant of the basic right to have the prosecutor's case encounter and "survive the crucible of meaningful adversarial testing." *United States v. Cronin*, 466 U.S. 648, 656, 104 S.Ct. 2039, 2045, 80 L.Ed.2d 657 (1984). See also *Washington v. Texas*, *supra*, 388 U.S., at 22-23, 87 S.Ct., at 1924-1925.

476 U.S. at 690-691, 106 S.Ct. at 2146-2147.

While we are not dealing with the credibility of a confession in this case, we are dealing with the credibility of the affiant and the "mere tipster." There is no reason why the concept of the right to present a defense should be any less in the context of this case. In *State v. Sachs*, 264 S.C. 541, 216 S.E. 2d 501, (1975) which was decided 40 years ago, it was held that it was alright to supplement a search warrant with oral testimony. But there is no reason in the present world why that oral supplement cannot be recorded and/or transcribed.¹ There was no independent investigation done by the police to corroborate the informant's information to determine if appellant was manufacturing meth. Questioning the informant would have been critical to the defense to determine the various uses of the household items he claimed he had seen at the house but that were not listed on the return. (Tr. p. 87, lines 6-

¹ No reason was given below as to why the magistrate was not called as a witness to corroborate what was told to him by the affiant.

24) The affidavit to the search warrant in this case was vague and inconsistent with what was actually found on the property. (Tr. p. 31, lines 9-14) While the police were told there was an active meth lab, the search did not reveal one. (Tr. p. 28, lines 10-15) As previously noted only a couple of items were listed on the return to a search warrant that claimed to have witnessed many more items. (Tr. p. 39, line 12- p. 40, line 17) Case law holds that the burden is on the defendant to show the facts and circumstances entitling him to disclosure of the identity of a confidential informant. State v. Humphries, 354 S.C. 87, 579 S.E.2d 613 (2003); State v. Shupper, 263 S.C. 53, 207 S.E.2d 799 (1974) But how can a defendant do this if he does not know who his accuser is in the first place? Is he just supposed to take it on the word of the solicitor or the affiant that the informant was only a “mere tipster?” This hardly seems fair to a defendant in a criminal prosecution.

CONCLUSION

Appellant's conviction should be reversed.

Respectfully submitted,



Robert M. Pachak
Appellate Defender

ATTORNEY FOR APPELLANT

This 28th day of September, 2015.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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Eugene C. Griffith, Jr., Circuit Court Judge

THE STATE,

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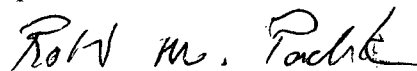
MOLINA ARMSTRONG,

APPELLANT

APPELLATE CASE NO. 2013-000932

CERTIFICATE OF SERVICE

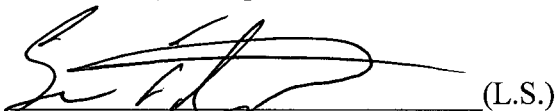
The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Salley W. Elliott, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Molina Armstrong, #282785, at Goodman Correctional Institution, 4556 Broad River Road, Columbia, SC 29210, this 28th day of September, 2015.



Robert M. Pachak
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 28th day of September, 2015.



(L.S.)

Notary Public for South Carolina
My Commission Expires: October 30, 2022.