THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of General Sessions

The Honorable Alison R. Lee, Circuit Court Judge

Case No. 2011-GS-40-03359

Appellate Case No. 2013-002531

State of South Carolina, ... Respondent,

v.

Joshua William Porch, ... Appellant.

FINAL REPLY BRIEF OF APPELLANT

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The trial court committed reversible error in two regards in this matter. First, the trial court failed to void the State's arrest warrant under *Franks v. Delaware*. Second, the trial court improperly limited Porch's testimony and, in so doing, violated his rights under the Confrontation Clause. The trial court's errors constitute reversible error. This Court should vacate Porch's conviction.

On July 7, 2009, the Richland County Sheriff's Department ("RCSD") obtained a warrant for Porch's arrest for the murder of Nakia Mallory. (Trans Dated 11/21/13 at 1057–59; R. 0843-0845). The RCSD did not inform the magistrate that Porch previously testified for the State as an eyewitness to the crime. (Trans. Dated 11/25/13 at 1521–23; R.1092-1094). Instead, the RCSD explained only that Porch's statements placed him at the scene of the crime and that newly tested blood evidence matched blood left at the scene by Porch. (Trans. Dated 11/12/13 at 7–10, 54–56; R. 0025-0028, 0072-0074).

Notably, the RCSD did not inform the magistrate that, in the two prior trials for Mallory's murder, the State presented testimony *from Porch* (1) that he witnessed an altercation between Nakia and her husband, Justin Mallory, (2) that Porch intervened in the dispute, and (3) that Porch suffered an injury himself during the altercation that caused his blood to be left at the scene. (Trans. Dated 11/25/13 at 1521–23; R. 1092-1094). The RCSD omitted this exculpatory information that directly touched on the warrant's essential purposes. The omission of this exculpatory information led to the issuance of the warrant and to Porch's arrest. Thus, the trial court erred in failing to

void that arrest warrant and any resulting evidence under *Franks v. Delaware*, 438 U.S. 154 (1978).

Moreover, the trial court violated Porch's rights under the Confrontation Clause. Members of the RCSD and the Los Angeles County Sheriff's Office ("LASD" or "the LASD") interrogated Porch following his arrest. (Trans. Dated 11/18/13 at 171; R. 0201; Trans. Dated 11/21/2013 at 1065–69; R. 0851-0855). Some of these interrogations were video recorded, including portions involving RCSD and a separate six-hour interrogation and polygraph examination conducted by Roberta Cohen, an investigator with the LASD. However, Cohen refused to testify at Porch's trial despite a *subpoena from the State*. (Trans. Dated 11/18/13 at 171–73; R. 0201-0203). Consequently, the State entered into evidence only the portion of the video showing the interrogation by members of the RCSD. (Trans. Dated 11/18/13 at 173–74, 191, 199–200; Trans. Dated 11/21/13 at 1106–07; R. 0203-0204, 0221, 0229-30, 0892-93).

The trial court ruled, over an objection from Porch's trial counsel, that Porch could not discuss Cohen's interrogation as part of his own defense or the court would permit the State to introduce those portions of the interrogation video even in Cohen's absence. (Trans. dated 11/25/13 at 1498–1500; R. 1069-1071). This ruling violated Porch's rights under the Confrontation Clause.

ARGUMENT

I. The State's argument misapprehends *Franks v. Delaware*.

The State's arguments on this point simply restate black letter law without specifically addressing the flaws in the RCSD affidavit used to obtain the warrant. The

fact of this matter is that the trial court erred in failing to void the State's arrest warrant under *Franks v. Delaware*. This Court should reverse.

Franks protects against omissions "designed to mislead" or that were made in "reckless disregard" of whether such omissions would mislead the magistrate in the issuance of the warrant. *United States v. Colkley*, 899 F.2d 297, 301 (4th Cir. 1990). The State's reliance on *Colkley* is misplaced. *Colkley* is factually distinct and actually supports reversal of the trial court.

In *Colkley*, the Fourth Circuit found that a *Franks* hearing was not required where the omitted information was not material to the probable cause determination. *Colkley*, 899 F.2d at 301. There, the defendant challenged the affidavit used to support his arrest for armed robbery. Defendant claimed the affidavit failed to note that numerous witnesses did not identify him in a photographic spread and because police based the composite height description on the testimony of a single witness and disregarded testimony from other witnesses who claimed the robber was shorter. *Id.* at 299. Defendant received a *Franks* hearing and the trial court held that, even with including the omitted information, probable cause existed for issuing the warrant. *Id.* The court also found that the police did not intentionally misrepresent defendant's height and that discrepancies in height descriptions were common and immaterial. *Id.*

The Fourth Circuit based its ruling, in part, on the amount of other incriminating information contained in the affidavit. *Id.* at 302. For instance, a car that a co-defendant purchased with cash after the robbery was located outside of defendant's home. *Id.* Defendant participated in cash purchases of two cars within a month of the robbery. *Id.* The affidavit also recited an informant's tip to the police

that defendant admitted committing a robbery that bore a "remarkable resemblance" to the one under investigation. *Id.*

The facts in *Colkley* are markedly different from the affidavit in the instant case. The facts here demonstrate that the trial court erred in failing to void the warrant. The *Colkley* court would have done so under these facts. Here, the affidavit contained this uncontested language: "The defendant has admitted to being at the scene of the crime during the assault and stabbing." (Trans. Dated 11/12/13 at 5; R. 0023). The affidavit did not inform the Court that Porch admitted to being at the scene of the crime as part of his service as the State's eyewitness in two trials for this same crime. *Id.* The affidavit also stated that Porch had been further implicated "by DNA testing of blood found at the scene." *Id.* The affidavit did not explain that Porch previously explained that he left blood at the scene of the crime because he intervened in a violent altercation between the victim and her husband – the man the State prosecuted twice for the crime.

The "very heart of the affidavit's purpose" was to establish probable cause for Porch's arrest in connection with Nakia Mallory's murder, yet the affidavit did not include key context regarding how the RCSD collected the supporting information. That was improper. *See State v. Missouri*, 337 S.C. 548, 556, 524 S.E.2d 394, 398 (1999) (finding that a substantial basis for probable cause did not exist where omitted information was directly related to the affidavit's purpose).

Moreover, the RCSD's intentional omission is not a case of requiring law enforcement to disclose "all" potentially exculpatory information or placing an onerous burden of "elaborate specificity" on the drafters of warrant affidavits, as argued by the State. Resp. Br. at 18–19 (citations omitted). Instead, this is a case where the RCSD

deliberately withheld exculpatory information and information critical to the magistrate's probable cause determination. Disclosure of such information is already required by well-settled law. Porch does not seek to alter or expand the settled requirements. Application of those settled principles leads to the inescapable conclusion that the trial court erred.

To support its erroneous view of *Franks*, the State relies on *United States v. Moody*, 762 F. Supp. 1491 (N.D. Ga. 1991). There, a federal judge and a lawyer were assassinated by mail bombs. *Id.* at 1493–94. The defendant claimed that in failing to disclose evidence implicating another individual, the government recklessly omitted material information. *Id.* at 1500. The court explained that whatever evidence the government marshaled regarding another individual did not "begin to exonerate" the defendant, but "at most" indicated that the defendant and another individual may have conspired to commit the crimes charged. *Id.*

Moody is not a helpful lens for analyzing the instant case. For one, the RCSD affidavit did not include facts related to an "investigation" but instead only contained selected facts related to *two* prior trials for the same exact crime. Second, the information RCSD omitted *does* begin to exonerate Porch as it is information which the State relied on to prosecute another individual for the same crime. As the *Moody* court acknowledged, the government may pursue multiple lines of investigation "so long as the government establishes probable cause as to each prior to the issuance of any warrant." *Id.* In this appeal, the RCSD "established" probable cause by hiding information critical to the magistrate's probable cause analysis.

Given the lack of authority supporting its view of *Franks*, the State then turns to the curious tactic of undercutting Porch's service as a State witness. The State speciously claims that, "[a]lthough, [Porch] attempted to place the blame for the murder on husband, neither a jury or circuit judge accepted his testimony." Resp. Br. at 21 (alteration added). This is a misleading depiction of Porch's testimony. Porch testified in two trials in which he was not the defendant and where he had no motivation to try and "place the blame" on anyone. Instead, Porch agreed to testify as to what he observed on the night of Nakia Mallory's death. Whether a judge or jury believed Porch's testimony in his trial is irrelevant to what the State had to disclose in obtaining the affidavit. The State's argument misapprehends this distinction. In fact, the State's argument on this point actually affirms how critical Porch's testimony was to the State's case and strengthens the argument that this crucial information should not have been excluded from the warrant affidavit.

The State also claims that if the RCSD included exculpatory information in the affidavit then the RCSD would have included other incriminating information in the affidavit. This argument makes the same mistake as the trial court in analyzing the RCSD's description of what it would have or could have included in the affidavit. That is not the focus. Instead, the focus of the magistrate's analysis of the information was what was actually included in the affidavit. *See Missouri*, 337 S.C. at 555, 524 S.E.2d at 397 ("Thus, the primary issue before this Court is whether excluding the false information and inserting the exculpatory statement, there remains a substantial basis upon which the magistrate could have found probable cause to issue the warrant.").

As the State notes, probable-cause is a flexible, common-sense standard. Resp. Br. at 10 (citing *Texas v. Brown*, 460 U.S. 730 (1983)). It is common-sense that an affidavit that states that a suspect admits to being at the scene of a crime should also state that the suspect admitted to being at the scene of that crime through his participation as an eye-witness for the state in two prior trials for the same crime.

In *State v. Lynch*, this Court found the defendant failed to show a *Franks'* violation where the information the defendant claimed police failed to relay to the magistrate was not actually known to police at the time of the warrant. 412 S.C. 156, 182–83, 771 S.E.2d 346, 360 (Ct. App. 2015). This is not the case here. Unfortunately for the State, the RCSD did not draft this affidavit in the haste of a criminal investigation. Instead, the RCSD produced this affidavit after an investigation spanning several years and significant litigation. The critical information the RCSD chose not to include in its affidavit was safely within their grasp and was neither technical nor elaborate. Testimony from the magistrate demonstrates that the RCSD did not take the opportunity to properly supplement the affidavit with sworn oral testimony explaining the facts contained in the affidavit. *Id.* at 184, 771 S.E.2d at 361.

The RCSD intentionally and recklessly omitted exculpatory information necessary for a sufficient probable cause determination. The trial court erred in its analysis. This Court should reverse.

II. The Trial Court's Limitation of Porch's Testimony Violated The Confrontation Clause.

The State incorrectly claims that the issue is not preserved for appellate review. According to the State, "Porch raised no objection below. Further, Porch did not object at any point under the Confrontation Clause." Resp. Br. at 28. This is erroneous.

As explained in Porch's Initial Brief, counsel preserved this issue for appeal. Over an objection from Porch's trial counsel, the trial court ruled that Porch could not discuss Cohen's interrogation during his testimony or the court would allow the State to introduce those portions of the interrogation even in Cohen's absence. (Trans. Dated 11/25/2013 at 1498–1500; R. 1069-1071). The conversation that takes place during this portion of the proceedings was an extension of an earlier discussion regarding Cohen's absence and Confrontation Clause concerns. (Trans. Dated 11/18/13 at 182–85; R. 0212-15). In that earlier discussion, Porch's trial counsel explained that Cohen's absence negatively impacted Porch's rights under the Confrontation Clause. (*Id.* at 184.) ("I can't stress how limited this confrontation was compared to what it would be in front of a jury. I guarantee Mr. Goings is [sic] cross-examining Mr. Porch isn't going to be the same as it will be when Mr. Porch testifies."). As part of that discussion, the State acknowledged that it was not "seeking to introduce the full interview of Ms. Cohen," and only wanted to introduce the statements the RCSD investigators received from Porch. (*Id.* at 189–90.)

This tactic by the State naturally required the later colloquy regarding what portions of the video recordings Porch could testify about and which he could not. (Trans. Dated 11/25/13 at 1498). During this discussion, the State explained that if

Porch testified about specific occurrences within the over six hour interview with Cohen, "it opens the door for the possibility of playing portions of that video as well." *Id.* The court agreed, and Porch's trial counsel objected, stating "I disagree with that ruling completely. I disagree with that position, because he has right the [sic] testify." *Id.* at 1499.

It is well-settled that error preservation rules do not require a party to use the exact name of a legal doctrine to preserve an issue for appellate review. *State v. Brannon*, 388 S.C. 498, 502, 697 S.E.2d 593, 595 (2010); *State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 694 (2003); *State v. Douglas*, 411 S.C. 307, 323, 768 S.E.2d 232, 241 (Ct. App. 2014). Instead, a litigant is required only to fairly raise the issue to the trial court, giving it an opportunity to rule on the issue. *Brandon*, 388 S.C. at 502, 697 S.E.2d at 595.

Porch properly preserved the Confrontation Clause issue as shown above. It was raised, perhaps inartfully, but nonetheless ruled upon by the trial court. Thus, Porch's Confrontation Clause argument is preserved for this Court's review. *See State v. Gamble*, 405 S.C. 409, 416 n.3, 747 S.E.2d 784, 787 n.3 (2013) ("While defense counsel could have articulated his objection more clearly, his objection adequately preserved the issue for this Court's review.").

Contrary to the State's assertions, the Confrontation Clause applies. Statements taken by police officers in interrogations are testimonial. *State v. Stokes*, 381 S.C. 390, 401, 673 S.E.2d 434, 439 (2009). This clear authority renders the State's gymnastics regarding whether the video recording is the statement of a witness or Porch's response to an investigator's questioning a nullity. It is undisputed that the

video recording depicts an interrogation of Porch, conducted by Cohen, and that Cohen was unavailable to testify.[1]

The State then asserts that Porch was not prevented from testifying, but instead, "if he did testify, Porch could not be allowed to testify falsely about what occurred earlier in the interview, when the videotape would show the jury exactly what had occurred." Resp. Br. at 31. This argument lacks merit. Perjury was not the concern. The State did not seek to admit the video tape only if Porch perjured himself. Rather, the State sought and obtained a ruling that if Porch testified *in any manner* regarding the interview then the State would be allowed to admit the entire video interview. Thus, the State's perjury argument is irrelevant and incorrect.

Next, the State urges this Court to collapse the *Denno* and Confrontation Clause guarantees into one analysis. Resp. Br. at 33. This argument simply invites the Court to replicate the trial court's error. The central concern in a *Denno* proceeding is the voluntariness of a defendant's confession. This is separate and distinct from the Confrontation Clause inquiry which commands, "not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination." *Crawford v. Washington*, 541 U.S. 36, 61 (2004).

Finally, the Confrontation Clause error was not harmless. It simply cannot be said that Porch's inability to discuss the events which gave rise to his false confession were so insignificant that it did not affect the verdict or that the record contains overwhelming evidence of Porch's guilt. This position is only strengthened by the State trying another defendant, twice, using similar evidence. The trial court's Confrontation

[1] At no time during the trial did the State assert that the Confrontation Clause simply did not apply and that is because it does.

Clause error prejudiced Porch in frustrating his ability to present a full and complete defense. *See State v. Turner*, 373 S.C. 121, 131, 644 S.E.2d 693, 698 (2007) (noting it is reversible error if the defendant establishes that he was unfairly prejudiced).

CONCLUSION

For the foregoing reasons, Porch's conviction and sentence must be reversed and vacated.

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CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR.

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Proof of Service

I, the undersigned Paralegal of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Joshua William Porch, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same by United States Mail, postage prepaid, to the following address(es):

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RE: The State v. Joshua William Porch
Appellate Case No.: 2013-002531
Our file no.: 38769/01522

Dear Ms. Kitchings:

Enclosed please find the original and fifteen copies each of the Final Brief of Appellant, Final Reply Brief of Appellant and the Record on Appeal in regard to the above-referenced matter. We would ask that you file the original of each and return clocked-in copies to us via our courier.

By copy of this letter to counsel of record, we are serving them with a copy of the Final Brief of Appellant and Final Reply Brief of Appellant.

Very truly yours,

Michael J. Anzelmo

MJA:mws
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