STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Laurens County
Eugene C. Griffith, Jr., Circuit Court Judge

THE STATE,

Respondent,

vs.

MOLINA ARMSTRONG,

Appellant.

BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

Appellant Molina Armstrong and co-defendant James Dill were indicted by the Laurens County Grand Jury for manufacturing methamphetamine as prohibited by S.C. Code §44-53-375(B). Armstrong and Dill were tried by jury on April 9, 2012, and found guilty as charged. The Honorable Eugene C. Griffith, Jr., sentenced Armstrong to ten years imprisonment.

Armstrong's counsel submitted a brief pursuant to Anders v. California, 386 U.S. 738 (1967). This Court issued an order directing the parties to brief the issues herein on September 8, 2015.

STATEMENT OF FACTS

The Laurens County Sheriff's Office executed a search warrant at the residence where Appellant Armstrong and co-defendant Dill lived. The State's primary witness was Lieutenant Jimmy Sharpton, who is the office's "meth tech." Lieutenant Sharpton described his duty in this regard as follows:

> Basically we go in on calls that there is a meth lab present or one that is suspected, we go in, identify what there is there, we go through the whole process including the disassembly and then bring the lab out for it to be disposed of.

R. p. 60, lines 3-7.

Lieutenant Sharpton received specialized training in recognizing methamphetamine labs, including training on the different processes and the different stages of methamphetamine production. Part of the training is actually manufacturing methamphetamine. Lieutenant Sharpton mused, "I would make a pretty good cook if I wasn't a cop, I guess." R. pp. 60-61 (direct quote p. 60, lines 7-9). Lieutenant Sharpton's training included a 52 hour course called CLAW (clandestine labs and weapons of mass construction). Lieutenant Sharpton described how the "class goes pretty deep into . . . the chemicals, the combination of chemicals, how hazardous they are." R. p. 62, lines 3-12. In that training, he dismantled methamphetamine labs while wearing HAZMAT suits: "you are trained in how to use all the HAZMAT materials and equipment." R. p. 62, lines 12-19. Lieutenant Sharpton is certified in CLAW and is required to recertify every year to maintain this qualification. R. p. 63. Lieutenant Sharpton was qualified without objection as an expert in the field of methamphetamine lab identification and cleanup. R. p. 65.

After the deputies secured the location, Lieutenant Sharpton investigated for evidence of a meth lab. Sharpton discovered Coleman fuel, five one-pound bags of salt, hydrogen peroxide, hypodermic needles, and an HCL generator. Tr. pp. 67-69. The HCL generator was found outside the back door; the remaining items were found inside the house. R. p. 73, lines 1-5.

Lieutenant Sharpton testified that Coleman fuel is used as a solvent. The ephedrine or pseudoephedrine found in Sudafed or other medications is loosened from the binder ingredients and migrates into the solvent. Lieutenant Sharpton testified as follows about how the salt is used:

> Salt is used to make a shell generator, it is combined with sulfuric acid, drain cleaner, liquid fire. There [are] a lot of different types of sulfuric acid you can just buy on the shelf. Once you mix those two together it produces hydrogen chloride. It is a gas that converts meth from a liquid state to a crystalline state. So it is the last step in the process of manufacturing meth. No matter what method you use before that you are going to gas it off.

R. p. 69, lines 16-24. Hydrogen peroxide is used to wash and make the final methamphetamine "look pretty," particularly in the shake and bake manufacturing method. R. p. 70, lines 7-12. Hypodermic needles are used to inject methamphetamine. R. p. 70, lines 15-19.

Lieutenant Sharpton testified that an HCL generator is a tool used to emit gas from the mixture to convert the methamphetamine from a liquid to a gas state. R. p. 71. Lieutenant Sharpton explained how to make an HCL generator as follows:

> You will take a plastic bottle that can be anywhere from, I see a lot of 16.9 ounce just water bottles, drink bottles,

> the biggest one I have seen was a five gallon garden sprayer that had a lot that was in a big lab that they were, they needed it to last a long time. You start by pouring an amount of salt and then you pour the sulfuric acid over the top of it.

R. p. 71, lines 16-23. Lieutenant Sharpton explained further:

> It immediately starts to react. The HCL gas is formed immediately. It starts to smoke and then it continues, it gets worse and worse. The generators generally have a tube, they will cut a hole in the plastic top and they have a tube that comes out. That tube is put down in the liquid that has the liquid methamphetamine and it bubbles like a fish tank and that gas and that liquid, it will start to snow, it looks like it is snowing in the liquid and the meth is turning in to a crystal and collects in the bottom of the container.

R. p. 72, lines 1-10.

Lieutenant Sharpton testified that if he sees an HCL generator that means to him "somebody has been making meth at that location." R. p. 72, lines 18-23. The only use for an HCL generator is to gas-off methamphetamine. R. p. 72, p. 88, lines 13-22. On cross-examination, defense counsel asked Lieutenant Sharpton, "You said there was a generator but I thought your testimony was it had never been checked to test it to see what was in it?" R. p. 88, line 25 – p. 89, line 2. Lieutenant Sharpton replied, "That's true. It had not. But you would not mix salt and any other thing in a bottle with a tube coming out of it if you weren't doing that. If that was not an HCL generator you wouldn't make it look like one." R. p. 89, lines 3-5.

Lieutenant Sharpton put the items found in five-gallon buckets as part of the process of packaging the items for transport. Lieutenant Sharpton discussed the dangers found in meth labs, noting some of the chemicals on their own are hazardous materials. R. p. 75.

Lieutenant Sharpton explained, "What particularly makes things dangerous in a methamphetamine lab is when you start combining chemicals and they start reacting." R. p. 75, lines 22-25. Lieutenant Sharpton warned that if chemicals were combined the wrong way, "you could have fire, explosion . . . there are vapors that could come off that could be harmful to inhale. The HCL generator, that gas can actually kill you if you inhale enough of it." R. p. 76, lines 3-7. Lieutenant Sharpton testified he needed to wear a protective suit to clean up the materials found at the residence. R. pp. 76-77. The materials were cleaned up and brought to safe location to be held until a cleanup crew disposed of the materials. R. pp. 78-79. Lieutenant Sharpton explained disposal was necessary because the items seized were hazardous materials. R. p. 79.

Lieutenant Sharpton explained why some ingredients or their packaging might not have been found, testifying as follows:

> People have learned, your more experienced cooks know what we are looking for. One of the biggest problems we have in the county now is they will do a cook, they will bag it up and throw it out in a ditch in front of your house. And then, of course, we have unsuspect[ing] citizens locate these bags. That is probably the biggest hazard to the public is finding these smoking garbage bags that have been thrown out. They dispose of it pretty quick.

R. p. 90, lines 7-15.

ARGUMENT

I.

The trial court did not err in failing to suppress evidence seized from the execution of the search warrant where the search warrant affidavit, supplemented with law enforcement's oral testimony, established the credibility of the informant and the basis of the informant's knowledge which was sufficient to support probable cause.

Armstrong argues his rights under the Fourth Amendment[1] were violated because the magistrate was not provided sufficient information to find probable cause. However, law enforcement attested that an informant observed a methamphetamine lab in operation at the residence, that there were items used for methamphetamine production at the residence, and that the informant provided credible information in the past that led to two arrests. Accordingly, the magistrate was provided sufficient information to support issuing the search warrant.

The task of a magistrate when determining whether to issue a search warrant is to make a practical, common sense decision as to whether, under the totality of circumstances set forth in the affidavit, including veracity and basis of knowledge of persons supplying hearsay information, there is a fair probability that evidence of crime will be found in a particular place. State v. Driggers, 322 S.C. 506, 510, 473 S.E.2d 57, 59 (Ct. App. 1996).

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[1] Armstrong cites the state constitution in his brief, but did not argue at trial that the evidence should be suppressed on state constitutional grounds. The ground asserted on appeal must be supported by the objection raised at trial. State v. Silver, 314 S.C. 483, 486, 431 S.E.2d 250, 251 (1993). Further, although citing the state constitution, Armstrong does not present any actual argument for suppression on that ground. State v. Jones, 344 S.C. 48, 58, 543 S.E.2d 541, 546 (2001) (conclusory argument considered abandoned on appeal).

An appellate court reviewing the decision to issue a search warrant should determine if the magistrate had a substantial basis for concluding that probable cause existed. State v. Arnold, 319 S.C. 256, 260, 460 S.E.2d 403, 405 (Ct. App. 1995). When reviewing a magistrate's decision to issue a search warrant, an appellate court must consider the totality of circumstances. State v. Jones, 342 S.C. 121, 126, 536 S.E.2d 675, 678 (2000). "Although great deference must be given a magistrate's conclusions, a magistrate may only issue a search warrant upon a finding of probable cause." Id.

"The affidavit must contain sufficient underlying facts and information upon which the magistrate may make a determination of probable cause." State v. Philpot, 317 S.C. 458, 461, 454 S.E.2d 905, 907 (Ct. App. 1995). "A search warrant that is insufficient in itself to establish probable cause may be supplemented by sworn oral testimony." State v. Weston, 329 S.C. 287, 290, 494 S.E.2d 801, 802 (1997).

In determining the validity of the warrant, a reviewing court may consider only information brought to the magistrate's attention. State v. Gentile, 373 S.C. 506, 513-14, 646 S.E.2d 171, 174 (Ct. App. 2007). Items not specified in a search warrant may be seized if there is a sufficient nexus between the items seized and the criminal activity. State v. McGuinn, 268 S.C. 112, 232 S.E.2d 229 (1977).

"Probable cause is a flexible, common sense standard" that "does not import absolute certainty." State v. Fletcher, 363 S.C. 221, 609 S.E.2d 572, 587 (Ct. App. 2005) *rev'd on other grounds by* State v. Fletcher, 379 S.C. 17, 664 S.E.2d 480 (2008). While supporting affidavits must contain sufficient underlying facts and information upon which the magistrate can make a probable cause determination, they are "not meticulously drawn by lawyers, but

are normally drafted by non-lawyers in the haste of a criminal investigation, and should therefore be viewed in a common sense and realistic fashion." Id. "Affidavits must be judged on the facts presented and not on the precise wording used." Id. at 587-88.

Justin Moody was a Deputy with the Laurens County Sheriff's Office on February 15, 2011. Moody testified he received information from an individual of possible manufacturing of methamphetamine at Armstrong's residence. Moody testified he received information from this person twice before that proved reliable and led to two arrests. Moody testified the information indicated that items used to manufacture methamphetamine were at the residence. Moody prepared and signed an affidavit and presented the affidavit to Magistrate Copeland. R. pp. 24-26. In the affidavit Moody attests to the following:

> Laurens County Sheriff's Office has received information in the last 72 hours that at the above listed location an active methamphetamine lab is in operation. A confidential informant working in an undercover capacity with the Laurens County Sheriff's Office was at this location and did see numerous items that are used in the manufacturing of methamphetamine.

Supplemental Record.[2] Moody advised Magistrate Copeland that the informant provided reliable information before that led to two arrests. R. p. 25, lines 23-25. Magistrate Copeland then issued a search warrant based on the information provided. R. p. 26.

"[A] warrant based solely on information provided by a confidential informant must contain information supporting the credibility of the informant and the basis of his knowledge." State v. 192 Coin-Operated Video Game Machines, 338 S.C. 176, 192, 525

[2] Concomitantly with this brief, Respondent will submit a motion to supplement the record to include the warrant and affidavit presented to the trial judge in making his ruling.

S.E.2d 872, 881 (2000). For instance, the search warrant in State v. Hammond, 270 S.C. 347, 242 S.E.2d 411 (1978), was upheld where the affidavit indicated the confidential informant saw use and sale of drugs at the location within the last forty-eight hours, the affiant knew the informant for three years, and the informant furnished information in the past leading to the arrest and conviction of known drug dealers. Id. at 353, 242 S.E.2d at 414.

Armstrong relies on Illinois v. Gates, 462 U.S. 213 (1983), but the case fails to support his argument. First, Armstrong's modifications in the block quote in her brief hides the true context of the paragraph quoted. The quote was an analysis of Nathanson v. United States, 290 U.S. 41 (1933). The unadulterated quote is the following: "An affidavit must provide the magistrate with a substantial basis for determining the existence of probable cause, and **the** wholly conclusory statement at issue **in Nathanson** failed to meet this requirement." Gates, at 239 (emphasis added). Changing "the" to "a" and omitting reference to a case may give the misimpression that the Supreme Court in Gates made a broader rule that supports Armstrong's position. However, Nathanson, by way of Gates, does not provide support Armstrong's argument. The warrant in Nathanson was issued to a customs agent on the basis that he **suspected** and **believed** there would be untaxed liquor found in a warehouse **without stating the agent's basis for this belief**. In the instant case, the affidavit stated a basis of knowledge – the informant's observation.

Additionally, Armstrong's brief is deficiently constructed. Armstrong provides three block quotes – from the Fourth Amendment, from the South Carolina Constitution, and from Gates. Then Armstrong provides a laundry list of how the facts supporting the warrant

could have been stronger, but provides no authority that the lack of any of these items requires reversal. State v. Colf, 332 S.C. 313, 332, 504 S.E.2d 360, 364 (Ct. App. 1998) (finding a conclusory two-paragraph argument citing no authority other than an evidentiary rule was deemed abandoned on appeal).

In the instant case, the information provided to the magistrate was sufficient for the magistrate to conclude there was a fair probability evidence of a crime would be found. The affidavit indicated that the informant was at the location and observed numerous items used in the manufacture of methamphetamine and that an active methamphetamine lab was in operation. Moody testified the informant provided information in the past that was reliable and led to two arrests. Therefore, the affidavit provided the basis of the informant's knowledge, and Moody provided information attesting to the informant's proven reliability. Accordingly, the trial court did not err in denying the motion to suppress evidence from the search.

II.

The trial court did not err in declining to require the State to disclose the identity of the confidential informant because the confidential informant was a mere tipster and not a participant in the crime.

Armstrong claims the trial court erred in failing to grant his motion to compel the State to reveal the identity of the confidential informant. However, the confidential informant was merely a tipster and did not participate in the crime. Accordingly, disclosure is not warranted.

"The purpose of the privilege [against disclosure] is the furtherance and protection of the public interest in effective law enforcement." Roviaro v. United States, 353 U.S. 53, 59 (1957). "The privilege recognizes the obligation of citizens to communicate their knowledge of the commission of crimes to law-enforcement officials and, by preserving their anonymity, encourages them to perform their obligation." Id.

However, the privilege against disclosure is limited to the extent necessary to ensure fundamental fairness for all parties to a case. Id. at 60. "Where the disclosure of an informant's identity, or of the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege must give way." Id. at 60-61. Significantly though, there is "no fixed rule with respect to disclosure[.]" Id. at 62. Instead, the public's interest in perpetuating the flow of vital information to law enforcement officials must be balanced against the criminal defendant's right to prepare his defense. State v. Bultron, 318 S.C. 323, 330, 457 S.E.2d 616, 620 (Ct.

App. 1995). Therefore, whether disclosure is required necessarily depends on the particular circumstances of each individual case. Roviaro, 353 U.S. at 62.

This Court has observed the following:

> The disclosure of the identity of one who is merely an informer and not a participant nor a material witness is not generally required. Where, however, the informer is also a participant and/or a material witness **on the issue of guilt or innocence**, disclosure may or may not be required depending on various factors and circumstances.

State v. Wright, 322 S.C. 484, 488, 472 S.E.2d 642, 645 (Ct. App. 1996) (emphasis added). This Court noted that "the trial court must balance the public's interest in perpetrating the flow of vital information to law enforcement officials against the right of the individual to prepare his defense." Id. Additionally, the Supreme Court has declared: "A criminal defendant's interest in access to certain evidence must be weighed against the State's interest in protecting the identity and safety of the informant." Hyman v. State, 397 S.C. 35, 47, 723 S.E.2d 375, 381 (2012); see also United States v. Mehciz, 437 F.2d 145, 149 (9th Cir. 1971) ("The reasons for refusing to disclose the identity of an informant are well known, as is the existence of the tremendous traffic in narcotics and dangerous drugs which require federal and state officers to rely heavily on informants.").

The Supreme Court has observed "an informant's identity need not be disclosed where he possesses only a peripheral knowledge of the crime or is a mere 'tipster' who supplies a lead to law enforcement." State v. Humphries, 354 S.C. 87, 90, 579 S.E.2d 613, 615 (2003). "The burden is upon the defendant to show the facts and circumstances entitling

him to the disclosure." Id. In the instant case, the informant was merely a tipster; no evidence indicates the informant was a participant in the crime.

Armstrong chiefly argues that law enforcement relied exclusively on the informant in order to have a search warrant issued and the informant could have provided elucidating testimony on what he saw at the house. However, the informant's observations that were not communicated to the magistrate serve no part in the determination of the basis for the warrant as discussed in the first issue. State v. Gentile, 373 S.C. 506, 513-14, 646 S.E.2d 171, 174 (Ct. App. 2007) see also McCray v. Illinois, 386 U.S. 300, 307 (1967) ("As we have said, the magistrate is concerned not with whether the informant lied, but with whether the affiant is truthful in his recitation of what he was told.").

This Court found disclosure of the informant's identity was not required where the informant's role was limited to calling the police with information that the informant observed cocaine in a hotel room. State v. Bultron, 318 S.C. 323, 457 S.E.2d 616, 620-21 (Ct. App. 1995). "[T]he identity of an informant who has supplied probable cause for the issuance of a search warrant need not be disclosed where such disclosure is sought merely to aid in attacking probable cause." People v. Hobbs, 873 P.2d 1246, 1251 (Cal. 1994) (emphasis removed); see also United States v. Gray, 47 F.3d 1359, 1365 (4th Cir. 1995) (concluding "Gray's request for disclosure is controlled by the well settled principle that the government is permitted to withhold the identity of a confidential informant when 'the informant was used only for the limited purpose of obtaining a search warrant.'" (citations omitted)). As in Bultron, Armstrong was not convicted based on the informant's observations, but instead on the evidence found when law enforcement searched the

premises; the record fails to indicate that the informant was present at the time of the search. The State presented evidence Appellants were in constructive possession of the narcotics independent of the information offered by the informant. Bultron, 318 S.C. at 331, 457 S.E.2d at 621.

Finally, Armstrong's contention of any benefit to him at trial from having the informant available is highly speculative and unlikely. It is highly likely the informant could have provided helpful testimony for the prosecution, but presumably other considerations, such as the continued utility of the informant and the informant's safety, mitigated against the State presenting the informant as a witness. "[T]he onus is on the defendant to 'come forward with something more than speculation as to the usefulness of such disclosure.'" United States v. Blevins, 960 F.2d 1252, 1259 (4th Cir. 1992) (citations omitted). Accordingly, the trial court did not abuse its discretion in failing to require the State to disclose the confidential informant. State v. Batson, 261 S.C. 128, 134-35, 198 S.E.2d 517, 520 (1973). (noting the trial judge has "considerable discretion" in the judge's decision whether to require disclosure of the informant's identity).

CONCLUSION

For all of the foregoing reasons, the judgment and conviction of the lower court should be affirmed.

Respectfully submitted,

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PROOF OF SERVICE

I, Norma Bigbee, certify that I have served the within Brief of Respondent on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to his attorney of record, Robert M. Pachak, Esquire, South Carolina Commission on Indigent Defense, Division of Appellate Defense, PO Box 11589, Columbia, SC 29211.

I further certify that all parties required by Rule to be served have been served.

This 19th day of October, 2015.

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