STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Laurens County

Eugene C. Griffith, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JAMES CLYDE DILL, JR.,

APPELLANT

APPELLATE CASE NO. 2013-000724

Opinion No. 2016-UP-010

PETITION FOR REHEARING

Pursuant to Rule 221(a), SCACR, James C. Dill, respectfully petitions the Court for a rehearing of its Opinion No. 2016-UP-010 issued on January 13, 2016 based upon the following points overlooked or misapprehended by the Court:

I.

"As to whether the trial court erred in concluding the magistrate properly found probable cause to issue the search warrant"

Magistrates must make a "practical, common-sense decision of 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) (*emphasis added*). However, a magistrate's determination of probable cause cannot be "a mere ratification of the bare conclusions of others. . . courts must continue to conscientiously review the sufficiency of affidavits." *Illinois v. Gates*, 462 U.S. 213, 238 (1983).

The search warrant in Appellant's case provided no information regarding the confidential informant's basis of knowledge. R. p. 146. The affidavit simply, and in conclusory fashion, stated that the informant "did see numerous items that are used in the manufacturing of methamphetamine." *Id.* Neither the affidavit nor Officer Moody's supplemental testimony explained what materials were observed, why the informant believed the materials would be used to manufacture methamphetamine, how the informant came to be in the residence, or what persons, if any, the informant observed in the residence. R. p. 23, l. 13 - 27, l. 25.

"[D]id see numerous items that are used in the manufacturing of methamphetamine" does not provide a magistrate with sufficient information on which to make an independent judgment that probable cause exists. Respectfully, this Court's reliance on *State v. 192 Video Game Machines*, 338 S.C. 176, 192, 525 S.E.2d 872, 881 (2000), is misplaced as there was no independent corroboration of the tip by law enforcement prior to seeking the warrant in this case.

II.

"As to whether the trial court erred in refusing to find the magistrate was misled by false information."

Officer Moody's search warrant affidavit states:

> 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 manufacture of methamphetamine.

R. p. 146 (*emphasis added*). At trial the State claimed that the "confidential informant working in an undercover capacity with the Laurens County Sheriff's Office" was actually ***a mere tipster***. R. p. 33, l. 3 - 38, l. 1. The State maintained there was no distinction between the two terms and, if there was any difference, such subtleties were beyond the capacity of an experienced narcotics officer to appreciate. *Id.*

The State further alleged that this informant was reliable as a mere tipster because he or she had been used in the past as a confidential informant working in an undercover capacity" in two past cases. R. p. 25, ll. 19-25. Furthermore, based on Moody's testimony it appears that he was the officer responsible for using the informant in an undercover capacity; so presumably he knew the difference from receiving a tip and having this informant operate "in an undercover capacity." R. p. 25, ll. 19-25; R. p. 33, l. 3 - 37, l. 2.

By the State's own admission, the warrant affidavit grossly mischaracterized the informant's role to the magistrate. R. p. 33, l. 3 - 37, l. 2. The phrase "confidential informant working in an undercover capacity" clearly infers that the informant was working at the direction of and under the control of law enforcement. This imbues the informant with a level of veracity not afforded to mere tipsters, including the ability to supply probable cause without the need for independent corroboration or further investigation. *State v. Green*, 341 S.C. 214, 218, 532 S.E.2d 896, 897 (Ct. App. 2000) (*information from tipster* ***insufficient to establish reasonable suspicion*** *without corroboration*) (*emphasis added*).

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 by an experienced narcotics officer. *State v. Jones*, 342 S.C. 121, 128, 536 S.E.2d 675, 678 (2000), Accordingly, this

mischaracterization had a material impact on the Magistrate's determination of probable cause and substituting the correct term -- "mere tipster" -- for the false term -- "a confidential informant working in an undercover capacity" -- results in a lack of probable cause.

III.

"As to whether the trial court erred in refusing to require the State to reveal the identity of the CI."

Given the State's self-serving, contradictory positions on whether the informant was a mere tipster or a confidential informant working in an undercover capacity" it is impossible to ascertain whether the informant was an active participant in any potential drug transaction - although a plain reading of the warrant affidavit strongly suggests the informant was directed by law enforcement to investigate the "information" police had received about an active lab. *State v. Blyther*, 287 S.C. 31, 33, 336 S.E.2d 151, 152-53 (Ct. App. 1985).

Here the identity of the informant was essential for a fair determination of the State's case against the accused because he was more than a mere tipster and law enforcement made no effort to independently investigate. The information supplied by the informant represented the sum total of law enforcement's investigation before seeking the search warrant.

Troublingly, much of the information that this supposedly reliable informant supplied was either inaccurate or so vague that law enforcement was unable to anticipate the method of manufacture or the ingredients it could expect to find at Appellant's residence. *State v. Burns*, 294 S.C. 338, 340, 364 S.E.2d 465, 466 (1988) (informant, the sole witness corroborating allegation of accused's drug use, was a material witness as he was relied upon by law enforcement when seeking a warrant).

Finally, the risk of harm to the informant was minimal, Appellant had no record of violent crimes, and his 2012 trial was fourteen months removed from the execution of the search warrant. R. p. 142, l. 24 - 143, l. 2.

IV.

"As to whether the trial court erred in refusing to grant a directed verdict"

All of the ingredients and items found at Appellant's residence that the State alleged showed the intent or attempt to manufacture methamphetamine were household goods. Even the purported HCL generator, found discarded on the back porch, was simply a broken two liter plastic bottle. R. p. 65, l. 16-23

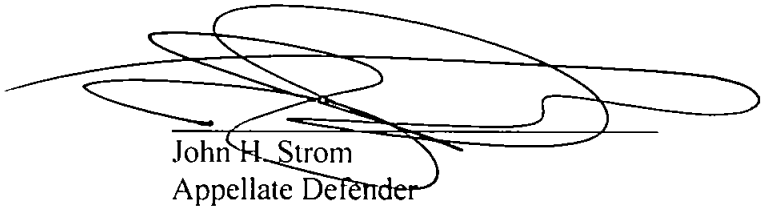
No testing for methamphetamine was done on any of the items seized and all of the evidence was destroyed. R. p. 82, l. 8 - 83, l. 25. The "proof" offered by the State at trial was four photographs representing a selection of the household items. Curiously, photographs also failed to show how the two liter bottle had been purportedly converted into a HCL generator.

Notably absent from Appellant's house was any evidence, including wrappers, of the key ingredients necessary to initiate the chemical reaction that generates methamphetamine: ephedrine, lithium strips/batteries, drain cleaners, sulfuric acid, or other common reactants. R. p. 78, l. 11 - 82, l. 11.

Respectfully, this Court's reliance on *State v. Hudson*, 277 S.C. 200, 284 S.E.2d 773 (1981), was misplaced as the contraband in that case consisted of four bags of heroin that the defendant was attempting to flush down the toilet. When police entered Mrs. Hudson's house, she was found standing outside the bathroom where the heroin was found. At trial, she claimed ignorance of her husband's drug dealing activities and alleged on appeal that the State failed to

present evidence of the same. Here, no illegal substances were found and there was no evidence that Appellant was aware of the alleged HCL generator, or its purported purpose.

Respectfully submitted,



John H. Strom
Appellate Defender

This 28th day of January, 2016.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

RECEIVED
JAN 28 2016
SC Court of Appeals

Appeal from Laurens County

Eugene C. Griffith, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JAMES CLYDE DILL, JR.,

APPELLANT

APPELLATE CASE NO. 2013-000724

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Petition for Rehearing in the above-entitled case has been served upon David Spencer, Esquire, this 28th day of January, 2016.

John H. Strom
Appellate Defender

ATTORNEY FOR APPELLANT

SWORN TO BEFORE ME this 28th day
of January, 2016.

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

My Commission Expires: May 12, 2025.