STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Laurens County
Eugene C. Griffith, Jr., Circuit Court Judge

Opinion No. 2016-UP-010 (S.C. Ct. App. filed 1/13/2016)
11-GS-30-633

THE STATE,

RESPONDENT,

V.

JAMES CLYDE DILL, JR.,

PETITIONER

APPELLATE CASE NO. 2013-000724

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

JOHN H. STROM
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, S. C. 29211-1589
(803) 734-1343

ATTORNEY FOR PETITIONER.

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CERTIFICATE OF COUNSEL

Counsel for petitioner certifies that the petition for rehearing was made and finally ruled on by the Court of Appeals on February 25, 2016.

QUESTIONS PRESENTED

I.

Did the Court of Appeals err by affirming the trial court's refusal to suppress evidence found during the execution of a search warrant where the search warrant affidavit and supplemental testimony was insufficient for the magistrate to establish a substantial basis for probable cause?

II.

Did the Court of Appeals err by affirming the trial court's upholding of the validity of the search warrant because, to the extent the magistrate may have had a substantial basis to believe probable cause existed, the magistrate was misled by knowingly false statements made by law enforcement which were material to the determination of probable cause?

III.

Did the Court of Appeals err by affirming trial court's refusal to reveal the identity of the confidential informant because confidential informant acted beyond the scope of a mere tipster and the informant's identity was relevant and helpful to Appellant and essential to a fair determination of Appellant' case?

IV.

Did the Court of Appeals err in affirming the trial court's denial of Appellant's motion for a directed verdict on the charge of manufacture of methamphetamine where the prosecution failed to present any direct or substantial circumstantial evidence that Appellant engaged in production, preparation, propagation, compounding, conversion or processing of any substance containing amphetamine or methamphetamine?

STATEMENT

On February 15, 2011, Laurens County Sheriff Deputy Justin Moody presented Magistrate Wayne Copeland with a search warrant for Appellant's residence based only on information received from a confidential informant:

> Laurens County Sheriff's Office has received information [in] last 72 hours that ***the location is an active methamphetamine lab is in [sic] operation. The confidential informant working in an undercover capacity with the Laurens County Sheriff's Office*** was at that location and did see numerous items that [are] used in the fashion of methamphetamine.

R. 18, ll. 7-13 (*emphasis added*). Moody also testified to the magistrate that the informant had been reliable in two past cases. R. 23, ll. 11 – R. 27, ll. 24. Based on the warrant affidavit and supplemental testimony provided by Deputy Moody, the magistrate approved the search warrant. R. 25, ll. 14 – R. 26, ll. 4.

No active methamphetamine lab was discovered. R. 91, ll. 12-17. Nor were any ephedrine, lithium strips/batteries, drain cleaners, sulfuric acid, or other common reactants found at the residence. *Id.*; R. 78, ll. 19 – R. 79, ll. 20. Deputies did discover salt containers, canisters of Coleman brand camping fuel, and hypodermic needles. R. 68, ll. 6-15. After searching the backyard, deputies located what they alleged was an HCL generator consisting of a one liter soda bottle with the top cut off. R. 67, ll. 1-5.

After concluding the search, deputies placed the above discovered items in buckets, took four photographs, and then immediately destroyed all of the items without any testing on the ostensible grounds that the evidence contained hazardous or toxic chemicals. R.72, ll. 11 – R. 73, ll. 10.

Appellant moved to reveal the identity of the informant or, in the alternative, to suppress the evidence found during the execution of the warrant for lack of probable cause. R. 18, ll. 16 – R. 19, ll. 22. Appellant argued that the identity of the informant was essential to the defense's case and that there was nothing in the warrant from which a magistrate could make an informed decision regarding probable cause. R. 34, ll. 11 – R. 35, ll. 15.

Appellant highlighted inconsistencies in the warrant affidavit, stating initially that there was an active methamphetamine lab at the residence, only to conclude with the more ambiguous statement that just material necessary for the manufacturing of methamphetamine was present. R. 28, ll. 10-15. Appellant maintained that without the chance to confront the informant, he had no way to determine the cause of this inconsistency; no way to determine what the informant actually saw; and no way to test the informant's credibility. R. 31, ll. 3-14. Appellant also argued that the warrant affidavit and Moody's testimony claimed that police exercised a high level or supervision and control over the informant. R. 21, ll. 5-13.

Oddly the State argued at trial that they, in fact, exercised no control over the informant, "[the informant] was not sent under the authority of the Sheriff's office and merely observed [the manufacture]." R. 20, ll. 8-18. The State based the informant's reliability solely on the accuracy of his two past tips, which Deputy Moody apparently explained to the magistrate in his unrecorded supplemental testimony. R. 20, ll. 12-18.

The State summarized its position as, "whether this is a confidential informant or a mere tipster, ***although the affidavit says this is a confidential informant working with the Laurens County Sheriffs Office, we are not disputing that*** ... this person worked with the Sheriff's office. But as our affiant can tell you, they weren't working with the Sheriff's office with regards to this actual incident" R. 21, ll. 22 – R. 22, ll. 4 (*emphasis added*).

According to the State, the undercover confidential informant was, in reality, a mere tipster because the State was now claiming that the informant was not acting at the behest of police. R. 20, ll. 1-9. Despite Moody's affidavit to the contrary, the State somehow averred that "Moody testified that when he spoke with the magistrate he told the magistrate that he had received the information that the individual had seen a meth lab at the house. *[Moody] didn't say that the individual was working undercover* and bought meth for them to go and then bust the individual." R. 37, ll. 17-24 (*emphasis added*).

The State contended that, while the warrant described the informant as a "confidential informant working in an undercover capacity," the informant was not working in that capacity in Appellant's case and, thus, was a mere tipster regardless of how Moody portrayed the informant to the Magistrate. *Id.* Moreover, Moody's testimony on the informant's past reliability satisfied both the reliability and veracity prongs needed for probable cause. R. 20, ll. 13-18. Ultimately, the State reasoned that the term: "confidential informant working in an undercover capacity" was ***irrelevant*** to the determination of reliability or probable cause. R. 36, ll. 9 – R. 37, ll. 2.

Appellant countered that the State had bolstered the reliability of the informant by describing him as a "confidential informant working in an undercover capacity" when in front of the magistrate, only to later downplay the informant as a mere "tipster" when in front of the trial judge so as to avoid making the informant available to the defense. R. 37, ll. 5-16. The court denied Appellant's motion, "the search warrant as it is based upon the inference that the informant was *nothing more than a tipster*." R. 38, ll. 2-9 (*emphasis added*).

In a belated effort to push the State into offering a plea, the court noted that the warrant return was inconsistent with the items sought by police when seeking the warrant as only two of the fifteen items sought were located. R. 39, ll. 12 – R. 40, ll. 17. The court also noted "[t]here is

not a house in Laurens county that doesn't have one of the ingredients". R. 41, ll. 7-8. The court found it odd that a highly reliable informant, who was at the residence seventy two hours prior to the search, would have been so wrong about the items found in the residence. R. 41, ll. 16-20.

Directed Verdict

At the close of the State's case, trial counsel moved for a directed verdict arguing that no methamphetamine was discovered during the search. R. 91, ll. 12-17. Nor were there any ephedrine, lithium strips/batteries, drain cleaners, or sulfuric acid found at the residence. *Id.*; R. 78, ll. 19 – R. 79, ll. 20. None of the evidence was tested for the presence of methamphetamine prior to destruction. R. 81, ll. 1-21.

The State countered that while the ingredients found were common household items, the presence of the alleged HCL generator in the backyard and the testimony from law enforcement presented sufficient evidence of manufacturing to submit the case to the jury. R. 96, ll. 2-19. The trial court denied the directed verdict motion finding that. R. 101, ll. 1-5.

Court of Appeals

The Court of Appeals (Short, Geathers, and McDonald, JJ.) affirmed Appellant's conviction in a summary opinion. *State v. Dill*, 2016-UP-010 (Ct. App. Filed January 13, 2016). In concluding that the trial court did not err in finding that the magistrate properly found probable cause to issue the search warrant, the Court relied on *State v. Keith*, 356 S.C. 129, 588 S.E.2d 145 (Ct. App. 2003) and *State v. 192 Coin-Operated Video Game Machines*, 338 S.C. 176, 525 S.E.2d 872 (2000).

In affirming the trial court's refusal to find the magistrate was misled by false information, the Court cited to *State v. Robinson*, 408 S.C. 268, 758 S.E.2d 725 (Ct. App.), for the holding that "a court may not suppress evidence "simply because the officer made a false statement in, or omitted

key facts from, an affidavit supporting a search warrant' . . . the proponent of suppression must demonstrate the false statement or omissions rendered the affidavit unable to support a finding of probable cause."

In affirming the trial court's refusal to require the State to reveal the identity of the confidential informant, the Court relied on *State v. Humphries*, 354 S.C. 87, 579 S.E.2d 613 (2003). Finally, in affirming the trial court's denial of a directed verdict, the Court cited to *State v. Cherry,* 361 S.C. 588, 606 S.E.2d 475 (2004) and *State v. Hudson*, 277 S.C. 200, 284 S.E.2d 773 (1982).

Petition for Rehearing

On January 28, 2016, Appellant filed a petition for rehearing. Appellant argued that the Court of Appeals erred in upholding the issuance of the search warrant because the warrant provided no information regarding the informant's basis of knowledge. Moreover, that the Court's reliance on *192 Video Game Machines* was misplaced as there was no independent pre-search warrant corroboration of the informant's information.

Appellant also argued that the Court erred in affirming the trial court's ruling that the magistrate was not misled by the use of the term "confidential informant working in an undercover capacity." The inaccuracy of the warrant affidavit represented, at the very least, a reckless disregard for the truth about the informant's role and the mischaracterization had a material impact on the magistrate's probable cause determination. Finally, Appellant contended that the Court erred in affirming the trial court's refusal to order the State to disclose the identity of the informant and that the Court erred in affirming the trial court's denial of Appellant's directed verdict motion.

The Court of Appeals denied Appellant's petition for rehearing on February 25, 2016.

ARGUMENT

I.

The Court of Appeals erred by affirming the trial court's refusal to suppress evidence found during the execution of a search warrant where the search warrant affidavit and supplemental testimony was insufficient for the magistrate to establish a substantial basis for probable cause?

The Court of Appeals erred by affirming the trial court's refusal to suppress the evidence found during the search because without additional investigation into the residence and sufficient indicia of the informant's reliability and basis of knowledge in this particular case; the search warrant affidavit and supplemental testimony was insufficient to establish probable cause. R. 38, ll. 2-9; *State v. Sachs*, 264 S.C. 541, 562, 216 S.E.2d 501, 512 (1975).

The Fourth Amendment of the United States Constitution guarantees "[t]he right of the people to be secure . . . [from] unreasonable searches and seizures." U.S. Const. amend. IV. Notably, the South Carolina General Assembly "has imposed stricter requirements than federal law for issuing a search warrant.

Both the Fourth Amendment of the United States Constitution and Article I, § 10 of the South Carolina Constitution require an oath or affirmation before probable cause can be found by an officer of the court, and a search warrant issued." *State v. Jones*, 342 S.C. 121, 128, 536 S.E.2d 675, 678 (2000); U.S. Const. amend. IV. The South Carolina Code mandates that a search warrant "shall be issued only upon affidavit sworn to before the magistrate, municipal judicial officer, or judge of a court of record . . . ." S.C. Code Ann. § 17-13-140 (1985).

"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, 454

S.E.2d 905 (Ct. App. 1995). A magistrate may issue a search warrant only upon a finding of probable cause. *State v. Bellamy,* 336 S.C. 140, 143, 519 S.E.2d 347, 348 (1999).

The magistrate should determine probable cause based on all of the information available to the magistrate at the time the warrant was issued. *State v. Dupree,* 354 S.C. 676, 684, 583 S.E.2d 437, 441 (Ct. App. 2003). Evidence obtained in violation of the Fourth Amendment is inadmissible in both state and federal court. *See State v. Forrester,* 343 S.C. 637, 643, 541 S.E.2d 837, 840 (2001).

In terms of a circuit court's review of a magistrate's finding of probable cause, "[t]he duty of the reviewing court is to ensure the issuing magistrate had a substantial basis upon which to conclude that probable cause existed." *State v. Baccus,* 367 S.C. 41, 50, 625 S.E.2d 216, 221 (2006). As the United States Supreme Court held in *Illinois v. Gates*:

> 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 "affiants 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.

462 U.S. 213, 238, 103 S.Ct. 2317, 2333-2334 (1983) (internal citations omitted) (*emphasis added*). The crucial element in evaluating whether a substantial basis exists 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. *Zurcher v. Stanford Daily,* 436 U.S. 547, 556 & n. 6 (1978).

In determining whether the information relied upon by law enforcement is reliable, no one factor is necessary or sufficient to establish probable cause. *Dupree*, 354 S.C. at 685, 583 S.E.2d at 442 (2003). Probable cause arises from the totality of the circumstances, and "[a] deficiency in one [factor] may be compensated for, in determining the overall reliability of a tip, by a strong showing as to the other, or by some other indicia of reliability." *State v. Gentile*, 373 S.C. 506, 515-516, 646 S.E.2d 171, 175-176 (Ct. App. 2008).

Oral testimony may also be used to supplement search warrant affidavits which are facially insufficient to establish probable cause. *See State v. Weston,* 329 S.C. 287, 494 S.E.2d 801 (1997); *see also State v. Sachs*, 364 S.C. 541, 216 S.E.2d 501 (1975). However, "[i]n reviewing the validity of a warrant, an appellate court may consider only information brought to the magistrate's attention." *State v. Thompson,* 363 S.C. 192, 200, 609 S.E.2d 556, 560 (Ct. App. 2005).

In Appellant's case, under the totality of the circumstances, the search warrant affidavit and the supplemental oral testimony of Deputy Moody failed to establish a substantial basis to support a finding of probable cause. First, the affidavit and oral testimony lacked sufficient indicia of the informant's reliability, as Moody only relied improperly upon ***prior*** unrelated information and unsubstantiated claims by the informant. R.34, ll. 1-8; *United States v. Ross*, 456 U.S. 798, 800-801 (1982); *State v. Peters*, 271 S.C. 498, 500-502, 248 S.E.2d 475, 476-477 (1978); *State v. Bultron*, 318 S.C. 323, 327, 457 S.E.2d 616, 619 (Ct. App. 1995).

Second, Law enforcement did not independently corroborate the informant's tip. See *Gates*, 462 U.S. at 241, 103 S.Ct. 2317 ("Our decisions applying the totality of circumstances analysis . . . have consistently recognized the value of corroboration of details of an informant's tip by independent police work").

Third, the informant gave very vague information; he or she did not identify who might be found at the residence, what ingredients were being used, what method of manufacture was being used, or how he or she came to be in the residence. *State v. Sullivan*, 267 S.C. 610, 613, 230 S.E.2d 621, 624 (1976) (specificity of the informant's statements coupled with the absence of ulterior motives show sufficient reliability). As noted, the warrant stated that there was an active methamphetamine lab and that the "***confidential informant working in an undercover capacity with the Laurens County Sheriff's Office*** was at that location and did see numerous items that used in the fashion of methamphetamine." R. 18, ll. 7-13 (*emphasis added*).

However, the return on the warrant listed fifteen specific items law enforcement was looking for, only two of which were found at the residence. *Id.* The State argued that law enforcement was simply writing down anything they believed could be used to manufacture methamphetamines before the search and then comparing it to what they found at the residence. R. 39, ll. 19-21.

If this is the case, then it appears the informant's statements to law enforcement about what methamphetamine ingredients were in the residence were so vague that they could not reasonably anticipate what evidence of a crime would be found. Furthermore, the HCL generator, highlighted by the State at trial as the bridge between possession of legal-household ingredients and methamphetamine production, was not on the warrant return. R. 40, ll. 2-11.

Fourth, the informant's identity was never disclosed, preventing an evaluation of informant's involvement in the alleged drug activity or any ulterior motives. *Bellamy*, 323 S.C. at 205, 473 S.E.2d at 841 (non-confidential informant should be given higher level of credibility for purposes of determining existence of probable cause to support issuance of search warrant, as

such informant exposes himself to public view and to possible civil and criminal liability should information prove to be false).

Finally, the good faith exception is inapplicable because Deputy Moody should have reasonably known that he did not provide the magistrate with sufficient information concerning the informant's reliability, basis of knowledge, and veracity upon which the magistrate could base a probable cause determination. *State v. Johnson*, 302 S.C. 243, 248, 395 S.E.2d 167, 169 (1990).

As will be discussed in Section II, Moody made materially false representations on the warrant affidavit and the exclusionary rule exists to deter such behavior. *Leon*, 468 U.S. 897 at 919, 104 S.Ct. 3405 at 3419. The search warrant affidavit and testimony in this case were exactly the kind of conclusory statements the Supreme Court warned against in *Illinois v. Gates.* 462 U.S. at 238, 103 S.Ct. at 2333-2334.

The Court of Appeals erred by affirming the trial court's refusal to suppress the evidence found during the execution of a search warrant because the search warrant affidavit and supplemental testimony was insufficient to establish a substantial basis for probable cause. *See* U.S. Const. amend. IV; *see also* S.C. Code Ann. § 17-13-140 (1985); *United States v. Leon*, 468 U.S. 897, 923 (1984) (*citing Franks v. Delaware*, 438 U.S. 154 (1978).

II.

The Court of Appeals erred by affirming the trial court's upholding of the search warrant because, to the extent the magistrate may have had a substantial basis to believe probable cause existed, the magistrate was misled by knowingly false statements made by law enforcement which were material to the determination of probable cause.

In this case, the magistrate was misled by the information contained in the search warrant affidavit because the affiant, Deputy Moody, knew that describing the informant as "a confidential informant working in an undercover capacity" was false, but very material, to the determination of probable cause. R. 18, ll. 7-13. Therefore, the Court of Appeals erred by affirming the trial court's refusal to suppress the evidence found during the execution of the search warrant because the search warrant affidavit and supplemental testimony misled the Magistrate into issuing the search warrant. *Accord Leon*, 468 U.S. at 923 (*citing Franks*, 438 U.S. 154); *Jones*, 342 S.C. at 127, 536 S.E.2d at 678 (suppression remains an appropriate remedy if the magistrate issuing a warrant was misled by information that the affiant knew was false or would have known was false except for his reckless disregard of the truth); *United States v. Colkley*, 299 F.2d 297 (4th Cir. 1990); *State v. Missouri*, 337 S.C. 548, 524 S.E.2d 394 (1999).

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 S.E.2d 872, 881 (2000) (information provided by the confidential informant independently corroborated by undercover SLED agents established probable cause under the totality of the circumstances).

There is a presumption of validity with respect to the affidavit supporting the search warrant. *Franks* at 438 U.S. 171, 98 S.Ct. at 2684. However, if a defendant establishes by a preponderance of evidence that a false statement knowingly and intentionally, or with reckless

disregard for the truth, was included by affiant in the search warrant affidavit, and, with affidavit's false material redacted, the affidavit's remaining content is insufficient to establish probable cause, the search warrant must be voided and fruits of search excluded to the same extent as if probable cause was lacking on the face of the affidavit. *Id.* at 155-156, 98 S.Ct. at 2675. South Carolina courts have held that relying on a false affidavit to secure a warrant is the equivalent of not having an affidavit at all which violates the requirements of S.C. Code § 17-13-140 (1976). *Jones*, 342 S.C. 121, 536 S.E.2d 675 (2000).

In *Jones*, the South Carolina Supreme Court held that a warrant affidavit containing false information did not create sufficient probable cause for a search warrant when the magistrate was totally dependent on oral information provided by the affiant to determine informant's actual credibility. 342 S.C. at 128, 536, S.E.2d at 679. As in the present case, law enforcement received a tip from a confidential informant that cocaine was being stored at particular house. *Id.* at 124, 536 S.E.2d at 677.

Unlike in the present case, law enforcement in *Jones* took the additional action of surveilling the residence to confirm the accuracy of the tip. *Id.* After the arrival of a van the confidential informant previously identified as transporting drugs, law enforcement sought a warrant. *Id.* The warrant affidavit stated:

> Over the past three weeks an agent of the Florence Combined Drug Unit has observed a quantity of cocaine being stored on the premises. That agent has been responsible for the seizure of illicit drugs and the arrest of illicit drug violators in the past. Information given by this agent has been corroborated by surveillance agents pertaining to this case.

Id. at 125, 536 S.E.2d at 677.

The affiant, a police officer, testified to the magistrate that he had intentionally used the term "agent" instead of "informant" in the affidavit in order to protect the identity of his informant. *Id.* The affiant then accurately repeated to the magistrate the information his informant had given him and also informed the magistrate of the surveillance results. *Id.* The magistrate found probable cause existed to search the house. *Id.* at 126, 536 S.E.2d at 677.

The Court of Appeals reversed because the false terms in the affidavit meant that the veracity of the informant was not established under the totality of the circumstances. *Id.* 128, 536 S.E.2d at 679. The officer's attempt to correct the false statement in the affidavit with oral testimony was insufficient as the magistrate still assumed that the informant was an undercover agent. *Id.* at 127, 536 S.E.2d at 678.

This Court affirmed, holding that the magistrate erroneously believed the confidential informant was a police officer and that under the circumstances a "police officer would be more credible than confidential informant". *Id.* 128, 536 S.E.2d at 679. The Court avowed that "oral information may only be used by an affiant to supplement or to amend incorrect information in an affidavit which was not knowingly, intentionally, or recklessly supplied by the affiant" *Id.* at 129, 536 S.E.2d at 679 (*citing Sachs*, 264 S.C. 541, 216 S.E.2d 501, and *State v. Workman*, 272 S.C. 146, 249 S.E.2d 779 (1978)).

Here, the State, in arguing that the informant was a mere tipster at the pre-trial hearing, made it clear that Deputy Moody had mischaracterized the informant in his warrant affidavit and in his testimony to the magistrate. R. 36, ll. 9-22. A plain reading of the warrant affidavit naturally leads to the conclusion that the informant was working at the direction of law enforcement at the time he allegedly observed the methamphetamine ingredients and the active methamphetamine lab. R. 18, ll. 7-13; *Cf. Dupree*, 354 S.C. at 685-686, 583 S.E.2d at 442-443

(confidential informant's reliability confirmed by informant's controlled undercover purchase of narcotics and independent corroboration by law enforcement).

Unlike the officer in *Jones*, Deputy Moody's oral testimony reinforced this false impression by stressing that the informant had been successful in past undercover investigations. The desired implication is that the informant was credible in Appellant's case precisely because he had been successfully used in this specific capacity before. *Id.*

In light of *Franks, Jones*, and *192 Coin-Operated Video Game Machines*, the State's contention that the term "confidential informant" is irrelevant is unavailing as Moody traded on the reliability attributed to undercover confidential informants working at the direction of law enforcement by magistrates. R. 36, ll. 23- R. 37, ll. 2; see *Jones*, 342 S.C.at 125, 536 S.E.2d at 679. Confidential informants are considered more reliable than tipsters because their targets are selected by and their actions are closely controlled by law enforcement, where as tipsters act independently. *See Dupree*, 354 S.C. at 685-686, 583 S.E.2d at 442-443; *see also 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*); *see also State v. Driggers*, 322 S.C. 506, 512, 473 S.E.2d 57, 60 (1996)(non-confidential informant afforded more credibility than confidential informant). Even if the informant may have been reliable as a confidential informant in two prior cases, there was no evidence in the affidavit for the magistrate to conclude the informant would be reliable in the present case as a tipster.

The good faith exception to the exclusionary rule under the Fourth Amendment should not apply here because Moody knowingly tainted the search warrant affidavit with false information and failed to correct the misperception it caused. *See Weston*, 329 S.C. at 292-93, 494 S.E.2d at 804 (explaining the three situations where deference to a magistrate's finding of

probable cause is not warranted under *Leon*, 468 U.S. 897). As the informant's observations were the only evidence submitted by law enforcement when seeking the warrant, but for the mischaracterization of the informant, the magistrate would likely not have issued the search warrant had law enforcement categorized the informant as a mere tipster. *Jones*, 342 S.C. at 128, 536 S.E.2d at 679 (magistrate erroneously believed confidential informant was a police officer and that a police officer would be more credible than a confidential informant).

Allowing the State to present a search warrant affidavit categorizing the informant as an apparently highly reliable confidential informant working in an undercover capacity while allowing the State to later argue that this same informant was a mere tipster, eviscerates the protections of the Fourth Amendment and the South Carolina Constitution and General Assembly. *Id.*, 536 S.E.2d at 678; U.S. Const. amend. IV; S.C. Const. art. I, § 10.

Allowing such self-serving and conflicting arguments at different hearings in the same criminal case encourages police and the State to game the system in order to obtain search warrants and then cripple a defendant's ability to challenge the warrant by recasting the information source. This would subvert the Fourth Amendment's warrant requirement from a constitutional protection against coercive State actions into a sword and a shield wielded by the State to hoard evidence while protecting investigative methods from adversarial scrutiny in the subsequent trial. R. 31, ll. 6-14.

Thus, the Court of Appeals erred in affirming the trial court's failure to quash the search warrant and to suppress the evidence obtained during the warrant's execution as law enforcement deliberately misled the magistrate as to the nature of the informant's involvement so as to deceptively bolster the informant's reliability; and without the untruthful statements, there would have been no substantial basis for a finding of probable cause.

III.

The Court of Appeals erred by affirming trial court's refusal to reveal the identity of the confidential informant because confidential informant acted beyond the scope of a mere tipster and the informant's identity was relevant and helpful to Appellant and essential to a fair determination of Appellant' case.

In this case, the confidential informant relied upon by law enforcement when seeking a search warrant for Appellant' residence was more than a mere tipster and his information was more than a mere lead for law enforcement to investigate. The information supplied by the informant represented the sum total of law enforcement's investigation before seeking the search warrant. Accordingly, the Court of Appeals erred by affirming the trial court's refusal to reveal the identity of the confidential informant because the informant was law enforcement's only source of information on the alleged methamphetamine manufacture; thus a material witness to the case and his identity was essential to a fair determination of Appellant' case.

Generally, the State may not be compelled to disclose the names of its confidential informants. *State v. Burney*, 294 S.C. 61, 362 S.E.2d 635 (1987). However, the United States Supreme Court has held, "Where the disclosure of an informer's identity . . . is *relevant and helpful* to the defense of an accused, or is *essential to a fair determination of a case*, the privilege must give way." *Roviaro v. United States,* 353 U.S. 53 (1957) (emphasis added); *see State v. Hayward*, 302 S.C. 75, 393 S.E.2d 635 (1990). Our Supreme Court has held, "[p]ublic policy considerations for nondisclosure of an informant's identity are absent where the informant openly participates in the criminal transaction." *State v. Diamond*, 280 S.C. 296, 299, 312 S.E.2d 550, 551 (1984)(whether to call an informant as a witness is a matter for the accused rather than the State);*see also State v. Blyther*, 287 S.C. 31, 33, 336 S.E.2d 151, 152-53 (Ct. App. 1985) (finding "where . . . the informant is either *a material witness to the crime* or directly participates in it, disclosure may be

required, particularly where, in a drug related crime, he is the *only witness to the transaction other than the buyer and the defendant*") (internal citation omitted) (*emphasis added*).

In determining whether disclosure of an informant's identity is essential to the defense, the trial court must determine whether the informant is a mere "tipster" who has only peripheral knowledge of the crime or an active participant in the criminal act and/or a material witness on the issue of guilt or innocence. *Bultron*, 318 S.C. at 329, 457 S.E.2d at 620. An informant's identity need not be disclosed where the informant possesses only a peripheral knowledge of the crime or is a mere tipster supplying a lead for law enforcement authorities to investigate. *Blyther*, at 31, 336 S.E.2d at 151.

In the present case, Appellant was unable to effectively present a defense or challenge the State's case. R. 31, ll. 3-14. Police conducted no independent investigation to confirm the validity of the informant's information; making the informant the only witness who could testify on the steps taken by Appellant towards the manufacture of methamphetamine. *State v. Burns*, 294 S.C. 338, 340, 364 S.E.2d 465, 466 (1988) (informant, the sole witness corroborating allegation of accused drug's use, was a material witness).

Moreover, the warrant affidavit was vague and inconsistent with what was actually found at the residence. R. 31, ll. 9-14. The informant told Moody the residence was the site of an active methamphetamine lab, but provided no further details. The search did not discover an active methamphetamine lab. R. 28, ll. 10-15. More troubling, of the fifteen items listed on the warrant return, which according to the State was a list of what law enforcement was expecting to find at the residence; the police only found two. R. 39, ll. 12 – R. 40, ll. 17. As the only source of information for the affidavit, the informant was the only person who could testify on these significant inconsistencies. *Blyther,* at 31, 336 S.E.2d at 151. The search warrant was executed over a year

before Appellant' trial, thus there was minimal risk that revealing the informant's identity would compromise the flow of information to law enforcement or harm the informant. *Id.*, R. 19, ll.11-17.

As a mere tipster, the State maintained that the informant did not participate in any drug transactions; the defense could not investigate whether this was the case. R. 36, ll. 9-22. Whether the informant had ulterior motives was likewise impossible to discover, as was whether the informant was paid or received other benefits as a result of his work. *Driggers*, 322 S.C. at 514, 473 S.E.2d at 61 (ulterior motives of informant, relevant to reliability).

Simply put, without the identity of the informant, Appellant was unable to put up a defense or attack the State's case while the State was able to hide the weaknesses in their case from scrutiny and the jury by keeping the informant's identity a secret. Therefore, the Court of Appeals erred in affirming the trial court's refusal to reveal the identity of the confidential informant because confidential informant acted beyond the scope of a mere tipster and his/her identity was essential to a fair determination of Appellant' case.

IV.

The Court of Appeals erred in affirming the trial court's denial of Appellant's motion for a directed verdict on the charge of manufacture of methamphetamine where the prosecution failed to present any direct or substantial circumstantial evidence that Appellant engaged in production, preparation, propagation, compounding, conversion or processing of any substance containing amphetamine or methamphetamine.

A defendant is entitled to a directed verdict when the prosecution fails to provide evidence of the offense charged. *State v. Brown*, 103 S.C. 437, 88 S.E.21 (1916); *State v. Weston*, 367 S.C. 279, 292, 625 S.E.2d 641, 648 (2006); *State v. McHoney*, 344 S.C. 85, 97 544 S.E.2d 30, 36 (2001). "If there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused," the trial judge may deny the motion for directed verdict. *State v. Lollis*, 343 S.C. 580, 584, 541 S.E.2d 254, 256 (2001).. If the State relies exclusively on circumstantial evidence, the trial judge must direct a verdict in the defendant's favor unless there is any substantial circumstantial evidence which reasonably tends to prove the guilt of the defendant or from which his guilt may be fairly and logically deduced. *State v. Bostick*, 392 S.C. 134, 139, 708 S.E.2d 774, 776 (2011)A directed verdict is proper when evidence produced "merely raises a suspicion the accused is guilty." *Lollis*, 343 S.C. at 584, 541 S.E.2d at 256

South Carolina's statutory scheme provides as follows concerning manufacturing of methamphetamine:

> A person who manufactures, distributes, dispenses, delivers, purchases, or otherwise aids, abets, attempts, or conspires to manufacture, distribute, dispense, deliver, or purchase, or possesses with intent to distribute, dispense, or deliver methamphetamine or cocaine base, in violation of the provisions of Section 44-53-370, is guilty of a felony.

S.C. Code Ann. § 44-53-375(B). "Possession of equipment or paraphernalia used in the manufacture of cocaine, cocaine base, or methamphetamine is *prima facie* evidence of intent to

manufacture." S.C. Code Ann. § 44-53-375(D). Appellant is unaware of any case in South Carolina interpreting our manufacturing methamphetamine statute. South Carolina courts have confronted the issue of manufacturing in other areas. Primarily, our appellate courts have considered what constitutes manufacturing in the context of the illegal manufacture of intoxicating liquor, "moonshining."

In *State v. Evans*, 216 SC 328, 57 S.E.2d 756 (1950), this Court overturned a conviction for manufacturing whiskey where the "evidence strongly tend[ed] to show an intention on the part of [Evans] to engage in the manufacture of liquor" but the prosecution failed to present any evidence of an overt act toward putting the intent into effect. "The law does not concern itself with the mere guilty intention, unconnected with any overt act." *Id.* at 332, 57 S.E.2d at 758.

When Evans saw the police, he ran. Officers found a 100-gallon copper still, two barrels of mash, tin tub buckets, shovels, other equipment and some whiskey in a small container. *Id.* However, neither meal nor sugar was found at the site. *Id.* Thus this Court held "there is not a scintilla of evidence of any overt act on the part of [Evans], or anyone else in his presence, which would constitute the offense of manufacturing whiskey without a license." *Id.*

Similarly, in *State v. Cunningham*, 239 S.C. 212, 122 S.E.2d 289 (1961), Cunningham was charged with manufacturing alcoholic liquors and with unlawfully having in his possession an apparatus, appliance, or device to be used for the purpose of manufacturing alcoholic liquors. The jury found him guilty of possession pf am apparatus used to manufacture liquor. While raiding a potential still, police caught Cunningham as he attempted to flee. He was carrying two cases of empty half-gallon fruit jars, which he dropped. *Id.* at 214-215, 122 S.E.2d at 290.

The State contended the fruit jars were a device used for the purpose of manufacturing liquor. However, no one testified as to what type of receptacle was being used to receive the liquor

at this particular still. "In fact, there [was] no evidence that fruit jars [were] suitable for use in manufacturing liquor." In granting Cunningham a directed verdict, the Court noted that the jars were "in common use in many if not most homes for other purposes." *Id.* at 215, 122 S.E.2d at 290.

Here, the plain language of the manufacture statute required the State provide evidence that Appellant engaged in the "production, preparation, propagation, compounding, conversion, or processing" of "any mixture or compound containing amphetamine or methamphetamine." *See* S.C. Code Ann. § 44-53-110 (defining "manufacture") (defining "methamphetamine").

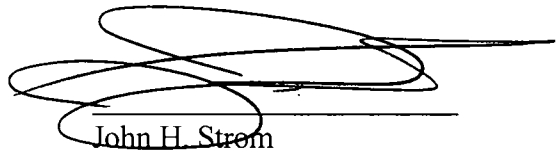
Located within Appellant' residence were items that could be used for manufacturing methamphetamine, but may be legally and innocently purchased and used, like the glass jars and raw sugar in the moonshining cases. None of the items presented by the State as evidence were tested for amphetamine residue prior to their destruction, including non-hazardous items such as table salt and, including the alleged HCL generator. R. 81, ll. 6-24. No pseudoephedrine containing medicine or other common reactants were found. R. 78, ll. 19 – R. 79, ll. 20.. *Id.* There was absolutely no evidence presented at trial substantiating the State's claim that Appellant had or was preparing to manufacture methamphetamine.

Just as the manufacturing intoxicating liquors statutes required an overt act toward putting the intent into effect, the manufacturing methamphetamine statute requires the prosecution to prove an overt act. It is not enough for the prosecution to prove a guilty intention on the part of Appellant, rather, the prosecution must prove Appellant engaged in an overt act connected to a guilty intention. Therefore, the Court of Appeals erred in affirming the trial court's denial of Appellant's directed verdict motion where the State's failed to present sufficient circumstantial evidence reasonably tending to prove that Appellant committed an overt act in connection with the manufacture of methamphetamine.

CONCLUSION

For the foregoing reasons, the Court should grant certiorari, allow further briefing, and ultimately reverse Appellant's conviction.

Respectfully submitted,



John H. Strom
Appellate Defender

ATTORNEY FOR PETITIONER.

This 18th day of April, 2016

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Laurens County

Eugene C. Griffith, Jr., Circuit Court Judge

Opinion No. 2016-UP-010 (S.C. Ct. App. filed 1/13/2016)
11-GS-30-633

THE STATE,

RESPONDENT,

V.

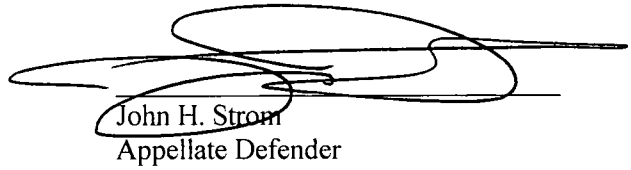
JAMES CLYDE DILL, JR.,

PETITIONER

APPELLATE CASE NO. 2013-000724

CERTIFICATE OF SERVICE

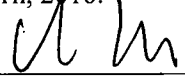
I certify that a true copy of the petition for writ of certiorari and a copy of the appendix, in this case has been served on David Spencer, Esquire, and the S.C. Court of Appeals this 18th day of April, 2016.



John H. Strom
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 18th day
of April, 2016.



_____(L.S.)
Notary Public for South Carolina
My Commission Expires: May 12, 2025